IN THE COURT OF APPEALS OF IOWA

No. 0-201 / 08-1756
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYLER RAY OBERHART,
Defendant-Appellant.

Appeal from the Iowa District Court for Jasper County, Dale Hagen, Judge.

Defendant appeals his conviction for murder in the first degree. **AFFIRMED.**

Tyler Oberhart, Anamosa, appellant.

Richard Phelps, Mingo, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Steve Johnson, County Attorney, and Michael K. Jacobsen, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J. takes no part.

VOGEL, P.J.

Tyler Oberhart appeals his conviction for murder in the first degree in violation of Iowa Code section 707.2 (2007). Because we find his trial counsel was not ineffective and substantial evidence supported the conviction, we affirm.

I. Background Facts and Proceedings

Oberhart was found guilty of first-degree murder following the stabbing death of Jerry Pittman II in October 2007. On the night of October 5, 2007, Oberhart and a group of friends, including Justin Robuck, Ray Travis, Courtney Hummel, and Mishana Cornejo, spent the evening partying together. Earlier that evening, Oberhart gave Pittman some Xanax pills in exchange for marijuana, which Oberhart later discovered was actually lawnmower clippings. Around 3:00 a.m. on October 6, Oberhart, Robuck, Travis, Hummel, and Cornejo, went to Pittman's house in order scare him into giving them marijuana, return the Xanax pills, or give them money.

When they arrived at Pittman's house, Oberhart, Robuck, and Travis got out of the car, all carrying a knife or other weapon. After Oberhart summoned Pittman to come out of the house, they discovered he was in the backyard wielding a knife. Threats were exchanged, and Pittman lunged at Oberhart. Pittman then went into the garage, purportedly to get the marijuana, but instead came out of the garage swinging a PVC pipe and struck Oberhart. After wrestling the pipe away from Pittman, Oberhart told Pittman, "You better run." Pittman began running, chased by Oberhart and Robuck, both armed with knives, and Travis, armed with a marble necklace, which could be used as a weapon. Upon tackling Pittman to the ground, Oberhart sat on his upper body

and Robuck sat on Pittman's legs. Both Oberhart and Robuck repeatedly stabbed Pittman. During the altercation, Travis saw a knife sticking out of Pittman's chest, and testified that he recognized it as Oberhart's knife. An autopsy would reveal Pittman died after suffering twenty-nine stab wounds, three of which were to his upper body, striking his heart, lungs, diaphragm and liver.

Before leaving the scene, Travis testified that Oberhart stood over Pittman's body and said, "You f***ed with the wrong guys." A neighbor of Pittman's, awakened by the noises outside, testified she heard someone say, "You f***ed with the wrong person this time." Immediately after the attack, Robuck returned to the car, announcing that Pittman was dead, followed by Travis approximately thirty seconds later, and Oberhart a minute or so later. Travis testified that as Oberhart returned to the car he had a smile on his face, and asked "Why did you guys leave? We could have got money. We could have got drugs." Cornejo testified Oberhart had blood on his clothing, a cut on his finger, and kept saying, "He is blacking out. He is blacking out." As they left, Oberhart admitted to Cornejo that he stabbed Pittman at least once or twice. The next morning, Pittman's father found Pittman's lifeless body laying in the back yard.

An investigation ensued, resulting in Robuck, Oberhart and Travis all being charged with first-degree murder. Oberhart filed a notice of intent to rely on the legal defenses of intoxication by drugs and/or alcohol, self-defense or defense of others, and diminished capacity. Following a jury trial, Oberhart was convicted of murder in the first degree. He appeals.

Oberhart raises four issues relevant to whether the State proved he was also participating in the offense of robbery, and hence whether the jury was able to properly consider and determine whether the record supported the felony murder alternative of first-degree murder. As discussed below, we find there was substantial evidence in the record to sustain Oberhart's conviction under either theory of first-degree murder and the district court did not err in its instructions nor did trial counsel breach any essential duties in failing to object to the instructions as given.

