

IN THE COURT OF APPEALS OF IOWA

No. 5-931 / 03-1664
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ANTONIO WILDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister,
Stephen C. Clarke, and James C. Bauch, Judges.

Wilder appeals the district court's judgment and sentence for first-degree robbery following a bench trial. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan Japuntich,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, and Thomas J. Ferguson, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

Paul Porter, an occupant of a Waterloo apartment building, informed police that he was assaulted and robbed of his cash and cell phone. Porter's statements led to the arrest of Mark Wilder and Dana Scott, who were later charged with first-degree robbery. Iowa Code §§ 711.2, 902.7 (2001). Scott's case was severed from Wilder's. Wilder is the sole defendant involved in this appeal.

Wilder moved to suppress his own statements to police and moved to recuse the district court judge on the ground that he engaged in ex parte communications with the State. The district court denied both motions.

The case was tried without a jury. Following the State's presentation of evidence, Wilder moved for a judgment of acquittal, which the district court denied. At the close of the evidence, the district court found Wilder guilty as charged. The court subsequently denied Wilder's motion for new trial and imposed sentence.

On appeal, Wilder contends: (1) the district court erred in overruling his motions for judgment of acquittal and for a new trial; (2) his statements to police should have been suppressed; (3) certain evidence should not have been admitted; (4) the district court judge should have granted his motion for recusal; and (5) trial counsel provided ineffective assistance.

I. Motions for Judgment of Acquittal and New Trial

A. Motion for Judgment of Acquittal.

Wilder argues that the State failed to present sufficient evidence to support a finding of guilt beyond a reasonable doubt. Our review of this challenge is for errors of law. *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996). The district court's findings of fact, in this bench trial, "have the effect of a special verdict." Iowa R. App. P. 6.4. The district court's findings are binding if supported by substantial evidence. Iowa R. App. P. 6.14(6)(a); *Randle*, 555 N.W.2d at 671.

The district court articulated the State's elements of proof as follows:

[O]n or about the 11th day of July, 2002, the defendant had the specific intent to commit a theft; to carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant: committed an assault on the victim or threatened the victim with or purposefully put the victim in fear of immediate serious injury; and the defendant was armed with a dangerous weapon.

The record contains more than substantial evidence to support the district court's findings relating to these elements.

1. Porter's Statements. The State introduced detailed and descriptive statements made by Porter, the alleged victim. In a taped 911 call, Porter stated that one of his assailants pointed a gun at him. He identified the color of this person's shirt as orange and white. He also identified the vehicle in which this man left as a dark blue Dodge Stratus.

Porter later spoke to Waterloo police officers at the scene. Porter told the officers that the man with the gun was Mark Wilder. He reiterated the color of Wilder's shirt and the color and model of the car in which Wilder left.

One of the officers then took Porter to the police station. Porter provided a statement to Officer Jeffrey Duggan, which was audiotaped and videotaped. Porter's statement was consistent with his 911 call and his statements at the scene. Porter described Wilder's age and height, stated Wilder's hair was in cornrows, and provided more details about Wilder's clothing. He stated that Wilder put a gun to his stomach and said "give me everything." Porter described the gun as a chrome revolver. He said Wilder took his cell phone, hat, and cash.

Porter presented a different story at trial, testifying for the defense that Wilder did not have anything to do with the events of July 11, 2002. The district court addressed this changed story as follows:

Paul Porter [was] not credible in several aspects of [his] testimony but the Court has found that part of [his] testimony is believable. The victim, Paul Porter, was reluctant to appear at trial and, in fact, denied that this defendant was the Mark Wilder who shoved a pistol into his stomach or that he had participated in the robbery. However, his initial 911 call and subsequent statements to officers at the scene as well as his videotaped interview with investigator Duggan shortly after the robbery sets out in detail what occurred on that day and who was involved. Those excited utterances in the statement given to Investigator Duggan which the Court admitted as substantive evidence were made when there was no time to fabricate and were made under the stress and seriousness of the offense that occurred which lends itself to their reliability. Although the victim testified that the defendant is not the one who had the gun pointed at him, he confirms all of the other aspects of his statement to the police.

As we have often stated, credibility determinations rest within the purview of the fact-finder. See, e.g., *State v. Smith*, 508 N.W.2d 101, 102-03 (Iowa Ct.

