IN THE COURT OF APPEALS OF IOWA

No. 2-705 / 11-1423
Filed September 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SETH SCHAFFER,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Marlita A. Greve, Judge.

Defendant appeals from his conviction and sentence for solicitation. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Michael L. Wolf, County Attorney, and Amanda Trejo, Assistant County Attorney, for appellee.

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

BOWER, J.

Seth Schaffer appeals from the judgment and sentence entered upon a jury verdict finding him guilty of solicitation, in violation of Iowa Code section 705.1 (2009). Schaffer argues the district court abused its discretion in admitting a videotaped interview containing prior bad acts evidence. Schaffer further contends his trial counsel was ineffective in failing to request a jury instruction limiting the use of the prior bad acts evidence. Upon our review, we conclude the district court did not abuse its discretion in finding any potential danger of unfair prejudice did not substantially outweigh the probative value of the challenged evidence. However, because we find this record is inadequate to evaluate Schaffer's claim of ineffective assistance of counsel, we preserve that claim for possible postconviction relief proceedings.

I. Background Facts and Proceedings.

In November 2009, Camanche police officers conducted a controlled buy of narcotics from Joseph Broughton. With a warrant, officers searched Broughton's phone. Officers identified sixty-four people Broughton had communicated with about controlled substances. Seth Schaffer's father was the subscriber to one of those numbers. Seth Schaffer used that number and had communicated with Broughton about narcotics.

Officers discovered that on November 7, 2009, Schaffer and Broughton had the following exchange via text messages:

Schaffer: Got dro?
Broughton: Yea
Schaffer: Fire?
Broughton: Yea

Schaffer: Yea come to my house
Broughton: Gimme a bit
Schaffer: Dude spot me a g of dro and ill give you 30 on payday the 20th
Schaffer: And im good on it.
Broughton: No i cant do that
Schaffer: Dont be like that. You know ill pay you.
Broughton: Yea ryt
Schaffer: On everything dude. Come on. I got you and dont act like I dont.
Broughton: Haha shitttttttttttttttttttttttttttttttt
Schaffer: You dont need collateral. Im swinging through
Broughton: Gutair
Schaffer: Dude. Its in the shop.
Broughton: Naw ur other one
Schaffer: Ill give you a gold seiko just needs a battery
Broughton: No geeeeeetaiiiirrr Lolllllll
Schaffer: Ill give you a gold seiko just needs a battery
Schaffer: Theyre both broke shit you out
Schaffer: Ill be there
Schaffer: K

"Dro" is slang for hydroponically grown marijuana—a high grade of marijuana. "Fire" is slang for marijuana that is high-quality for its grade. A "g" is slang for a gram of controlled substances.

Officers subsequently interviewed Schaffer regarding his interactions with Broughton. The interview was recorded. Schaffer acknowledged purchasing "some weed" from Broughton, most recently within "about a month." Schaffer stated he "doesn't smoke weed anymore," and was now "just trying to keep it under the radar." Schaffer agreed with officers that he had purchased marijuana from Broughton "about thirty times." Schaffer stated he "usually" purchased "just like a gram or something" of marijuana when he bought from Broughton, and that Broughton charged "somewhere around" twenty dollars for a gram. Schaffer also acknowledged the text conversation he had with Broughton that referenced using

Schaffer's guitar as "collateral" for payment for the marijuana when Schaffer "didn't have cash," and Schaffer's conduct in "bartering" with Broughton for marijuana and trying to purchase marijuana from Broughton.

The State filed a trial information charging Schaffer with solicitation of a controlled substance in violation of Iowa Code section 705.1. Following a one-day trial, the jury found Schaffer guilty as charged. The district court sentenced Schaffer to probation and ordered him to pay a $750 fine. Schaffer now appeals.

