IN THE COURT OF APPEALS OF IOWA

No. 0-2003 / 97-2067
Filed May 31, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MAURICE C. CAMPBELL,
Defendant-Appellant.

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

Maurice C. Campbell appeals from a judgment and sentence following his conviction for first-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

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VAITHESWARAN, J.

On appeal from a judgment and sentence for first-degree burglary, Maurice Campbell contends (1) trial counsel was ineffective in failing to move for judgment of acquittal and (2) the trial court abused its discretion in admitting evidence of prior uncharged crimes. We affirm.

I. Background Facts and Proceedings

In the early morning hours of July 9, 1997, Leora and Barry Thompson were having a snack on their porch when Leora noticed a gray Chevrolet parked on the street near her home. She saw three men get out of the car and approach the home of Linus and Martha Mensen. Two of the men went on to the Mensens' screened porch and the other man went to the side of the home. Leora called 911.

Before the men could enter the home, Calvin Bradford, who was sitting in the car, saw a police car approaching and honked his horn to alert the others. Based on Leora's identification, the police later arrested Campbell and took him to jail. While booking him, they seized two rings and a silver necklace. The police also took possession of a gun Leora found on the Mensens' porch.

On July 24, 1997, the State charged Campbell with first-degree burglary, in violation of Iowa Code sections 713.1 and 713.3 (1997). Campbell and co-defendant Rolandus Bradford were tried together. The jury convicted Campbell of first-degree burglary. The district court sentenced him to an indeterminate term not to exceed twenty-five years, with a requirement he serve no less than five years.

II. Ineffective Assistance of Counsel.

Campbell contends his trial attorney was ineffective in failing to move for judgment of acquittal. As a result of this failure, Campbell asserts he was precluded (1) from receiving a directed verdict in his favor based on insufficiency of the evidence and (2) from arguing on appeal that the evidence was insufficient to support the verdict.

We review ineffective assistance of counsel claims de novo. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). While we generally preserve such claims for post conviction relief proceedings, we will consider them on direct appeal when the record is adequate to address the issue. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

To prevail, Campbell must prove by a preponderance of the evidence (1) his trial counsel breached an essential duty, and (2) he was prejudiced by the breach. *State v. Laffey*, 600 N.W.2d 57, 60 (Iowa 1999). We may affirm on appeal if either element is lacking. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). To establish prejudice, Campbell must prove that, but for the errors, the trial outcome would have been different. *Wemark v. State*, 602 N.W.2d 810, 817 (Iowa 1999).

We choose to decide the issue on the basis of the second prong. Campbell cannot establish he was prejudiced by his attorney's failure to move for judgment of acquittal because the evidence supporting the verdict was extensive.

Leora Thompson testified she watched the burglary in progress. She provided a detailed description of the three men involved in the burglary as well as events as they unfolded. Additionally, she identified Campbell in court as one of the men she saw at the Mensen home. Calvin Bradford, the driver of the getaway car, confirmed Campbell was involved in the burglary. He testified he watched from the car as Campbell entered the front porch of the Mensen home. A police investigation of the house revealed pry marks on the front door and basement window. In light of this evidence, we conclude there is not a reasonable probability the outcome would have changed even if Campbell's attorney had moved for judgment of acquittal. Accordingly, we reject Campbell's ineffective assistance of counsel claim.

III. Prior Bad Acts.

Prior to trial, Campbell moved to exclude evidence of other burglaries in the neighborhood. Specifically, Campbell sought to keep out: (1) the testimony of two neighbors, Ruby Harris and Wilfred Gilles, whose homes had been burglarized; (2) evidence of attempts to gather latent fingerprints from those crime scenes; and (3) items seized from Campbell's room and a car he occupied which, the State asserted, came from the burglarized homes. The district court denied the motion, reasoning: (1) the other burglaries were committed in the same fashion as the Mensen burglary; (2) the State was able to tie the burglaries to Campbell through items discovered in his room and a car; (3) at least one of the burglaries occurred less than two hours before the Mensen burglary and a very short distance away; (4) the probative value of the evidence outweighed its

prejudicial effect; and (5) a cautionary instruction would address the question of unfair prejudice. Campbell takes issue with this ruling.

