

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff/Appellee, vs. K'VON JAMES HENDERSON, Defendant/Appellant.	SC 16-0575 FECR204131
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APPEAL FROM THE DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY
HONORABLE JUDGE GEORGE STIGLER

BRIEF FOR APPELLANT

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FINAL BRIEF

CERTIFICATE OF SERVICE AND FILING

The undersigned certifies that on the 27 day of April, 2017, he
will electronically file this document and will mail one (1) copy to

Appellant/Defendant K'von Henderson.


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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the trial court improperly deny counsel's mid-trial motion for judgment of acquittal? Alternatively did trial counsel commit ineffective assistance of counsel for failing to argue that there was insufficient evidence that K'von Henderson conspired to commit robbery with a gun?

ROUTING STATEMENT

This case is appropriate for transfer to the Court of Appeals as it involves the application of existing legal principles. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This case is an appeal from a conviction of robbery in the first degree in violation of IC §§ 711.1, 711.2, and 902.12. Order, Judgment and Sentence, March 24, 2016, at 1, Appx. 142.

K'von Henderson was charged by trial information on Feb. 20, 2015. The cases of his codefendants are on appeal as well: Riley Mallett, FECR204129, 16-0565, and Cody Plummer, FECR204130, 16-0647. Trial Information, Feb. 20, 2015, at 1, Appx. 5. The case was first tried to a jury in November 2015 but that case ended in a mistrial because another person in the courthouse stopped a juror in the hallway and encouraged the juror to return a verdict of not guilty. Transcript, Jury Trial – Mistrial, Dec. 2, 2015, 476, 511, Appx. 17-18. The case was tried again in Feb. 2016, with the jury being sworn in Feb. 9, 2015. Transcript, Trial, Feb. 9, 2016, at 2, Appx. 22. The jury returned a verdict of guilty on Feb. 17, 2016. Order, Judgment and Sentence, March 24, 2016, at 1, Appx. 142. Notice of appeal was filed March 30, 2016. Notice of Appeal, March 30, 2016, at 1, Appx. 146.

STATEMENT OF THE FACTS

The codefendants were alleged to have conspired to commit a robbery of a Waterloo pharmacy on Feb. 9, 2016. Transcript, Trial, Feb. 10, 2016, at 16, Appx. 23. The robbery took place just before the pharmacy closed the next night, Feb. 10, 2015. Id. at 17, Appx. 23. A gun was used during the robbery, allegedly by Riley Mallett. Id., Appx. 23. Henderson's involvement, and the involvement of the accomplice who ultimately testified against all three of them, Dayton Nelson, was limited to the role of getaway driver. Id. at 23, Appx. 24. Nelson was supposed to have received the stolen merchandise and Henderson was supposed to have picked up the two robbers and driven them away, after they had delivered the merchandise to Nelson. Id., Appx. 24. No robbers ever made it to Henderson; his codefendants were arrested separately.

Steven Scharg, counsel for Plummer, mounted a defense of saying his client wasn't planning for a gun to be involved. Transcript, Trial, Feb. 10, 2016, at 30, Appx. 21. John Standafer, counsel for Mallett, argued that his client wasn't involved and it was a case of mistaken identity. Transcript, Trial, Feb. 10, 2016, at 37, Appx. 26.

Delila Salman was a witness for the State who was present on the night before the robbery when the five accomplices allegedly planned it. She was defendant Plummer's girlfriend. Transcript, Trial, Feb. 15, 2016, at 613, Appx. 96. She testified that all five accomplices gathered at the house she was staying

at the night before the robbery. Id. at 617-18, Appx. 97.¹ These accomplices were Cody Plummer, Myles Anderson², Riley Mallett, Dayton Nelson, and K'von Henderson. Id. Her presence at this event led the court at one point to refer to her as a possible “sixth conspirator.” Transcript, Trial, Feb. 11, 2016, at 338, Appx. 76. Salman was never charged. She testified that she never involved herself in the planning conversation and also didn't listen in, nor did she hear any of what was said. Transcript, Trial, Feb. 15, 2016, at 619, Appx. 97.

Dayton Nelson testified that his role was to drive away with the stolen merchandise, and Henderson's role was to drive away Mallett and Plummer after they robbed the pharmacy. Transcript, Trial, Feb. 11, 2016, at 312, Appx. 70. According to Nelson, Henderson received a call from Mallett and was informed that Plummer was going to do the robbery itself instead of Anderson. Id. at 313, Appx. 70.

