

IN THE COURT OF APPEALS OF IOWA

No. 1-990 / 11-0359
Filed February 1, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TORAINO ADARYEL LOVE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Toraino Love appeals from his convictions of intimidation with a dangerous weapon, willful injury causing serious injury, going armed with intent, and possession of a firearm as a felon. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Appellant Toraino Love asks us to reverse his convictions because the district court admitted evidence of prior convictions of defense witnesses pursuant to Iowa Rules of Evidence 5.403 and 5.609. He also argues his trial counsel provided constitutionally ineffective representation in failing to preserve error on these evidentiary rulings. We reach the merits of the rulings and find the trial court did not abuse its discretion in permitting the evidence to be presented on the issue of the witnesses' credibility.

I. Background Facts and Proceedings

Around 1:00 a.m. on July 4, 2010, Love and Trice Scott were involved in a fight at a bar in Waterloo. During the fight, Love was knocked unconscious. Love and Scott had ties to rival gangs. Scott's cousin, Romeo Mabry, was present during the fight and had ties to the same gang as Scott. After the fight, Mabry and his friend Dontae Watson left the bar and headed to an area known as the Motorcycle Club, where people were known to gather after the bars closed.

Watson testified that around 3:00 a.m. a group of four men, including Love, arrived at the Motorcycle Club asking, "[W]here they at, who did it, who did it, who did it[?]" Watson stated he was annoyed these men would "bring a whole fight from the other bar to a whole another [sic] bar." Watson and Mabry testified they were then attacked by Love and his three friends. According to several witnesses, Watson and Mabry backpedaled, trying to avoid the confrontation.

Mabry testified that during the fight, he saw Love pull a gun from his waistband and fire in the direction of Mabry and Watson. Both Watson and

Mabry testified they ran away with Love chasing them and firing at them through the crowd. Love fired upwards of six shots, two of which hit Darrell Huggins, a bystander. The parties stipulated that Huggins suffered a serious injury. Mabry and Watson were not hit.

When the police arrived, Mabry identified Love by name as the shooter. Later that day, he identified Love as the shooter from a photographic array. Watson told the police at the scene of the crime that the same man who had been knocked out earlier in the night was the man he saw pull out a gun at the Motorcycle Club. Watson did not know the shooter's name, but he identified Love as the shooter from a photographic array. Both Watson and Mabry told police Love had been wearing a hooded sweatshirt when he arrived at the Motorcycle Club.

Orenthal Jones, an eyewitness, testified he was in the area of the Motorcycle Club and saw Love firing a silver handgun. He also testified Love was wearing a dark, hooded sweatshirt at the time of the shooting. Jones talked to police at the scene of the crime and identified Love by name as the shooter. He later identified Love as the shooter from a photographic array.

Two other witnesses testified that Love had been wearing a dark, hooded sweatshirt on the night in question. Neither of these witnesses, however, had seen the shooter. Another witness testified the shooter had been wearing a black, hooded sweatshirt.

In August, Mabry went to jail for two days and was in the same jail pod as Love. While he was there, Mabry wrote a signed statement dated August 19, 2010, retracting his earlier statement that Love had been the shooter during the

incident on July 4. Mabry's written statement explained that because of the large crowd, he never saw the shooter and he felt the police had put words in his mouth. He stated he could not identify the shooter.

Once Mabry was released from jail, he told police about this handwritten statement and informed them it was not true. He testified he wrote the statement because he had felt threatened by Love and one of Love's friends. Mabry testified that Love's friend told Mabry to sit down at a table and then told Mabry that Mabry was not going to tell on his friend, Love, because that "was not allowed in their pod." Love's friend then had Love join the conversation. Love told Mabry he should "write something saying it was not him." Mabry testified he felt intimidated by Love and his friend. Mabry testified the handwritten statement was not true and Love was the shooter on July 4.

Five witnesses testified on behalf of Love. Two of these witnesses, Quinteze Latiker and Sammy Landfair, testified they were present in jail when Mabry wrote his statement and he had not been coerced into making this written retraction. Latiker testified that he was at the table when Mabry wrote his statement and that Mabry stated his statement to the police that Love was the shooter was untrue. Landfair testified he was in the area at the time Latiker and Love spoke to Mabry, and Mabry was never threatened. The State impeached the credibility of both of these witnesses with evidence that each had been convicted of crimes.

