IN THE COURT OF APPEALS OF IOWA

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No. 6-629 / 95-2150

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BRIDGES E. COOK, II,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Bridges Cook appeals from judgment and sentence entered, following jury trial, for possession of a controlled substance with the intent to deliver, in violation of Iowa Code section 124.401(1)(a)(3) (1993), and failure to affix a drug tax stamp, in violation of Iowa Code section 453B.12. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeffrey Harris, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

Bridges Cook appeals from judgment and sentence entered, following jury trial, for possession of a controlled substance with the intent to deliver, in violation of Iowa Code section 124.401(1)(a)(3) (1993), and failure to affix a drug tax stamp, in violation of Iowa Code section 453B.12. He argues the trial court abused its discretion in permitting rebuttal evidence of his larceny conviction. He also contends his trial counsel was ineffective in failing to object on several occasions.

In April 1995, Cook was charged with possession with intent to deliver and failure to affix a tax stamp by trial information after a search of his hotel room resulted in the recovery of $13,000 worth of crack cocaine along with a scale and baggies.

The jury returned guilty verdicts, and the court sentenced Cook to an indeterminate fifty-year prison term for the intent to deliver charge, and an indeterminate five-year prison term for the tax stamp violation, to run concurrently. The court ordered he serve a minimum one-third of the sentence.

I. Rebuttal Testimony. Cook contends the trial court abused its discretion in allowing the testimony about his prior conviction because it did not rebut any evidence produced by him. He further argues because the larceny evidence is inadmissible under Iowa Rule of Evidence 609, it is also inadmissible as rebuttal evidence.

Defendant objected to the introduction of his 1992 larceny conviction on the grounds it did not truly rebut any statements he had made on either direct or cross-examination. The court overruled Cook's objection to rebuttal evidence regarding his larceny conviction in Illinois. The court ruled:

> [Cook] did make several different references to not knowing what was going to happen, not knowing what was going on, being the first time something like this had ever happened and several different references on three or four different occasions, not in response directly to questions by Mr. Harris. And I think the record as a whole would indicate that this door has been opened by [Cook's] statements implying that [] he's never been in this kind of difficulty, ...

Without further objection, Roger Oberhauser, a probation officer, testified he checked Cook's police record and record of convictions (a "Triple I") and it indicated Cook had a larceny conviction in 1992. Oberhauser opined it was likely Cook would have spent some time in jail for the offense, at least at the time of the initial arrest.

The trial court is vested with broad discretion concerning the admission of rebuttal evidence, and its ruling will be disturbed only upon a clear abuse of discretion. *State v. Hightower*, 376 N.W.2d 648, 651 (Iowa App. 1985). Past convictions are admitted under Rule 609 if the defendant opened the door for the production of further evidence by the state regarding the existence, nature, and timing of other convictions. Iowa R. Evid. 609. On cross examination regarding his arrest, Cook testified he was scared because it was "[his] first time being locked up in this type of situation" and "[he] had never been locked up before." While in literal terms,

Cook' statements at trial may not have indicated he had never been involved with the law, Cook did open the door by introducing evidence he had never been stopped for "anything" and that he "had never been locked up before." The trial court found the state's evidence of prior conviction of larceny in Illinois to be proper rebuttal evidence to Cook's testimony. We find no abuse of discretion in this ruling and, hence, no error.

Cook did not object and did not preserve the issue regarding the admissibility of the larceny conviction under rule 609 in the trial court. "The rule is well established that failure to object to evidence or move to strike the same at the time the record is made and when the grounds for objection or motion to strike are first apparent precludes the party from asserting on appeal admission of evidence was error." *State v. King*, 225 N.W.2d 337, 341 (Iowa 1975). Error which is not preserved is waived. *See State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). We find error was not preserved and decline to address defendant's arguments about the inadmissibility of his 1992 larceny conviction under rule 609.

II. Ineffective Assistance of Counsel. In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick*, 480 N.W.2d at 56. Such claims may be decided on direct appeal, however, if the defendant fails to show one of the two prongs. *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995); *State v. O'Donnell*, 533 N.W.2d 576, 579 (Iowa App. 1995).

A. Expert Testimony. Cook contends his trial counsel was ineffective because he failed to object to Officer Knief's testimony why Officer Knief believed Cook was involved in drug trafficking. He contends the evidence is improper expert testimony

under Iowa Rule of Evidence 702 because it is an opinion about the veracity of a witness. He further urges this testimony constitutes an opinion on the ultimate question of his guilt or innocence.

"Expert opinions as to the truthfulness of a witness is (sic) not admissible pursuant to [Iowa Rule of Evidence] 702." *Johnson v. State*, 495 N.W.2d 528 (Iowa App. 1992)(quoting *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986)). "A witness is not permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence." *Id.* In this case, Officer Knief testified in response to the prosecutor's question what he told Cook at the station in response to Cook's question why Officer Knief thought he was involved in the drug trade and why he had been brought into the station. Officer Knief testified he told Cook that he believed Cook was involved in drug trafficking because he lied about his previous whereabouts, he was in a drug trafficking area, he was with two individuals known to be drug dealers, and he had a pager. Officer Knief stated the possession of a pager is consistent with involvement in drug trafficking. Defense counsel did not object to the testimony.

