IN THE COURT OF APPEALS OF IOWA

No. 8-321 / 07-0987
Filed June 25, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALVIN LEE GAINES JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Marsha A. Bergan, Judge.

Alvin Lee Gaines, Jr. appeals his judgment and sentence following a jury trial for attempted murder, willful injury, and going armed with intent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Harold Denton, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Following a jury trial, Alvin Lee Gaines Jr. was found guilty of attempted murder in violation of Iowa Code section 707.11 (2005), willful injury in violation of sections 708.4(1) and 902.7, and going armed with intent in violation of section 708.8. Gaines now appeals contending his counsel rendered ineffective assistance by failing to object to evidence of other bad acts. He further contends the district court erred in imposing consecutive sentences. Because we find no merit in either claim, we affirm.

I. Background Facts and Proceedings.

The evidence presented at trial was sufficient to establish the following facts: During the early morning hours of May 21, 2006, Gaines tried to contact Kellen Williams by phone. Williams and Gaines attended the same high school and were casual acquaintances.[1]

After Williams woke up, he discovered he had missed two calls on his cell phone. He called the number that appeared on his phone and asked if anyone at that number had been trying to reach him. Gaines answered the phone and told Williams that he had been trying to reach him. Gaines told Williams, "I need my shit." Williams told Gaines he had no idea what Gaines was talking about and did not understand why Gaines thought he might have anything belonging to him.

Williams went back to sleep but was awakened by a call from his friend Darrius Johnson. Johnson told Williams that a person at Johnson's house, David Belton, wanted to speak with him. Belton told Williams over the phone that the "shit" was his and he needed it back. Williams believed that the calls from Belton

[1] Williams graduated from high school in 2004.

and Gaines were related to the same item. Ultimately, Williams was asked to meet Belton or Gaines at Wendy's Restaurant.

Williams picked up Johnson and then drove to Wendy's. As they pulled into the parking lot around 11:00 a.m., Williams saw Gaines standing next to the building. Williams parked the car, and he and Johnson got out of the vehicle. Williams and Gaines walked toward one another and shook hands. Johnson remained next to the passenger door. Williams then backed away from Gaines. Gaines told Williams that he needed to find his "shit." Williams told Gaines that he did not know what he was talking about. Gaines replied, "I'm going to need my shit back or I'm going to have to kill you." Williams turned around and looked at Johnson. Williams then turned back toward Gaines, and Gaines shot him in the face. Williams fell to the ground. While lying on the ground, Williams saw Johnson flee the area on foot. Williams was able to stand up and he then began to run. As Williams ran away, Gaines shot him two more times, once in the upper back and once in the lower back. The shot to Williams' face stopped the blood flow to his eye causing blindness in that eye. Williams was able to cross the street and enter the Kentucky Fried Chicken Restaurant.

Cedar Rapids police officer Tracy Schmidt and his partner, Thaddeus Paisdar, were patrolling the area where the shooting occurred. The two officers were dispatched to the Kentucky Fried Chicken where Williams, bleeding from the head, had entered and was shouting for police help. Upon their arrival at the restaurant, Officer Schmidt was led back to an office where Williams had been taken. An entry wound was visible on Williams' cheek. Officer Schmidt asked Williams who shot him, and Williams told him that "Alvin" did it. Williams told the

officer he did not know Alvin's last name. He also told the officer he believed the shooting may have been motivated by a money transaction or marijuana.

While Officer Schmidt talked to Williams, Officer Paisdar examined a blood trail in front of the restaurant. He was eventually directed across the street to Wendy's where he found another pool of blood. The crime scene was secured and two spent casings and one live round were found in the area where the shooting occurred.

James Emig, a customer at Wendy's, was present when the shooting occurred. He pulled into Wendy's parking lot at approximately 11:00 a.m. and observed a man standing by the front door talking on a cell phone. While waiting at the drive-through window, he heard what he thought was a vehicle backfiring. Emig thought the noise sounded like gunfire but dismissed the thought because it was in the middle of the day. He then heard a second shot and saw a person tumble from behind a bush and fall into the building. Emig saw part of the shooting through his side rearview mirror. He was able to identify Gaines as the person who shot Williams.

Mandy Kirby was dating David Belton at the time of the shooting. Belton worked at Wendy's. Kirby drove Belton to work around 10:00 a.m. on May 21. Before driving to Wendy's she had received a call from Gaines who asked to talk to Belton. During his conversation with Kirby, Gaines seemed nervous, panicky, and upset. When Kirby picked Belton up she told him that Gaines had been trying to reach him, and she gave Belton her phone to call Gaines. Belton spoke to Gaines several times on the phone before he went to work.

After dropping Belton off at work, Kirby called Gaines to let him know Belton was at work and Gaines did not need to call her phone anymore. Gaines then convinced Kirby that Belton wanted her to pick Gaines up and deliver him to Wendy's. Kirby eventually picked up Gaines, and later one of his friends, and drove to Wendy's. At Wendy's she removed some trash from her car while she waited for Gaines to go inside to talk to Belton. As she was cleaning out her car, she heard three, possibly four, gunshots. Kirby went back to her car and noticed that Gaines's friend, who was still sitting inside her car, seemed to be unconcerned by the shots. Williams then ran past her car, stumbling and bleeding from the mouth. Kirby was immediately concerned about what Gaines had done.

