

IN THE COURT OF APPEALS OF IOWA

No. 8-400 / 97-733

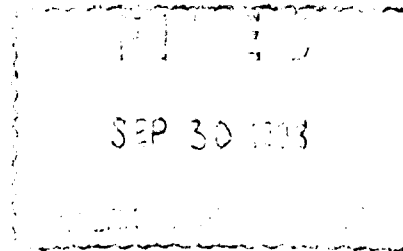
STATE OF IOWA,

Appellee,

vs.

DAVID PAUL FLORES,

Appellant.



Appeal from the Iowa District Court for Polk County, Richard G. Blane, II,
Judge.

David Paul Flores appeals from his convictions for first-degree murder,
attempt to commit murder, and terrorism. **AFFIRMED.**

Paul Rosenberg & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steven M. Foritano and Daniel
Voogt, Assistant County Attorney, for appellee.

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

PER CURIAM.

David Flores appeals the judgment and sentence following his convictions for first-degree murder, attempt to commit murder, and terrorism. He claims the district court erred by erroneously admitting certain letters and testimony into evidence, and by allowing the State to knowingly call a witness who would refuse to answer questions. He also asserts insufficient evidence existed to support the convictions and his counsel was ineffective. We affirm the district court.

The events giving rise to this case surround the death of Phyllis Davis. Davis was killed while driving home from work after she unwittingly drove between two vehicles whose occupants were engaged in a gun battle. The bullet that killed Davis was a .22 caliber slug. Four .22 caliber shell casings were found near the area where she was killed.

The eye-witness testimony detailing the events which led to Davis's death was conflicting. Several witnesses observed a brown Oldsmobile occupied by three or four black males traveling at a high rate of speed. The occupants of the Oldsmobile pulled into a lot near a home and began firing shots at a distinctive black Blazer on the opposite side of the street. Some of the witnesses testified only one person occupied the Blazer, while another witness testified several people were in it. Several witnesses also described the driver of the Blazer as black, while another witness testified he was not black.

A search warrant conducted at Flores' home revealed a box of .22 Winchester Western Super X brand ammunition, a live .22 caliber bullet, a live .9mm bullet, and

a plastic bag containing the parts of a spent bullet. DCI criminalist Robert Harvey explained the spent casing found in Flores' home had identical rim-shot firing pin markings as the four shell casings found at the crime scene. He was able to conclude the same firearm that fired the four shell casings at the crime scene also fired the shell casing found in Flores' home. Harvey also compared the bullet recovered from Davis's body with the .22 caliber bullet found in the Flores' home. He testified that while the comparison of the bullets would not lead to a positive identification, the bullet recovered from Davis's body contained characteristics consistent with the bullet found at Flores' home.

Flores was convicted of first-degree murder, attempted murder, and terrorism following a jury trial. The district court sentenced him to a term of life imprisonment for the first-degree murder charge, twenty-five years for attempted murder, and ten years for terrorism.

On appeal Flores claims: (1) the district court erred by admitting certain hearsay statements; (2) the trial court erred by allowing the prosecution to knowingly call a witness to the stand who would refuse to answer certain questions concerning the homicide; (3) insufficient evidence existed to support the conviction; (4) the trial court erred by admitting letters concerning the murder of Jody Stokes and refusing to allow Flores to admit exculpatory portions of the letters; and (5) he received ineffective assistance of counsel.

I. Hearsay

A motion in limine primarily functions to preclude reference to potentially prejudicial evidence prior to the trial court's definitive ruling on its admissibility. *Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa App. 1997). 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.*

The primary purpose behind Iowa Rule of Evidence 104 is to establish a procedure for the trial court to address preliminary matters concerning the admission and exclusion of evidence. Iowa R. Evid. 104 (comment); James A. Adams & Kasey W. Kincaid, 7 Iowa Practice § 104.1-.2 (1988). Because the underlying purpose of a motion in limine and a rule 104 ruling relate to the admissibility or exclusion of evidence, we believe we should apply the preservation of error standard for a motion in limine to rule 104 rulings. Accordingly, if the rule 104 ruling reaches the ultimate issue of admissibility, it is a final ruling and the objection need not be renewed at trial.

The State initially claims Flores did not preserve error on his hearsay claims. Flores, conversely, maintains he adequately preserved error by renewing his objections when the trial court resolved preliminary questions pursuant to rule 104.

The testimony Flores objects to on appeal concerns two different occasions:

- (1) On the evening following Davis's death, Flores' girlfriend, Tina McGarey,

stopped by her mother's home while her mother, Diane McGarey, was on the phone with her sister, Debra Christensen. Tina joined the phone conversation and stated, "I think I shot that lady that died yesterday." Tina then explained she was in the Blazer with Flores and his brother when she shot Davis. (2) Debra also testified Tina later asked her "to lie . . . [s]he asked that I not testify, that I find a way not to testify." Debra further testified, "[s]he made the statement that if the truth came out that David would go to jail for a long time." Finally, Debra stated Tina told her "[j]ust David" was in the Blazer.