App. 1993). In addition, there was evidence that Porter had a motive to change his story. A police officer testified that Dana Scott, Wilder's accomplice in the Waterloo robbery, returned to Porter's house after the robbery and gave him \$200 in exchange for Porter's agreement to "drop the charges and forget about the gun." This testimony, as well as the district court's credibility assessment of Porter, supports the district court's reliance on Porter's initial statements to police rather than his trial testimony.

2. Wilder's Statements. Wilder provided different versions of what transpired on July 11, 2002. Initially, he said he was not at the scene and knew nothing. After law enforcement officers told Wilder that he matched the description of one of the suspects, he said his brother lived nearby and might have participated in the incident. Wilder said he looked like his brother, but his brother had shorter hair. He said they owned similar shirts. Wilder later mentioned that his brother had a chrome gun. Wilder told officers where they could find a chrome .357 revolver. Wilder volunteered that he had previously touched the gun. Next, Wilder stated his brother sent for Porter and took drugs from him.

Later, Wilder told officers he dropped off Dana Scott at Porter's apartment complex. Wilder learned that, while Scott was at the apartment complex, he took items from Porter.

In still another version, Wilder stated he, Scott, and Porter went to the apartment complex. He said he saw Scott taking money and drugs from Porter,

but believed it could not have been a robbery because there was no weapon and because taking drugs from a drug dealer is not robbery.

After Wilder was taken to jail, he told Deputy Sheriff Sergeant Kent Smock, “How can they charge me with the robbery? All I did was hold the gun.” As he said this, he gestured as if he were holding a gun.

3. *Accomplice Statement.* Officers also interviewed accomplice Dana Scott, who said he saw Wilder with a .357 handgun on the day of the robbery. At trial, Scott said this sighting was “[e]arlier that day.” However, he described the gun as chrome, just as Porter did.

4. *Corroboration.* Officers corroborated several aspects of the statements made by Porter, Wilder, and Scott. One of the officers testified that Porter was “very upset.” The officers saw damage to a wall that was consistent with Porter’s account that he was shoved against a wall. They also noted plaster dust on Porter’s clothing. After officers learned that Wilder had received two citations while driving a blue Dodge Stratus, they stopped a blue Dodge Stratus. One of the occupants was Wilder’s girlfriend, Virginia Reed.¹ She told the officers Wilder’s whereabouts. When the officers found Wilder, he was wearing the clothing described by Porter, and his hair was in cornrows.

Officer Duggan interviewed Wilder. Acting upon information Wilder provided, officers located a chrome .357 revolver wrapped in a towel in a closet

¹ At trial, Wilder’s girlfriend recanted significant portions of her deposition testimony that implicated Wilder. The district court found her trial testimony “not credible.” As we noted with respect to Porter’s revised testimony, assessments of witness credibility rest with the fact-finder. *Smith*, 508 N.W.2d at 102-03.

at the home of the neighbor of Wilder's brother. This evidence corroborates the testimony of accomplice Scott as required by Iowa Rule of Criminal Procedure 2.21. See *State v. Jones*, 511 N.W.2d 400, 404-05 (Iowa Ct. App. 1993) (stating a defendant's statements may be considered corroboration of an accomplice's testimony). It also corroborates aspects of Porter's and Wilder's statements.

5. Wilder's Actions. After a Waterloo police officer placed Wilder in a holding cell, Wilder escaped. He was captured, handcuffed, and returned to the jail. His flight is further evidence of guilt. *State v. Ash*, 244 N.W.2d 812, 816 (Iowa 1976).

Substantial evidence supports the district court's findings that (1) Wilder was armed with a dangerous weapon, (2) Wilder used the weapon to threaten Porter or place him in fear of immediate serious injury, and (3) Wilder had the specific intent to commit a theft. The State proved the elements of first-degree robbery beyond a reasonable doubt.

B. Motion for New Trial.

In his motion for new trial, Wilder asserted that the verdict was against the weight of the evidence. The district court denied the motion, noting that detailed credibility determinations were made in the original ruling. We review this ruling for an abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

In light of the district court's credibility determinations and the court's detailed summary of the evidence that we find persuasive, we discern no abuse of discretion.

