

IN THE COURT OF APPEALS OF IOWA

No. 9-261 / 07-1503
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY JOE WILLIAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

A defendant appeals his judgment and sentence for first-degree murder, contending that the district court abused its discretion in failing to strike an unanswered question posed by the prosecutor that made reference to prior bad acts of the defendant. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

Terry Joe Williams appeals his judgment and sentence for first-degree murder arising from a stabbing in Des Moines. He contends the district court abused its discretion in failing to strike a question posed by the prosecutor that made reference to prior bad acts committed by Williams.

The pertinent exchange between the prosecutor and Williams's mother was as follows:

Q: [A] big part of Terry's problems was that he hit people; right?

[Defense Counsel]: Your Honor, objection. May I approach, Your Honor?

At this juncture, the court held a reported sidebar conference at which Williams's attorney objected on the ground that the State was attempting to elicit impermissible evidence of Williams's propensity for violence. The district court sustained the objection. Defense counsel moved to strike the unanswered question, to which the court responded, "Well, there was no answer, so we'll leave it at that."

Williams maintains that the court's failure to strike the question resulted in unfair prejudice to him because the answer to the question lay "in the question itself." The State responds that Williams failed to preserve error.

In *State v. Griffin*, 386 N.W.2d 529, ___ 534 (Iowa Ct. App. 1986), the prosecutor asked a child in a sexual abuse prosecution whether she learned a sexual abuse "game" from the defendant. As in this case, the defendant argued the question was highly prejudicial. This court held that Griffin waived error, reasoning, "Defense counsel did not request that the jury be admonished, nor

was a motion for mistrial made based upon any such improper suggestion to the jury.” *Griffin*, 386 N.W.2d at 535.

As in *Griffin*, Williams did not ask the district court to admonish the jury about the significance of the question and did not ask for a mistrial. Therefore, we could conclude that error was waived. However, we elect to bypass this error preservation concern and proceed to the merits.

The record discloses that Williams was not unfairly prejudiced by the prosecutor’s question because the district court instructed the jury that “[s]tatements, arguments, questions and comments by the lawyers” were not evidence. Jurors are presumed to follow the instructions. *State v. Simpson*, 438 N.W.2d 20, 21 (Iowa Ct. App. 1989). Additionally, the same evidence alluded to in the prosecutor’s question came in without objection through another witness. See *State v. Hood*, 346 N.W.2d 481, 484 (Iowa 1984) (“[N]o prejudice issues from admission of evidence where substantially the same evidence is elsewhere in the record without objection.”). For these reasons, we are not persuaded by Williams’s argument and we affirm his judgment and sentence for first-degree murder.

AFFIRMED.