IN THE COURT OF APPEALS OF IOWA

No. 0-312 / 99-764
Filed July 12, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERRICK SANTO WILLIS,
Defendant-Appellant.

FILED
JUL 12 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Defendant appeals from the judgment and sentence entered upon his conviction of first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, Melanie Keiper and Frank Severino, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Willis was initially charged with first-degree burglary and interference with official acts after he pointed a gun at a police officer in the course of an alleged burglary of a Kentucky Fried Chicken restaurant. Prior to trial those charges were dismissed, and Willis was instead tried on one count of first-degree robbery. Following the jury's guilty verdict, the district court entered a judgment of conviction sentencing Willis to an indeterminate twenty-five year term.

On appeal Willis contends the State's evidence was insufficient to support his robbery conviction. Willis also claims the district court erred by admitting evidence of his past drug use and that he was denied effective assistance of trial counsel.

II. Sufficiency of Evidence.

Review of a challenge to the sufficiency of the evidence is on assigned error. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). Willis's insufficiency of the evidence claim is premised on the State's failure to prove he intended to commit a theft. *See State v. Boley*, 456 N.W.2d 674, 679 (Iowa 1990) (conviction of robbery requires proof of intent to commit a theft). Willis cites the absence of evidence indicating he actually took or attempted to take anything of value from the restaurant. Willis also cites his testimony that he was hiding in the restaurant to escape from a vengeful drug dealer.

At trial, the State presented evidence indicating Willis parked his car on a poorly lit street a block from the restaurant. He entered the restaurant after it had

closed, wearing dark clothing armed with a loaded revolver. Willis moved the bank bags from the cabinet in the office triggering the motion detector near the office. When confronted inside the restaurant, he pointed a gun at a police officer and then fled. When arrested Willis told the arresting officer he needed money. Moreover, Willis's claims concerning fear of a drug dealer were noticeably absent from initial statements to police. Contrary to Willis's claims, this evidence sufficiently supports a finding he had the requisite intent to commit a theft, and we affirm on this issue.

III. Evidence of Prior Drug Use.

We review evidentiary errors for abuse of discretion. *State v. Query*, 594 N.W.2d 438, 443 (Iowa App. 1999). We initially acknowledge the State's claim that Willis failed to preserve error on this issue but decline to address the State's claim because we reach the same result on the merits.

In determining whether evidence of "other crimes, wrongs, or acts" is admissible, the trial court must employ a two-step analysis. Iowa R. Evid. 404(b). The court must first decide whether the evidence is relevant and there is clear proof the individual against whom the evidence is offered committed the prior acts. *State v. Zeliadt*, 541 N.W.2d 558, 560-61 (Iowa App. 1995). If the court finds it is relevant, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992); Iowa R. Evid. 403. A positive finding as to the second step overcomes the evidence's prima facie admissibility. *Query*, 594 N.W.2d at 443. Our supreme court has consistently held evidence of

narcotics sale or use in a nonnarcotics case is highly prejudicial and is exactly the kind of evidence which should be excluded. *State v. Crone*, 545 N.W.2d 267, 274 (Iowa 1996). However, error in admission of this evidence, like other evidentiary rulings, must be prejudicial. *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994).

As noted earlier, evidence of Willis's prior drug use was inherent in his factual defense. Because the State's drug evidence was no more than cumulative to that upon which Willis relied, we are unable to say he was prejudiced by its admission. We accordingly affirm on this issue.

IV. Ineffective Assistance of Counsel.

Willis argues should this court find error was not preserved, trial counsel was ineffective for failure to object to evidence of Willis's drug use during the State's cross-examination of other defense witnesses.

Our disposition of Willis's evidentiary claim is dispositive of this issue. Willis cannot show but for counsel's allegedly deficient performance the result of the proceeding would have been different.

The judgment and conviction of the district court is affirmed.

AFFIRMED.