

IN THE COURT OF APPEALS OF IOWA

No. 1-668 / 10-1899
Filed October 5, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NOEL JERMAINE BENDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Steven J. Andreasen, Judge.

Noel Bender appeals from his convictions for delivery of marijuana within 1000 feet of a school and failure to possess a tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy K. Oetken, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

DOYLE, J.

Defendant Noel Bender appeals from his convictions following a jury trial of two counts of delivery of marijuana within 1000 feet of a school and one count of failure to possess a tax stamp. Upon our de novo review, we affirm.

To avoid being charged with drug-related offenses, Scott Hinkeldey agreed to be a confidential informant for the LeMars Police Department. Hinkeldey informed the officers he could buy marijuana from a person who had been selling him marijuana for several months, a person Hinkeldey knew as “Noey.” Hinkeldey communicated with “Noey” by text messages and phone calls to set up the exchange. Later, while wearing a transmitter transmitting audio to nearby officers, Hinkeldey made two controlled buys of marijuana from “Noey” in LeMars.

The phone number “Noey” used to contact Hinkeldey was identified to be Bender’s number. Bender’s phone records were subpoenaed and showed incoming and outgoing calls and messages to Hinkeldey. Bender was ultimately arrested for selling marijuana to Hinkeldey in the two controlled buys.

Bender was charged with two counts of delivery of marijuana within 1000 feet of a school and two counts of failure to possess a tax stamp for selling marijuana from the two controlled buys to Hinkeldey.¹ Thereafter, Bender filed a notice of his intention to assert an alibi defense, asserting he was not the person who sold marijuana to Hinkeldey.

A jury trial commenced on August 31, 2010. In the State’s case in chief, Hinkeldey testified and identified Bender as “Noey,” the person who sold him the

¹ One of the counts of failure to possess a tax stamp was dismissed.

marijuana in the two controlled buys. On direct examination, Hinkeldey testified he had known Bender before the two controlled buys for at least four to six months. Hinkeldey testified he had purchased marijuana from Bender weekly. Additionally, Bender's jailhouse cellmate, Leslie Clark, testified Bender had stated he had delivered marijuana in LeMars on the dates of the controlled buys to Hinkeldey.

Bender testified he had never met Hinkeldey. He testified he was at school in Sioux City on the date of the first controlled buy and at home on the date of the second controlled buy. He testified he had sold his phone a couple of months prior to the controlled buys. Bender also denied speaking to Clark while in jail, but testified he believed Clark had overheard other inmates talking about a case in LeMars.

The jury found Bender guilty of two counts of delivery of marijuana within 1000 feet of a school and one count of failure to possess a tax stamp. Bender was sentenced as a habitual offender to fifteen years imprisonment for each count, to be served concurrently. Bender now appeals.

On appeal, Bender contends his trial counsel rendered ineffective assistance for failing to object to Hinkeldey's testimony that Bender had sold him marijuana in the past on numerous occasions over several months. We review claims of ineffective assistance of counsel de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although we generally preserve such claims for postconviction relief, where the record is sufficient to address the issues, we may resolve the claims on direct appeal. *Id.* We find the record here is adequate to address the issue.

In order to establish a claim for ineffective assistance of counsel, Bender must demonstrate his trial counsel (1) failed to perform an essential duty and (2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). If either element is not met, his claim will fail. *Id.* There is a strong presumption counsel's representation fell within the wide range of reasonable professional assistance, and Bender is not denied effective assistance by counsel's failure to raise a meritless issue. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). To demonstrate prejudice, Bender must show that "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Anfinson*, 758 N.W.2d at 499.

Bender does not dispute that Hinkeldey's testimony concerning prior bad acts was relevant and admissible for the determination of identity.² However, he asserts Hinkeldey could have testified as to his previous contacts with Bender without reference to activities regarding illegal drugs. He argues the testimony "was extremely prejudicial to [him] and no more probative of the identity issue than [Hinkeldey's] testimony would have been without references to drugs." In determining whether the probative value of the evidence on the issue for which it is offered substantially outweighs the danger of unfair prejudice to the defendant, we consider the following factors:

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

² See Iowa Rule of Evidence 5.404(b): "Evidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of . . . identity"

weakness of the evidence on the relevant issues, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

State v. Barnes, 791 N.W.2d 817, 825 (Iowa 2010) (citations omitted).

In balancing the four previously-noted considerations, we conclude the probative value of Hinkeldey's testimony concerning past drug sales by Bender was not substantially outweighed by the danger of unfair prejudice to Bender under Iowa Rule of Evidence 5.403. Identifying "Noey" was vital to the case. Hinkeldey's testimony of arranging prior drug purchases with "Noey" was admissible for this reason. It showed the relationship between Hinkeldey and "Noey," and it established Hinkeldey had face-to-face contact with "Noey" such that he could identify Bender as "Noey" with certainty. Hinkeldey's testimony was clear and consistent, and his previous meetings with Bender made Hinkeldey's identification of Bender as "Noey" stronger. Although a certain level of prejudice is inherent in prior-bad-acts evidence, this type of prejudice will not substantially outweigh the value of highly probative evidence. See *State v. Taylor*, 689 N.W.2d 116, 130 (Iowa 2004).

The jury was instructed that Bender was not on trial for those prior bad acts and the evidence of prior bad acts "must be shown by clear proof, and [could] only be used to show identity," reducing any risk that jury would be prompted to decide the case on an improper basis. Moreover, "[w]e presume juries follow the court's instructions," *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010), and there is no evidence indicating the jury did not follow the court's instructions in this case.

Because the probative value of Hinkeldey's testimony was not substantially outweighed by the danger of unfair prejudice to Bender, Bender's trial counsel had no duty to object to the admissible testimony. See *State v. Braggs*, 784 N.W.2d 31, 35 (Iowa 2010) ("Counsel has no duty to make an objection or raise an issue that has no merit"). Accordingly, Bender's ineffective-assistance-of-counsel claim must fail. We affirm his convictions.

AFFIRMED.