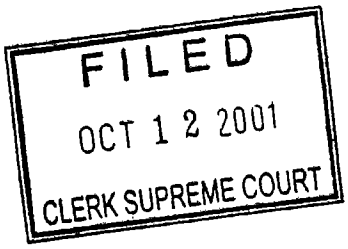
IN THE COURT OF APPEALS OF IOWA

No. 1-152 / 99-1444
Filed October 12, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

PHUOC THAN NGUYEN,
Defendant-Appellant.

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

Phuoc Than Nguyen appeals from the judgment and sentence entered upon his conviction for first-degree murder. **AFFIRMED.**

Alfredo Parrish and Andrew J. Dunn of Parrish, Kruidenier, Moss, Dunn, Montgomery & Boles, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and George Karnas and Susan Cox, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., and Streit and Hecht, JJ., but decided by Huitink, P.J., and Zimmer and Hecht, JJ.

HECHT, J.

On appeal from his conviction for first-degree murder, Phuoc Than Nguyen contends: (1) the evidence is insufficient to support his conviction; (2) the district court abused its discretion in limiting the testimony of an expert on eyewitness identification; (3) the district court abused its discretion by allowing evidence of Thanh Dao's attempt to purchase drugs; (4) his Sixth and Fourteenth Amendment rights were violated because he was unable to cross-examine Dao; (5) his Sixth and Fourteenth Amendment rights were violated when a witness's deposition was read to the jury; and (6) he was denied effective assistance of counsel in a number of respects. We affirm.

I. Factual Background and Proceedings. The jury could have found the following facts from the trial record in this case. On the afternoon of July 15, 1998, Nguyen and Dao approached "The Cloud," a Des Moines bar. Dao exited the car and expressed his interest in purchasing an ounce of cocaine. While Nguyen stayed near the car, several individuals accompanied Dao into an alley where he was beaten and robbed. After the robbery, Dao left the area on foot and Nguyen departed in the vehicle.

Later the same day, a car approached The Cloud and one or more of its occupants fired several gunshots into a crowd of people standing outside the bar. Monty Thomas was fatally shot. Two witnesses recorded the license plate of the vehicle in which the gun-toting assailants rode. When law enforcement officers stopped the vehicle later that evening, Nguyen was driving with Dao as his

passenger. Dao and Nguyen were charged with first-degree murder. The defendants were tried separately.

During Nguyen's trial, the district court admitted testimony into evidence regarding Dao's attempt to purchase cocaine prior to the shooting. The court also received into evidence a forensic psychologist's expert testimony regarding the general effect of stressful situations upon human perception, but excluded the expert's answers to case-specific hypothetical questions involving eyewitness identification. Nguyen was convicted of first-degree murder and appeals.

II. Sufficiency of the Evidence. Nguyen asserts there was insufficient evidence to prove he aided and abetted in the murder of Monty Thomas. To sustain a conviction on the theory of aiding and abetting, the record must contain substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission. *State v. Jefferson*, 574 N.W.2d 268, 277 (Iowa 1997). Proof of participation or encouragement need not be established by direct evidence; circumstantial evidence will suffice. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994).

Applying these principles, we find sufficient evidence in the record to establish Nguyen or someone he aided and abetted shot Monty Thomas. Witness testimony linked Nguyen to the incident before, during, and after the shooting. The testimony of Rodney Martin placed Dao and a man who looked like Nguyen at The Cloud shortly before the shooting. While the man resembling Nguyen remained in the driver's seat of the car parked near the bar, Dao and a

third individual solicited drugs from Martin. Martin testified when Dao was beaten and robbed following the unsuccessful cocaine purchase, Nguyen and the third person drove away from the bar. Confirming this testimony, Owen Smith described a conversation he had with Nguyen during the attempted drug transaction. After observing Dao walk down a nearby alley to buy drugs, Smith spoke with Nguyen for ten to fifteen minutes before Nguyen left the scene.

Nguyen was also recognized as the driver of the car that arrived at The Cloud transporting the armed participants in the shooting. Elgin Byron, a teller at the local bank where Nguyen was a regular customer, identified Nguyen as the driver of the car involved in the shooting. He recalled the black Mitsubishi Nguyen drove to the bar on the day in question as the same car Nguyen had brought to the bank on prior occasions. Shawn Duncan, who also observed the black automobile, identified Dao as an occupant of the car who fired a gun in his direction. Similarly, David Gray witnessed Dao shooting from the black car. Gray noted the car's license plate number, which matched that of the car Nguyen and Dao were arrested in later that evening.

