IN THE COURT OF APPEALS OF IOWA

No. 8-524 / 97-1173
Filed February 24, 1999

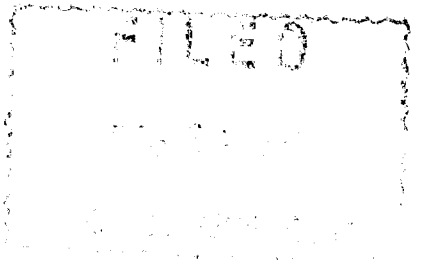
STATE OF IOWA,

Appellee,

vs.

CHLORIA BOUNDS,

Appellant.



Appeal from the Iowa District Court for Linn County, Patrick Grady, Judge.

Defendant Chloria Bounds appeals from judgment and sentence entered for wanton neglect of a dependent adult. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Denver D. Dillard, County Attorney, and Theresa Seeberger, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., Huitink, J., and Perkins, S.J.,* but considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997), deceased November 6, 1998.

VOGEL, J.

Defendant-appellant Chloria Bounds appeals from the judgment and sentence entered after a jury found her guilty of wanton neglect of a dependent adult in violation of Iowa Code section 726.9(1) (1995). Defendant asserts: (1) there was insufficient evidence to sustain the guilty verdict; (2) she received ineffective assistance of counsel because her attorney failed to properly object to evidence of her possession and use of marijuana; and (3) the district court erred in ruling it did not have authority to suspend the minimum fine. We affirm.

Background facts. Defendant Chloria Bounds was raised by her aunt, Inez Bounds. After receiving training as a nurse's aid and working in Chicago, defendant returned to Cedar Rapids in 1986 to live with Inez. Inez died at home on December 19, 1995. After an investigation, the State charged defendant with wanton neglect. In January of 1997, a jury found defendant guilty as charged. Defendant appeals.

I. Insufficient evidence. Defendant first argues there was insufficient evidence to sustain the guilty verdict. To convict defendant of wanton neglect of a dependant adult, the State needed to prove she was a caretaker who knowingly acted in a manner likely to be injurious to the physical, mental, or emotional welfare of a dependent adult. *See* Iowa Code § 726.8.[1]

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[1] Iowa Code section 726.8 reads in part:

1. A caretaker commits wanton neglect of a dependent adult if the caretaker knowingly acts in a manner likely to be injurious to the physical, mental, or emotional welfare of a dependent adult. Wanton neglect of a

We review substantial evidence claims on error. Iowa R. App. P. 4; *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). We are bound by the verdict unless the verdict is not supported by substantial evidence. *See State v. Lewis*, 514 N.W.2d 63, 65-66 (Iowa 1994). In making this determination, we must consider all the evidence in the light most favorable to the State. *State v. Peck*, 539 N.W.2d 170, 172 (Iowa 1995).

For purposes of section 726.8, a dependent adult means a dependent adult as defined in section 235B.2(4):

> [A] person eighteen years of age or older who is unable to protect the person's own interests or unable to adequately perform or obtain services necessary to meet essential human needs, as a result of physical or mental condition which requires assistance from another . . . .

Iowa Code § 235B.2(4).

Section 726.8 uses the meaning of caretaker found in section 235B.2(1):

> [A] related or nonrelated person who has the responsibility for the protection, care, or custody of a dependent adult as a result of assuming the responsibility voluntarily, by contract, through employment, or by order of the court.

Iowa Code § 235B.2(1). A caretaker "embraces both individuals who have legal and nonlegal responsibility to care for and oversee an adult." *State v. Johnson*, 528 N.W.2d 638, 641 (Iowa 1995).

> mental, or emotional welfare of a dependent adult. Wanton neglect of a dependent adult is a serious misdemeanor.

Iowa Code § 726.8(1) (1997).

Defendant contends Inez was strong-willed and made decisions about her own care, particularly whether or not to eat or take her medication. Consequently, defendant contends the evidence does not support that Inez was a dependent adult nor that she was her caretaker.

Defendant was trained as a nursing aid and had experience caring for the elderly in nursing homes. Despite this experience, the evidence at trial supported that she did not properly care for Inez. Inez relied on defendant to give her food, bathe her, tend to her bathroom needs, take her to doctor appointments, fill her prescriptions and see that she took her medication. Inez's doctor testified that he explained to defendant the importance of the medical treatment as well as how to administer Inez's medication. However, the State introduced evidence that Inez missed scheduled doctors' appointments in the six months before her death and failed to take medications her doctor testified were necessary to treat high blood pressure and congestive heart failure. Inez's pharmacist further testified that all of Inez's prescriptions were overdue for refills when she died, yet many of her medications had more than half the pills left in the bottle.