Nelson testified that the other members of the group knew Anderson possessed the gun that was ultimately used in the robbery, based on the fact that they all lived together. Transcript, Trial, Feb. 11, 2016, 318-19, Appx. 71. Before he, Anderson, elected to refrain from participation in the robbery itself,

¹ When questioning this witness, the prosecutor misstates the dates. The robbery was Feb. 10, 2015, and the meeting in question took place the night before, Feb. 9, 2015.

² Myles Anderson pleaded guilty and did not proceed to trial. His case was Black Hawk County FECR204127.

he gave this gun to either Mallett or Plummer for use in the robbery. Id. at 321,

Appx. 72. The State clarified:

Q: And just to be clear, was K'von Henderson, where was he during that time when the handgun was handed by Myles Anderson to either Mr. Mallett or Mr. Plummer?

A: At that time he was on Midlothian at the end by Prospect. Id. at 322, Appx. 72.

Nelson testified on redirect by the State that the original plan was not to use a gun:

Q: In doing so, during that planning, how were you – how were the people that entered the pharmacy going to attempt to get the employees at Greenwood Pharmacy to give them anything without showing a weapon or without using any kind of force?

A: A note.

Q: And what was the nature of the note going to be?

A: Just so you didn't have to use anything else. Id. at 405, Appx. 80.

Nelson confirmed that Henderson had driven away and was not present at the time the gun came out:

Q: Going back to when you were in the vehicles outside prior to Cody Plummer and Riley Mallett going into the Greenwood Pharmacy, just to make sure we have it straight, who arrived in what vehicles? When you arrived at that meeting place outside Greenwood Pharmacy, what vehicle did you arrive in and who was with you?

A: When I arrived, it was just K'von and I in the Alero.

Q: And were you driving the Alero at that time?

A: Yes.

Q: What happened as you exited the Alero and went to the other vehicle?

A: Well, when we pulled up, it was Riley, Cody and Myles in the other car. That was the BMW.

Q: And who was driving Riley Mallett's BMW at the time that you pulled up?

A: Riley, sorry.

Q: And who was in the front seat passenger?

A: Myles was the passenger.

Q: And who was in the back seat?

A: Cody.

Q: When you got out of your Alero, did K'von Henderson then go into your driver's seat of the Alero?

A: Yes, sir.

Q: And what did he do when you went over to the BMW?

A: He drove to his destination.

Q: And is that the spot over by Midlothian and Prospect?

A: Yes, sir.

Q: When you went towards the black BMW, what happened – what did Cody Plummer and Riley Mallett do when you went towards the black BMW?

A: They were, like, in the trunk area kind of, like, getting ready....

Q: And eventually as you described the firearm, when Myles Anderson handed that firearm off, did anyone throw it back in the car like a hot potato?

A: No, sir.

Q: When that firearm was handed off, did you see anyone throw it to the ground or hear clinking on the ground like someone was batting it away, refusing to take that?

A: No, sir.

Q: Did one of the individuals, either Riley Mallett or Cody Plummer, take that firearm?

A: Yes, sir.

Q: Were both Cody Plummer and Riley Mallett outside of the vehicle when Myles Anderson handed the firearm off?

A: Yes, sir. Id., 407-08, Appx. 80-81.

On cross-examination by other defense counsel Nelson continued to confirm that Henderson was not present when the gun became involved:

Q: And you said Mr. Anderson had the weapon?

A: Yes, sir....As we pulled up to the back side of the pharmacy, I was with K'von Henderson and then he was with – Mallett, Mr. Mallett, Mr. Plummer and Mr. Anderson were all three together.

Q: Okay. So Mallett Plummer and Anderson were together?

A: Yes, sir.

Q: When everyone gets to the pharmacy, Mr. Mallett, Mr. Plummer [get] out. Mr. Anderson gets in the car with you?

A: Yes, sir.

Q: And Mr. Henderson is with you at that point?

A: No.

Q: No. He's separate?

A: In the Alero.

Q: In another car?

A: Yes, sir....

Q: And he (Mr. Anderson) always carries a weapon; is that fair to say?

A: No.

Q: Okay. So when did you know he even had a weapon?

A: When I got in the car. Id., 357-58, Appx. 79.

