

IN THE COURT OF APPEALS OF IOWA

No. 7-054 / 06-0018
Filed March 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JAMES GUNTHER,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Michael Gunther appeals his conviction for second-degree murder.

AFFIRMED.

Patricia Reynolds, Acting State Appellate Defender, and Shellie L. Knipfer and Dennis D. Hendrickson, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Zimmer and Baker, JJ.

HUITINK, P.J.

Michael Gunther appeals his conviction for second-degree murder. On appeal, Gunther argues the trial court should have excluded subsequent bad acts evidence and portions of a newscast where he admitted killing the victim and one other person. He also claims he received ineffective assistance of counsel because his trial counsel did not request a limiting instruction for the jury. We affirm.

I. Background Facts and Proceedings

Gunther met Sally Kennedy at a convention in 2002. A personal relationship developed, and Kennedy hired Gunther to work at her traveling carnival. In March 2004 Gunther moved in with Kennedy. The relationship soon soured, and Kennedy told several friends that she intended to break off the relationship.

At approximately 7:50 p.m. on May 23, 2004, Gunther entered Kennedy's trailer parked at Bluffs Run Casino to pack up his things and move out. Surveillance cameras at Bluffs Run Casino recorded Gunther leaving the parking lot at 8:05 p.m. Gunther then traveled to the carnival in Bellevue Nebraska and shot his coworker, Michael Zawodney. Gunther was arrested shortly thereafter.

At the time of his arrest, Gunther had blood on his clothing and a large cut on one finger. Statements from witnesses led police to Kennedy's trailer. Police entered Kennedy's trailer and discovered her lying face down in a pool of blood. She had been stabbed twenty-two times. A bloody folding knife was left on the bathroom sink. Officers observed blood drops around other areas of the trailer

and “Band-aid” tabs on the floor. In her bedroom, the officers found two empty, open gun cases.

A DNA test revealed that several blood samples in the trailer matched Gunther. Also, DNA tests on Gunther’s clothing matched Kennedy’s blood.

Gunther was charged in Iowa with murder in the first degree for the death of Sally Kennedy. Gunther filed a pretrial motion in limine to exclude “any reference to the death of Mike Zawodney, the firearms involved in said death and/or physical evidence pertaining to said death.” He argued that admission of such evidence would inflame the jurors. The State claimed the evidence was part of the same crime and that it was not possible to untangle the shooting and statements Gunther made to a witness before, during, and after the shooting.

The court concluded the evidence was relevant and the probative value of the evidence relating to Zawodney’s death was not outweighed by the danger of unfair prejudice. The court further noted the State was entitled to show the surrounding circumstances and found the challenged evidence admissible under Iowa Rule of Evidence 5.404(b). Gunther also unsuccessfully tried to exclude two twenty-five-second news cast segments of his phone interview with a Nebraska reporter where he admitted killing Kennedy and Zawodney.

At trial the State played the brief video of the Nebraska news reporter’s interview with Gunther. Also, the head mechanic for the carnival, Christopher Davis, testified he spoke with Gunther on the evening of the murders. They spoke briefly about a mechanical problem on one of the rides. Thirty seconds later, Davis heard gunshots. He ran towards the shots and found Gunther standing over the body of Michael Zawodney. Gunther held two guns. Davis

recognized one of the guns as a handgun belonging to Kennedy. Gunther told Davis “[t]his is the mother f***er that’s been f***ing Sally” and then fired his remaining rounds into Zawodney’s inert body. Gunther then put the gun to his head and said, “I’m dead, Sally’s dead, and now he is f***ing dead.” The gun did not discharge, and Gunther was arrested shortly thereafter.

Gunther took the stand and claimed that on the night of the murder Kennedy told him she had been sleeping with Zawodney and one other man. She told him that these men, unlike Gunther, did not need to use Viagra. He said he called her the name of his former wife and she responded by pushing him against the wall and punching him in the face. Gunther remembers shaking, but does not remember anything else until he woke up in jail three weeks later. When asked whether he killed Kennedy, he replied “I know what the police reports say, and I know I had blood all over me, so I know I must have done it.”

Gunther also testified that the taped interview did not clearly indicate what he had said to the reporter. He claimed he actually said “they said I killed two people.” He also minimized the value of these statements by claiming he made them while he was deprived of sleep.

The court instructed the jury on the theories of first- and second-degree murder, voluntary manslaughter, and willful injury. The jury found him guilty of second-degree murder.

