IN THE COURT OF APPEALS OF IOWA

No. 2-905 / 12-0364
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUAN DENERO HARRIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower and Todd A. Geer, Judges.

Juan Harris appeals from his drug delivery convictions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ. Bower, J., takes no part.

TABOR, J.

Juan Harris appeals from his drug delivery convictions. Before trial, he moved in limine to exclude evidence discovered during a warranted search of his apartment—the same location where an informant completed a controlled buy. During trial, the district court allowed officers to testify that when executing the warrant they found Harris holding a recently lit blunt,[1] and in close proximity to packaged marijuana and a large amount of cash. On appeal, Harris claims the court's admission of that evidence violated Iowa Rules of Evidence 5.403 and 5.404(b). Harris alternatively claims he did not receive effective assistance of counsel because his attorney did not object to the search warrant evidence during the trial.

We find no abuse of discretion in the district court's limine ruling allowing testimony that officers found marijuana packaged in baggies similar to those sold to the informant from the same apartment just eight days earlier. Because Harris also challenges evidence on appeal that was not addressed in the pretrial ruling and was not the subject of an objection at trial, we analyze that portion of his claim as ineffective assistance of counsel. Finding counsel's performance did not fall below constitutional standards, we affirm.

I. Background Facts and Proceedings

Drug enforcement officers working in Black Hawk County arranged for an informant to make a controlled buy of marijuana and methylenedioxymethamphetamine (MDMA or ecstasy) on March 15, 2011. The

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[1] Blunts are "cigars whose contents have been emptied and refilled with marijuana." *State v. Sullivan*, 679 N.W.2d 19, 21–22 (Iowa 2004).

informant knew his dealer by the name "Big Bird." The officers searched the informant, provided him with one $100 bill and one $20 bill,[2] and wired him with an electronic monitoring device. The officers then conducted surveillance while the informant entered an apartment building at 625 West Fifth Street in Waterloo.

According to the informant, Big Bird, later identified by the informant as Juan Harris, took him into a second-floor apartment. There, Harris sold the informant two pills purported to be ecstasy and six baggies of marijuana for $100. After the buy, the officers collected the pills, the marijuana, the recording device, and the unused $20 bill. One of the baggies used to hold the marijuana had a green tint; the others were clear plastic.

On March 23, 2011, law enforcement executed a search warrant at the location of the controlled drug buy.[3] Officers found Harris sitting on a bed in the apartment; he was holding a blunt. Officers discovered a small amount of cash on a nearby table, including the same $100 bill that the informant used in the controlled buy. The search also uncovered a large amount of cash in a suitcase at the foot of the bed. In addition, officers found a number of small baggies of marijuana inside of a potato chip bag. The size and packaging of the marijuana was consistent with the informant's purchase one week earlier. In fact, the collection of baggies seized during the search included several with the same green tint as a baggie sold to the informant. A cellular telephone located on the

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[2] The officers kept records of the serial numbers on the currency.

[3] The apartment was leased to Keith Nelson, whom the informant knew from prior contacts as "Little Bird." Nelson occupied the apartment's single bedroom, while Harris stayed in a makeshift bedroom separated from the living area by a curtain.

bed was assigned the number called by the informant to reach Big Bird, and its phonebook listed a name and contact number for the informant.

An officer who interviewed Harris believed that his voice matched the voice on the audio recording of the controlled buy.

The State filed its trial information on September 9, 2011, charging Harris with one count of delivery of marijuana and one count of delivery of MDMA (ecstasy) occurring on or about March 15, 2011. Both counts were enhanced as second or subsequent offenses and alleged Harris to be an habitual offender. The prosecution amended the trial information on November 21, 2011, alleging the MDMA was a simulated controlled substance.

On November 20, 2011, Harris filed a motion in limine, asking the district court to exclude evidence related to the execution of the search warrant, among other information. The State agreed that it would not offer evidence of crack cocaine found in the apartment's kitchen during the execution of the search warrant. After hearing argument from counsel before trial, the district court ruled on the limine motion as follows:

> I will allow the search warrant, the discussion about the search warrant, the fact that the $100 bill, which was part of the controlled buy, was found in Mr. Harris' property, that the cell phones matched up, and that the drugs consistent with what was sold or allegedly sold on the 15th are similar. So yes, familiarity, identity of the address, layout of the house; no that he had been there for drugs prior, and search warrant is okay for the purpose of the currency, the cell phones, and the fact of the drugs consistent with these charges were found.

