IN THE COURT OF APPEALS OF IOWA

No. 1-961 / 11-0067
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIE JAMES WILDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

The defendant appeals his judgment and sentences for first-degree robbery and third-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Willie James Wilder, Anamosa, pro se.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook K. Jacobsen, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ. Bower, J., takes no part.

DOYLE, J.

Willie James Wilder appeals his judgment and sentences for first-degree robbery and third-degree theft. He claims the evidence was insufficient to support the jury's finding of guilt on the first-degree robbery charge. In a pro se brief, Wilder additionally claims the district court abused its discretion in allowing the State to (1) file a second trial information charging him with first-degree robbery without first dismissing the original trial information charging him with second-degree robbery and (2) introduce booking photographs of Wilder from past arrests. We affirm.

***I. Sufficiency of the Evidence*.**

The jury was instructed the State would have to prove the following in order to find Wilder guilty of first-degree robbery:

> 1. On or about the 22nd day of October, 2009, the defendant had the specific intent to commit a theft.
> 2. To carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant:
> a. Committed an assault on Tim Petersen or
> b. Threatened Tim Petersen with or purposely put Tim Petersen in fear of immediate serious injury.
> 3. The defendant purposely inflicted or attempted to inflict serious injury on Tim Petersen.

See Iowa Code §§ 711.1, .2 (setting forth elements for first-degree robbery) (2009).

Wilder challenges the third element, arguing that while the evidence showed he "either assaulted Petersen or threatened or purposefully placed him in fear of immediate serious injury," the "evidence of the infliction of serious injury (or the attempt of one) is wholly missing." A reasonable juror could have concluded otherwise based on the facts that follow.

On October 22, 2009, at around 7:55 p.m., Wilder walked into a department store. A loss prevention officer, who was monitoring the store's security cameras, watched Wilder take two hats and shove them into his coat. Wilder left the store without paying for the hats. The loss prevention officer contacted the store's security guard, off-duty deputy sheriff Timothy Petersen, and informed him of the theft. Both he and Petersen were familiar with Wilder from previous encounters.

Petersen went outside so he could stop Wilder as he left the store. He noticed a red Chevy Blazer idling in a traffic lane in front of the store. No one was inside the vehicle. Petersen saw Wilder exit the store and called out for him to stop. Wilder ignored him and got into the Blazer. Petersen testified the following then occurred:

> As I got closer to the vehicle, he was getting—he was already into the vehicle. The door was shut, so at that point, I then drew my duty weapon.
>
> Q. What was Mr. Wilder doing at that point? A. He was putting the vehicle into gear.
>
> Q. And what happened next? A. The vehicle took off at a high rate or speed, or not high rate, quick, quick acceleration.
>
> . . . .
>
> Q. And what path did this vehicle take? A. It pursued in my direction.
>
> Q. . . . What exactly do you mean by that? A. It pretty much curved right toward where I was at.
>
> Q. Was that curve towards where you were located necessitated by anything in the roadway? A. No.
>
> . . . .
>
> Q. Could he have traveled straight forward and then avoided you entirely? A. Yes.
>
> . . . .
>
> Q. As the vehicle came your direction, what did you do? A. I jumped back.
>
> Q. If you hadn't jumped back, would you have been struck? A. Yes.

> Q. What part of the vehicle would have struck you? A. The front driver's side.
>
> . . . .
>
> Q. Did any portion of your body or anything on you make contact with the vehicle when you jumped out of the way? A. Yes.
>
> Q. What happened? A. As I was jumping back to avoid from being hit, I still had my gun up here and when I jumped back, the windshield of the vehicle struck the barrel of the handgun.
>
> . . . .
>
> Q. Were you able to look inside the vehicle at that point? A. Yes.
>
> . . . .
>
> Q. What was [Wilder] doing as he drove by and you looked in the vehicle? A. He had a smile on his face.
>
> Q. Where was he looking? A. Right at me.

Petersen's testimony establishes that if he had not jumped out of the way in time, the vehicle would have struck him. *See State v. Musser*, 721 N.W.2d 734, 749 (Iowa 2006) ("First-degree robbery does not require . . . that any actual injury result from the defendant's action. On the other hand, it does require that the defendant "purposely inflict[ ] or attempt[ ] to inflict serious injury. . . ."). As it was, the vehicle came close enough to Petersen to hit the barrel of his handgun. And Petersen testified that as the vehicle drove by him, he saw Wilder looking at him with "a smile on his face." The jury could have reasonably inferred from this evidence that Wilder attempted to inflict serious injury on Petersen by quickly accelerating his vehicle towards Petersen at a high rate of speed. *See State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984) ("When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record.").

Having found the evidence sufficient to support the jury's finding of guilt on the first-degree robbery charge, we turn next to Wilder's two pro se claims.

II. Failure to Dismiss Second-Degree Robbery Charge.

Wilder was originally charged by trial information with, among other things, second-degree robbery. Following failed plea negotiations, the State filed a motion seeking to amend that charge to first-degree robbery. The district court denied the State's motion to amend under Iowa Rule of Criminal Procedure 2.4(8)(*a*), which provides that amendment is not allowed "if a wholly new and different offense is charged."

The State accordingly filed a new trial information under a different case number, charging Wilder with first-degree robbery based on the October 22, 2009 incident. The State then moved to consolidate the two cases. Wilder resisted, arguing that under our supreme court's decision in *State v. Sharpe*, 304 N.W.2d 220 (Iowa 1981), "before [the State] can file a trial information on a new case they have to dismiss the old action." The State responded, "When the files are consolidated robbery first and robbery second will merge as a matter of law. . . . [R]obbery second is a lesser-included offense of robbery first."