Flores filed a motion in limine requesting the district court preclude the State from offering evidence regarding conversations between Tina and her mother following the murder. The district court denied this request and stated "defendant shall be required to raise appropriate objection at trial."

Prior to the testimony of Diane McGarey and Debra Christensen at trial, the district court resolved preliminary questions pursuant to Iowa Rule of Evidence 104(a) concerning Tina's hearsay statements about shooting Davis. The trial court initially found insufficient evidence existed to support the theory Tina was involved in a conspiracy. The trial court then determined Tina's statements regarding Davis's shooting were not hearsay. The district court further found in the alternative even if the statements were hearsay, they would fall under the rule 803(3) exception of then existing state of mind or rule 804(b)(3) statement against interest. Iowa R. Evid. 803(3), 804(b)(3). The trial court additionally determined sufficient indicia of reliability existed for the statements made to Tina's mother and sister. The trial judge

also ruled Tina's statements to Debra Christensen asking her to claim the Fifth Amendment were part of Tina's intent, plan, or motive. Defense counsel did not further object to these statements during the witness' testimony.

The motion in limine clearly did not reach the ultimate issue of admissibility of the statements Tina made to her mother and sister. While the trial court did determine Tina's hearsay statements would likely be generally admissible during its rule 104 ruling, the trial court also admonished the parties:

"And I'm not saying that everything that Mrs. Tina McGarey talked to with [sic] Diane McGarey, her mother, or Debra Christensen, her sister, is admissible. I've just indicated those areas which I thought were admissible based upon those being the type of statements by Tina McGarey which would be either admissions against interest under 804 or statements of existing mental or emotional condition. Again at this point, I guess it's only preliminary because it's not been offered.

While the trial court made preliminary findings concerning the admissibility of Tina's hearsay statements, the trial court's subsequent admonishment reveals the court's intention of a preliminary ruling.¹ Because the trial court's ruling was preliminary, Flores should have renewed his objections at trial in order to preserve error on appeal. Because he failed to do this, we find Flores failed to adequately preserve error on his hearsay claims. Nonetheless, even had Flores preserved error, the statements would

¹ The conversation following Diane McGarey and Deb Christensen's testimony indicates defense counsel and the trial court viewed the trial court's initial ruling differently. After Diane McGarey and Deb Christensen testified, the trial court, in a discussion with counsel, stated it was waiting for objections to the hearsay statements so a final ruling could be made. Defense counsel told the trial court they believed the court had already made its ruling on the issue. The trial court then explained to counsel the previous discussion was a rule 104 preliminary hearing, and the earlier ruling could not reasonably be expected to be final because of new questions asked at trial. Although trial counsel misunderstood the trial court's ruling, trial counsel nevertheless bears the responsibility for properly preserving error.

have been admissible as non hearsay or under the exception urged by the State. Further, with regard to Flores' confrontation clause claim, we note our rule of error preservation applies with equal strength to constitutional issues. *State v. Kinkead*, 570 N.W.2d 97, 102 (Iowa 1997).

II. Tina McGarey Testimony

Before Tina McGarey took the stand, she testified in chambers she would refuse to answer questions surrounding the evening of the murder. She did, however, indicate she would answer some questions concerning the conversations she had with her mother and sister. Based on this information, the trial court determined Tina was somewhat available and would be allowed to be called as a witness.

As Tina testified before the jury, she refused to answer certain questions concerning the murder, but did answer questions regarding conversations with her mother and sister. The district court advised her during her testimony she did not have a Fifth Amendment privilege and ordered her to answer the questions. Despite the district court's order, she nonetheless refused to answer certain questions.

Flores claims the district court erred by allowing Tina to take the stand when the parties knew she would refuse to answer questions regarding the murder. Specifically, he contends her refusals to answer certain questions allowed the jury to make inferences of his guilt or to impeach Tina's testimony with statements she made to her mother and sister.

While it is improper to require a witness to assert the privilege against self-incrimination in the presence of the jury when the prosecutor knows or has reason to

anticipate the witness will assert the privilege, the witness must have had the right to invoke the privilege in the first place. *See State v. Brown*, 397 N.W.2d 689, 699-700 (Iowa 1986). In this case, Tina McGarey did not have the right to invoke the Fifth Amendment privilege against self incrimination because the trial court had already granted her immunity. Furthermore, Flores was aided rather than prejudiced by Tina's refusal to answer certain questions.² Finally, we find the State did not call Tina to testify for an improper purpose such as admitting otherwise inadmissible statements through impeachment evidence. *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). We therefore find the district court did not err by allowing Tina to testify despite her refusal to answer certain questions.

