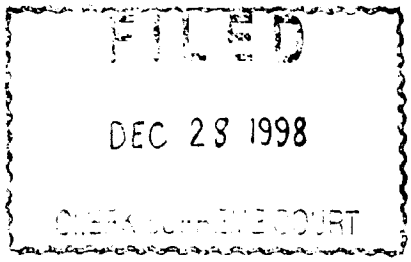
IN THE COURT OF APPEALS OF IOWA

No. 8-533 / 97-1427



STATE OF IOWA,

Plaintiff-Appellee,

vs.

CLIFTON C. KINNEY,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane, II, Judge.

Defendant appeals from his convictions for possession of a firearm by a convicted felon and terrorism. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, John P. Sarcone, County Attorney, and Dan Voogt, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

SACKETT, C.J.

Defendant-appellant Clifton C. Kinney appeals his conviction following a jury trial of possession of a firearm by a felon, in violation of Iowa Code section 724.26 (1995), and terrorism, in violation of Iowa Code section 708.6. Defendant contends his trial counsel was not effective in allowing the charges to be consolidated and in failing to object to certain hearsay evidence. We affirm.

Defendant was charged following a gathering outside an apartment house in Des Moines. Gun shots were fired and a man was shot Two witnesses identified defendant as being at the scene. One of these witnesses testified defendant had a small black handgun he was shooting that jammed. Defendant and several witnesses who testified on his behalf denied defendant was present at the time shots were fired. It is not claimed defendant shot the injured victim.

Defendant's claim his trial attorney was not effective raises claims under the Sixth and Fourteenth Amendments to the United States Constitution. We therefore review de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997). To prove his claim, defendant must show by a preponderance of evidence his trial attorney both failed to perform an essential duty and he was prejudiced as a result of the failure. *Id.* at 613-14.

Defendant first contends his trial attorney should have moved to sever the possession-of-a-firearm charge from the terrorism charge. Defendant's rationale is because the firearm charge was predicated on his prior felony conviction, in trying both charges together, the jury learned he was a felon and he was prejudiced.

The State, citing *State v. Lam*, 391 N.W.2d 245 (Iowa 1986), advances the motion would not have been successful, for Iowa Rule of Criminal Procedure has liberalized charging practices to allow the State more leeway to join multiple offenses in a single case. The State argues because the charges came from the same occurrence, they were properly consolidated.

Iowa Rule of Criminal Procedure 6(1) states, in relevant part:

> Two or more public offenses which arose . . . from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single . . . information . . . unless, for good cause shown, the trial court in its discretion determines otherwise. . . .

Iowa R. Crim. P. 6(1).

A rule 6(1) determination is distinguished from an evidentiary ruling by its concern for which offenses may be properly joined for prosecution in a single trial and not crimes which are admissible as evidence to prove the offense charged. *Lam*, 391 N.W.2d at 250. Although rules of evidence limiting admission of prior crimes are not implicated by this determination, consideration of unfair prejudice are common to both contexts. *State v. Smith*, 576 N.W.2d 634, 637 (Iowa App. 1998).

Rule 6(1) vests the trial court with broad discretion. *See Lam*, 391 N.W.2d at 249-51; *State v. Dicks*, 473 N.W.2d 210, 214 (Iowa App. 1991). Two charges arise out of the same act or transaction if they are so clearly linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge. *State v. Bair*, 362 N.W.2d 509, 511 (Iowa 1985) (Carter, McGiverin, and Schultz, JJ., dissenting). The charges against defendant were clearly

linked in time, place, and circumstance. However, a complete account of the terrorism charge could be made without relating the details of defendant's felony conviction.

We agree with the State the charges were subject to consolidation. However, the underlying issue is whether defendant can demonstrate he was sufficiently prejudiced by the consolidation of the charges. In balancing the issue of severance with judicial economy, the basic issue is whether defendant received a fair trial. *See Dicks*, 473 N.W.2d at 214. To establish sufficient prejudice to succeed on the issue of ineffective assistance of trial counsel, defendant must show not only his trial counsel failed in a duty but the error worked to defendant's actual and substantial disadvantage, creating a reasonable probability that, but for the error, the trial's result would have been different. *Cook*, 565 N.W.2d at 614; *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). We may dispose of an ineffective-assistance-of-counsel claim if defendant fails to meet either the breach of duty or the prejudice prong. *See Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

There is no basis under which defendant can claim he suffered prejudice by the failure to try the possession-of-a-firearm count separately. As a felon, defendant's status as a felon is an element of the crime and the challenged prejudicial evidence, that is, that defendant is a felon, is admissible. *See Cook*, 565 N.W.2d at 615.