II. Sufficiency of the Evidence

The marshalling instruction given to the jury included: "The defendant acted willfully, deliberately, and premeditatedly and with a specific intent to kill Jerry Alden Pittman, II; or the defendant was participating in the offense of robbery." Oberhart challenges the sufficiency of the evidence to support his conviction of murder in the first degree under either alternative, specifically challenging the submission of a robbery instruction. Challenges to the sufficiency of the evidence are reviewed for errors at law. *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996). The court views the evidence in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence. *State v. Jacobs*, 607 N.W.2d 679, 682 (Iowa 2000). A jury verdict is upheld if it is supported by substantial evidence. *Id.* "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004).

In his motion for judgment of acquittal, Oberhart argued the State presented insufficient evidence to prove specific intent to commit a theft, an element of robbery; therefore submission of a robbery jury instruction was in error, as it allowed the jury to find Oberhart guilty under the felony murder alternative. Jury instruction twenty-three instructed jurors that "[A] person commits theft when the person takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof." Oberhart asserts he only went to Pittman's house to take back what belonged to him because he felt he had been "ripped off" in the earlier drug transaction. This is not a valid argument because self-help is only a defense for theft, not burglary or robbery, and this was an element of robbery. *State v. Miller*, 622 N.W.2d 782, 785-87 (Iowa Ct. App. 2000). Nevertheless, the evidence clearly illustrates that Oberhart went to Pittman's house with a wider intent. Travis testified of their initial plan to scare Pittman into giving them Xanax, drugs, or money, and when Pittman failed to cooperate, their intent became to steal the items. Testimony from Hummel corroborated that Oberhart went to Pittman's in order to "get their money or pills back . . . or they were going to beat him up." Oberhart's demands on Pittman to give him the real marijuana, his threats, the violent stabbing of Pittman, and later statement to his friends, "Why did you guys leave? We could have got money. We could have got drugs," all confirmed Oberhart's intent to commit a theft, both as he approached Pittman's house and as the attack unfolded.

Further, instruction thirty explained, "when two or more persons act together and knowingly commit a crime, each is responsible for the other's acts

done in furtherance of the commission of the crime." It is clear from Oberhart's actions that he intended, with use of force, to take from Pittman what he believed he deserved. Coupled with Travis's admission that the group went to Pittman's house "to get the marijuana, drugs, or the money back" and other supporting testimony, we find sufficient evidence demonstrated Oberhart's intent to commit a theft, as an element of robbery.

III. Ineffective Assistance of Counsel

Oberhart makes several claims his counsel was ineffective. Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Oberhart must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To prove that counsel breached an essential duty, a defendant must overcome a presumption that counsel was competent and show that counsel's performance was not within the range of normal competency. *Ledezma*, 626 N.W.2d at 142. Counsel has no duty to raise a meritless issue. *State v. Dudley*, 166 N.W.2d 606, 620 (Iowa 2009). To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997).

Ordinarily, we do not decide ineffective-assistance-of-counsel claims on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such questions for postconviction proceedings so the defendant's trial counsel can defend against the charge. *Id.* However, we depart from this

preference in cases where the record is adequate to evaluate the appellant's claim. *Id.* We find the record is adequate to address Oberhart's claims.

A. Plea Agreement

The State introduced evidence at trial that Travis accepted a deal to plead guilty to robbery rather than face murder charges. Oberhart asserts his trial counsel was ineffective for failing to object to or move in limine as to the testimony of Travis that there was a factual basis for his guilty plea. While a co-defendant's guilty plea is inadmissible as substantive proof of defendant's guilt, it is permissible when introduced for other purposes, such as a reflection of witness credibility. *State v. Hendrickson*, 444 N.W.2d 468, 471 (Iowa 1989). The State began its direct examination of Travis by having him acknowledge that he had "to make a factual basis to the Court" before the court would accept his guilty plea to robbery in the second degree. The State then proceeded to question Travis about the events surrounding the attack on Pittman. On cross-examination, Oberhart's attorney asked Travis whether any of the defendants actually intended to rob Pittman, or whether they were just there to exchange a defective product (grass clippings for marijuana, Xanax, or a cash "refund"). Trial counsel attempted to paint the picture that Travis made up the robbery scenario in order to have a crime to plead guilty to, and therefore avoid facing murder charges.

