IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

No. 1-340 / 00-829
Filed November 16, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LANCE RUSSELL DIXON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Defendant appeals from the judgment and sentence entered following his conviction of first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

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

Heard by Mahan, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Lance Russell Dixon appeals from the judgment and sentence entered following his conviction of first-degree murder in violation of Iowa Code sections 707.1, 707.2(1) and 707.2(2) (1999). He contends the district court erred in denying his request to sever his trial from that of his codefendant, by admitting evidence of gang activity, and by overruling his motion for judgment of acquittal which challenged the sufficiency of the evidence to support a finding of guilt. Dixon also claims his trial counsel rendered ineffective assistance. Because we find no merit in any of his claims, we affirm.

I. Background Facts and Proceedings

Dixon and his cousin, Charles James, Jr., were charged with first-degree murder for the shooting death of Cedric Johnson. On November 10, 1999, Johnson was shot through the door in the kitchen of his house from outside his home. Dixon and James were tried together.

At trial, Marie Van Dyke testified she drove Dixon and James to Johnson's home late in the evening on November 10th. She testified both men got out of the car and returned shortly after she heard shots fired. Van Dyke then drove the men to a bridge where she observed both throw guns into the river. Ballistics evidence indicated two guns were involved in the shooting.

Van Dyke testified that after the shooting Dixon stated, "My gun jammed." She further testified that as she drove the men to the river, James exclaimed, "I got me one. I wanted to get both. I know I got one of them." James also stated he shot the man in the chest. An autopsy revealed Johnson died from a gunshot wound to the chest.

Ten-year-old Richard Lewis lived in Cedric Johnson's home at the time of the shooting. He testified he was in the kitchen when someone knocked at the door. Johnson told Richard not to open the door. Shots soon rang out, striking Johnson and killing him. Either right before the shooting, or right after, Richard looked out the window. He testified he saw James and Dixon standing there. He only saw James with a gun.

Charlie Smith testified she received a phone call from James in which he sounded upset. James requested that she pick him up at his girlfriend's home. When James was in Smith's car, she asked him if he shot Johnson. Smith testified that James answered affirmatively. In his statement to Smith, James did not implicate Dixon in the shooting.

The victim's fiancée, Nicole Sanders, testified that several hours before Johnson was shot, James came to the residence she occupied with Johnson and asked to see "Boogie." Cedric Johnson was also known as "Boogie." Sanders testified Johnson told James to leave the home because Johnson did not know him.

Following trial, the jury found Dixon and James guilty of first-degree murder. Both were sentenced to life in prison. Dixon appeals. He contends the district court erred by denying his request to sever his trial from James's and by allowing testimony about gang activity. He also contends the evidence was insufficient to support his conviction and the district court erred in denying his motion for judgment of acquittal. Finally, Dixon claims his trial counsel was ineffective in several particulars.

II. Severance

Dixon first contends the district court erred by denying his request to sever his trial from James's. Prior to trial, Dixon joined in codefendant James's motion for severance. The codefendants sought separate trials claiming their defenses were at odds, each implicating the other.

We review challenges to a trial court's denial of a motion to sever for abuse of discretion. *State v. Leutfaimany,* 585 N.W.2d 200, 203 (Iowa 1998). An abuse of discretion exists where there is sufficient prejudice to constitute a denial of a fair trial. *Id.* To cause this type of prejudice, the codefendant's defenses must be more than merely antagonistic. *State v. Snodgrass,* 346 N.W.2d 472, 475 (Iowa 1984). Rather, their defenses "must conflict to the point of being irreconcilable and mutually exclusive." *Id.*

Dixon argues his defense was irreconcilable with James's defense because each defendant attempted to inculpate the other. He asserts this case is like the situation presented in *State v. Sauls,* 356 N.W.2d 516, 519 (Iowa 1984). In *Sauls*, each defendant testified and offered the defense that he was innocent and the other defendant was solely guilty. Under those circumstances, our supreme court concluded the trial court abused its discretion in failing to grant a severance. *Id.* at 519.

In this case, neither defendant testified and neither gave a pre-trial statement incriminating the other. At trial, each defendant attempted to elicit testimony from the State's witnesses that was more favorable to him and less favorable to his codefendant. Counsel then referred to this testimony in their closing arguments in an attempt to create doubt about their client's role in the

homicide. We conclude the circumstances of this case are distinguishable from the situation in *Sauls*. Therefore, the district court did not abuse its discretion in denying defendant's motion to sever. [1]

III. Evidence of Gang Activity

Dixon next contends the district court erred by admitting evidence of gang related activity and an incident of terrorism which occurred several months prior to Johnson's death. At trial, witnesses testified about a shooting at the Des Moines home of Sharon Barquet in August 1999. Barquet is Dixon's mother and James's aunt. A witness also testified that Johnson was a member of the Black Gangster Disciples street gang. The purpose of this testimony was apparently to suggest that Johnson was murdered in retaliation for the shooting at the Barquet residence. Dixon claims this evidence was highly prejudicial and had little or no relevance.

