IN THE COURT OF APPEALS OF IOWA

No. 2-633 / 11-1538
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSIE PAUL CHANDLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Jessie Chandler appeals his forgery conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John Sarcone, County Attorney, and Justin G. Allen, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

Jessie Chandler appeals his forgery conviction. He alleges he is entitled to a new trial because the jurors improperly heard evidence suggesting he was involved in other illegal activity and the money obtained from the forgery was used to buy drugs. Because the testimony elicited from his accomplice was relevant to show Chandler's motive and intent, we find no abuse of discretion in its admission. We also reject Chandler's claim that counsel was ineffective for not objecting to additional questions by the prosecutor or to comments in the State's closing argument. Accordingly, we affirm.

I. Background Facts and Proceedings

Gena Rodriguez lived with Daniel Chutnicutt during the summer of 2010. Chutnicutt believed he was "basically helping her out" because she was "in a bad situation." When Chutnicutt went to jail in the fall of 2010, Rodriguez helped herself to the money in his bank account. With Chandler posing as Chutnicutt, Rodriguez withdrew $800 on November 26 and $4700 on November 27. Chandler and Rodriguez tried to withdraw $6200 more from Chutnicutt's account on November 29, 2010, but bank employees called the police.

In January 2011, the Polk County Attorney charged Chandler with committing or aiding and abetting the commission of forgery, in violation of Iowa Code sections 715A.2(1)(c) and 715A.2(2)(a)(3) (2009), a class "D" felony. Chandler's attorney filed a motion in limine seeking to exclude evidence of his prior criminal convictions. The State did not resist the motion. The district court held a jury trial starting on July 11, 2011. The State offered testimony from

Chutnicutt, as well as a bank employee and a police officer. The defense called Rodriguez to testify. She told the jury she had assured Chandler she had permission to withdraw money from Chutnicutt's bank account.

After receiving the case at 11:12 a.m. on July 13, 2011, the jury returned a guilty verdict at 1:20 p.m., the same day. Chandler received a suspended prison sentence and now appeals.

II. Scope and Standards of Review

We generally review evidentiary rulings for an abuse of discretion. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). To the extent Chandler is claiming his trial attorney was ineffective in not lodging further objections, we engage in a de novo review of counsel's performance. *See State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006).

To prove his claim of ineffective assistance of counsel, Chandler bears the burden to show by a preponderance of the evidence that counsel failed to perform an essential duty and prejudice resulted. *See id.* at 784.

III. Merits

Chandler complains his attorney did not adequately represent him at trial because he failed to object to several questions posed by the prosecutor during cross-examination and recross-examination of Rodriguez and to mentions of "drug money" in the State's closing argument. Chandler also contends when his attorney did lodge a relevance objection, the district court abused its discretion in overruling it.

On appeal, Chandler points to the following passages from the trial record.

At the end of the direct examination, defense counsel elicited testimony from Rodriguez that she had been charged with a crime in connection with the events on November 29, 2010. The State started its cross-examination as follows:

> Q. Miss Rodriguez, just to pick up where [defense counsel] just left off, you were charged with a crime arising out of these events, correct? A. Yes.
>
> Q. You are in what is called a drug court program, is that right? A. Yes.
>
> Q. And that's a supervision program where you are taking responsibility for your actions and trying to turn your life around, correct? A. Yes.
>
> Q. Because at the time that this was all going on is it fair to say you weren't really running with the right crowd. A. Yes.
>
> Q. You were hanging out with some people that were bad influences. A. Yes.
>
> Q. You were doing some things that weren't right. A. Yes.
>
> Q. And it was at the same time, I think you said in October of 2010 that you met the defendant for the first time, is that right? A. Yes.
>
> Q. Do you remember if Daniel was already in jail when you met the defendant or was he still out of jail? A. He was in jail.

Chandler contends the State's questions about meeting Chandler at the time when Rodriguez was running with the wrong crowd "effectively implied" Chandler was engaged in other criminal activity. The implication is not obvious from the prosecutor's inquiries.