II. Prior Bad Acts.

Schaffer contends the district court abused its discretion in admitting prior bad acts evidence set forth in the DVD recording of his interview with police referencing Schaffer's prior purchases and efforts to purchase drugs from Broughton. Schaffer unsuccessfully objected to exclude the DVD recording at trial.[1] Schaffer alleges the DVD recording was irrelevant and unfairly prejudicial to the crime charged.

We review rulings on the admission of evidence of prior bad acts for an abuse of discretion. *State v*. *Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009). An abuse of discretion is found only when the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id*. (quotation marks omitted). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v*. *Rodriquez*, 636 N.W.2d 234, 239 (quotation

[1] Because we find trial counsel preserved error by objecting to admission of the DVD recording at trial, we need not address Schaffer's alternative contention that trial counsel was ineffective in failing to preserve error on this issue.

marks omitted). Even if an abuse of discretion occurred, reversal will not be warranted if the error was harmless. *Reynolds*, 765 N.W.2d at 288.

The admissibility of prior bad act evidence is controlled by Iowa Rule of Evidence 5.404(b), which states:

> 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.

Rule 5.404(b) seeks to exclude evidence that "serves no purpose except to show the defendant is a bad person, from which the jury is likely to infer he or she committed the crime in question." *Rodriquez*, 636 N.W.2d at 239. Therefore, to be admissible, the evidence must be relevant "to prove some fact or element in issue other than the defendant's criminal disposition." *State v. Newell*, 710 N.W.2d 6, 20 (Iowa 2006) (quotation marks omitted).

A. Relevancy. We are to employ a two-step analysis to determine whether the evidence at issue is admissible. *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004). We must first determine whether the evidence is relevant and material to a legitimate issue in the case other than a general propensity by Schaffer to commit wrongful acts. *Id*. Schaffer states that during trial, he "did not dispute the text message content or that he was the one that sent [the messages]," and he "did not dispute having the intent that marijuana be delivered." Rather, as Schaffer states, he "disputed that his conduct rose to the level of solicitation [and argued] that he did not command, beg or attempt to persuade Broughton to deliver drugs." Schaffer argues his prior purchases from

Broughton were not relevant to show his intent to solicit delivery of a controlled substance, and that the purchases were used "as propensity evidence and therefore were not admissible."

To support a conviction for solicitation, the State was required to prove the following three elements:

> 1. Between November 4, 2009 and July 7, 2010, the defendant solicited another to commit the act of delivery of a controlled substance.
> 2. The defendant intended that the act of delivery of a controlled substance would be committed.
> 3. The defendant's intent is corroborated by clear and convincing evidence.

See Jury Instruction no. 16. The jury was instructed "the term 'solicited' means to have commanded, begged, or to have otherwise attempted to persuade someone to do something." The jury instructions also set forth that "[t]o commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware they were doing the act, and they did it voluntarily, not by mistake or accident." *See* Jury Instruction no. 15.

Upon our review, we find the evidence challenged by Schaffer was relevant in this case. The evidence focuses on the fact that Broughton and Schaffer had a pre-existing dealer-buyer relationship. It is entirely reasonable to believe a person would be more likely to solicit drugs from their drug dealer rather than from a random person. In addition, a dealer-buyer relationship would make it more probable that Broughton and Schaffer had an arrangement where Schaffer might persuade Broughton to "spot" him on drugs and accept payment

at a later date. In other words, such relationship is relevant to show Schaffer might be more likely to *persuade* Broughton to sell him drugs, rather than merely *ask* Broughton to sell him drugs.[2] Evidence of Schaffer's prior purchases of drugs from Broughton also make it more likely Schaffer intended for Broughton to actually deliver drugs (*i.e.*, it was not a mistake or accident for Schaffer to request the marijuana from Broughton).