The State contends error has not been preserved with respect to Dixon's complaints about evidence of Johnson's gang involvement. Prior to trial, Dixon joined in a motion in limine filed by James that sought to exclude evidence of the Sharon Barquet shooting and "evidence of defendant and codefendant's alleged gang activity or membership." The district court denied the defendant's request as to both the shooting evidence and evidence of gang activity. The court concluded the State was entitled to prove it's theory of motive and intent, but warned the prosecutor that he would still be required to lay a proper foundation,

[1] In reaching this conclusion, we do not suggest that each defendant had to testify personally to an irreconcilable defense in order to present a claim for severance. *See Leutfaimany*, 585 N.W.2d at 204.

show how the appropriate value of the evidence outweighed any prejudicial effect, and keep hearsay testimony out of the record.

Generally, a motion in limine is insufficient to preserve error. *State v. Frazier,* 559 N.W.2d 34, 39 (Iowa Ct. App. 1996). An objection is properly preserved when the objection is made in trial. *Id.* However, a defendant is not required to object at trial where a prior ruling on a motion in limine amounts to "an unequivocal holding concerning the issue raised." *Id.* (citation omitted.) Based on the district court's warning to the prosecutor regarding the potential admissibility of evidence regarding the Barquet shooting and gang activity, we do not find the court's ruling on the motion in limine to be an unequivocal holding on the issues. In order to preserve the issues, the defendant was required to lodge an objection when the evidence was raised at trial.

During trial, Dixon joined in his codefendant's relevancy objection to prosecution evidence that his mother had been the target of an act of terrorism prior to Johnson's murder. He also joined in an objection referring to Iowa Rule of Evidence 403 and thereby preserved a claim that the probative value of such evidence was substantially outweighed by its prejudicial impact. Dixon failed to object at trial to evidence that the murder victim was a member of a street gang. Dixon has preserved error regarding the introduction of evidence on the Barquet shooting, but not with regard to evidence of Johnson's involvement in gang activity.

The trial court is given wide latitude regarding the admissibility of evidence. *State v. Wixom,* 599 N.W.2d 481, 487 (Iowa Ct. App. 1999). We will not disturb the lower court's evidence ruling unless we find an abuse of

discretion. *Id.* An abuse of discretion occurs when the trial court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *State v. Greene,* 592 N.W.2d 24, 27 (Iowa 1999).

The State contends evidence that Dixon's mother had been the intended target of an act of terrorism is relevant to establish a possible motive for the murder of Cedric Johnson. Evidence is relevant if it renders the desired inference more probable than it would be without the evidence. *State v. Harris,* 589 N.W.2d 239, 243 (Iowa 1999). The incident involving Sharon Barquet occurred a few months prior to Johnson's death. The State offered evidence suggesting Johnson was a member of a local street gang. Other evidence revealed Dixon's cousin, codefendant James, went to Johnson's residence a few hours before Johnson was shot and killed, spoke with the victim, and was then asked to leave. As previously noted, James is also a close relative of Barquet. The State argues this evidence supports the desired inference that James and Dixon shot Johnson in retaliation for the earlier incident at the Barquet residence. The district court admitted the evidence as relevant to motive and intent.

Dixon claims the evidence should have been excluded because its probative value, if any, was outweighed by the danger of unfair prejudice. He claims the evidence implies that the murder occurred because Johnson was in a different gang than the defendant and codefendant, and that this evidence would appeal to the jury's instinct to punish gang members. *See State v. Nance,* 533 N.W.2d 557, 562 (Iowa 1995). We agree with the defendant's claim that the probative value of this evidence is diminished by the State's failure to demonstrate a direct connection between Johnson and the shooting at the

Barquet residence. However, assuming the connection is weak, or even lacking, we do not believe Dixon suffered prejudice.

In *Nance,* a police officer testified that while searching the defendant's home, he found a note with an encoded message similar to notes the officer had found in other gang member's homes. *Id.* In this case, no evidence was presented to suggest that either Dixon or James was a gang member. *Nance* is distinguishable because in the present case, it was the victim who was labeled a gang member rather than either defendant. In addition, evidence of the prior shooting was not offered as a prior criminal act of Dixon or his codefendant. Therefore, we conclude the admission of the evidence was not prejudicial to Dixon.