III. Sufficiency of Evidence

Our standard of review for claims of insufficient evidence is well established. We review such claims for errors at law. Iowa R. App. P. 4.; *State v. Nichols*, 572 N.W.2d 163, 163 (Iowa App. 1997). A verdict of guilty is binding on appeal unless no substantial evidence in the record exists to support it, or it is clearly against the weight of the evidence. *State v. Forsyth*, 547 N.W.2d 833, 834 (Iowa App. 1996). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997).

² Tina testified she would not answer certain questions because she was scared for her family's safety. She testified she knew who was driving the Blazer and that the person driving it was not Flores. Her selective answers therefore created an impression that Flores did not kill Davis, and she feared the individual responsible for the crime.

In determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Milner*, 571 N.W.2d 7, 10 (Iowa 1997). All evidence is considered, not merely the evidence supporting the verdict. *State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crimes. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Additionally, discrepancies in testimony do not, in and of themselves, preclude proof beyond a reasonable doubt. *See generally State v. Phansouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it found credible); *Forsyth*, 547 N.W.2d at 836 (jury's function to determine credibility and resolve conflicts in evidence).

Flores claims insufficient evidence exists to support the jury's verdict. He maintains much of the eye-witness testimony does not support the jury's verdict, and the physical evidence is circumstantial. Specifically, he points out many witnesses did not observe a shot fired from the Blazer. He also emphasizes many of the witnesses observed the single occupant of the Blazer was a black male.

The record in this case provides substantial evidence from which the jury could find Flores guilty of first-degree murder, attempt to commit murder, and terrorism. Numerous witnesses observed the occupants of Flores' distinctive black Blazer and a brown Oldsmobile engaged in a gun battle at the time of the killing. Several witnesses also testified only one person was driving the Blazer Flores was earlier seen driving. While several of the witnesses thought the driver of the Blazer was a black

male, another witness testified the person inside the Blazer was not black. In addition to the eye-witness testimony, the forensic evidence at the crime scene and the bullets found at Flores' home support the jury's finding of guilt. Although there are conflicts in the evidence in this case, it is the jury's function to resolve the conflicts and credibility issues. *Forsyth*, 547 N.W.2d at 836. Consequently, viewing the evidence as a whole and in a light most favorable to the State, we find there is substantial evidence to support the jury's findings of guilt.

IV. Letters

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.

Flores claims the trial court erred by allowing the prosecution to read to the jury portions of two letters discovered during the search warrant executed on his residence.³ He asserts the letters were not relevant and the prosecution failed to establish any link between Davis's death and the content of the letters. Flores further

³ The letters were not offered into evidence.

maintains the State's purpose in offering the letters was to show his motivation for the shoot out, specifically a call for "street justice" in reprisal for another murder. He also contends the district court further erred by refusing to admit a portion of another letter showing he requested reprisal for the murder through legal means.

The trial court allowed the prosecution to read to the jury portions of two letters written by Flores. The letters indicate a dispute over the killing of Jody Stokes occurred, and an inference may be drawn the gun battle resulting in Davis's death was a result of this dispute. The letters were therefore clearly relevant to explain the motive behind the killing.

After the State read portions of the letters to the jury, Flores attempted to admit a portion of a third letter which was also found at his home during the execution of the search warrant. The letter encouraged an individual named only "Chuck" to testify against Jody Stokes' killers. This letter, like one of the letters the prosecution read to the jury, was addressed to "Chuck" and signed by "David." The district court ruled Flores could not read this letter to the jury unless he could establish it related to a Chuck Holder.

We find the district court erred by failing to allow Flores to read the portion of the third letter to the jury. The foundational basis for this letter was the same as the letters read by the prosecution. Although we find the district court erred by failing to allow the letter to be read, we find this error harmless. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998) (stating reversal is not required unless prejudice results). Even if the line encouraging "Chuck" to testify against Stokes' murderers

had been read to the jury, the statements in all three letters support a theory of a dispute over Stokes' death between rival groups of individuals. Thus, although this line indicates Flores encouraged justice through legal channels, it did not remove the theory behind the underlying dispute. Consequently, we find the error harmless.

V. Ineffective Assistance of Counsel

Flores' ineffective assistance of counsel claim 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, Flores 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). Flores 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).

Flores claims he received ineffective assistance of counsel. Specifically, he maintains trial counsel was ineffective for failing to renew preliminary objections to Diane McGarey and Debra Christensen's testimony. He also contends trial counsel was ineffective by failing to raise relevancy objections to Debra Christensen's testimony of Tina's attempts to tamper with her testimony.

The record in this case reveals defense counsel failed to renew objections to the hearsay testimony because counsel believed the trial court had already issued its final ruling. While it was error for defense counsel to fail to renew these objections, Flores is not prejudiced by this error. Flores is also not prejudiced by defense counsel's failure to object to the relevancy of Debra Christensen's testimony because this testimony was clearly relevant to Tina's veracity. Moreover, considering the forensic evidence, eye-witness testimony, and other evidence presented at trial, we cannot conclude that but for the error, the trial's result would have been different.

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

AFFIRMED.