Love's other three witnesses testified they were present at the Motorcycle Club on the night in question and had seen Love at the time shots were being fired. All three testified Love was not the shooter. One of the three testified Love

was not wearing a hooded sweatshirt on the night in question. All three were friends of Love and waited several months to make any statement regarding Love's involvement. The State impeached the credibility of two of these witnesses with evidence that each had been convicted of crimes.

The court instructed the jury to use evidence of the witnesses' prior convictions only to determine the witnesses' credibility. The jury found Love guilty of intimidation with a dangerous weapon, willful injury causing serious injury, going armed with intent, and possession of a firearm as a felon. Judgment was entered on all four counts. Love appeals, asserting: (1) the district court erred in allowing into evidence the attempted murder conviction of one of the defense witnesses; (2) his trial counsel was ineffective for failing to object to evidence of prior convictions of three other defense witnesses and for not requesting the court perform the balancing test required by the Iowa Rules of Evidence in deciding whether to admit these prior convictions; and (3) the district court erred in failing to merge his conviction for going armed with intent with his conviction for intimidation with a dangerous weapon.

II. Prior Convictions

Iowa Rule of Evidence 5.609 provides, "Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 5.403, if the crime was punishable by death or imprisonment in excess of one year" Rule 5.403 provides, "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" "Rule 5.609(a)(1) therefore operates as a rule of admission as to an ordinary witness's prior felony convictions." *State v. Redmond*, 803 N.W.2d 112, 121 (Iowa 2011).

We review rulings on the admission of prior crimes evidence for an abuse of discretion. *Id.* at 117. “Because the weighing of probative value against probable prejudice is not an exact science, we give a 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). We measure a prior conviction’s probative value by how greatly it undermines the witness’s credibility. *Redmond*, 803 N.W.2d at 122. We gauge prejudicial effect by anticipating the extent to which a jury may misuse a witness’s prior conviction thereby deciding the case on an improper basis. *Id.* at 124.

In this case, the impeachments by prior conviction were permitted as to witnesses other than the accused. Love, therefore, had the burden to prove the unfair prejudice from admission of the prior convictions substantially outweighed the probative value. See Iowa R. Evid. 5.609(a) (admitting prior convictions of witnesses other than the accused subject to rule 5.403).

A. Quinteze Latiker

Love asserts the district court erred in allowing the State to impeach Latiker with evidence of an attempted-murder conviction. At trial, Love’s counsel argued the conviction was “far more prejudicial than probative,” especially given that Love’s case involved a shooting. Over Love’s objection, the district court determined that because Latiker had no other conviction the State could use for impeachment purposes, the probative value was not outweighed by the prejudice and the State could use the attempted-murder conviction for impeachment purposes. After this ruling, the defense presented evidence of Latiker’s

conviction on direct examination to show they were “not trying to hide anything.” The State later mentioned the conviction on cross-examination.

Love asserts that because Latiker’s prior offense was a crime of violence, like the crime with which Love was charged, danger of unfair prejudice outweighed the probative value of the evidence of his prior conviction. The State asserts that because Love himself first elicited Latiker’s testimony regarding his prior conviction for attempted murder, Love did not preserve error on this issue. The State further asserts the district court did not abuse its discretion in admitting evidence of Latiker’s prior conviction. Finally, the State contends that even had the court abused its discretion, error would be harmless because of the overwhelming evidence of Love’s guilt.

We decline to address whether error was preserved because we agree with the State that, on the specific facts in this record, the district court did not abuse its discretion in allowing the State to impeach Latiker with his attempted-murder conviction.

The State concedes and we acknowledge that Latiker’s attempted-murder conviction did not involve premeditation or dishonesty and thus carried low probative value. *See Redmond*, 803 N.W.2d at 122–26 (noting crimes involving dishonesty or premeditation often have relatively higher probative value, while crimes based on violent or disorderly conduct are not as probative of testimonial credibility). Additionally, Latiker’s release from confinement as a result of the conviction occurred nearly eight years before the date of trial. Although within the ten-year limit for purposes of the rule, the probative value of the conviction diminishes with each passing year. *See Iowa R. Evid. 5.609* (stating that, unless

a limited exception applies, evidence of a conviction is not admissible if more than ten years has elapsed since the date of the conviction or the release from confinement, whichever is later); *Redmond*, 803 N.W.2d at 123 (noting the ten-year limitation “suggests older convictions become less probative”).