II. Suppression Ruling

Wilder seeks reversal of the district court's suppression ruling on several grounds. He argues (A) there was no proof that he waived his *Miranda*² rights, (B) his statement to Officer Smock was not voluntary, (C) his statements to Officer Duggan were not voluntary, and (D) Officer Smock violated Wilder's statutory right to contact a family member or attorney. We agree with the State that the last two arguments were not preserved for review and, accordingly, must be reviewed under an ineffective-assistance-of-counsel rubric. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). Our review of the preserved issues is de novo. *State v. Lloyd*, 701 N.W.2d 678, 680 (Iowa 2005).

A. Waiver of Miranda Warnings.

The law on waiver of *Miranda* rights is clearly established: "Only after the *Miranda* warnings regarding the accused's rights have been given and an opportunity throughout the interrogation has been afforded the accused to exercise these rights, can the accused knowingly and intelligently waive the rights and answer questions." *State v. Peterson*, 663 N.W.2d 417, 424 (Iowa 2003).

The first question we must address is whether Wilder was read his *Miranda* rights. The record contains disputed testimony on this question. Officer Duggan testified that he read Wilder his rights when he first made contact with

² *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966) (stating police must warn person that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," before conducting custodial interrogation).

Wilder. Duggan stated that he asked Wilder whether he understood those rights, and Wilder provided an affirmative response. Wilder, in contrast, denied that he was ever read his rights.

The district court resolved this dispute in favor of the State. The court reasoned that Wilder was “not a believable witness because of his interest in the case and the multiple inconsistent statements he gave to the investigator.” The court further determined that “the investigator’s testimony that he did advise Defendant Wilder of his rights is believable, consistent with the officer’s training and experience, and with the circumstances and length of the interview.” Although our review is *de novo*, we give weight to the district court’s findings, and particularly its findings on witness credibility. Iowa R. App. P. 6.14(6)(g). The district court’s acceptance of Officer Duggan’s version is supported by the record.

The next question is whether Wilder waived his *Miranda* rights. Duggan conceded he did not revisit these rights prior to the police station interview, and he did not ask Wilder to sign a written waiver of his rights. He testified, however, that Wilder proceeded to answer his questions, both at the scene and at the police station.

Citing the totality of the circumstances, the court determined that Wilder implicitly waived his *Miranda* rights. The court made reference to the following evidence:

[Wilder] expressed no hesitation or reluctance to answer the investigator’s questions, he was advised of his rights at the residence where he had been living since January, which was a noncoercive setting, and the police investigator is a soft-spoken individual, smaller than [Wilder], whose general demeanor is in no way intimidating. It is also apparent that [Wilder] had a story ready

to tell the officer, which he did not hesitate to advance, and that he is no stranger to police interrogation, having been convicted previously for a number of crimes, one or more of which were felonies.

In reviewing these findings, we are aided by a videotape and audiotape of the police station interview. Based on our examination of these tapes as well as the remaining record on this issue, we fully concur in the court's analysis. Like the district court, we conclude Wilder waived his *Miranda* rights after properly being advised of them.

B. Voluntariness of Statements to Jailer.

As noted, Wilder spoke to Deputy Sheriff Sergeant Kent Smock after he was jailed. Wilder asked, "How can they charge me with the robbery? All I did was hold the gun." As he said this, he gestured as if he were holding a gun. Wilder argues this statement was obtained through "deception." He asserts Deputy Smock "used the pretense that he wanted to tell Mr. Wilder why he could not use the phone as a ruse to pump him for information." The district court rejected this argument, finding "Wilder's statements to the jailer were spontaneous, voluntary, and unsolicited." The record supports this assessment.

At the suppression hearing, Sergeant Smock testified that Wilder asked to speak to him. Smock said he "stepped into" Wilder's cell and "talked with him a little bit." Smock answered Wilder's questions. When Smock informed Wilder that he was being charged with first-degree robbery, Wilder responded with the inculpatory statements.

Although Wilder denied that he initiated the conversation with Smock and denied making reference to a gun or gesturing in the manner described by

Smock, a videotape of the incident shows Wilder in his cell attempting to hail an officer. Although the audio portion of the tape is garbled, the videotape shows Wilder speaking to the officer in what appears to be a conversational tone. The videotape also shows Wilder making some sort of gesture. We cannot independently ascribe the meaning that Smock ascribed to it, but we give weight to the district court's finding that Sergeant Smock's testimony was "credible and reliable." Like the district court, we conclude Wilder's statements to Officer Smock were voluntary.