We review a district court's ruling on evidentiary issues for abuse of discretion. *State v. Query*, 594 N.W.2d 438, 443 (Iowa App. 1999). To prevail, the defendant must demonstrate the district court exercised its discretion on clearly unreasonable or untenable grounds. *State v. Alderman*, 578 N.W.2d 255, 258 (Iowa App. 1998). Even when we identify an abuse of discretion, we will not reverse unless the abuse results in prejudice to the defendant. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999) (quoting *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994)).

Evidence of other crimes, wrongs or acts is inadmissible to prove a defect in a person's character or to demonstrate action in conformity with that character defect. Iowa R. Evid. 404(b). However, the evidence may be admissible for other purposes, including, but not limited to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997) (citations omitted). We use a two-part test for determining whether evidence of other crimes, wrongs or acts is admissible. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998). First, we determine whether the evidence is relevant to a legitimate issue in the case. *Brown*, 569 N.W.2d at 116. Second, we decide whether the probative value of the evidence outweighs the danger of unfair prejudice. *Id.* at 117. In certain instances, we have also required "clear proof" that the prior bad acts were committed by the defendant. *Id.*

The State contends Campbell has not raised a relevancy claim on appeal. We disagree. 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 or less probable than it would be without the evidence." Iowa R. Evid. 401. Examining the merits, we agree with the district court that the proximity in time and distance of the Harris burglary renders evidence of that incident relevant and admissible. Gilles' house was burglarized twice, once in May 1997 and once in late June 1997. The first Gilles burglary occurred during the day and Gilles was blindfolded during the second. Although the State attempted to link Campbell to items taken from Gilles's home, we cannot find these burglaries were sufficiently similar or close in time to the Mensen burglary to have been relevant. Accordingly, we conclude the court abused its discretion in admitting evidence of the Gilles burglaries. However, we also conclude Campbell suffered no prejudice in light of the extensive evidence supporting his conviction.

We also agree with the district court that the probative value of the evidence relating to the Harris burglary outweighs its prejudicial effect. "Probative value" gauges the strength and force of the evidence's relevancy. *Id.* at 786. "Unfair prejudice" is "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *Id.* The evidence is compelling on the issue of whether Campbell intended to burglarize the Mensen home. Additionally, we note that the district court repeatedly admonished the jury to consider the prior burglaries only for the limited purposes permitted by Rule 404(b), and not for the purpose of proving Campbell was a bad person. The court also provided the jury with a limiting instruction which

contained the same admonishment. Under these circumstances, we conclude the district court did not abuse its discretion in applying the balancing test.

Finally, we must determine whether there was clear proof of Campbell's involvement in the Harris burglary. Although Campbell was not charged and convicted of that burglary, Harris identified items stolen from her home that were later discovered in Campbell's possession or in areas that he controlled or had access to. The record does contain evidence that a latent fingerprint on Harris's porch and fingerprints on certain items retrieved by the police did not match Campbell's. However, the fingerprint analyst testified that, of all the cases he handled, he only found latent fingerprints that were suitable for identification in about ten percent of the cases and, of those, he could only identify the fingerprints in a small portion. Therefore, despite this evidence, we conclude the other testimony furnished clear proof that Campbell was involved with the Harris burglary. *Cf. State v. Williams*, 360 N.W.2d 782, 786 (Iowa 1985) (noting it was not necessary for State to show defendant's participation in crime as principal or prove complicity beyond a reasonable doubt). We conclude the district court did not abuse its discretion in admitting evidence of that burglary.

We affirm Campbell's conviction and sentence.

AFFIRMED.