However, we believe the probative value of the attempted murder conviction was increased by the fact that the district court allowed Love to impeach Mabry with his prior conviction for criminal mischief in the third degree. Latiker’s testimony was in direct opposition to Mabry’s testimony. Given the facts of this case, especially Latiker’s assurances that he had no reason to lie on behalf of Love, we find evidence of Latiker’s prior conviction allowed the jury to more accurately assess the credibility of the two witnesses, increasing its probative value. *Redmond*, 803 N.W.2d at 123–24 (“[W]here the witness has boasted of his credibility, impeachment with a prior conviction may be necessary to ensure the jury does not overvalue the defendant’s credibility.”).

We believe the admittedly low probative value of the attempted-murder conviction outweighed any unfair prejudice for several reasons. We do not find persuasive Love’s argument that the similarity between the charges against him and Latiker’s attempted-murder conviction compounded the risk that Latiker’s prior conviction unfairly prejudiced Love. Love’s argument appears to rely on case law that has “continually cautioned against admitting prior convictions which are similar to the defendant’s current charge for fear the jury will assume the defendant’s guilt by inferring the defendant acted in conformity with his past conduct”. *Id.* at 124. However, we do not believe a danger of the jury inferring guilt based on propensity is present in this case, where the prior conviction was

that of a witness and not of the defendant himself. We believe the extent to which prior convictions enhance the danger of unfair prejudice depends on whether the impeached is the accused or a witness other than the accused. When the prior conviction is that of the accused, the jury may misuse evidence of a prior conviction to assume guilt through propensity to commit a crime, a risk which is elevated when the two crimes are similar. *Id.* at 126. However, because Latiker was merely a witness and not the accused, we do not believe such a danger is present here. It would not be logical for the jury to infer based on Latiker's conviction for a crime of violence that Love was more likely to be guilty of a crime of violence.

We acknowledge that Latiker's prior conviction for violence may have been misused by the jury to assume that he did, in fact, intimidate Mabry. It would not be surprising for the jury to infer based on Latiker's conviction for a crime of violence that Latiker intimidated Mabry into writing his retraction, and this connection may not have been mitigated by the court's instruction to consider the prior conviction for credibility only.

However, we believe the potential prejudicial impact of this impeachment evidence was blunted by the fact that the jury necessarily learned that Latiker, Mabry, and Love had been in jail. Latiker testified he knew Love from jail and had been in jail for roughly seven months. Further, Latiker and Mabry were testifying about an event that occurred while they were in jail. The jury could have assumed from this that both Latiker and Mabry had committed a crime, diluting any danger of unfair prejudice arising from the evidence of Latiker's prior conviction. Based on the above factors, we conclude the district court did not

abuse its discretion in weighing the probative value against unfair prejudice and allowing the admission of Latiker's prior attempted-murder conviction for impeachment purposes.

B. Ineffective Assistance

We review Love's claims of ineffective assistance of counsel de novo. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). Although we ordinarily preserve ineffective-assistance-of-counsel claims for postconviction proceedings, we find that in the present case the record is adequate to decide the claims on direct appeal. See *State v. Stewart*, 691 N.W.2d 747, 751 (Iowa 2004).

In order to prove his counsel was ineffective, Love must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id.* In order to establish the first prong of the test, Love must show that his counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To satisfy the second prong, Love must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Utter*, 803 N.W.2d at 654. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.*

1. Failure to Perform an Essential Duty

Love asserts his counsel was ineffective for failing to object to the admission of prior convictions of three other defense witnesses and for not requesting that the court perform the balancing test required by the Iowa Rules of Evidence in deciding whether to admit this evidence. The record is clear that the district court made a ruling as to whether the State would be allowed to impeach

each of the three witnesses with prior convictions. The record further reflects the district court properly weighed whether the probative value of each conviction was substantially outweighed by the danger of unfair prejudice as required by Iowa Rules of Evidence 5.609 and 5.403. The court did find one prior conviction of one of these three witnesses was not allowable for impeachment purposes as the prejudice outweighed the probative value. Accordingly, we conclude counsel was not ineffective as counsel obtained a ruling on the matter that complied with the rules. Further, even if counsel had not preserved error, we would find that any error was not prejudicial for the reasons stated below.