Upon review of the transcript, it appears the State began its questioning of Travis's plea agreement in order to inform the jury of Travis's role in the incident, clarify why he was testifying for the State, and allow the jury to then assess the credibility of his testimony against Oberhart. In turn, Oberhart's counsel

questioned Travis by attacking the underlying basis for the plea agreement and Travis's motives for accepting the agreement. In doing so, Oberhart's counsel also called Travis's credibility into question. We find that trial counsel was not ineffective for failing to object to Travis's testimony concerning his plea agreement because both sides utilized this testimony to inform the jury and to assess Travis's credibility as a witness to the murder.

B. Robbery Jury Instruction

Oberhart next alleges trial counsel was ineffective for failing to object to the jury instructions relevant to robbery, as it was the predicate felony for the felony murder alternative. In order to satisfy the felony murder alternative of first-degree murder, jury instruction fifteen required the State prove "the defendant was participating in the offense of Robbery." Robbery is defined in instruction twenty-two:

> Concerning element number 4 of Instruction No. 15, Robbery means
>
> 1. On or about the 6th day of October 2007, the defendant had the specific intent to commit a theft.
>
> 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant:
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> a. Committed an assault on Jerry Alden Pittman II.
>
> b. Threatened Jerry Alden Pittman II with or purposely put Jerry Alden Pittman II in fear of immediate serious injury.
>
> c. Threatened to immediately commit robbery.

Oberhart asserts that the State could not prove robbery by a "threat to commit a robbery," and thus it was inappropriate to instruct on felony murder. Oberhart failed to cite authority to support this proposition or identify how this instruction caused him prejudice. *See Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate brief, fails to state, argue, or cite to

authority in support of an issue, the issue may be deemed waived."); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (discussing that in order to establish prejudice, a defendant "must . . . identify how competent representation probably would have changed the outcome").

Further, Iowa Code section 711.1 delineates that a person commits robbery if with the intent to commit a theft, that person does any one of three acts "to assist or further the commission of the intended theft . . . with or without the stolen property," including an assault, a threat of immediate serious injury, or a "threat[] to commit immediately any forcible felony." The instruction given to the jury here included all three options, and designated robbery as the forcible felony. While we agree that the instruction should have indicated the options were alternatives[1] and that the designated forcible felony logically should have been other than robbery, we find counsel was not ineffective for failing to object to jury instruction twenty-two. Oberhart is unable to show prejudice on this record, which includes evidence of Oberhart's own words and Travis's description of the crime, all of which amount to overwhelming evidence of robbery.

C. General Verdict

The final issue Oberhart alleges relevant to the underlying robbery is that trial counsel was ineffective for failing to request a special interrogatory as to which theory the jury accepted to reach its first-degree murder verdict. We would need to address this issue only if Oberhart would have prevailed on his assertion

[1] Oberhart does not argue the absence of language in the instruction indicating the State need only prove one of the three alternatives, undoubtedly because the form of the instruction was advantageous to him.

that insufficient evidence supports the felony murder alternative. As set forth above, sufficient evidence supported that Oberhart "was participating in the offense of Robbery," the predicate felony in this case of murder in the first degree while participating in a forcible felony and therefore, the special interrogatory would not have affected the jury's verdict.

D. Challenge to *Miranda* Waiver and Failure to Move to Suppress Statement

Oberhart asserts his trial counsel was ineffective for failing to challenge the way in which his *Miranda* warnings were given and hence the validity of his waiver.[2] He then alleges counsel should have moved to suppress the video statement of his confessed acts because he was read the version of *Miranda* warnings designed for juveniles.[3] He argues being read the juvenile version implied a promise of leniency; therefore his subsequent statement was not voluntarily given. When construing the voluntariness of a juvenile statement, the court considers the totality of the circumstances surrounding the waiver.[4] *State v. O'Connor*, 346 N.W.2d 8, 10 (Iowa 1984).

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[2] *See Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966) (explaining to a defendant that he does not need to speak to police and that any statement he makes may be used against him).

[3] Oberhart was read his *Miranda* rights twice throughout the course of police questioning, and the second time he was read the version designed for adults.

