IN THE COURT OF APPEALS OF IOWA

No. 9-329 / 98-906
Filed September 29, 1999

FILED
SEP 29 1999
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNY BEVARD, II,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Defendant appeals following his convictions for third-degree burglary and interference with official acts. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, John P. Sarcone, County Attorney, and Jim Ward, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

STREIT, J.

Kenny Bevard appeals his convictions for third-degree burglary and interference with official acts in violation of Iowa Code sections 713.6(a) and 719.1 (1997). He contends the trial court erred in admitting evidence of his drug use to show motivation for the burglary. Although evidence of drug use should not necessarily infer motive, the evidence in this case provided an extremely detailed and overt nexus between Bevard's drug use and his impetus for committing the crime.

I. Background Facts & Proceedings.

On October 19, 1997, Sharon Neal witnessed two white men enter Frank Marcum's home and begin to carry property out to a truck. Neal reported the apparent theft to the police and gave them the truck's license plate number as well as a description of the men.

Police traced the truck to Bevard's girlfriend, Carolyn Bower. An officer went to her home to inquire about the truck and was directed to the defendant, Kenny Bevard, and a friend, John Jay. Bevard told the officer he had lent the truck to a Gary Mulford the day before and that Mulford later told him the truck had broken down on the south side of Des Moines. The officer then located the truck and found Marcum's stolen television inside.

Sharon Neal later identified Jay and, to a lesser degree of certainty, Bevard, in a photographic lineup. At this point, the officers returned to Bower's residence to arrest Jay and speak with Bevard. When Bower opened the door, officers saw Bevard

and Jay run out the back door. Officers gave chase and followed the men over fences, over a creek, and through several lawns before finally apprehending them.

After his arrest, Jay implicated both himself and Bevard in the burglary. Jay later pled guilty to third-degree burglary in exchange for dismissal of an interference with official acts charge. Over Bevard's objections, Jay testified they were both methamphetamine addicts and had taken the property for drugs.

The defense suggested that another long-haired, white man must have committed the crime. The defendant produced a friend, Randy Allen Hale, who accounted for Bevard's whereabouts on October 19.

The jury found the defendant guilty of third-degree burglary and interference with official acts in violation of Iowa Code sections 713.6(a) and 719.1 (1997). The court sentenced him to an indeterminate term of five years on the burglary charge and a one-year term on the interference charge. Both sentences were to run concurrently.

Bevard appeals contending the trial court erred in admitting Jay's testimonial evidence regarding his substance abuse and ineffective assistance of trial counsel for failing to request a limiting instruction.

II. Standard of Review.

We review Bevard's evidentiary claim for an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998).

III. Admission of Bevard's Drug Abuse Was Proper as to Motive.

Evidence of prior bad acts is not admissible to show a general propensity to commit crime. *State v. Haskins*, 573 N.W.2d 39, 45 (Iowa App. 1997). Evidence of prior bad acts may be admitted, however, for one or more of the nonexclusive purposes listed in Iowa Rule of Evidence 404(b). *Id.* Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he 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.

The explanative list provided in rule 404(b) is not exhaustive. *State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). Rather, the court employs a tiered analysis in reviewing admission of prior bad acts. *State v. Uthe*, 542 N.W.2d 810, 814 (Iowa 1996). The first tier requires the evidence be relevant for a purpose other than to show the general propensity of the defendant to commit crime. *Id.* If the evidence clears the relevancy hurdle, the court must then turn to the second tier of analysis: whether the probative value of the evidence "is substantially outweighed by the danger of prejudice." Iowa R. Evid. 403.

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 probable or less probable than it would be without the evidence." Iowa R. Evid. 401. The balance

between the probative value of the evidence and its prejudicial nature is tipped in favor of being unduly prejudicial when it:

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case.

State v. Plaster, 424 N.W.2d 226, 231 (Iowa 1988). Finally, evidence immediately surrounding the offense is admissible to show the complete story of a crime, even it involves the commission of another crime. *State v. Veal*, 564 N.W.2d 797, 812 (Iowa 1997).

Admitting testimony of Bevard's substance abuse was relevant. The detailed testimony provided by Bevard's co-defendant wove the various events into a well-crafted tapestry depicting a burglary necessitated by the need for drugs. Evidence of a defendant's motivation for committing a crime is strong indicia of guilt. *State v. Kuhn*, 90 N.W. 733, 736 (Iowa 1902). Evidence of Bevard's prior abuse coupled with the fact he immediately traded the burgled items for methamphetamine does tend to show the impetus for the burglary. The evidence therefore was relevant.

Clearing the relevancy hurdle, we now turn to balancing the probative value of the evidence with the prejudice connoted by admission of prior bad acts. "While motive is not an element of a crime and proof thereof is not essential to sustain a conviction, it is of great probative force in determining guilt . . . ." *State v. Knox*, 18 N.W.2d 716, 724 (Iowa 1945). Despite the great probative value of motive, admission of drug abuse is fraught with prejudice. Given the current societal

emphasis placed on the eradication of substance abuse, the mere mention that a crime was motivated by drug addiction could provoke the jury to convict for improper purposes. In the present case, however, the probative value of the evidence outweighs any prejudice. The testimony did not infer that drugs are necessarily a motivation for all theft-related crimes. Rather, the evidence in this case provided a detailed account of all events surrounding the crime as well as the specific motivation for this crime. We offer, however, a caution. The mere inference that prior substance abuse is necessarily a motivation for theft-related crimes will not stand. There must be substantial and overt evidence, as in this case, that the crime was motivated to fund a present drug addiction.

IV. The Ineffective Assistance of Counsel Claim Is Preserved for Postconviction Relief.

Bevard contends his trial attorney was ineffective for failing to request a limiting instruction concerning drug use. Normally, "we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Query*, ____ N.W.2d ____ (Iowa App. 1999). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). The ineffective assistance of counsel claim rests upon the motivations and strategies of trial counsel. The record does not contain adequate facts to justly examine trial counsel's actions and is therefore preserved for postconviction relief.

V. Conclusion.

The trial court properly admitted as to motive Jay's testimony regarding Bevard's substance abuse. The ineffective assistance of counsel claim is preserved for full development of the facts. The trial court is affirmed.

AFFIRMED.