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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-380 / 93-1527

STATE OF IOWA,

Appellee,

vs.

JOE WILLIE CANNON,

Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of first-degree murder and first-degree burglary, in violation of Iowa Code sections 707.1 and .2 and 713.1 and .3 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie H. Brown, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Scott D. Brown, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

HAYDEN, J.

Orley Culp died after someone broke into his house and beat him with a baseball bat. Shoe prints taken from broken plexiglass at Culp's home and from envelopes at a broken-into Wendy's restaurant matched tennis shoes found outside of Joe Cannon's residence. Cannon was charged with first-degree murder and first-degree burglary.

Cannon filed a motion in limine seeking to exclude "[a]ny evidence concerning an alleged prior robbing of or theft from Orley Culp by defendant." The motion was overruled following a hearing.

At trial, Cannon testified he had never met Culp and had never been inside of Culp's residence. The State recalled witness Karen Herd, and the following occurred:

> Q. Have you been in [Culp's] house?
> A. Yes, I have.
> Q. Who were you in that house with?
> MR. WAPLES: Your Honor, at this point I'm going to object. I think the question and this line of testimony does not reflect proper rebuttal testimony. I think Mr. Cannon's testimony was that he did not recall--or to the best of his recollection, he hadn't been there, or didn't recollect being there.
> THE COURT: Overruled. You may answer.
> A. Me and Joe Cannon.
> * * *
> Q. Were you there for the purpose of attempting to get money from Mr. Culp? A. Yes, I guess.

Cannon was convicted as charged. The trial court sentenced him to a life term on the murder conviction and a term not to exceed twenty-five years on the burglary conviction, the terms to be served consecutively. Cannon appeals.

Cannon challenges Herd's testimony above on the basis it constitutes evidence of other crimes, wrongs, or acts inadmissible pursuant to Iowa Rule of Evidence 404(b). He also contends if error was not properly preserved on this ground, trial counsel was ineffective. Each issue will be discussed in turn.

I. **Admissibility of Evidence**.

Defendant complains Herd's rebuttal testimony quoted above was "prior bad acts" testimony in violation of Iowa Rule of Evidence 404(b). Defendant contends the admission of this testimony was reversible error.

This objection to admissibility based on Rule 404(b) is raised for the first time on appeal. Defendant contends error was preserved by his August 16, 1993, motion in limine. Reversible error cannot be predicated merely on making a motion in limine. Compare State v. Judkins, 242 N.W.2d 266, 269 (Iowa 1976) with State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979). Record of the objection must be made during trial when the evidence is offered. Judkins, 242 N.W.2d at 269.

Defendant also argues error was preserved by his objection at trial. We disagree. As the record reflects, trial counsel's objection was Herd's testimony constituted improper rebuttal testimony. Trial counsel failed to mention Rule 404(b) or "prior bad acts" evidence. A party cannot specify one reason for objection at trial and rely on a different one on appeal to challenge an adverse ruling.

State v. Bean, 239 N.W.2d 556, 560-61 (Iowa 1976), cert. denied, 429 U.S. 824 (1976).

Furthermore, there is even a serious question as to whether Herd's testimony was about a "prior bad act" in violation of Rule 404(b). Given Herd's failure to provide details and her vague and brief description of what transpired, it is doubtful the jury interprets Herd's testimony as evidence of a prior crime. Indeed, the record reveals the victim did loan money to various people and "[if] he liked [something], he bought it." Given this testimony, the jury could reasonably have understood Herd and defendant went to the victim for a loan or in the hopes he would buy something they were selling.

We have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974) (citations omitted). For this reason, the trial court is affirmed on this issue.

II. Ineffective Assistance of Counsel.

Defendant argues alternatively if error was not preserved, this omission is attributable to ineffective assistance of counsel. When a defendant alleges the denial of a constitutional right, the appellate review is de novo, based on the totality of the circumstances. Polly v. State, 355 N.W.2d 849, 854 (Iowa 1984) (citations omitted).

To prevail on a claim of ineffective assistance, a postconviction applicant must show (1) his counsel failed to perform an essential duty and (2) the failure prejudiced applicant. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989). Applicant has the burden to prove both of these elements by a preponderance of the evidence. Id.; Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694 (1984).

The Iowa Supreme Court has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. Taylor, 352 N.W.2d at 685. The court quoted Strickland v. Washington:

> The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N.W.2d at 685 (quoting Strickland, 466 U.S. at 697). Pursuant to Taylor v. State, we may affirm applicant's conviction because he has not failed to prove prejudice, without deciding whether there was a failure of duty. See Taylor, 352 N.W.2d at 685.

Upon a review of the record in this case, we determine applicant has failed to satisfy the prejudice component of an ineffectiveness claim. See Taylor, 352 N.W.2d at 685 (citing Strickland, 466 U.S. 668). There are several reasons for the lack of prejudice here.

First, as noted earlier and as defendant concedes, Herd was rather vague about her and defendant's attempt to get money from the victim. It is arguable whether the testimony at issue was even interpreted by the jury as evidence of prior bad acts.

Second, the alleged prior bad act was hardly a noticeable blotch on an otherwise spotless record. Defendant readily admitted at trial he was a convicted felon (specifically, he had multiple burglary convictions), he had a crack cocaine habit, he used crack approximately five times on the evening the victim was murdered, he is an "ex-alcoholic" because he "drink[s], but . . . doesn't need to drink", he would steal to buy crack, and he lied to police regarding his whereabouts on the night of the murder. Clearly, the jury would not have been shocked by Herd's "revelation."

Third, the jury received a cautionary instruction on the evidence in question. Only in extreme cases will a cautionary instruction be insufficient to remove danger of prejudice. State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982) (citation omitted). This is not an extreme case.

Fourth, the State's case against defendant was strong. Defendant admitted he committed a burglary at Wendy's on May 4, four days before the murder. Police found tennis shoe prints on an envelope at Wendy's. Tennis shoes imprints were also discovered at the murder scene on a piece of broken plexiglass. During the execution of a search warrant on May 9, a pair of tennis shoes were discovered behind defendant's residence. The State's expert testified shoe prints found at Wendy's were consistent with defendant's shoes. He further testified the right shoe made the shoe prints found at the murder scene "to the exclusion of any other shoe ever produced."

Defendant also made incriminating statements on two different occasions. On the night of the murder, he told Karen Herd he "hit somebody." On May 10 defendant called Tansha Gordon from jail, crying. He told Gordon he "hit [an] old man and robbed him." In fact, the victim died from head injuries which were consistent with the baseball bat found at the murder scene. On the night of the murder, witnesses noted defendant had an injured hand for which he was requesting ice and was acting nervous and anxious to get home.

Finally, on the night of the murder, defendant was consuming crack cocaine and was looking for money to purchase additional crack. As discussed earlier, defendant knew the victim and on a prior occasion, had attempted to obtain money from him.

Defendant has failed to demonstrate any prejudice. Under this record defendant was not denied effective assistance of counsel.

Judgment of the trial court affirmed.

AFFIRMED.