IN THE COURT OF APPEALS OF IOWA

No. 2-257 / 11-0732
Filed May 23, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WALTER LEE MILLER, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

A defendant appeals his conviction for possession of crack cocaine with the intent to deliver. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant Appellate Defender, and Kevin B. Patrick, Student Intern, for appellee.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Walter Miller asks us to reverse his conviction for possession of crack cocaine with the intent to deliver, alleging the trial court wrongly permitted the State to offer testimony that police set up a controlled drug buy using a confidential informant and to play an audio-recording of the transaction. Miller first contends his counsel was ineffective for not challenging that evidence as a violation of Iowa Rules of Evidence 5.403 and 5.404(b). Miller alternatively argues that if the evidence was relevant, the trial court violated his Sixth Amendment confrontation right by denying his motion to disclose the informant's identity, yet allowing the jury to hear the informant's recorded statements.

Because the controlled-buy evidence was intrinsic to the charged crime and probative of Miller's intent to deliver, we find counsel breached no duty in failing to object on prior bad acts grounds. Further, because the confidential informant was not a witness to the charged crime, the trial court did not err in denying Miller's motion to disclose his identity. Moreover, because the informant's statements on the audio-recording were not testimonial assertions offered for their truth, the Confrontation Clause did not bar their admission. Accordingly, we find no basis to reverse Miller's conviction.

I. Background Facts and Proceedings

Davenport police arranged for a confidential informant to purchase $100 worth of crack cocaine from a dealer who went by the street name "Mississippi." The informant agreed to cooperate with the police in return for favorable treatment on his own pending charges.

On November 9, 2010, Officer Brandon Koepke supervised the controlled buy. That supervision included searching the informant's person and vehicle; wiring the informant with a recording device; and providing the informant with two fifty-dollar bills, photocopied for later comparison. In the officer's presence, the confidential informant called "Mississippi" at a designated number; a male voice answered the phone and arranged to meet the informant near 500 Oak Street in Davenport. The dealer told the informant that he would be in an older blue Suburban. Officer Koepke watched the informant's progress until he turned northbound from Fourth Street onto Oak Street, where the visual surveillance was picked up by another officer.

Shortly after midnight, the informant rendezvoused with a woman who led him into an alley between Fifth and Sixth Streets, west of Oak Street. For one to two minutes, the informant was out of the officers' sight. When he returned from the alley, the informant had two baggies containing rocks of crack cocaine, each worth fifty dollars.

At this point, the officers saw the blue Suburban leave the alley and followed it about three miles to 3105 Homestead Avenue, where it parked. When Officer Tom Runge approached the back of the Suburban he could smell burning marijuana. The officer opened the vehicle's door and found Walter Miller and two women inside. A search of Miller's coat pocket revealed a keychain equipped with two small canisters, one containing cocaine residue and the other containing nine rocks of crack cocaine weighing 1.77 grams. In Miller's wallet, police found the two fifty-dollar bills that Officer Koepke had given to the informant for buy

money, as well as a receipt for the same prepaid cellular telephone that the informant had called. The police found the cell phone on the seat of the Suburban, and also located a partially smoked marijuana blunt.

On November 19, 2010, the State filed a trial information charging Miller with possession with intent to deliver a schedule II controlled substance, a class "C" felony, in violation of Iowa Code sections 124.401(1)(c)(3), 124.206(2)(d), and 703.1 (2009). The State did not charge Miller with the delivery to the informant. Miller's possession-with-intent charge was enhanced by a prior drug conviction.

At the start of the trial, defense counsel asked the court for an order limiting the State from offering evidence that the police used an informant to buy drugs from Miller because the minutes of evidence did not use the term "confidential source." Over the State's objection, the court ruled: "[T]he Motion in Limine is granted to the extent that there will be no officer testifying to any hearsay conversation with a confidential informant."

Defense counsel further argued that if the court was going to allow the State to offer evidence of the informant's interactions with police, then Miller was "entitled to know the name of the confidential informant." The court ruled that ordering the State to reveal the informant's name was "a step too far."

At trial, the State offered testimony from four police officers. Miller took the stand in his own defense. He acknowledged that some people called him "Mississippi" because he moved to Iowa from Mississippi, but that his real nickname was "Pluck." Miller denied that he was in the vehicle during the

controlled buy. He testified that his girlfriend called him from outside the Homestead residence, and he entered the Suburban just moments before the police arrived. He claimed he had left his coat in the vehicle earlier that day and did not know how the drugs got into the pocket. Miller also denied having a wallet when the police searched him.

In rebuttal, the State offered to play approximately four minutes of an audio-recording of the controlled buy. Defense counsel objected to the exhibit on Sixth Amendment Confrontation Clause grounds, arguing: "They are making this informant a material witness." The court denied the defense motion.