The defense did not object to testimony regarding the search warrant during the trial and did not allege the State violated the court's limine ruling. The jury

returned guilty verdicts on both delivery counts. The State did not pursue the sentencing enhancements on those convictions. Harris received an indeterminate ten-year term to run consecutive to a twenty-five year sentence in a separate case. Harris appeals his delivery convictions.

II. Analysis

Harris argues his possession and use of marijuana on March 23, 2011—which was not related to his sale of drugs to the informant on March 15, 2011—constituted other bad acts, inadmissible under rule 5.404(b). Harris contests both the evidence that he possessed baggies of marijuana and the evidence he was smoking a blunt when officers arrived to execute the warrant. He advances the same argument in relation to the $1400 in cash found during the search of his apartment.

The district court addressed the packaged marijuana in ruling on the defense motion in limine, allowing testimony concerning "drugs consistent what was sold or allegedly sold on the 15th." Because the pretrial ruling reached the ultimate issue as to the baggies of marijuana and declared that evidence admissible, the ruling was final and did not call for further objection during trial. *See State v. Alberts*, 722 N.W.2d 402, 407 (Iowa 2006) (discussing character of limine rulings). We review the district court's admission of that evidence under rules 5.403 and 5.404(b) for an abuse of discretion; we will reverse only if the district court's ruling was untenable under the substantive limitations of those rules. *See State v. Matlock*, 715 N.W.2d 1, 3–4 (Iowa 2006).

But the pretrial ruling did not specifically refer to the marijuana blunt or the $1400 in cash.[4] Accordingly, the question is whether counsel was ineffective in not objecting to the admission of that evidence during the trial. We conduct a de novo review of claims that counsel provided ineffective assistance. *See State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007).

A. Ruling on Motion in Limine

Drug enforcement officers executing a search warrant for 625 West Fifth Street in Waterloo found a potato chip bag repurposed as a receptacle for packaged marijuana. Inside the chip bag, officers discovered more than a dozen small baggies of marijuana, consistent with the size, shape, and color of the baggies sold to the informant eight days earlier. On appeal, Harris claims proof of his possession of these marijuana baggies more than a week after the controlled buy should be classified as a subsequent bad act, the admission of which was unfairly prejudicial. His brief asserts: "The jury could well have believed that, because defendant was in possession of marijuana on March 23, 2011, he more than likely possessed it on March 15."

Rule 5.404(b) controls the admissibility of bad-acts evidence. It provides as follows:

> 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.

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[4]In the limine ruling, the district court expressly allowed testimony concerning the $100 bill used in the controlled buy and found during the search. Harris does not challenge the admission of that discrete evidence on appeal.

Iowa R. Evid. 5.404(b).

Iowa courts employ a two-step analysis to determine whether bad-acts evidence may be admitted. *Sullivan*, 679 N.W.2d at 25. First, the evidence must be relevant to a legitimate factual issue in dispute. *Id.* Second, "if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant," the court must exclude the bad-acts evidence. *Id.;* Iowa R. Evid. 5.403. When the State is offering evidence of uncharged misconduct to establish an inference of the defendant's intent, the court should require the prosecutor to "articulate a tenable noncharacter theory of logical relevance." *See Sullivan*, 679 N.W.2d at 28.

The State argues that Harris's possession of the packaged marijuana on March 23, 2011, was admissible to corroborate the informant's identification of Harris as the drug dealer he knew as "Big Bird" and to establish that Harris was staying at the apartment where the controlled buy occurred. We agree that the informant's credibility and the identity of his dealer were legitimate factual issues in dispute.

The defense questioned the informant's reliability at trial. Defense counsel cross-examined the officers about the informant's motivation to "help himself out" by arranging a controlled drug buy and the possibility the informant was using controlled substances at the time he was working with police. The defense also tried to undermine the certainty of the informant's identification of his dealer, eliciting testimony that no officer saw Harris on March 15, that the police did not find fingerprints on the baggies purchased by the informant, and

that the informant only knew the dealer by a nickname. Defense counsel argued in closing: "I submit to you they haven't proven that Big Bird and Juan Harris are the same person."

The evidence of marijuana located in close proximity to Harris, packaged in a manner consistent with the informant's purchase at the same location eight days earlier, supported the State's position that Harris was the individual who delivered drugs to the informant—a tenable, noncharacter theory of logical relevance. *See State v. Henderson*, 696 N.W.2d 5, 11 (Iowa 2005) (finding State articulated valid, noncharacter theory for admission of defendant's prior marijuana conviction to show her knowledge of nature of substance found during a search of her kitchen).