After the shooting, law enforcement officers observed a black Mitsubishi matching the description of the vehicle and license plate number given by eyewitnesses to the crime. Upon stopping the car, they arrested its driver, Nguyen, and the vehicle's backseat passenger, Dao. Two bullet holes in the vehicle's trunk were of a size consistent with the .45 caliber casings found outside The Cloud. The man who loaned the black Mitsubishi to Nguyen testified the first time he noticed the trunk bullet holes was upon recovering his car from

police after Nguyen's arrest. Lastly, Nguyen made an incriminating statement regarding his involvement in the shooting. An officer testified upon telling Nguyen he was being arrested for his role in The Cloud homicide, Nguyen replied "all he did was drive the car."

Although no witness testified to seeing Nguyen fire a gun during the shooting, the circumstantial evidence linking Nguyen to the crime was sufficient to support his conviction for aiding and abetting in the murder of Monty Thomas. There was adequate evidence from which the jury could conclude Nguyen accompanied Dao as a driver at the time of the thwarted cocaine purchase before returning with him as a driver during the shooting. We conclude this direct and circumstantial evidence of Nguyen's involvement was sufficient to prove he assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission. Accordingly, we affirm on this issue.

III. Limited Expert Testimony. Nguyen claims the district court erred in limiting the testimony of his expert witness, Dr. Sannito, regarding psychological factors that bear on eyewitness identification. The exclusion of expert testimony is a matter committed to the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. *State v. Schutz*, 579 N.W.2d 317, 320 (Iowa 1998). Expert testimony directly expressing an opinion on the credibility of a witness is not admissible. *State v. Allen*, 565 N.W.2d 333, 338 (Iowa 1997).

Nguyen's trial counsel questioned Dr. Sannito at length regarding psychological factors that can influence witness perception and memory. Among other factors, he addressed the effect of stress, race, and the passage of time upon a witness's ability to perceive accurately. However, the district court prohibited counsel from posing fact-specific hypotheticals to the expert. As our supreme court has explained, "[t]here is a fine but essential line between testimony that is helpful to the jury and an opinion that merely conveys a conclusion concerning the defendant's guilt." *Allen*, 565 N.W.2d at 338. Here, the district court determined the proposed hypotheticals crossed the line from helpful to conclusory:

> [T]he expert witness in this case can render an opinion about psychological factors affecting eyewitnesses but not if they are tantamount to conveying a conclusion as to the credibility or truthfulness of a witness. While the definitions of "reliability," "accuracy," and "credibility" of a witness may not be identical, the context in which Defendants here seek to tender the hypothetical questions do . . . rise to the level of opinions by the expert concerning the credibility of witnesses.

Given the level of detail and case-specificity of the hypotheticals, it was not an abuse of discretion for the district court to prohibit the expert from answering them. The likelihood the jury would associate the hypotheticals with live witness testimony was substantial. The district court did not abuse its discretion by finding the disputed hypothetical questions called for opinions on the credibility of the testimony of eyewitnesses.

IV. Evidence of Dao's Attempted Drug Transaction. Nguyen contends the district court erred in admitting the testimony of Smith recounting Dao's

statements uttered in furtherance of his attempt to purchase drugs prior to the shooting. Nguyen maintains the testimony should have been excluded pursuant to Iowa Rule of Evidence 402 (relevance), rule 403 (exclusion of relevant evidence if it is "substantially outweighed by the danger of unfair prejudice"), and rule 404(b) (prior "bad acts" evidence). We review rulings on the admissibility of evidence for correction of errors of law. Iowa R. App. P. 4; *Bangs v. Maple Hills, Ltd.*, 585 N.W.2d 262, 265 (Iowa 1998).

The evidence of Dao's attempt to purchase drugs and the resulting beating and robbery constituted background evidence relevant to the motive for the shooting and the identity of the perpetrators of the crime. Evidence immediately surrounding the offense is admissible in order to show the complete story of a crime, even when it shows commission of another crime. *State v. Veal*, 564 N.W.2d 797, 812 (Iowa 1997). Accordingly, we find no abuse of discretion in the district court's ruling on Nguyen's rule 402 objection.

Our analysis of Nguyen's contentions based upon rules 403 and 404(b) requires a prejudice analysis. *See* Iowa R. Evid. 403 (exclusion of relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice"); *State v. Zeliadt*, 541 N.W.2d 558, 562 (Iowa Ct. App. 1995) (requiring consideration of the degree to which the jury was probably roused by the evidence objected to under rule 404(b)). Nguyen contends evidence of Dao's attempt to purchase drugs was unnecessary and calculated to arouse a prejudicial response in the jury. The State contends Dao's attempt to purchase drugs was an inextricable aspect of the transaction that formed the motive for the

killing. The State further asserts the evidence was not unfairly prejudicial against Nguyen because it was Dao who attempted to purchase the drugs. We find the State's contentions more persuasive. We find any prejudice to Nguyen from his mere association with one who attempted to purchase drugs was not of sufficient magnitude to justify reversal.