II. Merits

A. Evidentiary Rulings

On appeal, Gunther claims the district court erred in admitting Davis’s testimony and the two clips of his interview with a Nebraska television news

reporter. Gunther claims the evidence concerning the Zawodney shooting and the “graphic” testimony of Davis were not relevant. He also claims that, even if they were relevant, the probative value of this evidence was far outweighed by the danger of unfair prejudice. He contends Davis’s testimony “stirr[ed] such passion in the jury as to sweep them beyond a rational consideration” of his guilt or innocence in the Kennedy murder trial.

We review evidentiary rulings for an abuse of discretion. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2003). The trial court abuses its discretion when such discretion is exercised on grounds clearly untenable or to an extent clearly unreasonable. *Id.*

For the following reasons, we find the evidence describing the Zawodney shooting and the aforementioned television interview was relevant and not unfairly prejudicial.

Relevancy. In general, relevant evidence is admissible, and irrelevant evidence is not admissible. Iowa R. Evid 5.402. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to” the case more or less probable “than it would be without” such evidence. Iowa R. Evid. 5.401.

The televised phone interview is relevant because it relayed Gunther’s admission that he killed Kennedy and Zawodney. The evidence of Gunther’s statements to Davis requires more thorough analysis because his statements are intertwined with the “bad act” of shooting Zawodney.

Evidence of other bad acts is not admissible to show a general propensity to commit wrongful acts. *State v. Haskins*, 573 N.W.2d 39, 45 (Iowa Ct. App.

1997). Evidence of other bad acts may be admitted, however, for one or more of the nonexclusive purposes listed in Iowa Rule of Evidence 5.404(b). *Id.* Iowa Rule of Evidence 5.404(b) provides:

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.

The list of admissible “other purposes” in rule 5.404(b) is not exclusive. *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). Instead, the key to determining admissibility depends upon “whether the challenged evidence is relevant and material to some legitimate issue other than a general propensity to commit a wrongful act.” *State v. Uthe*, 542 N.W.2d 810, 814 (Iowa 1996). Other bad acts evidence is allowed as evidence of the required mens rea for the crime charged if the acts are probative of that intent in a manner other than a propensity of the accused to act in a particular manner. *State v. Matlock*, 715 N.W.2d 1, 5 (Iowa 2006).

The State contends Davis’s testimony about the context of Zawodney’s statements was admissible and relevant because it completed the story of the crime and it was necessary to avoid juror confusion. We agree. “Evidence immediately surrounding the offense is admissible in order to show the complete story of a crime, even when it shows commission of another crime.” *State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa Ct. App. 1998). Gunther’s statements and actions were necessarily intertwined. Gunther made statements to Davis about Kennedy’s alleged affair with Zawodney while he was in the process of shooting

Zawodney. Also, his statement connected his knowledge of Kennedy's death to his actions—"Sally's dead, and now he is f***ing dead."

There is no doubt that Davis's testimony is relevant because it indicates Gunther's motive for killing both Kennedy and Zawodney—he believed they were sleeping together. Davis's testimony also indicates Gunther held one of Kennedy's missing guns while he shot Zawodney. A redacted version of his statements could have confused the jury. We find Gunther's statements and the context of those statements were relevant to the case. See *Old Chief v. United States*, 519 U.S. 172, 186-87, 117 S. Ct. 644, 653, 136 L. Ed. 2d 574, 591-92 (1997) ("[A] criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."); *State v. Oppelt*, 329 N.W.2d 17, 19 (Iowa 1983) ("When acts are so clearly related in time and place and so intimately connected that they form a continuous transaction, the whole transaction may be shown to complete the story of what happened.").

Danger of Unfair Prejudice. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. "Unfair prejudice" means use of evidence that "appeals to the jury's sympathies, arouses its sense of horror, [or] provokes its instincts to punish. . . ." *Henderson*, 696 N.W.2d at 10-11.

One factor we consider when balancing the probative value of evidence against its potential for unfair prejudice is the comparative enormity of the charged and uncharged crimes. *State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993). The potential prejudicial effect of the Zawodney shooting was neutralized by the equally reprehensible nature of the charged crime—the brutal

stabbing death of his girlfriend. Here, the uncharged crime “did not involve conduct any more sensational or disturbing” than the charged crime, so as to warrant exclusion under Iowa Rule of Evidence 403. See *id.* Also, the State did not elicit great detail about the shooting and spent a relatively small amount of time on this line of questioning. Although Davis testified that Gunther shot Zawodney repeatedly, the jury did not hear or see any evidence about Zawodney’s gunshot wounds, the carnival crime scene, or the murder trial and conviction in Nebraska. We conclude Davis’s testimony was presented in a such as manner as not to inflame the jury’s emotions. We cannot say the district court abused its discretion in determining that the probative value of Davis’s testimony was not substantially outweighed by its potential for unfair prejudice.¹

In light of the preceding discussion, we similarly find it was not unfairly prejudicial to admit the videotape which contained Gunther’s admission that he killed both Zawodney and Kennedy.