Cook now argues this testimony was an opinion as to the truthfulness and credibility of Cook, because Officer Knief said Cook lied in the past to him. Cook also argues this testimony opines directly to his guilt or innocence. Officer Knief's testimony did not directly opine on the truthfulness and credibility of Cook or express an opinion as to the ultimate fact of Cook's guilt or innocence. *See State v. Tracy*,

495 N.W.2d 675, 680, (Iowa 1992); *State v. Myers*, 382 N.W.2d 91, 97-98 (Iowa 1986); *Johnson v. State*, 495 N.W.2d 528, 530 (Iowa App. 1992). Officer Knief's testimony was an answer to a question the prosecutor asked in establishing consent for search of Cook's motel room where the cocaine was found.[1] We find defense counsel's actions were reasonable and there was no duty to object to Officer Knief's testimony because it was not improper opinion testimony.

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[1]THE STATE: Sir, when would you have first had the opportunity to talk to him about his involvement or not in the drug trade?

KNIEF: It would have been at the police station?

* * *

THE STATE: During the course of your conversation, did you request a consent to search the room?

KNIEF: Yes.

THE STATE: And what was his response?

KNIEF: At first he was hesitant. He kept--I don't believe he came right out and said no, but he wanted to know why I thought that he was involved in the drug trade, why he had been brought to the station, what was going on. He wasn't antagonistic at all. He wasn't arrogant. He just seemed inquisitive as to why I thought that he had been involved in the drug trade.

THE STATE: So you did, in fact, believe he was involved in the drug trade?

KNIEF: Yes, I did.

* * * * * * * * * * *

THE STATE: Mr. Knief, if we could narrow it a little bit more, what were the specific reasons that you either articulated personally or advised the Defendant of as to why you believed he was involved in the drug trade?

KNIEF: He had lied to me about his whereabouts over the previous week. He had volunteered that he had just arrived from Chicago, had a bus ticket in his back pocket, that within an hour and a half or so prior to being stopped he had just arrived in Waterloo. He had checked into a local motel, paid cash for the motel room.

He was in a known drug trafficking area. The two individuals in the car with him I knew to be involved in illegal drug sales on previous occasions. He had a pager which is extremely consistent with someone being involved in the drug trade, especially in this part of town.

B. Collateral Issue. Cook next asserts his counsel failed to object to rebuttal evidence regarding his college attendance because the evidence constitutes impeachment on a collateral issue and lacks proper foundational requirements. He argues his trial counsel similarly failed to object to the lack of foundation for testimony about his larceny conviction.

Cook testified that, at the time of the arrest, he was attending Malcolm X College in Chicago, studying premed, and on spring break. When he arrived in Waterloo from Chicago to visit a friend, Terrence Redding, a known drug trafficker, picked him up from the bus station and took him to a hotel. He further testified Terrence was alone in his hotel room while he was in the bathroom. Cook admitted the bag in which the cocaine was located was his, but he denied any knowledge of the drugs, scale, or baggies. He also denied making any admissions to Officer Knief.

The State presented rebuttal testimony, without objection, from Judy Flores, the legal assistant at the Black Hawk county attorney's office, that she called Malcolm X College upon the prosecutor's request and the registrar faxed her information stating Cook had not declared a major and he did not attend college during the spring session of 1995.

Cook's attendance at college or his major may have been impeachment on a collateral matter. "Impeachment testimony that only goes to a collateral issue is inadmissible." *State v. Jones*, 511 N.W.2d 400, 406 (Iowa App. 1993). Defense

counsel could have objected to the rebuttal testimony. However, there is no prejudice and no ineffective assistance of counsel on this issue.

Similarly, we find there was no ineffective assistance of counsel for failure to object to the lack of foundation for testimony about defendant's larceny conviction. We found the defendant opened the door for the production of further evidence by the state regarding the existence, nature, and timing of other convictions. Counsel was not ineffective for failing to object to the testimony. Proper foundation had been laid.

Finally, Cook urges the combined errors of trial counsel prejudiced the final outcome. We cannot find trial counsel actions prejudiced Cook because the evidence against Cook was overwhelming.

At trial, Officer Knief testified he received a tip from an informant that occupants of a white and red Chevy were selling marijuana. The informant gave him the license plate number and told him one of the occupants was named "Cook." On April 7, 1995, Officer Knief observed a vehicle matching the description in a high drug trafficking area. He saw the back seat passenger drinking from a two quart bottle wrapped in a paper sack, and he stopped the vehicle. Officer Knief identified the two front seat passengers as Terrence Redding and Damien McMullen, both known to be involved in drug trafficking. He testified Cook was the back seat passenger, and he was twenty years old and drinking beer. Officer Knief instructed

Cook to empty his pockets, and he recovered a pager and a motel key. He arrested Cook for the alcohol violation, and took him to the police department.

At the police department, Officer Knief questioned Cook about his involvement in drug trafficking, and asked if he could search his motel room. Cook eventually consented to the search of his motel room, and a black bag containing individual baggies of crack cocaine, a scale, and empty baggies was recovered from the air conditioner unit. Officer Knief stated Cook later admitted he was transporting the cocaine from Chicago for a distributor.

Cook has failed to show there is "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *See State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). Trial counsel was not ineffective and we affirm defendant's convictions.

AFFIRMED.

Vogel, J. concurs; Sackett, P.J., specially concurs without opinion.