2. Prejudice

Sammy Landfair testified that he was in jail with Mabry, Latiker, and Love and that he overheard Mabry tell Love he was willing to recant his previous statements to the police. Landfair was impeached with two drug convictions, one of which involved his release from custody approximately eight years before trial. Identification witness Corey Dunn testified that Love was not the shooter. He was impeached with convictions for drug-related charges, theft, three counts of harassment of a public official for providing a false name to the police, and domestic assault. A second identification witness, Lawrence Campbell, testified he was present and with Love when the shots were fired, and that Love was not the shooter. He was impeached with two drug convictions and convictions for burglary and theft.

We conclude Love has not shown a reasonable probability that, had counsel objected to this prior conviction evidence and the district court found it inadmissible, the result of the proceeding would have been different. Dunn and

Campbell each testified he did not immediately inform the police of Love's innocence because he had a warrant out for his arrest. The jury necessarily learned that Landfair had been in jail because Landfair was testifying about events that had occurred in jail. Even without the use of prior convictions to impeach these witnesses, the jury was aware all three of the witnesses had committed crimes. As mentioned in our discussion of Latiker above, this dilutes the prejudicial effect of the evidence.

In addition, we do not find persuasive Love's assertions that the admission of these three witnesses' prior crimes was prejudicial because it tended to suggest gang activity. The evidence was undisputed that Love was at the scene of the crime. Several witnesses testified that many of the individuals present at the scene of the crime, and that Love in particular, had ties to gangs. Thus, the admission of these three witnesses' prior crimes, which tended to suggest gang activity, was merely cumulative of other evidence already admitted regarding gang activity.

III. Merger of Lesser-Include Offense

Love argues the district court erred in failing to merge his conviction for going armed with intent with his conviction for intimidation with a dangerous weapon. Love asserts that going armed with intent is a lesser-included offense of intimidation with the dangerous weapon and the district court's failure to merge the two resulted in an illegal sentence. The State asserts the two convictions were based on two separate acts and therefore should not be merged. We review this issue for errors at law. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008).

The district court gave the following marshalling instruction for the crime of going armed with intent:

The State must prove all of the following elements of Going Armed With Intent:

1. On or about the 4th day of July, 2010, the defendant was armed with a handgun.
2. The handgun was a dangerous weapon
3. The defendant was armed with the specific intent to use the handgun against another person.

The district court gave the following marshalling instruction for the crime of intimidation with a dangerous weapon:

The State must prove all of the following elements of Intimidation With a Dangerous Weapon With Intent:

1. On or about the 4th day of July, 2010, the defendant shot or discharged a handgun within an assembly of people.
2. The handgun was a dangerous weapon
3. A member or members of the assembly of people actually experienced fear of serious injury and the fear was reasonable under the existing circumstances.
4. The defendant shot or discharged the handgun with the specific intent to injure or cause fear or anger in Romeo Mabry, Dontae Watson, and/or Darrell Huggins.

Ordinarily, going armed with intent is not considered a lesser-included offense of intimidation with a dangerous weapon and therefore the two convictions would not merge. *See State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999). The record in this specific case clearly supports a factual basis for two separate crimes. *See State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000) (finding the record supported a factual basis for willful injury and manslaughter as two separate crimes). The crime of going armed with intent was complete and punishable before the crime of intimidation with a dangerous weapon occurred. *See State v. Arioso*, 218 N.W.2d 920, 920–21 (Iowa 1974) (“[T]he crime of going armed with intent was complete and punishable before any assault with intent to

commit great bodily injury occurred.”). The crime of going armed with intent was complete when Love armed himself with a pistol and made his way through the crowd looking for revenge. Had Love stopped at that point and not proceeded to shoot into the crowd, the crime of going armed with intent would have been complete and punishable. The entirety of Love’s actions constituting the crime of going armed with intent happened prior to, and separately from, the later acts that constituted intimidation with a dangerous weapon. Because the two crimes were separate and distinct acts, the district court did not err in entering separate convictions and sentences for the two charges.

AFFIRMED.