IN THE COURT OF APPEALS OF IOWA

No. 0-691 / 99-161
Filed January 10, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERTO RODRIGUEZ, a/k/a ROBERTO PEREZ, a/k/a DEE JAY GOTTSCH,
Defendant-Appellant.

FILED
JAN 10 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Defendant appeals following his conviction on the charge of first-degree murder. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeffrey Noble and Jamie D. Bowers, Assistant County Attorneys, for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

Defendant Roberto Rodriguez Perez appeals following his conviction for first-degree murder. He contends counsel was ineffective in failing to object to the aiding and abetting theory submitted to the jury. He also argues the trial court erred in admitting evidence in violation of Iowa Rules of Evidence 104(b) and 404(b). Finding Perez suffered no prejudice, we affirm.

Perez was accused of stabbing and killing a waitress at a Denny's restaurant in Des Moines at around 2:00 a.m. on April 14, 1998. The State asserted Perez's motive was robbery to get cash to supply his drug habit. On May 20, 1998, he was charged with murder in the first degree in violation of Iowa Code sections 707.1, 707.2(1) and 702.2(2) (1997) (count I), and robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (count II). Trial commenced on December 9, 1998. The jury returned a guilty verdict on count I; count II was not submitted. Perez was subsequently sentenced to life in prison. He now appeals.

I. Scope of Review. Claims of ineffective assistance of counsel are afforded a de novo review. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). In reviewing a trial court's decision to admit evidence, we reverse only if we find an abuse of discretion. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996). An abuse of discretion occurs when the district court has exercised its discretion on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. *Id.*

II. Ineffective Assistance of Counsel. At trial, the State's theory was that Perez alone killed the waitress, robbed the restaurant, and used the money

to buy drugs. However, because of Perez's defense, that an acquaintance, Steve Schnoebelen, had actually killed the waitress and Perez was only a witness to the crime, the State requested an aiding and abetting instruction as well. The trial court instructed the jury on alternative theories—either Perez committed the murder or he aided and abetted another. On appeal, Perez claims this was error because no evidence supported submitting the aiding and abetting theory. Therefore, he argues, his trial counsel rendered ineffective assistance by failing to object to the jury instruction setting out the aiding and abetting theory. He also contends that even if the aiding and abetting theory was properly submitted, the aiding and abetting instruction was not tailored to the specific intent crime of first-degree murder. *See* I Iowa Crim. Jury Instructions 200.8 (comment). Counsel also failed to lodge any objection in this respect.

In determining whether trial counsel was ineffective, we look at "'whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence.'" *State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000) (quoting *Snethen v. State,* 308 N.W.2d 11, 14 (Iowa 1981)). In order for Perez to prevail, the record must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Artzer,* 609 N.W.2d at 531 (citation omitted). Prejudice is found where there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Id.* (citation omitted). Prior case law suggests that an instruction on aiding and abetting or joint criminal conduct that lacks evidentiary support is reversible error without regard to prejudice. *State v. Mays,* 204 N.W.2d 862, 865 (Iowa 1996); *State v. Hershberger,* 534 N.W.2d 464, 466 (Iowa App. 1995). However, in those

cases the error was properly preserved. This case comes to us under the rubric of ineffective assistance of counsel and, therefore, we must address prejudice. Ordinarily, ineffective assistance of counsel claims are reserved for postconviction relief actions. *Id.* (citation omitted). However, when the appellate record is sufficient to permit a ruling, we will address the claims on direct appeal. *Id.* We deem this record sufficient.

We need not address whether Perez's counsel breached a duty by failing to object to the aiding and abetting theory in the instructions because we conclude Perez cannot show prejudice. *See State v. Speaks,* 576 N.W.2d 629, 633 (Iowa App. 1998) (stating appellate court may resort to the prejudice prong of ineffectiveness claim without first determining counsel's performance is deficient). There was overwhelming evidence of Perez's guilt as a principal.

At approximately 1:45 a.m. on April 14, two female customers observed a man they later identified as Perez enter the Denny's restaurant. He had on a long trench coat. He perused the smoking section and they later saw him sitting in the waiting area with the victim, the waitress Connie Osborn. The two women left at about 2:10 a.m. and Perez was still in the waiting area. The credit card receipt of one of the women customers was later found in the dead woman's hand. The time of the receipt was 1:59 a.m. Over $500 was missing from the cash register. It appeared the killer fled in Osborn's Trans Am, which was later found near the residence of an acquaintance of Perez's, Steve Schnoebelen.

Two more customers, Vickie Leach and Mark Varvel, arrived at 2:20 a.m. They found the restaurant empty. Varvel checked the bathrooms and found Osborn dead of multiple stab wounds in the men's restroom. Just a few blocks

away, a jogger found a bloody knife discarded on the street. Forensic tests later revealed the blood on the blade matched Osborn's. Furthermore, the knife was similar to, if not the same as, a knife seen in Perez's possession.

