

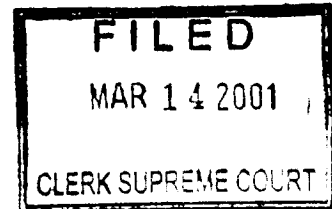
IN THE COURT OF APPEALS OF IOWA

No. 1-02 / 99-0727
Filed March 14, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THANH NGOC DAO,
Defendant-Appellant.



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

Thanh Ngoc Dao appeals from the judgment and sentence entered upon
his conviction for first-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds,
Assistant State Appellate Defender, for appellant.

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

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

STREIT, P.J.

A man convicted of shooting another man outside a bar complains the trial court erroneously allowed into evidence the deposition testimony of a hoodlum and the trial testimony of a conscientious citizen. We affirm his conviction for first-degree murder.

I. Background Facts & Proceedings.

Thanh Ngoc Dao was charged with shooting and killing a man outside a Des Moines bar called The Cloud. At Dao's trial, State witness Rodney Martin invoked his Fifth Amendment privilege against self-incrimination. The court allowed Martin's deposition testimony to be read to the jury. Martin testified that prior to the shooting Dao had approached him near The Cloud about buying drugs. Martin also testified he and his cousin then served as lookouts while another man beat and robbed Dao in a nearby alley.

The court also allowed the live testimony of State witness Deborah Doherty. Doherty testified that on the evening of the shooting she saw a car parked in the middle of the street in a neighborhood near The Cloud. She testified three Asian males—one of whom was Dao—got into the car.

Dao was convicted of first-degree murder. He appeals, claiming the court should not have allowed Martin's deposition testimony or Doherty's trial testimony. He also claims he received ineffective assistance of counsel.

II. Martin Deposition.

Dao claims the admission of Rodney Martin's deposition testimony violated his Sixth Amendment right to confront witnesses against him. Because

Dao's claim implicates a constitutional right, our review is de novo. *See State v. Holland*, 389 N.W.2d 375, 378 (Iowa 1986).

The Sixth Amendment's Confrontation Clause states the following: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him." U.S. Const. amend. VI. "The Confrontation Clause requirement is met, even if the witness is not present for the trial, when the following tests are 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). Only the first test is at issue in this case.

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). Although Martin invoked his privilege during Dao's trial, Dao argues Martin was not unavailable. According to Dao, Martin could not properly invoke his privilege because he waived it when he testified at his deposition.

A waiver of a Fifth Amendment privilege is generally limited to the particular proceeding in which the waiver occurs—whether that proceeding is a grand jury proceeding, a deposition, or some other separate preliminary proceeding. *See id.*; *State v. Roberts*, 622 A.2d 1225, 1235 (N.H. 1993). "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." *Roberts*, 622 A.2d at 1235 (quoting 1 *McCormick on*

Evidence § 140, at 528 (John W. Strong ed., 4th ed. 1992)). This concern was implicated in this case. At trial the State noted Martin could still be charged with robbery. Dao's counsel stated she had intended to ask Martin questions at trial that went beyond the questions she had asked him during his deposition. Martin thus had reasonable cause to fear that taking the stand at Dao's trial would lead to further self-incrimination. See *State v. Parham*, 220 N.W.2d 623, 627 (Iowa 1974). His waiver of his Fifth Amendment privilege did not extend to any proceedings beyond his deposition.

We recognize Martin had an attorney present at his deposition. This fact alone, however, does not dictate the result in this case. Martin was unavailable for purposes of the Confrontation Clause. The trial court did not err in allowing his deposition testimony to be read to the jury.

III. Doherty Testimony.

Dao also claims Deborah Doherty's trial testimony about seeing him get into a car parked in the middle of the street was inadmissible pursuant to Iowa Rule of Evidence 404(b). We review the trial court's rulings on the admissibility of this evidence for an abuse of the court's discretion. *State v. Sallis*, 574, N.W.2d 15, 16 (Iowa 1998).

Rule 404(b) reads as follows:

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.

In order to fall within the rule's "other purposes" exception, evidence of a defendant's "other crimes, wrongs, or acts" must be relevant for some other purpose than to show the propensity of the defendant to commit wrongful acts. *State v. Uthe*, 542 N.W.2d 810, 814 (Iowa 1996). Moreover, the evidence's probative value must not be "substantially outweighed by the danger of unfair prejudice." See *id.*; Iowa R. Evid. 403.

Doherty's testimony does not implicate rule 404(b). See *State v. Anderson*, 517 N.W.2d 208, 213 (Iowa 1994). Doherty testified she saw Dao and two other Asian men enter a dark car that had been parked in the middle of the street with its doors open--she did not testify about any other conduct by Dao. Doherty also testified she wrote down a brief description of what she had seen, including the car's license plate number. Such evidence did not, as Dao asserts, "unfairly insinuate [he] had been involved in another crime" on the evening of the shooting at The Cloud. The trial court did not abuse its discretion in allowing Doherty's trial testimony.

IV. Ineffective Assistance of Counsel.

Finally, Dao claims his trial attorney was ineffective. Our review of such claims is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App. 1994). To prevail, Dao must show his attorney's performance fell outside a normal range of competency and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for his attorney's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S.

668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

Dao argues his attorney should have sought to exclude evidence of Dao's involvement in drug activity. He also argues his attorney should have made a record on the issue of whether the \$150,000 restitution award the sentencing court imposed pursuant to section 910.3B of the Iowa Code was appropriate in this case "given the details of the victim's life." Dao's attorney was not ineffective for failing to pursue such meritless issues. See *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). The drug evidence was necessary to tell the story of the shooting at The Cloud. See *State v. Garren*, 220 N.W.2d 898, 900 (Iowa 1974). The restitution award was mandatory because Dao's felonious actions resulted in the loss of human life. See *State v. Klawonn*, 609 N.W.2d 515, 522 (Iowa 2000). We affirm Dao's conviction and sentence for first-degree murder.

AFFIRMED.

000413