Other witnesses testified to observing feces on the floor of Inez's room, soiled linens on her bed, Inez in soiled clothes and in obvious need of a bath. In addition, Inez lost over forty pounds in the last eight months of her life when she was dependant on defendant for food. Even when Inez was mobile, she was unable to get food for herself because defendant had locked the kitchen to keep her from leaving

the stove on. Defendant claimed Inez would not ask for food and would eat only when she wanted to; however, one witness who brought some food to Inez testified that she was hungry and ate well during her visit.

Defendant advances she had health problems of her own and received no assistance with Inez's care. She also points out that although the Department of Human Services investigated a complaint regarding Inez's care, it took no further action. Defendant's contentions are facts the jury was free to consider with the State's evidence in making its decision as to whether the State proved defendant was guilty beyond a reasonable doubt. There was, however, in considering the evidence in the light most favorable to the State, substantial evidence to support the jury's verdict.

II. Ineffective assistance. Defendant next contends she received ineffective assistance of counsel during trial because her attorney failed to properly seek exclusion of defendant's possession and use of marijuana. She contends the evidence should have been excluded.

On the day of the trial, defendant's attorney filed a motion in limine seeking to prevent the State from eliciting testimony about defendant's use of marijuana. The district court overruled the motion, finding defendant's drug use was relevant to show her knowledge and whether her conduct was willful and intentional under Iowa Code section 726.8. The court further found the testimony was not barred by Iowa Rule of Evidence 404(b).

Under Iowa Rule of Criminal Procedure 10(4), motions in limine are to be made at least nine days before trial. However, we find no breach of duty by defendant's attorney. Defendant's motion was denied on the merits, not because it was untimely. *See State v. McCurry*, 544 N.W.2d 444, 448 (Iowa 1996) (even though counsel filed an untimely evidentiary motion, there was no breach of professional duty where counsel nonetheless secured a ruling on the merits). In addition, defendant's trial counsel renewed his objection to the marijuana evidence during trial. *See Id.* (timely objection at trial to evidence can be enough to cure any claimed breach of duty to file a timely motion to suppress such evidence).

III. Admissibility of marijuana evidence. Although Bounds raised this issue primarily in the context of ineffective assistance, she also contends that the court erred in admitting the marijuana evidence. She asserts the evidence was not relevant, and even if it were, the relevancy was outweighed by the inherent prejudice.

At trial, defendant's neighbor, Barbara Turnish, testified that during a visit she had entered defendant's bedroom and observed her rolling marijuana joints. Defendant stated, "Oh, you caught me. I'm rolling my joints, my marijuana here. I've got a pretty good supply." The trial court ruled defendant's use of intoxicants was relevant to show knowledge and was also relevant to show whether defendant's conduct was willful and intentional.

In considering whether or not the evidence should have been admitted, we review for an abuse of discretion. *Shawhan v. Polk County*; 420 N.W.2d 808, 809

(Iowa 1988). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *See State v. Schaffer*, 524 N.W.2d 453, 455 (Iowa App. 1994).

The admission of the evidence is governed by Iowa Rule of Evidence 404(b).[2] To admit evidence under this rule, it must be relevant. *See State v. Howell*, 557 N.W.2d 908, 911 (Iowa App. 1996). However, relevant evidence may be inadmissible if the probative value of the evidence is outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 403.

The evidence indicated that defendant used an illegal drug while her elderly aunt was in her care and completely dependent on her for every need. The jury could have inferred from defendant's drug use that at times she would become "high." As with the use of any intoxicant, defendant's ability to properly care for her aunt could be compromised when she was using marijuana. For this reason, defendant's drug use bears directly on the crime charged and the jury was properly allowed to consider this evidence.

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[2] Rule 404(b) provides that:
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.

We recognize that evidence of drug use can be prejudicial. *See Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 811 (Iowa App. 1995). However, in this case the marijuana evidence was elicited from a witness who was primarily called to describe the deteriorating condition of the home as well as Inez's poor condition as observed during a visit. The only mention the State made of the evidence in closing was as a challenge to defendant's excuse that she had been experiencing financial problems; the State pointed out that she apparently had sufficient cash to purchase marijuana.