IV. Ineffective Assistance of Counsel

Dixon alleges his trial counsel was defective in several respects. He claims counsel was ineffective in: 1) failing to file a timely motion to sever; 2) failing to object to evidence of gang association on the proper basis; and 3) failing to object to inherently prejudicial testimony regarding drug trafficking by the defendant.

We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998). To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996). First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* Ordinarily we preserve ineffective assistance claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding

counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, such claims may be resolved on direct appeal when the record adequately addresses the issues. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998).

A. The Motion to Sever

Dixon contends his counsel was ineffective if he failed to preserve error on the issue of severance of the codefendants' trials. Dixon's trial attorney requested to join the codefendant's motion to sever two days after the court's extended deadline for pre-trial motions had expired. The State did not object to Dixon's joinder request on the basis of untimeliness. In addition, the motion was addressed on its merits by the trial court and renewed at various stages of the trial. We conclude error was preserved on this issue. Further, because we have determined the trial court did not abuse its discretion in failing to sever Dixon's case from his codefendant's case, there may be no finding of ineffective assistance of counsel.

B. Failure to Object to Evidence of Gang Activity on the Proper Basis

Dixon also contends trial counsel was ineffective in failing to object to testimony regarding the gang membership of the victim on the proper basis. In *Nance*, the court held evidence regarding a defendant's involvement in gang activity is inherently prejudicial. *Nance*, 533 N.W.2d at 562. We have already distinguished *Nance* from the circumstances of this case where no evidence was introduced regarding the defendant's membership in a gang. We conclude evidence of a victim's gang membership is not inherently prejudicial, and therefore, counsel had no duty to object to its introduction.

C. Failure to Object to Testimony Regarding Drug Trafficking.

Dixon last argues his counsel was ineffective in failing to object to evidence that he helped a prosecution witness acquire marijuana just prior to the murder. The State's first witness, Marie Van Dyke, testified she went to Lance Dixon's home on the evening of November 10, 1999. Van Dyke testified she drove both defendants to the victim's home, heard shots, and then observed them run back to the car. She saw the two men with guns and then drove them to a river to dispose of the weapons. She admitted smoking some marijuana that night and testified, without objection from defendant's counsel, that Lance Dixon supplied the marijuana. Van Dyke denied smoking the marijuana before driving the defendants to Johnson's home.

Both Dixon's attorney and James's attorney questioned Van Dyke about when she smoked the marijuana. Dixon's counsel asked her questions about her ability to recall the events of the evening. Counsel also questioned her about inconsistencies between her trial testimony, her earlier deposition, and her initial statement to the police. Dixon asserts the testimony was irrelevant to the crime for which he was on trial and was inherently prejudicial.

We conclude counsel did not breach an essential duty in failing to object. The record reflects a sound tactical reason for counsel's failure to object to this evidence. The evidence assisted the defense in challenging the credibility of an important prosecution witness. Counsel breached no duty by failing to object to this evidence.

V. Sufficiency of the Evidence

Dixon contends the evidence was insufficient to support his conviction. We review a jury verdict for substantial evidence. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). In deciding whether the evidence is substantial, we review the evidence in the light most favorable to the State and make all reasonable inferences that may be fairly drawn from the evidence. *Id.* As such, a challenge to the sufficiency of the evidence is for correction of errors at law. *Id.*

We find there was substantial evidence to support the jury's verdict. Van Dyke testified she drove Dixon and James to the victim's home in Des Moines the night of the murder. Both men got out of the car, and returned soon after she heard shots fired.

Ten-year-old Richard Lewis testified he was in the kitchen when someone knocked at the door. The victim ordered him not to open the door. Shots were fired. At some point, Richard looked out the window and saw James and Dixon standing there. He saw only James with a gun. Richard testified that he heard Dixon say, "Forget this," to James before James started shooting.

Van Dyke testified that after the shooting she drove Dixon and James to the river where she observed both men with guns. She then witnessed each defendant throw his gun into the river. Although the guns were never recovered, bullets from two different caliber guns were found at the crime scene. Van Dyke heard James state he had shot a man in the chest. Van Dyke also testified that she heard Dixon state, "My gun jammed," after the shooting occurred. Finally, before the victim died, he stated: "They shot me."

Dixon contends the testimony of Richard Lewis suggests he discouraged his confederate from shooting Johnson and fled before shots were fired. The jury was not required to accept the entire testimony of the young boy who witnessed the shooting. When the evidence is viewed in the light most favorable to the State, we conclude the record contains substantial evidence to support Dixon's conviction of murder, either as a principal or as an aider and abettor. Therefore, we affirm the conviction and sentence of defendant Dixon for first-degree murder.

AFFIRMED.