III. Evidentiary Rulings

Wilder challenges several of the district court's evidentiary rulings. We review hearsay claims for errors of law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). We review other evidentiary rulings for an abuse of discretion. *State v. Frazier*, 559 N.W.2d 34, 38 (Iowa Ct. App. 1996).³ We review the constitutional claim that the Confrontation Clause was violated de novo. *Newell*, 710 N.W.2d at 23.

A. Escape.

Wilder first argues the district court should not have admitted evidence of his escape. He maintains "there is no relevance to the facts surrounding [his] escape conviction unless it is used to show that [he] acted in conformity with character, a prohibited use, which is unfairly prejudicial."

³ Wilder asserts the district court's evidentiary rulings implicate his constitutional right to a fair trial. He argues review of those issues should be de novo. *State v. Traywick*, 468 N.W.2d 452, 455 (Iowa 1991). We are not convinced the claimed errors go to "the heart of the case." *Id.*

The district court found the evidence relevant, reasoning that it “absolutely shows the defendant’s state of mind at that point in time, and it’s absolutely relevant to the finder of fact to show a consciousness of guilt of the defendant on what he’s being charged with and the acts he’s committed.” We discern no abuse of discretion in this aspect of the court’s ruling. See Iowa R. Evid. 5.401; *Ash*, 244 N.W.2d at 816.

As for Wilder’s contention that the evidence was unfairly prejudicial, the case was tried to the court, minimizing the prejudicial impact. *State v. Casady*, 491 N.W.2d 782, 786 (Iowa 1992). Additionally, the court stated it would afford the evidence only limited weight, further minimizing any undue prejudice. See Iowa R. Evid. 5.403. We conclude that the district court did not abuse its discretion in admitting evidence of the escape.

B. Tapes of Porter’s Interview.

Wilder argues the district court erred in admitting the recordings⁴ of the police interview with Porter. He maintains the tapes were no longer material or probative in light of subsequent deposition testimony in which Porter recanted his earlier statement to the police. He further argues his Confrontation Clause rights were violated by admission of this exhibit.⁵

In a detailed ruling, the district court determined that the tapes were admissible under specified exceptions to the hearsay rule. See Iowa Rs. Evid. 5.803(24) and 5.804(b)(5). There is no dispute that he could not be found at the time of the court’s preliminary ruling or when the exhibit was offered at trial.

⁴ The record contains a videotape and audiotape of the police interview.

⁵ The State argues the Confrontation Clause issue was not preserved. We disagree.

There is also no dispute that the State notified the defense of its intent to use the tapes. The interview tapes had strong indications of trustworthiness because the interview was recorded, was made shortly after the incident, and was consistent with the recording of Porter's 911 call and other evidence obtained at the scene. The tapes were material, as they provided direct proof of the elements for first-degree robbery. Moreover, the evidence was necessary to refute Porter's subsequent retraction of his allegations against Wilder at the deposition and at trial. Indeed, the recantation created a credibility issue that the State was entitled to explore and that the district court was obligated to resolve. And, we agree with the State that the evidence served the interests of justice by advancing "the goal of truth-seeking." Based on these factors, we conclude that the district court did not abuse its discretion in admitting the tapes. Even if the evidence was erroneously admitted, the admission was not prejudicial, because substantially the same evidence properly came into the record. See *Newell*, 710 N.W.2d at 19.

As for the court's ruling on the Confrontation Clause issue, it is clear that, at the time of the ruling, the requirements for admission of testimonial statements were satisfied. See *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004). Cf. *Davis v. Washington*, ___ U.S. ___, ___, 126 S. Ct. 2266, 2277, ___ L. Ed. 2d ___, ___ (2006) (holding interrogation in a separate room away from defendant was testimonial whereas tape of 911 call

was not testimonial). Additionally, the Confrontation Clause issue disappeared when Porter appeared at trial and testified for the defense.⁶

We affirm the district court's admission of evidence relating to Porter's interrogation at the police station.