The State further has argued defendant's testimony he did not have a gun that day because he was a felon showed trial counsel had a strategic reason not to ask that the two charges be severed.

While we agree with the State's argument this is persuasive as to strategy in defending the possession-of-a-firearm charge, we cannot from this record concur it would have been strategic had the terrorism charge been severed and tried separately.

We next address defendant's contention he was prejudiced because the possession-of-a-firearm charge was not severed from the terrorism charge, in that the jury learned he was a convicted felon.

The pivotal questions here are (1) whether the fact defendant was a felon would so prejudice the jury in considering the terrorism charge it is probable the trial court should have exercised its discretion and severed the charges; and (2) whether there was a reasonable probability but for defendant's trial attorney's failure the result of the trial would have been different.

The incident occurred while an argument was taking place and a crowd gathered. The State introduced no physical evidence connecting defendant to the crime. Rather, the State's case against defendant was based on the testimony of eye witnesses to the event.

Jejuan T. Lyke, a part of the crowd, testified he first saw defendant sitting on a stairwell near where the argument was taking place. Jejuan next heard someone say, "Get him, Cliff." Jejuan heard multiple shots from numerous guns and ran. Jejuan was shot; he did not see defendant with a gun.

Darryl Hardy said he was in the crowd when defendant came. Hardy related somebody said about two times, "Get him, Cliff. Get him." Hardy also said defendant was shooting a gun he identified as a black handgun that jammed after two shots.

The State's evidence was contradicted. Defendant testified he was in his grandmother's apartment at the time. Other witnesses testified defendant did not have a gun and was not a party to the event.

Unfair prejudice is an undue tendency to suggest decisions on an improper basis, commonly, though not necessarily, an emotional one. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997). Prejudicial evidence has been considered that evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action and may cause a jury to base its decision on something other than the established propositions in the case. *See State v. Alderman*, 578 N.W.2d 255, 258 (Iowa App. 1998). The prejudice discretionary severance of charges seeks to prevent includes that which inherently attends evidence of a defendant's other crimes. *Dicks*, 473 N.W.2d at 214; *see also Old Chief v. United States*, 519 U.S. 172, ____, 117 S. Ct. 644, 650, 136 L. Ed. 2d 574, 589 (1997).

The State has not advanced defendant's felony conviction would have been admitted had he been tried only on the terrorism charge. Additionally, even if the evidence had been admitted for a valid purpose other than showing defendant to be a bad man, a cautionary instruction would have been appropriate. It is only in

extreme cases such an instruction is deemed insufficient to nullify the danger of unfair prejudice. *State v. Conner*, 314 N.W.2d 427, 429 (Iowa 1982).

The jury would be aroused by learning defendant was a felon, a factor considered in assessing the prejudice of bad acts evidence. *See State v. Zeliadt*, 541 N.W.2d 558, 562 (Iowa App. 1995). Defendant was prejudiced by the jury's learning of his felony conviction in assessing the terrorism charge. Had the proper motion been made, the charges should have been severed. We cannot on this record say defendant's trial attorney was ineffective in failing to make a motion to sever. We preserve defendant's right to raise this issue in a postconviction proceeding challenging trial counsel's ineffectiveness for failing to sever as to the terrorism charge only.

Defendant next contends his trial attorney should have objected to the hearsay evidence from the two witnesses that they heard someone say, "Get him, Cliff." The State argues the statement was admissible because it falls under the excited utterance exception, which is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Iowa R. Evid. 803(2).

For an out-of-court utterance to be hearsay, it must be a statement. Iowa R. Evid. 801(c). A statement is defined as an oral or written assertion or nonverbal conduct intended as an assertion. Iowa R. Evid. 801(a). A great many out-of-court utterances are assertions, such categories as greetings, pleasantries, expressions of gratitude, courtesies, questions, offers, instructions, warnings, exclamations,

expressions of joy, annoyance, or other emotion. *Rawlings*, 402 N.W.2d at 409. Such utterances are not intentional expressions of facts or opinions. *Id.* They are not assertions, at least for purposes of the hearsay rule. *Id.* Thus, they are not hearsay. *Id.* An out-of-court utterance is not hearsay unless it contains an assertion of fact and is offered to prove the truth of that assertion. *State v. Jones*, 271 N.W.2d 761, 767 (Iowa 1978); *State v. Leonard*, 243 N.W.2d 887, 890 (Iowa 1976).

The challenged words were instructions and not assertions for the purpose of the hearsay rule. They contain no assertion of fact. We find no basis to reverse on this issue.

We affirm defendant's conviction for possession of a firearm by a felon, in violation of section 724.26, and for terrorism, in violation of section 708.6.

AFFIRMED.