While the sound quality of the recording played for the jury was not outstanding, the informant can be heard making a phone call to ask where to meet, getting out of his car and walking, conversing with a woman he meets at the alley, greeting someone he calls "playa" over strains of rap music, and then talking to another man. As the prosecutor recapped in closing argument:

> You know that what you can hear is loud rap music in the background. And the loud rap music essentially made it difficult to hear exactly what was being said, but the theme that you can ascertain from that is . . . the CS [confidential source] getting in [the Suburban] and referencing the name of Mississippi and then you can hear male voices where there are communications.

The jury found Miller guilty as charged. Miller stipulated to his prior drug conviction. He now appeals from his conviction.

II. Scope and Standards of Review

We perform a de novo review of Miller's ineffective-assistance-of-counsel claim. *See State v. Cromer,* 765 N.W.2d 1, 6 (Iowa 2009). To prevail, Miller

must show that (1) counsel breached an essential duty and (2) prejudice ensued. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

If we can determine from the existing record that it will be impossible for Miller to establish either prong of the *Strickland* test, we will affirm his conviction without preserving the claim. *See State v. Taylor,* 689 N.W.2d 116, 134 (Iowa 2004). But if it is necessary to more fully develop a factual record, we will preserve the claim for a possible postconviction relief action. *Id.*

Miller's Confrontation Clause challenge also calls for a de novo review. *See State v. Rainsong*, 807 N.W.2d 283, 286 (Iowa 2011).

III. Discussion

A. Did Trial Counsel Have a Material Duty to Object to Evidence of the Controlled Buy Based on Iowa Rules of Evidence 5.403 and 5.404(b)?

Miller complains the trial court allowed testimony concerning "the police officers' conduct and observations about the controlled buy." He further contends the State offered the "most damaging evidence" in rebuttal when the prosecutor played a four-minute recording which included a conversation between male voices, presumably inside the Suburban. Miller asserts that the court permitted the jury to hear this evidence because his trial counsel raised the wrong objection. Rather than moving in limine to exclude the controlled-buy evidence as hearsay or in violation of the Confrontation Clause, Miller now claims that his trial counsel should have objected to the State's evidence as prior bad

acts under Iowa Rule of Evidence 5.404(b)[1] and as more prejudicial than probative under Iowa Rule of Evidence 5.403.[2]

Miller—while denying he was the person who sold crack cocaine to the confidential informant—argues on appeal that the State tried to connect him with the prior bad act of the "unidentified male drug dealer in the blue Suburban" and impermissibly allowed the jury to presume that if he sold drugs to the informant then he knowingly possessed the crack cocaine police found in his coat pocket. Miller also contends that police testimony concerning the use of "street monikers" such as "Mississippi" as exclusive to certain individuals was unfairly prejudicial. Miller summarizes his position as follows: "Without the charge of delivery the testimony regarding the entire controlled buy was unfairly prejudicial to Miller and should have been objected to by trial counsel."

In analyzing Miller's claims, we keep in mind the precept that counsel has no duty to raise an issue that lacks merit. *Taylor*, 689 N.W.2d at 134. In this case, we do not believe that admission of the controlled-buy evidence violated rules 5.404(b) and 5.403. Accordingly, counsel had no duty to object under those rules.

---

[1] Rule 5.404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. 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.

[2] Rule 5.403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under rule 5.404(b), prior bad acts are admissible if (1) they are relevant to a legitimate issue in the case and (2) there is clear proof that the individual against whom the evidence is offered committed the prior act. *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). The relevancy prong requires the prosecutor to articulate "a valid, noncharacter theory of admissibility." *Id.* at 28. The purpose of the clear-proof prong is to prevent jurors from speculating or drawing inferences on mere suspicion that the defendant was responsible for the prior acts. *See State v. Alderman*, 578 N.W.2d 255, 258 (Iowa Ct. App. 1998). But the commission of the prior acts need not be established beyond a reasonable doubt, and corroboration of the other acts is not required. *Id.*

Miller contests both the relevance of the controlled-buy evidence and the proof that he was the person selling the drugs to the informant. On the issue of clear proof, we find strong circumstantial evidence that Miller sold drugs to the informant. By Miller's own admission, some people called him Mississippi, the name that the confidential informant used for the dealer during the controlled buy.[3] Even more critically, in Miller's wallet, police found the receipt for the cellular telephone called by the informant and the two fifty-dollar bills used for the controlled buy. The jurors were free to disbelieve Miller's claim that he did not have a wallet when the police searched him.

On the issue of relevance, we conclude that these circumstances fall into that narrow category of cases in which the other crimes evidence is "inextricably

---

[3] Police were aware of another person in the community going by the moniker of "Mississippi." But that fact does not detract from other evidence in the record which provided clear proof that Miller was the person selling drugs to the informant.

intertwined" with the charged offense. *See State v. Nelson*, 791 N.W.2d 414, 424 (Iowa 2010) (recognizing that Iowa "appear[ed] to follow the inextricably intertwined doctrine" but declining to find drug crimes intrinsic to evidence of murder). The uncharged crime of delivery and the charged crime of possession with intent to deliver were so closely related in time and place that they formed one continuous transaction. *See id.* Accordingly, telling the story of how the police came to search Miller and find the 1.77 grams of crack cocaine in his pocket would have been disjointed and confusing without starting from the narrative of the controlled buy. *See United States v. Qualls*, 447 F. App'x 698, 702 (6th Cir. 2011) (allowing evidence of controlled buys that were very close in time to charged conduct and supported the search).