[4] When a court is construing a voluntariness issue in connection with the juvenile statement, it may consider any factors it finds relevant and shall consider the following factors:

> a. Opportunity for the child to consult with a parent, guardian, custodian, lawyer or other adult.
> b. The age of the child.
> c. The child's level of education.
> d. The child's level of intelligence.
> e. Whether the child was advised of his or her constitutional rights.
> f. Length of time the child was held in shelter care or detention before making the statement in question.

Oberhart was read his *Miranda* rights. The only difference between the adult and juvenile version of the *Miranda* warnings was the juvenile warning contained a statement alerting him that his case could be transferred to adult criminal court if the juvenile court waived jurisdiction.[5] Oberhart argues the juvenile reference rendered his confession involuntary because he was being investigated for a forcible felony, which if charged to a person sixteen years or older, is tried in adult court unless transferred back to juvenile court for good cause. Iowa Code § 232.8(1)(c). While violations which constitute a forcible felony are excluded from the jurisdiction of the juvenile court, Oberhart had not yet been charged with a forcible felony when the questioning occurred. Oberhart cannot prove counsel breached a duty by failing to make a meritless motion. *Dudley*, 166 N.W.2d at 620. Moreover, Oberhart cannot prove he was prejudiced by his counsel's failure to move to suppress his statements to investigators. He makes no claim he would not have waived his *Miranda* rights had he been told that if he were charged with a forcible felony he would have been tried in adult court, unless waived back to juvenile court. As such, he cannot succeed on this claim. *See State v. Hildebrant*, 405 N.W.2d 839, 841 (1987) (stating no prejudice exists in counsel's failure to file a motion which would have no impact on the outcome of a case).

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g. The nature of the questioning which elicited the statement.
h. Whether physical punishment such as deprivation of food or sleep was used upon the child during the shelter care, detention, or questioning.

State v. O'Connor, 346 N.W.2d 8, 10-11 (Iowa 1984).

[5] The additional statement in the juvenile warnings given to Oberhart read, "this includes the adult criminal court if the juvenile court waives jurisdiction." The officer asked Oberhart if he understood before he signed the waiver, and Oberhart responded, "yes."

While Oberhart next argues he did not knowingly and voluntarily waive his *Miranda* rights, examining the totality of the circumstances, we find he did. Oberhart had the opportunity to consult with his mother before the questioning began; several breaks were provided to him during the three-hour questioning; he presented no evidence that he lacked sufficient intelligence to understand his rights or the effect of his waiver; he was advised of his constitutional rights; and he made no claims the circumstances surrounding the questioning caused duress. *State v. Barker*, 564 N.W.2d 447, 449 (Iowa Ct. App. 1997). Counsel was not ineffective for failing to challenge his *Miranda* waiver and therefore not ineffective for failing to move to suppress statements given.

E. New Trial

Finally, Oberhart alleges his trial counsel was ineffective for failing to file a motion for a new trial because he asserts the verdict was contrary to the weight of the evidence. A court may grant a new trial when the verdict is contrary to law or the evidence, meaning "contrary to the weight of the evidence." Iowa R. of Crim. P. 2.24(2)(*b*)(6); *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). When a motion for new trial is made, the court weighs the evidence and considers the credibility of witnesses. *Ellis*, 578 N.W.2d at 658-59.

Oberhart argues the record did not support submission of a robbery instruction, or that he had the intent to kill Pittman, and therefore there was not substantial evidence to support his first-degree murder conviction, under either theory. He therefore asserts a motion for new trial would have been successful. Upon our review of the record, we disagree. It is manifestly clear that Oberhart intended to confront Pittman to obtain drugs or money; he was armed when he

arrived at Pittman's home; he angrily ordered Pittman to present himself; he threatened Pittman; and when Pittman took off running, he tackled him to the ground and stabbed him at least twice, leaving him for dead. Further, as previously addressed, sufficient evidence was introduced for the court to give the robbery instruction. This record does not support that a motion for new trial would have been successful as the evidence does not "preponderate[] heavily against the verdict." *Ellis*, 578 N.W.2d at 659. Therefore, counsel was not ineffective for failing to file such motion.

We find sufficient evidence to sustain the conviction and conclude Oberhart did not show his counsel was ineffective.

AFFIRMED.