Later that morning, police were dispatched to Steve Schnoebelen's residence. Schnoebelen testified that Perez had first arrived at his residence on the morning of the murder around 3:00 a.m. carrying a handful of crack cocaine and a wad of cash in excess of what he usually had. At that time, Perez was no longer wearing the tan trench coat Schnoebelen had seen him wearing earlier in the evening. In an effort to get rid of Perez, Schnoebelen offered him a ride anywhere he wanted to go. Perez returned to Schnoebelen's later that morning. Perez was then arrested wearing shoes that had blood on them. Subsequent testing showed the blood was Osborn's. In the squad car, Perez volunteered that Schnoebelen had been with him at Denny's that evening. He also said Schnoebelen had come home, showered, put his clothes in a bag, and dumped them. Perez took officers to the asserted dumping location at 19th and Carpenter Streets. A tan trench coat was later discovered in another dumpster. It was identified as belonging to Perez. Blood on the coat was consistent with that of Osborn, as were blood stains found on Perez's clothes.

In addition to this significant amount of circumstantial evidence, several witnesses testified as to Perez's motive. He was very upset with Osborn in the days before her murder, believing she stole his wallet. He was quoted as saying "[s]he's going to get what she deserves," and he was "going to get even with that fucking bitch," and he was "going to kill that fucking bitch." Perez also had a significant drug habit to supply. Even if the case had been submitted without the

aiding and abetting theory, there is no reasonable probability the outcome would have been different.

III. Evidence of Prior Drug Transaction. A cab driver testified that Perez was an occasional passenger of his. One location where they went one time two months before the murder was 7th and College Streets, where Perez went to buy or sell drugs. Defense counsel lodged a relevancy objection but it was overruled. On appeal, Perez argues this testimony violated Iowa Rule of Evidence 404(b), governing evidence of prior crimes or bad acts.[1] The State contends the relevancy objection did not preserve error on the rule 404(b) issue.

The record created at trial is largely determinative of whether the appellate courts have sufficient information to review a trial court's ruling. *State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa App. 1999) (concluding generic relevancy objection did not preserve rule 404(b) issue for appeal). As with the defendant's objection in *Mulvany*, Perez's objection here was generic and immediately overruled, so the prosecution was unable to make a record to support the relevancy of the evidence. Furthermore, there was no record at all on the 404(b) issue. Given the limited record made by counsel, we conclude Perez failed to preserve error on this issue. *See id.*

Even if the error had been preserved, we find there was no abuse of discretion by the trial court in admitting this evidence. The State's case included the assertion that on the night of the crime, Perez dumped clothing twelve blocks

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[1] Rule 404(b) provides:

> (b) **Other Crimes, Wrongs, or Acts.** 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.

away at 19th and Carpenter, purchased drugs in that area, and returned to Schnoebelen's residence. Perez's familiarity with the area and knowledge he could acquire drugs there made it more plausible that he did so on the night of the murder. Furthermore, the cab driver's testimony was cumulative of the testimony of Traci Reed, who testified Perez frequently requested rides or she offered to give him rides to areas of town known for drug sales. No argument was made that this evidence was inadmissible. It was also no secret at trial that Perez had a drug habit. A significant amount of evidence was admitted about his drug use and how drugs were involved in the crime. This one incident cannot be considered more prejudicial than probative. The involvement of drugs in the crime also distinguishes this case from others such as *State v. Liggins,* 524 N.W.2d 181 ((Iowa 1994). We affirm on this issue.

IV. Evidence of Neighborhood's Character as "High Crime Area." A police officer testified that after Perez's arrest, he led police to the vicinity of the discarded evidence, a location which was characterized as a "high crime area" involving many narcotics investigations. On appeal, Perez objects to this characterization on grounds similar to those discussed in section III. He also asserts a foundational issue under Iowa Rule of Evidence 104(b). The State contends error was not preserved on any of these arguments.

The following colloquy took place during direct examination of Officer Emary:

> Q. So what happened next? A. And at this point we did go up to the location that he took us to, which would have been 1901 Carpenter.
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> . . .
>
> Q. Tell the jurors what type of area that is there on Carpenter. What – what landmarks are there or what type of an

area is it? A. Well, there's a hardware store there. There use to be a grocery store there at one time.

Q. Do you know the name of the hardware store? A. I can't think off the top of my head what the name is.

MR. POWERS: I think we can stipulate that it's Miller Hardware Store.

THE COURT: Very well.

Q. Does that sound right, officer? A. That's correct. It's a high crime area in that area.

Q. What do you mean by crime? What type of crime?

MR. POWERS: Objection, immaterial.

THE COURT: It's sustained at this point.

. . .

Q. Did you have occasion to investigate narcotics crimes in that area? A. Yes, sir.

MR. POWERS: Objection, not material. . . .

THE COURT: Do you want to approach the bench, please?

(A brief sidebar conference was held off the record.)

THE COURT: Okay. The objection is overruled pursuant to 104(b).

There are two objections at issue in this particular portion of the testimony. None was lodged to the "high crime area" characterization; the objection was lodged to the follow-up question, asking for the type of crimes committed in the area. The second objection was overruled pursuant to rule 104(b) which provides:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

There is no further record asking the court to withdraw the evidence because the condition was not fulfilled. We do not know what was said at the sidebar and we believe it was the defendant's duty to make the record on evidentiary objections. We conclude the error was not preserved.

In the alternative, Perez asks us to consider this issue under an ineffective assistance of counsel analysis. As in the foregoing section, Perez cannot

demonstrate prejudice. Similar testimony was admitted without objection. Drugs were an integral part of the evidence. There is no reasonable probability that the characterization of the particular area as "high crime" affected the result where drugs were interwoven with the crime. We affirm the conviction.

AFFIRMED.