There was substantial evidence presented at trial to support that defendant committed wanton neglect. We should only reverse when justice would not be served in allowing the district court judgment to stand. *See Shawhan*, 420 N.W.2d at 810. For these reasons, we find the evidence was properly admitted.

IV. Minimum fine. Defendant finally contends the district court had authority to suspend the minimum fine. She argues the district court erred in not doing so.

Defendant was sentenced to a jail term of 365 days, with all but sixty days suspended. During the sentencing hearing, the district court indicated it would suspend the minimum fine of $250. However, in its final judgment and sentence, the court imposed the fine pursuant to Iowa Code section 903.1, stating it did not have the authority to suspend the minimum fine.

Defendant's claim raises an issue of statutory interpretation. Thus, our review is for correction of errors at law. *See State v. Daniel*, 574 N.W.2d 333, 335 (Iowa 1998).

Iowa Code section 903.1(1)(b) contains the general sentencing provisions for serious misdemeanor offenses:

> 1. If a person eighteen years of age or older is convicted of a simple or serious misdemeanor and a specific penalty is not provided for . . . the court shall determine the sentence, and shall fix the period of confinement or the amount of fine, *which fine shall not be suspended by the court,* within the following limits:
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> b. For a serious misdemeanor, there shall be a fine of at least two hundred fifty dollars but not to exceed one thousand five hundred dollars. In addition, the court may also order imprisonment not to exceed one year.

Iowa Code § 903.1(1)(b) (1997) (emphasis added).

We read the general sentencing provisions of chapter 903 in *pari materia* with specific sentencing provisions found elsewhere in the code. *See State v. Hildebrand*, 280 N.W.2d 393, 397 (Iowa 1979). However, we also recognize the specific language of a statute controls over the general misdemeanor sentencing provisions of section 903.1(1)(b). *See, e.g., State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997); *State v. Sandifer*, 570 N.W.2d 256, 257 (Iowa App. 1997); *State v. Gobeli*, 342 N.W.2d 898, 899 (Iowa App. 1983).

Defendant was convicted under Iowa Code section 726.8. That section provides no specific sentencing guidelines, stating only that wanton neglect of a

dependent adult is a serious misdemeanor. Therefore, the general guidelines of 903.1(1)(b) applied, and the court did not have discretion to suspend the fine. *See* Iowa Code § 903.1(1) ("fine shall not be suspended by the court"). *Cf. State v. Ayers,* ____ N.W.2d ____ (Iowa 1999) (holding that courts have discretion to suspend fines for aggravated misdemeanors under 903.1(2) based, in part, on the absence of express language as found in 903.1(1), which prohibits suspension of fines for simple and serious misdemeanors).

Having considered all issues properly before us on appeal, we hereby affirm defendant's conviction and sentence.

AFFIRMED.

All judges concur except Sackett, C.J., and Huitink, J., who concur in part and dissent in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I would reverse and remand for a new trial.

Defendant was found guilty of wanton neglect of her Aunt Inez. This case paints the sad picture of a once independent and strong Inez, through the aging process, being robbed of her independence and strength. It also shows defendant being thrust into the role of caretaker for Inez, who once was defendant's caretaker. The situation is complicated by Inez's direction she did not want to spend her final years in a nursing home. The evidence shows the frustration both defendant and Inez felt in experiencing an erosion of their prior roles. It further shows the difficulties each had in assuming the new role. Defendant contends Inez, an aunt who raised her, was strong-willed and made decisions about her own care, most particularly in areas of not eating or taking her medication. Defendant advances she had health problems of her own and received no assistance with Inez's care.

Defendant challenges whether there was substantial evidence to support her conviction. The majority has found there is substantial evidence. Giving the State's evidence the deference it receives in our review, I agree. Although, a fact finder easily could have made other inferences and returned with a verdict of acquittal.

In making my assessment, I find particularly relevant the testimony of Aletha Panek, a social worker for the Iowa Department of Human Services. There was a complaint and Panek made an unannounced visit to the Bounds' home on December 7, 1995. Inez died on December 19, 1995, only twelve days later.