The district court properly exercised its discretion in concluding the probative value of the marijuana baggies was not substantially outweighed by the danger of unfair prejudice to Harris. Given the ongoing nature of drug dealing, the span of eight days between the controlled buy and the warranted search did not significantly decrease the probative value of the disputed evidence. *Cf. State v. Gogg*, 561 N.W.2d 360, 367–68 (Iowa 1997) (rejecting staleness argument in search warrant case when informant observed drugs six days before warrant issued). The instant circumstances diverge from *Sullivan*, where the temporal separation of the prior bad act from the charged offense was three years, "casting doubt on the weight of this evidence." *See* 679 N.W.2d at 28. Moreover, the probative value of the evidence against Harris was strengthened by the distinctive green tint of some of the baggies that emerged from both the

controlled buy and the search warrant. On the prejudice side of the ledger, the disputed evidence did not pose a risk that the jurors would reach a verdict based on emotion rather than fact. As the State argues: "It is likely most jurors would infer a person dealing drugs would do so more than once, and have more than one baggie or package on hand as well as proceeds from sales."

Because the district court appropriately determined the evidence of packaged marijuana was probative of a legitimate factual issue in dispute and tipped the scales away from the danger of unfair prejudice, we find no basis for ordering a new trial.

B. Ineffective Assistance of Counsel

Harris contends his trial counsel failed to perform an essential function when he did not object to evidence of the blunt and the large amount of cash found during the search. He asserts he was prejudiced by that evidence because the jury could have used it to find he was "a repeated drug dealer and bad character."

Claims that counsel did not provide effective assistance find their basis in the Sixth Amendment to the United States Constitution. *State v. Madsen*, 813 N.W.2d 714, 723 (Iowa 2012). To prove a constitutional violation, Harris must show his trial counsel breached an essential duty and the breach resulted in prejudice. *See id.* at 723–24 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). To satisfy the first prong, Harris must establish "counsel's representation fell below an objective standard of reasonableness." *See Strickland,* 466 U.S. at 688. In evaluating the objective reasonableness of

counsel's conduct, we examine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. To satisfy the second prong, Harris must exhibit "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id*. at 694. "A 'reasonable probability' means a 'substantial,' not 'just conceivable,' likelihood of a different result." *Madsen*, 813 N.W.2d at 727.

Although we often preserve claims of ineffective assistance of counsel for postconviction relief proceedings, we will consider such claims on direct appeal if the record is adequate to resolve them. *State v. Henderson*, 804 N.W.2d 723, 725 (Iowa Ct. App. 2011). We find the record adequate in this case to reject Harris's ineffective-assistance claims.

We turn first to the evidence that Harris was holding a recently lit marijuana blunt when police arrived to execute the warrant. It was defense counsel who asked the police officer about Harris consuming marijuana, likely to show his client was engaged in personal use rather than drug dealing. Because the attorney's action represented a viable strategy, and not inattention to his responsibilities as counsel, we find no breach of duty. *See State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011) (discussing difference between counsel's tactical decisions and incompetence). Even if counsel had breached an essential duty by introducing evidence of the blunt, we find no reasonable probability the outcome of the trial would have been different if the jury had not learned of

Harris's personal use of marijuana. Evidence showing Harris was involved in drug dealing overshadowed the single reference to his marijuana consumption.

We next address the evidence that police found $1400 in cash during the search. The money was located in a suitcase along with CDs and DVDs. Harris told police after his arrest that he earned the money selling CDs, DVDs, and t-shirts. We do not find that trial counsel breached a material duty by not objecting to testimony concerning the cash found in the suitcase. As discussed above in relation to the packaged marijuana, the State was required to prove Harris was the dealer the informant knew as "Big Bird." The presence of the $1400 near Harris's bed, where he could also reach the packaged marijuana, was relevant to show that he received cash for the sale of drugs. *Cf. State v. Dykes*, 471 N.W.2d 846, 848 (Iowa 1991) (positing in a forfeiture case: "Under the record such a sizable amount of cash [$1500] in proximity to the drugs fits well within the pattern of making change in a drug operation"). Counsel was not required to lodge an objection that had no chance to prevail. *See State v. Belken*, 633 N.W.2d 786, 801 (Iowa 2001).

Harris is unable to show his counsel provided ineffective assistance on this record. Accordingly, we deny his request for a new trial.

AFFIRMED.