

IN THE COURT OF APPEALS OF IOWA

No. 0-232 / 08-1752
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESUS FRANCISCO SEGOVIA,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donald Nickerson,
Judge.

Appellant appeals from his convictions for second-degree robbery and
false imprisonment. **AFFIRMED.**

James Nelsen, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, John P. Sarcone, County Attorney, and Jim Ward, Assistant County
Attorney, for appellee.

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

VOGEL, P.J.

Jesus Segovia appeals from his convictions of two counts of robbery in the second degree and one count of false imprisonment. He claims (1) the State engaged in prosecutorial misconduct by violating a ruling in limine, (2) counsel was ineffective for failing to object to prejudicial testimony and failing to request a mistrial, and (3) the district court erred in failing to grant his motion for judgment of acquittal. We affirm.

I. Background Information and Prior Proceedings

In February 2007, a robbery occurred at a McDonald's restaurant in Pleasant Hill. Given the testimony presented, the jury could have found the following key facts pertinent to the issues raised on this appeal. While taking the trash out shortly after midnight, employee Segovia propped open the back door, contrary to store policy, and when he re-entered the restaurant, he was being held at gunpoint by Adam Green. Green tied up the employees, took their wallets, and ordered Segovia to take money from the safe. Police officers arrived at the restaurant and apprehended Green as he fled.

While interviewing witnesses, officers learned that Green's MySpace page on the internet contained a series of photos of Green, and one of Segovia taken in the same location. Officers interviewed Green, and he revealed that Segovia was involved in the planning and carrying out of the robbery. Green testified that Segovia gave him his sister's cell phone, and told Green he would "get a call" from Segovia when the robbery was to begin. After receiving a call from Segovia around midnight from a phone belonging to Segovia's girlfriend, Green testified the plan was to "go in there and . . . get the money." Upon completion of the

robbery, Green was to give Segovia a portion of the money. Green pled guilty to robbery in the second degree and kidnapping in the third degree.

Segovia was charged with two counts of robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (2005), and kidnapping in the second degree in violation of sections 710.1 and 710.3. Prior to trial, Segovia filed a motion in limine seeking to keep a photograph out of evidence which depicted Segovia pointing a gun and making an obscene gesture. At the hearing on the motion, the State responded that the photo was needed to establish a connection between Green and Segovia. The court granted the motion in limine, finding the photo was “highly prejudicial,” but left the door open to testimony surrounding the photograph.¹ Trial was held in April 2008, which ended in a mistrial after the jury was unable to agree on a verdict. A second trial was held in September 2008, where the original ruling in limine was made part of the record and stipulated to by the parties. Segovia was found guilty of two counts of robbery in the second degree and one count of false imprisonment. He appeals.

II. Prosecutorial Misconduct

Segovia alleges that the State introduced evidence in violation of the ruling in limine, namely testimony by Green about the photograph, and as a result committed prosecutorial misconduct. The State responds that Segovia did not preserve error on this issue as no objection was made at trial. Further, even if it was preserved, the testimony did not violate the ruling in limine and no prosecutorial misconduct occurred.

¹ Other photos from Green’s MySpace internet page were allowed in evidence.

A ruling in limine is a preliminary ruling and does not preserve error. *State v. Frazier*, 559 N.W.2d 34, 39 (Iowa Ct. App. 1996). Error does not occur until the matter is presented at trial and an objection should be made at that time to preserve error. *Id.*; see also *State v. Latham*, 366 N.W.2d 181, 183 (Iowa 1985). “This rule, however, has an exception. A defendant is not required to object at trial if the prior ruling on the motion in limine amounts to ‘an unequivocal holding concerning the issue raised.’” *Frazier*, 559 N.W.2d at 39.

During the hearing on the motion in limine, defense counsel sought to have the photo of Segovia excluded, but stated, “I think the testimony [concerning the photograph] is—I think that it’s probably admissible to establish a relationship, but I don’t think the photograph itself should be admitted.” At trial, the State questioned Green,

- Q: In that photograph, is the defendant standing or sitting?
 A: Standing.
 Q: And is he holding anything? A: Yes.
 Q: What’s he holding? A: A shotgun.
 Q: And is he looking at the camera? A: Yes
 Q: So he’s looking at you and he’s holding a gun; is that right? A: I’m not the one taking the pictures.

 Q: And is the defendant making some gesture in that photograph? A: Yes.
 Q: Is it on—is it an obscene gesture? A: I guess you would say so. I mean—
 Q: Well, what is it? A: The middle finger.

Segovia failed to object to this testimony at trial, nor allege prosecutorial misconduct, and therefore he has failed to preserve this issue for our review. *Latham*, 366 N.W.2d at 183.

III. Ineffective Assistance of Counsel

Segovia next claims his counsel was ineffective for failing to request a mistrial following what he now asserts was Green's prejudicial testimony at trial and the prosecutor's closing argument. 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, Segovia 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. 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.*

In addition to the testimony by Green at trial, the prosecutor described the photograph during closing arguments, imploring the jury to use the information regarding the photo to establish a relationship between Segovia and Green. The prosecutor also stated, "Adam Green happened to pick the McDonald's Jesus Segovia was working at, [and] happened to use the same gun that Jesus Segovia had been playing with a couple months before." Segovia argues the jury may have inferred the gun Green used in the robbery was the same gun described in the photograph, and therefore asserts his trial counsel was ineffective for failing to lodge appropriate objections and request a mistrial. We

find the record before us is insufficient to address this issue. “Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned.” *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We therefore preserve this issue for possible postconviction proceedings.

IV. Sufficiency of the Evidence

Finally, Segovia challenges the sufficiency of the evidence to support his convictions, arguing the court erred in failing to grant his motion for judgment of acquittal. 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.*

Segovia generally argues that the evidence is insufficient to sustain his convictions. He claims that his connection with Green was “tenuous at best” and Green’s testimony was contradictory, such that it should be deemed a nullity.² However, we find his argument without merit. The record is clear that Segovia and Green knew each other prior to the robbery, and a collection of facts corroborated Green’s testimony: Green had Segovia’s sister’s phone the night of the robbery; he received a call from Segovia on his girlfriend’s cell phone when the plan was to be carried out; the robbery occurred at the time Segovia took the garbage outside, after he had propped open the door, contrary to customary

² Green attempted to explain some inconsistencies in his testimony by testifying that he was usually “high” and did not have a good sense of dates and times.

restaurant procedures; and Segovia was the person in charge of gathering the money from the safe. Further, it is the jury's duty to determine what weight to give testimony. *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). We find evidence corroborating Green's testimony is sufficient to link Segovia to Green and to support the convictions for robbery and false imprisonment. See *State v. Jones*, 511 N.W.2d 400, 404 (Iowa Ct. App. 1993) ("Any evidence tending to connect the defendant with the commission of a crime supports the credibility of accomplice testimony and is sufficient.").

We find sufficient evidence to sustain Segovia's convictions and preserve one issue for possible postconviction proceedings.³

AFFIRMED.

³ We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. See Iowa R. App. P. 6.905(7)(c).