Over defendant's hearsay objection, the district court allowed testimony from Martin and Smith regarding Dao's attempt to buy cocaine from them. The admission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established. *State v. Barret,* 445 N.W.2d 749, 754 (Iowa 1989). The contrary is established when the record shows the challenged evidence did not impact on the jury's finding of guilt. *Id.*; *see also State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996) ("Admission of hearsay alone is not a valid ground for reversal in cases where the State upholds its burden of proving the challenged evidence did not impact upon the jury's verdict of guilty."). Assuming the hearsay evidence was improperly admitted, we are convinced Dao's statements did not impact on the jury's verdict. The testimony did not directly implicate Nguyen in the attempt to purchase drugs and merely indicated he remained in or near the car while Dao went into a nearby alley with his assailants. The possibility of prejudice to Nguyen from evidence of Dao's conduct is not sufficiently substantial as to deny Nguyen a fair trial in this case.

Nguyen also claims the district court's receipt into evidence of the attempted drug transaction deprived him of his Fourteenth Amendment right to due process. Nguyen failed to preserve error because he did not make this

contention in the district court. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) ("Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal.").

V. Right to Confrontation. Nguyen contends his Sixth Amendment right to confront witnesses against him was violated by the admission of statements made by Dao. In particular, he argues the testimony of Smith and Martin included inadmissible statements made by Dao concerning Dao's attempt to buy cocaine prior to the shooting. We review this constitutional claim de novo. *State v. Osmundson*, 546 N.W.2d 907, 909 (Iowa 1996).

Defendant asserts two grounds for this argument. First, he states the admission of Dao's statements raised a *Bruton* problem at trial. In *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Supreme Court held the admission of a non-testifying codefendant's confession implicating a defendant in a joint trial violated the defendant's right of confrontation. In this case, *Bruton* does not control because Nguyen and Dao were tried separately. *See State v. Ross*, 573 N.W.2d 906, 916-17 (Iowa 1998) (holding defendant did not have a Sixth Amendment claim because he was tried alone).

Nguyen next argues the district court's ruling admitting Dao's statements violated rights secured to him generally under the Sixth Amendment's Confrontation Clause. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). We conclude Dao was not a "witness against" Nguyen for purposes of the

Confrontation Clause. The statements attributed to Dao regarding the purchase of cocaine did not incriminate Nguyen in the attempted transaction. There was no evidence connecting Nguyen himself to the attempt to buy drugs. As a result, defendant was not denied his right of confrontation.

VI. Admission of Deposition Testimony. Nguyen also contends the admission of Martin's deposition testimony violated the Sixth Amendment Confrontation Clause. Our review of this constitutional claim is de novo. *State v. Osmundson*, 546 N.W.2d 907, 909 (Iowa 1996). The purpose of the Confrontation Clause is to provide the accused an opportunity to challenge testimony introduced by the state against him at trial by cross-examining the declarant's testimony. *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000) (quoting *State v. Froning*, 328 N.W.2d 333, 336-37 (Iowa 1982)). The Confrontation Clause requirement is met, even if the witness is not present for trial, when the following test is satisfied: (1) the witness is unavailable; and (2) defendant cross-examined the witness before trial. *State v. Wright*, 378 N.W.2d 727, 730-31 (Iowa Ct. App. 1985) Nguyen disputes the first prong of this two-part test.

A witness who invokes his Fifth Amendment privilege against self-incrimination is unavailable for purposes of the Confrontation Clause. *State v. Kellogg*, 385 N.W.2d 558, 560 (Iowa 1986). Despite Martin's exercise of his privilege at Nguyen's trial, Nguyen contends the witness was not unavailable. Defendant argues Martin waived the privilege by testifying at his deposition and could not subsequently invoke it at trial. We disagree.

The waiver of a Fifth Amendment privilege does not extend to subsequent proceedings. As noted by our supreme court, "[t]he general rule is that a waiver of a Fifth Amendment privilege is limited to the particular proceeding in which the waiver occurs." *Id.*

> The rule that a loss of privilege lasts no longer than the distinct stage at which the witness testified is "consistent with the spirit of the privilege," because it recognizes that a witness's admissions in a second appearance may exceed those previously made.

