

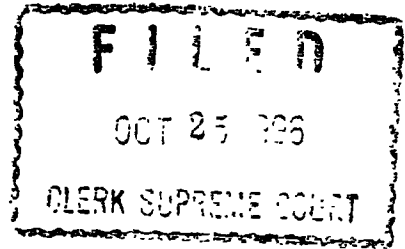
IN THE COURT OF APPEALS OF IOWA

No. 6-406 / 95-1561

STATE OF IOWA,
Appellee,

vs.

TROY L. WILSON,
Appellant.



Appeal from the Iowa District Court for Scott County, Patrick J. Madden,
Judge.

Troy Wilson appeals his convictions for first-degree robbery and use of a
juvenile in violation of Iowa Code sections 711.2 and 709A.6 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John Priester, Assistant State
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, William E. Davis, County Attorney, and Michael J. Walton and James Stein,
Assistant County Attorneys, for appellee.

Heard by Habhab, P.J., and Cady and Vogel, JJ.

VOGEL, J.

Troy Wilson appeals his convictions for first-degree robbery and use of a juvenile in violation of Iowa Code sections 711.2 and 709A.6 (1995). We affirm.

The defendant, Troy Wilson, was charged by trial information with first-degree robbery, second-degree theft, use of a juvenile, and felon in possession of a firearm,¹ stemming from the robbery of a Conklin's grocery store in Davenport. According to the testimony of Shadon Davis, on March 27, 1995, Davis took a shotgun from his house and went with Thomas Vogel to Wilson's house. While at Wilson's house, Vogel and Davis decided to steal a car. Vogel and Davis left Wilson's house, stole a Ford L.T.D. from a parking lot, and returned to Wilson's house. Davis, who was sixteen years old at the time of the crime, stated Wilson approved of Vogel and Davis stealing the car.

Davis testified it was Wilson's idea to rob a grocery store. Davis testified Wilson did all the planning for the robbery and also made the decision to use the shotgun. Davis testified they proceeded to Conklin's, where Wilson remained in the car while he and Vogel went into the store and robbed it. Davis had possession of the gun and fired it several times while in the store. When the police arrived, they observed a car driving slowly away from the back of Conklin's. The police stopped

¹ The felon in possession of a firearm charge was later dismissed.

the car. Wilson was driving the car and Davis and Vogel were passengers. The three men were arrested.

During a search of the car, the police found the shotgun and money in the back seat. Davis told the police during his interrogation that he was “messed up” on drugs and had an invisible tattoo from God on his forehead. Prior to trial, Davis entered a plea agreement whereby he pleaded guilty to first-degree robbery and second-degree theft, in exchange for the State dismissing a terrorism charge.

At trial, Davis stated he went along with the robbery to obtain money and to also gain acceptance into the Crips gang, of which Wilson was allegedly a member. Davis stated he participated in order to show Wilson he could do it. Defense counsel’s objection to this testimony was overruled. Wilson was ultimately found guilty of first-degree robbery and use of a juvenile on the theory of aiding and abetting. The jury found Wilson not guilty on the theft charge.

Wilson appeals.

I. Evidentiary Issue. Wilson contends the district court erred in allowing testimony concerning Wilson’s alleged gang membership. Our review of the district court’s evidentiary rulings is for an abuse of discretion. *State v. Knox*, 536 N.W.2d 735, 738 (Iowa 1995). We find an abuse of discretion only when the district court “exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994) (citation omitted).

Shadon Davis testified it was Wilson's idea to rob the grocery store, it was Wilson who suggested a shotgun be used to commit the robbery, and Wilson decided who would do what during the robbery. Davis testified he agreed to commit the robbery not only for the money, but also because he wanted to be involved in the Crips gang. Davis stated Wilson was a member of the gang and that he, Davis, agreed to commit the robbery as part of his initiation into the gang.

Wilson argues the evidence was inadmissible under Iowa Rule of Evidence 403 because the evidence was more prejudicial than probative. To support this argument, Wilson relies on *State v. Nance*, 533 N.W.2d 557 (Iowa 1995). Our supreme court in *Nance* stated "evidence of gang membership and activity is inherently prejudicial. It appeals to the jury's instinct to punish gang members." *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995). We find, however, *Nance* is not applicable to this case. Unlike the case before us, the testimony regarding gang membership in *Nance* did not relate to an essential element of the crime.

Wilson was charged with and convicted of the crime of using a juvenile, Davis, to commit certain offenses. The Iowa Code states:

It is unlawful for a person to act with, enter into a common scheme or design with, conspire with, recruit or use a person under the age of eighteen, through threats, monetary payment, or other means, to commit an indictable offense for the profit of the person acting with, entering into the common scheme or design with, conspiring with, recruiting or using the juvenile.

Iowa Code § 709A.6(2). Thus, in order for Wilson to be convicted, the jury must find he had procured the juvenile's involvement by use of threats, monetary payment, or by other means. We find the disputed testimony is directly relevant to an essential element of the crime under section 709A.6(2). The testimony was directly related to the element of Wilson's procurement of Davis's participation in the robbery "by other means." Those other means were the acceptance of Davis into the Crips gang. We find the evidence was both relevant and admissible.

We also note that while the district court did not find the evidence was admissible for the same reasons we do, this does not preclude us from affirming the ruling. We may uphold a district court's decision on any basis existing in the record, even though different from the one relied upon by the district court. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995).

II. Ineffective Assistance of Counsel. Wilson contends he was denied his right to effective assistance of counsel. Wilson argues defense counsel failed to properly cross-examine the police officers with their investigative reports and failed to cross-examine Shadon Davis with his deposition.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 5069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind

the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32.

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had the opportunity to respond to the allegations. *State v. Walker*, 538 N.W.2d 316, 321-22 (Iowa App. 1995). Such claims may be decided on direct appeal if the defendant fails to show one of the two prongs. *Id.* at 322.

In order for this claim to be preserved for possible postconviction proceedings, the defendant must state specific ways in which defense counsel's performance was inadequate *and* identify how competent representation would have probably changed the outcome. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). As Wilson has not met his initial burden, we can neither address his claim nor preserve it for possible postconviction proceedings.

AFFIRMED.

J

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