The district court agreed with the State and entered an order consolidating the two cases. At trial, the jury was instructed as to both first- and second-degree robbery. Wilder argues this was improper because the second-degree robbery charge should have been dismissed. We disagree.

Sharpe does not stand for Wilder's above-cited proposition. 304 N.W.2d at 222, 225 (holding district court erred in allowing the State to amend a trial information charging the defendant with second-degree murder to first-degree murder but finding error harmless because defendant was only convicted of second-degree murder). Nor does our unpublished opinion in *Davis v. State*,

No. 04-1142 (Iowa Ct. App. Oct. 12, 2005), which was also cited by Wilder in the district court proceedings, require dismissal, though we envisioned such a scenario could occur.

Furthermore, Wilder has not alleged or established any prejudice resulted from the failure to dismiss the second-degree robbery charge. *See State v. Braun*, 495 N.W.2d 735, 741 (Iowa 1993) ("We generally will not reverse on the ground of technical defects in procedure unless it appears in some way to have prejudiced the complaining party or deprived him or her of full opportunity to make defense to the charge presented in the indictment or information."). In fact, the trial court has a duty "to instruct 'not only as to the public offense charged but as to all lesser offenses of which the accused might be found guilty under the indictment and upon the evidence adduced.'" *State v. Shearon*, 660 N.W.2d 52, 55 (Iowa 2003) (quoting Iowa R. Crim. P. 2.6(3)); *see also State v. Douglas*, 485 N.W.2d 619, 623 (Iowa 1992) ("The general rule applies that when a defendant is convicted of a greater offense he cannot complain of the fact the jury was permitted to consider his guilt of a lesser offense."). Thus, even if the second-degree robbery charge had been dismissed, the jury would nevertheless have considered that charge as a lesser-included offense of first-degree robbery.[1] We accordingly reject this claim.

[1] We note Wilder does not claim the district court erred in allowing the State to file the new trial information charging him with first-degree robbery or in consolidating that charge with the original case. Instead, he simply argued in the district court proceedings, "Count I of the older case needs to be dismissed. You can't have a robbery first and a robbery second for the same incident." *See* Iowa R. Crim. P. 2.6(1) ("Where a public offense carries with it certain lesser included offenses, the latter should not be charged, and it is sufficient to charge that the accused committed the major offense.").

***III. Photos of Wilder*.**

Wilder finally claims the district court abused its discretion in allowing the State to introduce three booking photographs of him from past arrests.[2] The court admitted the photographs over Wilder's objection. Wilder's argument is not a model of clarity, but we surmise his assertion is that the booking photographs are evidence of prior bad acts.

Iowa Rule of Evidence 5.404(*b*) governs the admissibility of a person's other crimes, wrongs, or acts, providing the evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show that the person acted in conformity therewith. Iowa R. Evid. 5.404(*b*). It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id*.

> In order to be admissible, the evidence must be probative of some fact or element in issue other than the defendant's criminal disposition. . . . If a court determines prior-bad-acts evidence is relevant to a legitimate factual issue in dispute, the court must then decide if its probative value is *substantially* outweighed by the danger of unfair prejudice to the defendant. Evidence that is unfairly prejudicial is evidence that has an undue tendency to suggest decisions on an improper basis commonly, though not necessarily, an emotional one. Because the weighing of probative value against probable prejudice is not an exact science, we give a

[2] The State made an effort to distinguish these photographs from Wilder's booking photographs taken in this case. The three 4" x 6" photographs, reproduced on photographic paper, look similar to driver's license photographs. They were not profile shots and had no markings or any other identifiers to indicate they were booking photographs. The State did not refer to the photographs as booking photographs. The booking photographs of Wilder, taken at the time of his arrest four days after the incident, were admitted without objection. The two 5" x 7" photographs, a frontal view and a profile view, were reproduced on a single sheet of 8 1/2" x 11" copy paper. Nonetheless, the three booking photographs from Wilder's prior arrests look very similar to Wilder's current booking photographs, and a reasonable juror could easily conclude the three photographs were in fact booking photographs.

> great deal of leeway to the trial judge who must make this judgment call.

State v. Newell, 710 N.W.2d 6, 20-21 (Iowa 2006) (citations omitted).

A pivotal issue at trial was whether the identity of the shoplifter and driver of the Blazer was in fact Wilder. To assist in proving Wilder's identity, the State offered the prior booking photographs to compare his likeness to the shoplifter captured on the store video and the deputy's description. The store video of the shoplifter depicts an individual with close-cropped hair and facial hair. When Wilder was apprehended four days after the incident, he had a shaved head and no facial hair. Deputy Petersen testified he recognized Wilder the night of the incident from his previous face-to-face contacts. He described Wilder's haircut and facial hair from those previous occasions and testified Wilder's haircut and facial hair depicted in the photographs was similar to what he had observed on previous contacts with Wilder. The photographs were relevant under Iowa Rule of Evidence 5.401 to prove the shoplifter's identity on the store video.

Next we turn to the question of prejudice, that is, whether the probative value of this evidence was *substantially* outweighed by its prejudicial effect. *See* Iowa R. Evid. 5.403. In balancing the probative value against unfair prejudicial effect, the court considers

> the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

Newell, 710 N.W.2d at 21. Wilder chose to testify on surrebuttal. He testified he was "on probation for at least one theft. There might have been two thefts." He

admitted to three other theft convictions and a conviction for harassment of a public official. In view of his testimony, we find no unfair prejudice in the admission of the booking photographs.

For all these reasons, we find no abuse of discretion in the court's decision to admit the second set of photographs into evidence.

***IV. Conclusion*.**

We therefore affirm Wilder's judgment and sentences.

AFFIRMED.