In addition, the State was required to prove Miller's intent to deliver the nine rocks of crack cocaine found in his coat pocket. The evidence that he had delivered two rocks of crack cocaine just minutes earlier to the confidential informant from inside the same vehicle where police found him was highly probative of his intent regarding the other quantity of drugs. *See State v. Grosvenor*, 402 N.W.2d 402, 406 (Iowa 1987) (holding "the proximity of the two incidents vitiates any suggestion that the evidence was offered solely for the purpose of proving the defendant's general propensity to deliver illegal drugs"). Evidence of the controlled buy was also admissible to rebut Miller's claim that he did not know the source of the drugs in his coat pocket or the cash and phone receipt police found in a wallet taken from his pants pocket. The danger of unfair

prejudice did not outweigh the probative value of the controlled-buy evidence in this case.

Trial counsel had no duty to challenge the controlled-buy evidence under rules 5.404(b) and 5.403 because such an objection would have been without merit.

B. Did the Trial Court Violate Miller's Right to Confrontation?

Miller argues that if the disputed evidence was relevant, then the trial court should have excluded it under the Confrontation Clause argument raised by his trial counsel.[4] He claims the court violated his confrontation right by denying his request to disclose the name of the confidential informant and by allowing the State to play the recording of the controlled buy for the jurors without giving him an opportunity to cross-examine the informant.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington,* 541 U.S. 36, 53–54 (2004). Only "testimonial statements" cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813, 821 (2006).

On the issue of confidential informants, the State's privilege to withhold the identity of a person who furnishes information of criminality helpful to law

[4] Miller acknowledges on appeal that he did not preserve a claim under the Iowa constitution.

enforcement is balanced against the defendant's right to prepare and present a meaningful defense. *See State v. Robertson*, 494 N.W.2d 718, 722-23 (Iowa 1993). When the informant is present at the scene or participates in the crime, his status changes from informant to witness, and the State generally must divulge his identity. *State v. Byrd*, 448 N.W.2d 29, 31 (Iowa 1989). But a defendant does not enjoy the right to confront an informant who does not, directly or indirectly, offer evidence during the trial. *Id.*

As an initial matter, we do not believe that the trial court violated Miller's Sixth Amendment right by denying his request for the informant's name. The informant participated in the controlled buy, but not in the charged crime of possession of crack cocaine with intent to deliver. *See id.* As was the case in *Byrd*, "[n]o informant witnessed or participated in the search that uncovered the evidence of [the charged] crime." *See id.* (noting any alleged sale of drugs by Byrd was not relevant to the prosecution at bar). We acknowledge that the instant facts present a closer case than *Byrd*, because evidence of the controlled buy did form an important part of the State's case here. But the distinction does not require a different result. Miller does not show that he was denied the right to prepare or present a meaningful defense because he did not know the identity of the confidential informant. Indeed, Miller's defense was that he did not have any interaction with the confidential informant.

Miller also contends his confrontation rights were violated because the confidential informant was a "witness" in this case, and his testimony was "heard under the guise of the State's rebuttal without being cross-examined by Miller."

We reject this contention. A "witness" against the accused, for Confrontation Clause purposes, is someone who "bear[s] testimony." *See State v. Schaer*, 757 N.W.2d 630, 635 (Iowa 2008) (quoting *Crawford*, 541 U.S. at 51). Testimony is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 636 (quoting *Crawford*, 541 U.S. at 51).

The confidential informant's statements during the four-minute audio-recording played for the jury were not "testimonial" under the formulation in *Crawford*. The informant's casual exchanges with the woman and man he encountered during the controlled buy were not formal accusations against Miller. Courts from other jurisdictions have upheld the admission of recordings of controlled buys against similar Confrontation Clause challenges. *See, e.g., United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2006) (holding *Crawford* "only covers testimonial statements proffered to establish the truth of the matter asserted" and not informant's statements offered to make another speaker's admissions intelligible for the jury); *United States v. Spencer*, 592 F.3d 866, 879 (8th Cir. 2010) (holding that statements providing context for other admissible statements are not hearsay because they are not offered for their truth and admission of such context evidence does not offend the Confrontation Clause because the declarant is not a witness against the accused); *People v. Marshall*, 65 A.D.3d 710, 712 (N.Y. App.Div. 2009) (finding informant's statements on recordings of controlled drug buys were not testimonial); *State v. Johnson*, 771 N.W.2d 360, 369-70 (S.D. 2009) (same). We find the rationale in these cases to

be persuasive and detect no error in the trial court's ruling on Miller's Confrontation Clause motion.

AFFIRMED.