IN THE COURT OF APPEALS OF IOWA

No. 6-944 / 05-0588
Filed February 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD LEROY PARKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Monica J. Ackley and Alan L. Pearson, Judges.

Richard Leroy Parker appeals his conviction and sentence for second-degree robbery as an habitual offender. **REVERSED AND REMANDED.**

Patricia Reynolds, Acting State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Ralph Potter, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

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

MAHAN, P.J.

Richard Leroy Parker appeals his conviction and sentence for second-degree robbery as an habitual offender in violation of Iowa Code sections 711.3 and 902.8 (2003). He argues the district court erred when it (1) determined James Hall was not his attorney and admitted their conversations; (2) admitted evidence of prior drug convictions; and (3) sentenced him as an habitual offender. He further alleges the prosecutor engaged in misconduct by violating a motion in limine. Finally, he argues his trial counsel rendered ineffective assistance. We reverse and remand for new trial.

I. Background Facts and Proceedings

Parker was charged with second-degree robbery as an habitual offender on September 16, 2004. A jury trial began on December 6, 2004. Prior to trial, Parker filed a motion in limine pursuant to Iowa Rules of Evidence 5.404(*b*) and 5.609 to exclude prior drug offenses. The district court overruled his motion as to rule 5.404(*b*), but reserved judgment on his rule 5.609 claim for trial.

At trial, Parker began his direct examination as follows:

> Q: Other than the present charge against you, Mr. Parker, to your knowledge, have you ever been charged with theft? A: No.
> Q: Have you ever been charged with robbery? A: No.
> Q: Have you ever been charged with burglary? A: No.

On cross-examination, the prosecutor asked Parker about whether he had been charged with burglary in the past. Parker waffled, and then admitted to being accused of burglary but being charged with criminal mischief. The prosecutor then impeached him, asking, "1993, County of Dubuque, you were charged with burglary in the first degree on—on 5-10-1993. You don't remember

that, sir?" Parker admitted to the charge. Then the prosecutor asked Parker about "some other convictions" he hadn't mentioned on direct examination. At that point, Parker's attorney objected pursuant to rule 5.609. The following discussion between the court and counsel took place in front of the jury:

> DEFENSE: Your Honor, I'm going to object to this. I—I think we ought to be talking about this outside the presence of the jury.
>
> PROSECUTOR: I believe it falls clearly within the rules, Your Honor, when there are felony convictions, not to mention the fact that he opened the door by describing that he hadn't been charged with previous particular crimes. I don't believe he can be allowed to mislead the jury otherwise. The rules are very clear, but the procedure is for felony convictions.
>
> THE COURT: I agree. Go ahead.
>
> DEFENSE: Your Honor, then I wish to simply remind the Court of the motions prior to the case, and I wish to remind the Court of the rules of evidence, and particularly, I believe it's 603.
>
> PROSECUTOR: I believe it's rule 5.609(*a*)(1).
>
> THE COURT: The court is well acquainted with that [rule], and you've opened the door and asked him questions pertaining to his prior history. I believe the State has the right to go into that subject, especially if it's a felony or anything related to an untruthful manner.
>
> DEFENSE: Your Honor, my client was asked specific questions.
>
> THE COURT: And gave very specific answers. That opens the door to this inquiry. Go ahead.

The prosecutor then asked about Parker's previous drug charges from 1993:

> Q. You have convictions for Possession of a Schedule I Substance? A. Yes. Thirteen years ago, I was charged with, you know, you know, I believe it was aiding and abetting or delivery of a controlled substance, yes.
>
> Q. Delivery of a Schedule II Controlled Substance within a thousand feet of a school and Delivery of a Schedule II Controlled Substance; do you recall that, sir? A. I just said I did, yes.
>
> Q. And you were convicted of it? A. Yes, I was.
>
> Q. And you went to prison? A. Yes, I did.

II. Standard of Review

We review the admission of prior convictions for an abuse of discretion. *State v. Martin*, 704 N.W.2d 674, 677 (Iowa 2005); *State v. Roby*, 495 N.W.2d 773, 775 (Iowa Ct. App. 1997).

III. Merits

Parker claims the district court erred in allowing evidence of his prior drug convictions. He points out that the convictions are from 1993 and argues they have nothing to do with his veracity as a witness.

According to Iowa Rule of Evidence 5.609:

> (*a*) General rule. For the purposes of attacking the credibility of the witness:
> (1) Evidence . . . that an accused has been convicted of [a crime punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
> (2) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
> (*b*) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Parker's attorney did not object when the State cross-examined Parker on his prior convictions relating to burglary, but did object under rule 5.609 when the State asked about "other prior convictions." The court ruled Parker opened the door with his prior testimony. However, Parker never mentioned drug convictions or denied having convictions other than burglary, theft, and robbery. Further, the district court never engaged in a balancing test or stated how the thirteen-year-

old convictions could be admitted. *See State v. Daly*, 623 N.W.2d 799, 802 (Iowa 2001) (requiring district court to engage in balancing test when ruling on rule 5.609 objection); *Roby*, 495 N.W.2d at 775 ("Rule 609(*b*), in effect, creates a rebuttable presumption that convictions over ten years old are more prejudicial than probative and are therefore inadmissible.").

Under rule 5.609, the court is to determine whether the probative value of the evidence of a prior conviction outweighs its prejudicial effect. Essentially, the court is to determine whether the State has sufficiently rebutted the presumption that the thirteen-year-old convictions are prejudicial. Factors we are to consider include (1) the nature of the conviction; (2) the convictions' bearing on veracity; (3) the age of the conviction; and (4) its tendency to improperly influence the jury. *Daly*, 623 N.W.2d at 802.

In this case, Parker was previously convicted of drug possession. There was no evidence connecting drugs to the alleged bank robbery. Second, Parker did not deny having drug convictions, or any other type of conviction other than theft, burglary, and robbery. Third, the drug convictions themselves are not inherently related to veracity. Fourth, the convictions were thirteen years old. Finally, the prosecutor mentioned the words "felony convictions" twice inside the presence of the jury, told the jury the convictions were for delivery within one thousand feet of a school, and forced Parker to admit he went to prison for the convictions. Given these factors, we conclude the value of the evidence of the 1993 drug convictions did not outweigh their prejudicial effect. In fact, it is unclear what value the drug convictions offered, since the prosecutor had already

successfully impeached Parker based on his denial of prior burglary charges. As the *Daly* court emphasized,

> [O]ne solution [for limiting the prejudice of prior convictions] might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.

Daly, 623 N.W.2d at 802 (quoting *Gordon v. United States*, 383 F.2d 940 (D.C. Cir. 1967)).

We therefore conclude the district court abused its discretion when it admitted evidence concerning Parker's 1993 drug convictions. Because we resolve the appeal on this issue, we need not address Parker's remaining claims. Parker's conviction and sentence are reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.