Panek testified at the time of her visit she talked to Inez, who was sitting in a chair in her bedroom. There was a functioning baby monitor in the bedroom. Though Panek found no sheets on the bed, there were blankets. Inez was dressed in a sweat suit and Panek learned Inez could not control her elimination. When asked, Panek said she did not observe any particular odor about Inez. Inez told Panek she had not eaten that day. Panek asked defendant about this and defendant said Inez had not asked for food. Panek told defendant to present food at given times. Defendant said Inez had quit eating for a time because of problems with her dentures. Her dentures were replaced at the University of Iowa Hospitals. Panek confirmed this fact. Panek also discussed with defendant Inez's medication, problems Inez had with her heart, and problems suffered from old age. Panek was told by defendant Inez would spit out medication and only eat when she wanted to eat. On leaving the Bounds' home on December 7, Panek testified she did not ask for immediate intervention.

Defendant called Panek on December 13 to tell her she was not taking Inez to the doctor because it was icy, and again on December 15 because she said Inez would not go.

At trial, Panek was asked:

> Q. Did any discussions come up involving services or placement? A. Yes. I spoke to [defendant] about the possibility of services. . . . She stated she had talked to the last person from the department that had come out and that she could not afford the services because they were, I believe, approximately eight dollars per hour, and that she and her mother could not afford that. They were having some financial difficulties.

> Q. Was placement ever discussed? A. She told me that her mother did not wish to go to a nursing home.

Had the situation been so serious when Panek visited, the State should have offered assistance rather than charge defendant for doing the best she could for Inez after the State provided no help. Additionally, it must be remembered Inez was an adult legally capable to make her own care decisions. She was able to communicate. Decisions as to whether she ate or took medications remained her own.

Because I find different inferences could be made from the evidence, I disagree with the majority's ruling on the admission of evidence defendant rolled and smoked marijuana. The admission of the evidence is governed by rule 404(b):

> 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.

Iowa R. Evid. 404(b). To admit evidence under this rule, it must be relevant. *See State v. Howell*, 557 N.W.2d 908, 911 (Iowa App. 1996). Relevant evidence may be inadmissible if the probative value of the evidence is outweighed by the danger of unfair prejudice. Iowa R. Evid. 403.

The basic test of relevancy is whether the evidence offered would make the desired inference more probable than it would be without the evidence. *See State v. Casady*, 491 N.W.2d 782 (Iowa 1992). The trial court ruled defendant's use of intoxicants was relevant to show knowledge and was also relevant to show whether defendant's conduct was willful and intentional. There is, at best, a tenuous

connection between the alleged drug use and the criminal behavior of which defendant was accused. Marijuana use was not crucial to the State's case and bore little relation to the crime charged. *Compare Shawhan v. Polk County*, 420 N.W.2d 808, 809 (Iowa 1988) (ruling admission is justified where there is a showing the use of an illegal drug has relation to the incident in question).

Even if the evidence was relevant, the trial court abused it discretion in concluding the probative value of the evidence outweighed the danger of unfair prejudice. In determining whether evidence is unfairly prejudicial, we consider the following factors:

> (1) [T]he actual need for the evidence in view of the issues and the other available evidence, (2) the strength of the evidence showing that the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and (4) the degree to which the jury will probably be roused by the evidence improperly.

Howell, 557 N.W.2d at 912.

Evidence of drug use is prejudicial. *See Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 811 (Iowa App. 1995). The introduction of such evidence could cause the jury to consider the evidence shows the drug user is a bad person and could prejudice his or her case. *Id.*; *see also United States v. Ong*, 541 F.2d 331, 339-40 (2d Cir. 1976) ("there are few subjects more potentially inflammatory than narcotics and thus such evidence should usually be excluded in a non-narcotics trial").

The prejudice of the evidence comes forth from the majority statement, "The jury could have inferred from the defendant's drug use that at times she becomes

'high.'" The admission of evidence of defendant's drug use could have improperly affected the jury's decision. The jury could conclude from this evidence defendant was a bad person and convict her for those reasons rather than because the State had proven wanton neglect. On the other hand, the probative value of the evidence is negligible. Little evidence was offered to show a connection between the drug use and the crime charged.

The error affected the substantial rights of defendant. The district court specifically stated the drug use would be used to determine defendant's state of mind under the wanton neglect statute. Furthermore, evidence of drug use can be so inflammatory as to taint the jury's perception of defendant as well as the entire judicial proceeding. For these reasons, I would reverse and remand for a new trial.

Huitink, J., joins this partial dissent.