Harmless Error. Even if we had found an abuse of discretion, we would not reverse because Gunther’s rights were not injuriously affected by the alleged error. See *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (indicating an error in the admission of evidence does not warrant reversal where the record affirmatively establishes the alleged error was harmless); see also Iowa R. Evid. 5.103(a). Absent the subsequent bad acts evidence, there was still

¹ Gunther lists many comments contained in the newscast, but does not indicate which of these comments were actually shown to the jury and does not articulate why those comments were prejudicial. Because Gunther does not articulate why these comments were unfairly prejudicial to his case, we will not address such comments here. See Iowa R. App. 6.14(1)(c) (stating a party’s failure to state, argue, or cite authority in support of any issue may be deemed waiver of that issue).

overwhelming evidence of Gunther's guilt. See *State v. Rodriguez*, 636 N.W.2d 234, 244 (Iowa 2001) (“Although it is difficult for a reviewing court ‘to surmise what answer to what question by what witness tipped the burden of proof and thus precipitated the verdict,’ where the other evidence overwhelmingly establishes the defendant’s guilt, we have applied the harmless error doctrine.”) (quoting *State v. Brodene*, 493 N.W.2d 793, 797 (Iowa 1992)). Gunther admitted he was in Kennedy’s trailer on the night of her death. DNA samples from blood found on several items in Kennedy’s trailer matched Gunther’s DNA. Gunther was arrested shortly after Kennedy was stabbed and, upon his arrest, police discovered he had a large cut on one of his hands and Kennedy’s blood on his clothes. Gunther also had in his possession at least one of Kennedy’s missing guns.

The prejudicial effect of the subsequent bad acts evidence was minimal when viewed in the context of the other evidence already in the record. For these reasons, we hold that the admission of evidence of the Zawodney shooting, even if erroneous, was harmless.

B. Ineffective Assistance of Counsel

Gunther also claims he was denied his Sixth Amendment right to counsel because his trial counsel did not request a “similar crimes”² jury instruction to

² For example, Iowa Criminal Jury Instruction No. 200.34 states

Similar Crimes. Evidence has been received concerning other wrongful acts alleged to have been committed by the defendant. The defendant is not on trial for those acts.

This evidence must be shown by clear proof, and can only be used to show [motive] [intent] [absence of mistake or accident] [common scheme] [identity of person charged].

If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar

explain the limited purpose of Davis's testimony. Because there was no limiting instruction, Gunther contends the jury was free to conclude he was "simply a murderer" and therefore convict him for the murder of Kennedy as well.

We review claims of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prevail on such a claim, Gunther must prove by a preponderance of the evidence that (1) his counsel failed in an essential duty and (2) that prejudice resulted. *Id.* at 669. We need not determine whether counsel's performance is deficient before examining the prejudice element, *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990), because ineffective-assistance claims fail if the defendant cannot prove both prongs. *Martin*, 704 N.W.2d at 669. The standard for prejudice is whether counsel's failure worked to Gunther's actual and substantial disadvantage so that a reasonable possibility exists that *but for* the trial attorney's errors, the resulting conviction would have been different. *Id.* "A reasonable probability is one sufficient to undermine confidence in the outcome." *State v. Kone*, 557 N.W.2d 97, 102 (Iowa Ct. App. 1996).

As discussed above, overwhelming record evidence exists from which a rational jury could find Gunther guilty of second-degree murder. There simply is no plausible basis upon which we could conclude that but for counsel's failure to request this jury instruction, Gunther would not have been convicted. Thus we conclude any alleged breach of an essential duty attributed to trial counsel's

manners as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing [motive] [intent] [absence of mistake or accident] [common scheme] [identity of person charged].

failure to request a “similar crimes” jury instruction did not affect the outcome of the trial. Finding no prejudice, we reject Gunther’s ineffective assistance of counsel claim and affirm the conviction.

AFFIRMED.