C. Handgun.

Wilder argues the district court erred in admitting the handgun. He maintains there was no "conclusive proof" linking the gun to the one used in the robbery. He also contends "the probative value was almost nil, while the extremely prejudicial effect can be seen in the district court's ruling."

To warrant admission of guns, "it is not necessary to show they were actually connected with the crime. It is only necessary to show sufficient circumstances which make such connection probable or likely." *Ash*, 244 N.W.2d at 816.

The handgun was similar to the weapon described by witnesses, Wilder indicated he handled a gun which was in the control of his brother, and Wilder implicated his brother in the robbery. This evidence established "sufficient circumstances," making a connection between the gun and the robbery likely. *Id.*

⁶ In *Davis*, the United States Supreme Court also reaffirmed that a defendant who "obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." ___ U.S. at ___, 126 S. Ct. at 2280, ___ L. Ed. 2d at ___. In this case, the record reveals that Wilder's accomplice may have induced Porter into recanting. The record does not reveal whether Wilder was also involved in these inducement efforts, but we need not reach this issue because, as noted, Porter ultimately testified at trial.

D. Videotaped Conversation with Smock.

Wilder argues the district court abused its discretion in admitting the videotape of his conversation with Smock. He maintains the videotape is “inherently unreliable” because it has a garbled audio track. This fact goes to the tape’s weight, not its admissibility, and the district court did not abuse its broad discretion in admitting the exhibit.

IV. Motion for Recusal

Wilder filed a motion to recuse the district court judge, which the district court denied. Wilder takes issue with this ruling. He contends the court and the prosecutor engaged in conversations about case scheduling that resulted in a postponement of the trial date. He further asserts the court did not act in a “neutral and detached” manner and the district court appeared to have a preference for the prosecution. Wilder requests a new trial before a different judge.

The Iowa Code of Judicial Conduct governs disqualifications of judges. See Canon 3(C). The pertinent language states:

A judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following instances:

a. The judge has a personal bias or prejudice concerning the party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

Canon 3(C)(1)(a). Only personal bias or prejudice as opposed to judicial predilection will disqualify a judge. *State v. Smith*, 282 N.W.2d 138, 142 (Iowa 1979). The claimed bias and prejudice must arise from an extrajudicial source and must result in an opinion that is based on something other than what the

judge learned from participation in the case. *Id.* (citation omitted). Our review of this issue is for an abuse of discretion. *Id.*

We discern no abuse. The claimed bias arose entirely out of the district court's actions in this case. That alone was grounds for denial of the motion.

As for the claimed *ex parte* communication, the prosecutor testified it related to a scheduling matter rather than the merits of the case. Additionally, the prosecutor stated he unsuccessfully attempted to contact defense counsel about rescheduling the trial. Finally, the prosecutor's request for a continuance was heard in open court, with an opportunity for defense counsel to respond.

With respect to Wilder's contention that the court favored the State, the record reflects the district court twice prompted defense counsel so that counsel would not waive claims of error. These actions are not consistent with Wilder's assertion of bias. *Cf. In re S.P.*, ___ N.W.2d ___, ___ (Iowa 2006) ("The record in the present case simply does not display what Edmund Burke described as 'the cold neutrality of an impartial judge.'")

We conclude the district court did not abuse its discretion in overruling Wilder's motion for recusal.

V. Ineffective-Assistance-of-Counsel-Claims

As noted, Wilder raises two challenges to the district court's suppression ruling, both of which were not raised before that court. Because error was not preserved, Wilder urges us to review these challenges as ineffective-assistance-of-counsel-claims. *See Lucas*, 323 N.W.2d at 232. We will do so.

First, Wilder contends his statutory right to contact a family member or attorney was violated. See Iowa Code § 804.20. Second, he argues his statements to Officer Duggan were involuntary. Assuming Wilder should have been allowed to contact a family member and assuming Wilder's statements to Duggan were not voluntary, and further assuming a motion to suppress, if made, would have been granted on these grounds, Wilder still must show *Strickland*⁷ prejudice. See, e.g., *Berg v. Maschner*, 260 F.3d 869, 872 (8th Cir. 2001). Specifically, he must establish a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Based on the evidence outlined in Part I, we conclude Wilder cannot satisfy this standard.

We affirm Wilder's judgment and sentence.

AFFIRMED.

⁷ *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 698 (1984).