State v. Roberts, 622 A.2d 1225, 1235 (N.H. 1993) (quoting 1 *McCormick on Evidence* § 140, at 528 (John W. Strong ed., 4th ed. 1992)). Here, Martin had reasonable cause to apprehend his answers to questions at trial would expose him to prosecution. *See State v. Parham*, 220 N.W.2d 623, 627 (Iowa 1974) (finding witness may properly assert Fifth Amendment privilege if testimony could incriminate the witness as to other crimes). The State, noting the possibility of further investigation into the incident, refused to rule out at the time of Nguyen's trial the prospect Martin might still be charged with a crime for his involvement in the robbery of Dao. Moreover, Nguyen's counsel intended to question Martin during trial on matters beyond those discussed in the deposition. We conclude Martin did not waive his Fifth Amendment privilege by testifying at his deposition. Nor is the fact Martin had access to an attorney at his deposition--unlike the defendant in *Kellogg*--dispositive on this issue. Martin was unavailable at trial for Confrontation Clause purposes and the trial court correctly allowed his deposition testimony to be read to the jury.

Nguyen further contends he was denied due process because (1) Martin could have given exculpatory evidence; (2) the State withheld from Martin an

offer of immunity; and (3) the district court failed to grant the witness immunity. Our review of this constitutional issue is de novo. *State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998). A grant of immunity may be required if a witness possessing clearly exculpatory and essential information declines to testify on the ground he might incriminate himself. *Id.* at 772-73. Nguyen notes Martin's deposition testimony to the effect he was not "100 per cent sure" of his identification of Nguyen, and asserts Martin could have testified to Nguyen's "lack of involvement." We are unconvinced Martin was capable of giving clearly exculpatory testimony in this case. The fact the witness was less than one hundred percent sure of his identification is not "clearly exculpatory." Nguyen also generally asserts Martin could have testified "to Defendant's lack of involvement." However, after carefully reviewing Martin's deposition testimony, we find no support in the record for the contention Martin could have provided such exculpatory evidence. Accordingly, we conclude the district court did not err when it declined to grant Martin immunity.

VII. Ineffective Assistance of Counsel. Lastly, Nguyen claims his trial attorney was ineffective and urges two grounds for reversal. Our review of such claims is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App. 1994). To prevail, defendant must prove (1) counsel's performance fell outside a normal range of competency, and (2) defendant suffered prejudice as a result; that is, but for counsel's errors the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Ruesga*, 619 N.W.2d 377, 384 (Iowa

2000). In order to prove prejudice the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L. Ed. 2d at 698. "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome' of the defendant's trial." *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)). An ineffective assistance of counsel claim will fail if the defendant is unable to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L.Ed.2d at 699; *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995); *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984)).

Nguyen argues his attorney was ineffective because he failed to request limiting or cautionary instructions regarding Dao's prior bad act of attempting to purchase drugs from Smith and Martin and failed to file a motion for a new trial. The State replies Nguyen's ineffective assistance claims are without merit and should be rejected on direct appeal. We generally preserve ineffective assistance claims for postconviction proceedings to allow development of the record and to provide counsel an opportunity to defend the charge. *State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa Ct. App. 1999). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a

defendant's ineffective assistance claim. *Id.* We find the record before us sufficient to make a determination on the two ineffective assistance of counsel claims.

Although cautionary instructions are often given in cases where "other crimes" evidence is admitted, *State v. Delaney*, 526 N.W.2d 170, 176 (Iowa Ct. App. 1994), we conclude Nguyen cannot prove the prejudice prong of the *Strickland* test in this case. The record contains substantial independent evidence to convict Nguyen of first-degree murder on an aiding and abetting theory. In addition to Nguyen's incriminating statement made at the scene of his arrest, the State presented numerous witnesses identifying Nguyen as the driver of the car transporting the armed participants in the shooting. We find no reasonable probability the result of the proceeding would have been different had a limiting instruction been given. Nguyen also claims his trial counsel was ineffective when he failed to file a motion for new trial. The district court noted inconsistencies in the evidence and "a serious argument about the identification of [the defendant]" before overruling the motion for judgment of acquittal. Nguyen contends these evidentiary inconsistencies and the doubt as to his identification would have entitled him to a new trial under the weight-of-the-evidence standard if his counsel had filed a timely motion. We acknowledge the district court's discretion to grant a new trial if the verdict was contrary to the weight of the evidence such that a miscarriage of justice may have resulted. *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). However, we are also mindful of our supreme court's caution the discretion to grant new trials must be

exercised "carefully and sparingly." *Id.* at 659. After a careful review of the record, we find the evidence tending to prove Nguyen aided and abetted Dao in the murder was sufficient to sustain the conviction. Although we note some obvious inconsistencies in the evidence and acknowledge significant credibility issues with respect to some of the State's witnesses, we are unable to conclude the district court would have been required on this record to find the verdict was so contrary to the weight of the evidence that a new trial is required. Accordingly, we conclude Nguyen has failed to establish the prejudice prong of his ineffective assistance of counsel claim.

Having considered all issues properly before us on appeal, we hereby affirm Nguyen's conviction and sentence for first-degree murder.

AFFIRMED.