IN THE COURT OF APPEALS OF IOWA

No. 8-450 / 97-489

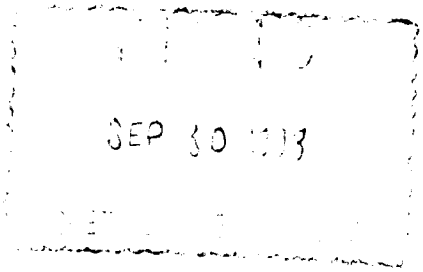
STATE OF IOWA,

Appellee,

vs.

MARK F. PEXA,

Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch and K.D.Briner, Judges.

Mark F. Pexa appeals the judgment and sentence entered following his convictions of second-degree theft and reckless use of explosive. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Steve Norby, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Streit, and Vogel, JJ.

CADY, C.J.

Mark Frederick Pexa appeals his convictions for second-degree theft and reckless use of explosives. He claims the district court abused its discretion by allowing evidence of the execution of a search warrant into evidence and his counsel was ineffective. We affirm the district court.

On June 23, 1996, police officers executed a search warrant at Pexa's home after he had been arrested for attempting to blow up a tree stump in his yard with an explosive device. The search warrant was issued for the purpose of locating explosive devices. During the execution of the warrant, officers noticed a number of tools with JD or JWD markings. The police suspected the tools belonged to a John Deere manufacturing company. The police therefore contacted a John Deere employee. Based upon the officers' observations during the execution of the first warrant and the conversation with John Deere employees, a search warrant was obtained and executed at Pexa's residence for John Deere tools on June 26, 1996.

Pexa filed a motion in limine prior to his second-degree theft trial objecting to any statements or references by witnesses to the June 23 search warrant. He claimed the evidence was not relevant and any relevance was outweighed by unfair prejudice. The trial court ruled the State could present evidence officers executed the June 23 search warrant and what the officers' observations led them to conclude. The State could not, however, explain the reason behind the issuance of the June 23 search warrant.

A jury found Pexa guilty of second-degree theft. He later pled guilty to reckless use of explosives. The district court sentenced him to an indeterminate five-year term for second-degree theft and a one-year term for the reckless use of explosives. The sentences were to be served concurrently.

On appeal Pexa claims the district court abused its discretion by admitting evidence concerning the June 23 search warrant and he received ineffective assistance of counsel.

I. Evidence Claim

The State first contends Pexa failed to preserve error on his motion in limine claim. Ordinarily, any error resulting from the court's ruling on a motion in limine is not preserved unless a timely objection is made when the evidence which was the subject of the motion in limine is offered at trial. *State v. Edgerly*, 571 N.W.2d 25, 29 (Iowa App. 1997). However, if the ruling on the motion in limine reaches the ultimate issue of admissibility, it is a final ruling and the objection need not be renewed at trial. *Id.*

In this case, the district court's ruling expressly admitted testimony concerning the execution of the search warrant and the officer's observations. It also expressly forbid the admission of evidence covering the reason behind the issuance of the June 23 search warrant. Pexa was therefore not required to renew his objection at trial to preserve error on this issue, and his claim is adequately preserved for our review.

On appellate review of an evidentiary ruling we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding

an abuse of discretion. *State v. Sallis,* 574 N.W.2d 15, 16 (Iowa 1998). Relevant evidence 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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 403.

Rule 403 does not render all prejudicial evidence inadmissible. *State v. Howell,* 557 N.W.2d 908, 912 (Iowa App. 1996). Instead, it only prohibits *unfairly* prejudicial evidence. *Id.* Examples of unfairly prejudicial evidence which may cause a jury to base its decision on something other than established facts include: evidence that "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action . . . ." *State v. Bayles,* 551 N.W.2d 600, 607 (Iowa 1996) (citing *State v. Plaster,* 424 N.W.2d 226, 229 (Iowa 1988)).

Pexa claims the trial court abused its discretion by admitting evidence officers executed a search warrant on June 23 and evidence of the officers' observations made during the execution. Specifically, he claims the evidence was not relevant and any relevance was outweighed by unfair prejudice. He asserts the admission of this evidence allowed the jury to speculate about the reason behind the June 23 search warrant and left the jury with the suspicion he was a career criminal. He also maintains the June 23 search warrant evidence was confusing to the jury and needlessly consumed time during trial.

The district court did not err in admitting the evidence surrounding the execution of the June 23 search warrant. The evidence was relevant not only to Pexa's ownership of the tools, but also explained how the State discovered the tools. Further, the limitation forbidding testimony of the reason behind the June 23 search warrant adequately protected Pexa from any prejudice. Finally, we note the references to the June 23 search warrant were minimal and were not a needless presentation of cumulative evidence or misleading to the jury.

II. Ineffective Assistance of Counsel

Pexa's claim of ineffective assistance of counsel involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Pexa must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). Pexa must therefore overcome the strong presumption of counsel's competence and that

counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

We will find counsel failed to perform an essential duty if defense counsel allows the defendant to plead guilty to a charge for which no factual basis exists and thereafter fails to file a motion in arrest of judgment challenging the plea. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Conversely, where a factual basis exists for the plea, counsel will not usually be found ineffective for allowing the defendant to plead guilty. *Id.* In determining whether a factual basis for Pexa's plea exists, we consider the entire record, including the minutes of testimony and the plea colloquy. *See id.* at 448-49; *State v. Hack*, 545 N.W.2d 262, 263 (Iowa 1996).

Iowa Code section 712.5 (1995) provides: "[a]ny person who shall so use fire or any incendiary or explosive device or material as to recklessly endanger the property or safety of another shall be guilty of a serious misdemeanor." Explosives do not include fireworks as defined in Iowa Code section 727.2. *See State v. Durgin*, 328 N.W.2d 507, 509 (Iowa 1983). Part of the distinction between explosives and fireworks depends upon the primary purpose of the device. *Id.* The fireworks statute deals with devices primarily intended for a visual or audible effect, while the

explosives definition covers devices intended to damage or destroy property by explosion. *Id.*

Pexa claims he received ineffective assistance of counsel due to his trial counsel's failure to prevent him from pleading guilty to the charge of reckless use of explosives when no factual basis existed for this plea and for failing to file a motion in arrest of judgment. He maintains that while he pled guilty to reckless use of explosives, he was actually using a firecracker which is not included in the definition of "explosive" in Iowa Code section 101A.1(3).

In this case Pexa used a powerful explosive device to attempt to remove a stump from his yard. Although Pexa referred to the explosives as firecrackers during the plea colloquy, the record indicates he was not using the device for a visual or audible effect. The minutes of testimony also establish several neighbors heard the explosion, and one family reported the explosion shook the walls of their home. Additionally, during the plea colloquy, Pexa admitted someone could have been injured by the explosives. A factual basis for Pexa's guilty plea to reckless use of explosives therefore exists in the record.

We have considered all of Pexa's claims and affirm the district court.

AFFIRMED.