Cassandra Lumpkin also testified at trial. Lumpkin met Gaines when she was sixteen years old and later had a relationship with him that lasted about three years. Lumpkin and Gaines were living together just prior to the time of the shooting. The day before the shooting, she began receiving calls from Gaines threatening her for having taken something from him. Gaines also threatened to shoot her friend, Kellen Williams. The night before the shooting, Gaines sent Lumpkin a series of text messages. One message just had the name "Kellen" in it. Another message said, "Kellen is dead."

Jessica Phelps, Lumpkin's best friend, also testified to the events surrounding the shooting. The day before the shooting she received a call from Gaines. Gaines told Phelps that some marijuana was missing from his apartment and he believed that Lumpkin had taken it and given it to Williams. Gaines claimed to be missing fifteen pounds of marijuana. Gaines told her he

was going to "fuck up" the person who had his marijuana. He also threatened to "slap and shoot" another one of Phelps' and Lumpkin's friends if she had taken the marijuana. Gaines called Phelps again following the shooting, and told her to tell Lumpkin that "if I don't get my shit back it's going to be round number two for you and her." He told Phelps he would "fuck Cassandra [Lumpkin] up and shoot me too."

On July 7, 2006, the State charged Gaines with attempted murder, willful injury, and going armed with intent. A jury trial commenced on April 2, 2007. On April 4 the jury found Gaines guilty of all charges. On May 25, 2007, the court sentenced Gaines to twenty-five years for his attempted murder conviction, ten years for his willful injury conviction, and five years for his going armed with intent conviction. All sentences were ordered to run consecutive with each other for a total of forty years in prison.

Gaines appeals.

II. Discussion.

A. Ineffective Counsel Claim.

Gaines contends his counsel rendered ineffective assistance by his failure to object to evidence of other criminal acts.[2] We review claims of ineffective assistance of counsel de novo. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). To establish ineffective assistance of counsel, Gaines must prove: (1) his

[2] In his pro se supplemental brief, Gaines asserts separately that the court should be required sua sponte to identify other bad acts evidence and balance probative value versus prejudicial quality before allowing any inquiry on such topics. We disagree. We have rarely found a sua sponte duty for the court to actively resolve evidentiary issues. *See, e.g.*, *State v. Reynolds*, 670 N.W.2d 405, 413 (Iowa 2003); *Schertz v. State*, 380 N.W.2d 404, 415 (Iowa 1985); *Lamphere v. State*, 348 N.W.2d 212, 217 (Iowa 1984); *State v. Mulder*, 313 N.W.2d 885, 892 (Iowa 1981). In this case, we find the court had no duty to raise this issue on its own motion.

attorney's performance fell below "an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish breach of duty, Gaines must overcome the presumption that counsel was competent and prove that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Gaines may establish prejudice by showing a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Gaines's ineffective-assistance-of-counsel claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Gaines argues his counsel should have objected to testimony that he claimed ownership of fifteen pounds of marijuana, and that he threatened to shoot Phelps and Lumpkin. He claims this evidence was subject to exclusion under Iowa Rule of Evidence 5.404(b) which controls the admission of bad-acts evidence. The rule provides:

> 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.

Our supreme court has determined that Iowa Rule of Evidence 5.404(b) is a rule of exclusion. *See State v. Sullivan*, 679 N.W.2d 19, 28 (Iowa 2004); *State v. Mitchell*, 633 N.W.2d 295, 300 (Iowa 2001). Thus, unless a prosecutor can articulate a valid, noncharacter theory of admissibility for admission of the bad-

acts evidence, such evidence should not be admitted. *Sullivan*, 679 N.W.2d at 28.

The State argues the evidence Gaines claims his attorney should have challenged is relevant and highly probative for a variety of reasons. We agree. Evidence of Gaines's statement regarding his missing marijuana was relevant to show his motive for shooting Williams. The State asserts the amount of the marijuana Gaines claimed was missing was significant because it is difficult to believe any individual would attempt to commit murder in broad daylight in front of multiple witnesses unless the stakes were very high. In addition, evidence of the threats made by Gaines to other individuals help explain his intent and establish his identity as the shooter.

Gaines also suggests that even if the challenged evidence regarding missing marijuana was relevant, the prejudicial value of testimony regarding the amount of missing marijuana outweighs its probative value. *See* Iowa R. Evid. 5.403 (stating that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"). Once again, we disagree. Although the evidence of narcotics is inherently prejudicial, in this case, we find the single mention by one witness of the amount of marijuana Gaines claimed was missing was not unduly prejudicial. Moreover, we believe the evidence of Gaines's efforts to recover a substantial quantity of missing marijuana is an integral part of the immediate context of the crime charged, and is thus admissible. *See State v. Bower*, 656 N.W.2d 349, 354 (Iowa 2002); *State v. Nelson*, 480 N.W.2d 900, 905 (Iowa Ct. App. 1991). Therefore, Gaines is unable to show his counsel breached his duty by failing to

object to the testimony that he claimed ownership of fifteen pounds of marijuana and testimony that he threatened others in an attempt to recover the marijuana, because any objection would have been meritless. *State v. Nitcher,* 720 N.W.2d 547, 555 (Iowa 2006).