The fighting issue at trial was Chandler's intent to defraud. Chandler offered Rodriguez's testimony to show he lacked criminal intent and was only helping her withdraw funds because she said she had Chutnicutt's permission. The prosecutor's inquiry into Rodriguez's association with people who were a "bad influence" explained why she was in drug court and not in prison. The evidence was relevant to show her potential bias and interest in the case. *Cf.*

State v. Stewart, 691 N.W.2d 747, 751-52 (Iowa Ct. App. 2004) (permitting cross-examination to show the witness's credibility, bias, ill will, hostility, or interest in the case when conducted in a straight-forward, non-inflammatory manner). The prosecutor explored the timing of Rodriguez's relationship with Chandler to show Chutnicutt was already in jail and had never met Chandler. The lack of a connection between Chutnicutt and Chandler undermined the defense theory that Chandler believed he was not doing anything wrong when he accepted hundreds of dollars from Rodriquez for helping her withdraw Chutnicutt's funds from the bank. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 5.403.

Chandler is unable to prove defense counsel breached a material duty by not objecting to this line of questioning. An objection would not have been successful and may have highlighted an inference of criminality the jurors did not otherwise pick up on. Chandler is unable to overcome the strong presumption his counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *See State v. Smothers*, 590 N.W.2d 721, 722 (Iowa 1999).

Chandler also challenges evidence about drugs elicited from Rodriguez during recross-examination and discussed in the State's closing argument. During redirect examination, defense counsel asked Rodriguez about the amount of back rent owed by her and Chutnicutt. Rodriguez also reiterated she told Chandler she had Chutnicutt's approval to withdraw funds from his account. On

recross-examination, the prosecutor engaged in the following exchange with Rodriguez:

> Q. After you got the money from the bank, did you go right to the rental office and pay the rent? A. No.
> Q. Did you part ways with the defendant after the transactions or did the two of you stay together and hang out? A. We parted ways at first but we hung out later.
> Q. You partied together later? A. Yes.
> Q. Was there any alcohol or drugs involved at that party?
> [DEFENSE COUNSEL]: Objection, relevance.
> [PROSECUTOR]: Goes to intent with the money.
> THE COURT: All right. Overruled.
> A. Drugs.
> Q. And to pay for those drugs, right? A. Yes.
> Q. And the defendant was there? A. Yes.

In closing argument, the prosecutor challenged Chandler's claim he believed they had permission to withdraw the funds.

> [T]he defendant was paid for his help. It just does not make sense that [Rodriguez] would be paying him hundreds or thousands of dollars to give her a ride to the bank. Maybe you give the guy ten bucks, pay for his troubles, as gas money. Wouldn't give him thousands, don't give him hundreds.
> What we are talking about here is not gas money. We are not talking about rent money, we are not talking about food money, we are not talking about church offering money.
> We are talking about drug money. You get that amount of money so you can go and buy some drugs, you can go and party that night. Is it reasonable for the defendant to have believed that he was being given permission to take this amount of money from Daniel Chutnicutt's account? It's not.

Chandler argues the district court should have sustained the relevance objection. He also alleges trial counsel breached a duty by not objecting to the drug evidence under Iowa Rule of Evidence 5.404(b).[1]

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[1] A generic objection on relevance grounds does not preserve error for an appellate claim concerning prior bad acts under Iowa Rule of Evidence 5.404(b). *State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa Ct. App. 1999). But a relevancy objection does

We first address the preserved error. Counsel objected to the prosecutor's question whether any alcohol or drugs were evident at the party attended by Rodriguez and Chandler. The prosecutor argued the presence of those substances was relevant to show the witness's intent in withdrawing Chutnicutt's money. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. Here, the pair's exposure to drugs at a party on the night after they made sizeable withdrawals from Chutnicutt's account tended to make it more probable they undertook the forgery to obtain money to buy drugs and less probable they intended to use the money to pay Chutnicutt's rent. *See State v. Crawley*, 633 N.W.2d 802, 808 (Iowa 2001) (holding evidence of defendant's drug use was relevant to motive; defendant's need to obtain money to buy drugs was the reason the forgery was undertaken).