Finally, Nelson confirmed that the plan was for a gun to not be involved:

Q: Now, when you made this plan to rob this pharmacy, you know very well that there was supposed to be no guns at all involved in this robbery, correct?

A: Yes, sir.

Q: That was made certain at this house, Cody Plummer's house?
A: Yes, sir. Id. at 359, Appx. 79.

When interviewed by an officer after his arrest, Henderson acknowledged being present on the night Salman testified about, but denied involvement in the robbery. Transcript, Trial, Feb. 15, 2016, 551-52, Appx. 94.

ARGUMENT

DIVISION I

Henderson's trial counsel made a motion for judgment of acquittal at the mid-point of the trial. Id., 722-23, Appx. 110. The grounds he raised, and the grounds that were subsequently debated and ruled upon, were that Nelson's testimony was not sufficiently corroborated to qualify for submission to the jury. Id., 724-25, Appx. 110-11. The argument of this brief is that there was insufficient evidence – indeed, no evidence – presented to show that Henderson conspired for a gun to be involved.³

Trial counsel's motion can be read as a blanket argument rejecting all elements of the offense, which would include the element that a gun was intended to be involved. The lack of evidence regarding the weapon element was not specifically stated, so for purposes of error preservation Henderson

³ This brief does not concede that Nelson's testimony was sufficiently corroborated; for purposes of error preservation, it is anticipated that this point will be argued by a *pro se* supplemental brief to be filed by Henderson. This brief, however, will focus only on the weapon element of the robbery charge.

argues in the alternative that trial counsel was ineffective for failing to argue the point, with the resulting prejudice being that the Class B robbery (IC § 711.2) as opposed to the Class C robbery (IC § 711.3) was allowed to be proceed to the jury.

A trial court's denial of a motion for judgment of acquittal will be upheld if there is substantial evidence to support the conviction. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa App. 2001). Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa App. 1999). The scope of review for sufficiency of the evidence challenges is for correction of errors at law. *Adney*, 639 N.W.2d at 250 (citations omitted). In reviewing such challenges the court given consideration to all evidence and views it in the light most favorable to the State. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel failed to perform an essential duty, and that prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). The review of ineffective assistance of counsel claims is de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). Ineffective assistance of counsel claims are an exception to traditional error preservation rules. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006). The present record is adequate to address the

claim so it can be raised on direct appeal. *See* State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003); *see also* IC § 814.7(2).

The argument of this brief is that a careful review of the transcript demonstrates that at no time did the State present any evidence to show that K'von Henderson conspired for a gun to be involved in this robbery. Indeed, the consistent testimony of the State's accomplice witness was that during the Feb. 9 planning meeting, it was decided that a gun would not be involved, and a gun only came to be involved because of the one conspirator, Myles Anderson, who supplied the gun as he was backing out of involvement with the robbery itself. This happened just before the robbery, and after Henderson – according to the State – had already driven away. While the decision of the other defendants to proceed with the robbery with the gun involved qualifies as premeditation to commit Class B robbery as to them, the record is utterly devoid of any evidence that Henderson knew a gun would be involved. He did not have the chance to choose not to be involved in the same way that Nelson, Mallett and Plummer all did once Anderson had given them the gun. Henderson wasn't present for that event. This is true according to the uncontested testimony and consistent case that was put on by the State.

As there was no evidence implicating Henderson as to conspiracy to commit robbery with a weapon, there was necessarily insufficient evidence. This is true even when viewing all the evidence in the light most favorable to

the State. Accordingly, Henderson requests that the court grant the same relief that was given in *Adney*: a remand for a judgment of acquittal as to Class B robbery, and an entry of a guilty verdict as to Class C robbery.


CONCLUSION

This brief has argued solely that the evidence was insufficient to demonstrate that Henderson conspired for a gun to be involved in this robbery. The relief requested, again, is for a remand with directions to enter a judgment of acquittal as to the Class B robbery count and a conviction as to the lesser included offense of Class C robbery.

The intention of this brief has not been, however, to concede that Henderson was involved. It is anticipated that Henderson will file a *pro se* supplemental brief arguing that Nelson's testimony was insufficiently corroborated. Henderson through counsel therefore requests that the court decide both points, assuming that Henderson himself files a *pro se* brief arguing the latter point.

REQUEST FOR ORAL ARGUMENT

Appellant requests to be heard in oral argument.



Signature

4/27/17

Date

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