To succeed on a claim of ineffective assistance of counsel, Gaines must prove prejudice resulted from his counsel's failure to object to the other criminal acts evidence. Gaines claims the evidence of specific intent for each crime of which Gaines was convicted was not overwhelming. He argues that threats against Lumpkin and Phelps allowed the jury to extrapolate specific intent to Williams from unrelated comments to Lumpkin and Phelps. He asserts that without this evidence, the outcome would have been different. We disagree.

In this case, the victim of the shooting lived. Williams testified that the person who shot him multiple times was Gaines, an acquaintance of his from high school. Emig, a neutral and detached witness to the shooting, was able to identify Gaines as the shooter. Johnson, who also witnessed the shooting, testified that he saw Gaines start shooting at Williams. Kirby, who drove Gaines to Wendy's immediately before the shooting occurred, testified that after she heard gunshots she immediately wondered what Gaines had done. Williams, Johnson, Lumpkin, and Phelps all testified to the threats Gaines made to kill someone in the hours leading up to the shooting.

Given the overwhelming evidence supporting Gaines's guilt, we conclude there is no reasonable probability that, but for counsel's failure to object to the evidence concerning the defendant's possession of a large amount of marijuana and his threats to shoot other individuals, the result of the proceeding would have

been different. Because Gaines has failed to prove the prejudice prong of the *Strickland* test, his claim of ineffective-assistance-of-counsel must fail.

B. Sentencing Claim.

Gaines also contends the court erred in imposing consecutive sentences. Because the issue raised by Gaines involves a question of statutory interpretation, our review is for correction of errors of law. *State v. Ross*, 729 N.W.2d 806, 809 (Iowa 2007). Upon our review, we find the court did not err in sentencing Gaines.

Gaines asserts the crimes for which he was cumulatively sentenced to forty years in prison are not "separate offenses" under Iowa Code section 901.8. Therefore, he argues his sentence is illegal. Section 901.8 provides:

> If a person is sentenced for two or more separate offenses, the sentencing judge may order the second or further sentence to begin at the expiration of the first or succeeding sentence.

In this case, Gaines was convicted and sentenced for attempted murder, willful injury, and going armed with intent. Neither willful injury nor going armed with intent is a lesser-included offense of attempted murder; therefore, they are separate offenses for purposes of section 901.8. *See State v. Haskins*, 573 N.W.2d 39, 44 n.1 (Iowa Ct. App. 1997).

In *State v. Criswell*, 242 N.W.2d 259, 260 (Iowa 1976), our supreme court stated that the great weight of authority

> generally recognized that if accused . . . is convicted on several counts of an indictment, and each count is for a separate and distinct offense, a separate sentence may be pronounced on each count, and the court may pronounce separate and distinct sentences which are cumulative, and are to run consecutively. This is true, even though the several offenses were committed in the course of a single transaction.

The court further recognized that this issue is a matter of statutory construction and not one of constitutional dimension. *Criswell*, 242 N.W.2d at 260. In *State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999), the court reaffirmed the rationale of *Criswell*, and explained that the decision to impose consecutive sentences is discretionary.[3]

Gaines cites to a number of other jurisdictions in support of his argument that his sentences for the offenses he committed should not be consecutive. However, we do not believe the statutory interpretations that other states apply to their own sentencing provisions control the outcome here. *See Stradt v. State*, 608 N.W.2d 28, 29-30 (Iowa 2000) (finding that both the Florida and West Virginia opinions cited by the defendant were inapposite to Iowa's case law concerning consecutive sentences). Based on our prior case law, we conclude the district court did not impose an illegal sentence when it sentenced Gaines to serve consecutive sentences pursuant to section 901.8.

III. Conclusion.

Because he has not shown a breach of duty by his counsel or prejudice, we conclude Gaines has failed to prove his ineffective-assistance-of-counsel claim. Additionally, we conclude the district court did not impose an illegal

[3] On appeal, Gaines tried to make a distinction between his case and the *Taylor* case, apparently because *Taylor* resolved a double jeopardy issue. We find no merit in his claim. As the State pointed out, although *Taylor* began as a double jeopardy case, it also resolved a statutory argument. The court held that once it concluded the offenses of terrorism and going armed with intent were separate for the purpose of the double jeopardy clause, it needed to resort to no other analysis for the statutory question as to whether the offenses were separate offenses for purpose of section 901.8. *Taylor*, 596 N.W.2d at 57.

sentence in sentencing Gaines to serve consecutive sentences for his convictions. Accordingly, we affirm the district court.

AFFIRMED.