

IN THE COURT OF APPEALS OF IOWA

No. 6-692 / 05-1983
Filed November 16, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SCOTT ANTHONY RISTAU,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Mary J. Sokolovske, Judge.

A defendant appeals his conviction and sentence following a jury trial.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Brigit Barnes, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

Scott Ristau appeals the district court's ruling allowing the admission of booking photographs during his jury trial. He was later convicted and sentenced as an habitual offender for possession with intent to deliver a controlled substance (marijuana) and drug tax stamp violation, under Iowa Code sections 124.401(1)(d), 453B.12, and 902.8 (2005). We affirm the admission of the evidence.

I. Background Facts and Proceedings.

Early in the morning of July 30, 2005, in Sioux City, Iowa State Patrol troopers noticed a red Pontiac with a loud exhaust system and the absence of a license plate light. The driver of the car did not respond to the officers' activating the patrol car lights and then accelerated when the siren was activated. A high-speed chase ensued, until the Pontiac stopped and the driver fled the scene. The pursuing trooper was unable to apprehend the driver. However, the troopers were able to describe the driver as follows: a white male with long, unkempt "gray to blondish" hair, a "pretty thin" build, and height around five feet, eight inches to five feet, ten inches tall. The video camera in the patrol car recorded the stop and the driver's escape, both of which was later admitted into evidence on a DVD and shown to the jury.

A search of the car revealed a brick of compressed marijuana in a duffel bag located in the right passenger side of the car. Although the registration papers indicated the owner of the car was Scott Miller, a letter from the Iowa Department of Transportation to Scott Anthony Ristau was found in the trunk. The DOT letter to Ristau showed his address as 2614 Washington Street, Sioux

City, which was within a few blocks from where the car was stopped. When Miller was questioned, he stated he had loaned the Pontiac to Ristau and Ristau had exclusive access to the car on July 30, 2005. Miller also denied knowledge of the marijuana. Armed with this information, the officers observed past booking photographs of both Miller and Ristau and determined that Ristau matched their recollection of the driver's appearance. When Ristau was arrested on August 3, 2005, he was clean shaven and had very short hair. The identity of the driver became a central issue in the trial. Over Ristau's objection, the State was permitted to present his most recent booking photo from May 2004, depicting him with long, unkempt hair and facial hair. The jury found Ristau guilty as charged and he now appeals, claiming it was prejudicial error to admit the booking photograph.

II. Scope and Standards of Review.

Challenges to evidentiary rulings are reviewed for correction of errors at law. Iowa R. App. P. 6.4. A court has wide discretion in making such rulings, and its decisions in this regard are reversed only for a demonstrated abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). Abuse is found where a district court exercised its discretion on clearly untenable grounds, for clearly untenable reasons, or to a clearly unreasonable extent. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996).

Claims involving the ineffective assistance of counsel have their basis in the Sixth Amendment of the United States Constitution and thus are examined de novo. *State v. Nitcher*, 720 N.W.2d 547, 553 (Iowa 2006). Although these claims are typically preserved for postconviction relief actions, "we will address

such claims on direct appeal when the record is sufficient to permit a ruling.”
State v. Wills, 696 N.W.2d 20, 22 (Iowa 2005).

III. Admission of the Booking Photograph.

Ristau argues that the district court erred when it admitted the May 2004 booking photograph over his objection, as it was evidence of a prior bad act and, as characterized to the district court, a “back door to admitting the past convictions of the defendant.”

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. 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. 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 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).

The primary issue at trial was the identity of the driver of the Pontiac and whether it was in fact the defendant. Ristau’s raised an alibi defense supported by the testimony of his cousin that he was in South Sioux City, Nebraska, at the time of the traffic stop. To prove Ristau’s identity, the State offered several prior and the current booking photographs, to compare his likeness to the driver captured on the DVD video, the troopers’ descriptions, and then to show that

Ristau attempted to change his appearance following the traffic stop. Ristau objected to the admission of the evidence as unfairly prejudicial for highlighting a past arrest. He argued that the State could alternatively use photos from driver's license applications made by Ristau in February 2002 and May 2003. The district court ruled that only the most recent May 2004 booking photograph, (a combined photo showing a front view and a side view), would be admissible and solely for purposes of identity. Booking photos from three prior arrests were not allowed into evidence. We agree with the district court's admission of the photo. The photograph was relevant under Iowa Rule of Evidence 5.401 to prove the driver's identity on the traffic video, to compare to the troopers' descriptions, and to show a comparison of Ristau's appearance before he cut his hair and shaved his facial hair.

We next 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 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.

While Ristau argued in his motion in limine that using "mug shots will suggest to the jury that the defendant has a long running battle with the law," it appears the court attempted to minimize the prejudicial effect to Ristau by admitting only one set of the booking photographs offered by the State with

redacted booking information. Use of one such photo would not indicate a “long running battle with the law” but may rather indicate only the most recent of his prior arrests, May 2004. During the hearing on the motion in limine, the State made reference to having obtained copies of Ristau’s driver’s license applications for 2002 and 2003 with accompanying photos; however, none was proffered to the court by the State or the defense for consideration as an alternative. After comparing the dates of the two driver’s license application photos of Ristau, the court allowed admission of only the most recent photograph, which happened to be Ristau’s booking photo from May 2004.

Further, there was no dispute that the two-view photo accurately depicted Ristau’s appearance as it was in the summer of 2005, before he shaved and cut his hair. The probative value for such a photo escalated as the question then turned to when Ristau altered his appearance. The State argued that if it could show Ristau changed his appearance after July 30, it would demonstrate a deliberate attempt to elude arrest. Ristau claimed he cut his hair and shaved several days prior to the July 30, 2005 traffic stop. His sister, Melissa Sharpe, testified that he cut his hair sometime before he was arrested. Ristau’s son, Daniel Kloss, testified that he helped Ristau cut his hair on July 24. Using this photo rebutted the defense testimony as to when Ristau changed his appearance by supporting the image the troopers reported when they saw a fleeing man on July 30, matching the image on the photos as well as the image of the driver captured on the video of the stop. See *State v. Casady*, 597 N.W.2d 801, 808 (Iowa 1999) (holding a booking photograph was admissible as relevant and not unfairly prejudicial to show the defendant’s appearance at the time of his

arrest, when he altered his appearance between arrest and trial). The danger of unfair prejudice did not outweigh the strong probative value of the photographs, revealing Ristau's likeness as described by the troopers. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997) (stating that to be unfairly prejudicial, evidence must create an undue tendency in the jury to make a decision on an improper, and often emotional, basis). The district court did not abuse its discretion in admitting this booking photograph.

IV. Ineffective Assistance of Trial Counsel.

Ristau argues that his trial counsel failed to adequately object to and preserve error on the admission of the booking photos and testimony regarding it. When the record on appeal is inadequate for the assessment of counsel's performance, we are normally inclined to preserve the claim for postconviction proceedings, to allow trial counsel an opportunity to explain the facts and circumstances surrounding the disputed issue. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We conclude that this issue should be preserved for possible future postconviction relief proceedings, as it arguably calls for motivations behind trial counsel actions. We otherwise affirm Ristau's conviction.

AFFIRMED.