In addition, the district court did not abuse its discretion in concluding the danger of unfair prejudice did not substantially outweigh the probative value of the evidence that drugs were available at the party. Evidence of a defendant's drug-related activity is "inherently prejudicial." *State v. Parker*, 747 N.W.2d 196, 208-09 (Iowa 2008). But this was not a situation like *State v. Liggins*, 524 N.W.2d 181, 188-89 (Iowa 1994); the evidence solicited by the State did not show Rodriguez or Chandler were drug dealers. At worst, the prosecutor's

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preserve error on the question whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice under Iowa Rule of Evidence 5.403. *State v. Sallis*, 574 N.W.2d 15, 17 (Iowa 1998).

cryptic question—"And to pay for those drugs, right?"—suggested Rodriguez and Chandler used the spoils from the forgery to buy controlled substances. The pair's motive to make the withdrawals was hotly contested at trial. Under these circumstances, it was acceptable to offer evidence of other bad acts to illustrate the likelihood Rodriguez and Chandler committed the charged crime to obtain money to buy drugs. *See Crawley*, 633 N.W.2d at 807; *accord Massey v. State*, 826 S.W.2d 655, 659 (Tex. App. 1992) (finding codefendant's testimony about drug use before and after robbery was compelling evidence of defendant's motive to commit robbery). We find no abuse of discretion in the court's admission of the challenged evidence.

We next turn to the question of counsel's obligation to object under rule 5.404(b). Chandler alleges his attorney was ineffective for failing to properly challenge the cross-examination questions about drugs and the reference in closing argument to "drug money." He claims had counsel advanced a rule 5.404(b) objection, there is a reasonable probability the outcome of the proceeding would have been different.

Rule 5.404(b) requires exclusion of other bad acts evidence when the State is offering that evidence to prove the defendant has a criminal disposition or propensity for committing crime.[2] *See State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). The evidence should reach the jury only if the prosecutor can articulate a valid, noncharacter theory of admissibility. *Id*. at 28. Here, the

[2] While federal courts count the rule governing admissibility of other bad acts as a rule of inclusion (*see, e.g., United States v. Vega*, 676 F.3d 708, 719 (8th Cir. 2012)), our supreme court considers rule 5.404(b) to be a rule of exclusion. *State v. Elliott*, 806 N.W.2d 660, 675 (Iowa 2011).

prosecutor did articulate a valid, noncharacter theory of admissibility: Rodriguez and Chandler intended to use the money from the forgery to buy drugs at the party and not to pay back rent and utilities owed by Chutnicutt. Under *Crawley*, counsel had no duty to object based on rule 5.404(b). 633 N.W.2d at 806-07.

In closing argument, the State contrasted Rodriguez's testimony for the defense that she needed Chutnicutt's money to pay rent with her admission that she and Chandler went to a party and paid for drugs. Rather than objecting to the State's contention in closing argument that the withdrawn funds were "drug money," defense counsel opted to counter the point in his own summation: "No evidence showed during this trial that any money obtained was used to obtain drugs or go out and party."

Because the prosecutor built his closing argument on admissible evidence in the record, defense counsel had no occasion to object. *See State v.* Carey, 709 N.W.2d 547, 554 (Iowa 2006) (recognizing that in closing arguments counsel may "draw conclusions and argue permissible inferences which reasonable flow from the evidence presented"). Defense counsel followed a viable strategy by using his own closing argument to dispute the strength of the State's evidence that Rodriguez or Chandler used Chutnicutt's money to buy drugs. Finding no breach of duty on the part of trial counsel, we affirm.

AFFIRMED.