We are not persuaded by Schaffer's reliance on *Sullivan*, 679 N.W.2d at 28-29, where our supreme court concluded the district court abused its discretion in admitting evidence of an act of drug-dealing by the defendant that took place "three years" prior, and was "unconnected to the charge for which Sullivan was being tried," and where the State's "inherent argument for admitting the evidence was based on the character theory that if Sullivan entertained the intent to deliver during a similar prior incident, he probably harbored the same intent at the time of the charged offense." In contrast, in this case, we find the State offered evidence of Schaffer's prior bad acts while "articulating a valid, noncharacter theory of logical relevance" connected to the charge for which Schaffer was being tried and where such evidence had no "temporal separation" to the crime charged. *Sullivan*, 679 N.W.2d at 28-29.

B. *Prejudice*. We must next determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004); *see also* Iowa R. Evid. 5.403.

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[2] Schaffer's argument at trial focused on the distinction between whether Schaffer merely *asked* Broughton to sell him drugs, or whether Schaffer attempted to *persuade* Broughton to sell him drugs.

Evidence is unfairly prejudicial if it has "an undue tendency to suggest decisions on an improper basis commonly, though not necessarily, an emotional one." *Newell*, 710 N.W.2d at 20 (quotation marks omitted). "Because the weighing of probative value against probable prejudice is not an exact science, we give a great deal of leeway to the trial judge who must make this judgment call." *Id*. at 20–21.

> In balancing probative value against prejudicial effect, we are to consider
>
> > the need for the evidence in light of the issue and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

Reynolds, 765 N.W.2d at 290 (quotation marks omitted). If the probative value is substantially outweighed by the danger of unfair prejudice, the court must exclude the evidence. *Sullivan*, 679 N.W.2d at 25. Schaffer states the DVD recording shown to the jury "lasted approximately two and a half minutes total," and argues that "[t]he fact that the majority of the interview shown to the jury involved references to Schaffer's multiple purchases of marijuana from Broughton put undue emphasis on that evidence to support the State's case."

Upon our review, we find the challenged evidence had probative value. The evidence shows a dealer-buyer relationship which made it more likely (1) Schaffer would attempt to persuade Broughton to deliver marijuana to him and (2) Schaffer actually intended marijuana to be delivered to him. The jury instructions required proof of Schaffer's intent to be "corroborated by clear and convincing evidence." Schaffer's trial strategy was to admit the text message

conversation took place but minimize the conversation and allege the attempted persuasion and bartering was a joke. The challenged evidence was critical to show the text messages were not rhetorical or a joke. Accordingly, we conclude the district court did not abuse its discretion in finding any potential danger of unfair prejudice did not substantially outweigh the probative value of the evidence at issue. We therefore affirm as to this issue.

III. Ineffective Assistance of Counsel.

Schaffer raises an alternative ineffective-assistance-of-counsel claim, arguing "if [this] Court finds the district court properly admitted the prior bad acts evidence, trial counsel failed to request a jury instruction limiting the use of the prior bad acts evidence." Specifically, Schaffer contends "[t]rial counsel could have requested Iowa Criminal Jury Instruction 200.34 regarding the use of similar crimes evidence, but did not do so," and therefore, "the jury was allowed to consider the prior bad acts evidence without any guidance on its limits, thus prejudicing Schaffer."

Our review of ineffective-assistance-of-counsel claims is de novo. *State v*. *Maxwell*, 743 N.W.2d 185, 189 (Iowa 2008); *see State v*. *Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) ("Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules."). To prevail on his claim of ineffective assistance of counsel, Schaffer must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Maxwell*, 743 N.W.2d at 189. The claim fails if either element is lacking. *Anfinson v*. *State*, 758 N.W.2d 496, 499 (Iowa 2008).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v*. *Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). These claims are typically better suited for postconviction relief proceedings that allow the development of a sufficient record and permit the accused attorney to respond to the defendant's claims. *Id*. If we determine the claim cannot be addressed on appeal, we must preserve it for a postconviction relief proceeding, regardless of our view of the potential viability of the claim. *State v*. *Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Upon our review, we find the record is inadequate to decide Schaffer's claim on direct appeal. Accordingly, we preserve the matter for possible postconviction relief proceedings. However, we affirm Schaffer's conviction and sentence.

AFFIRMED.