IN THE COURT OF APPEALS OF IOWA

No. 0-268 / 08-1190
Filed July 28, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MURRAY FORD,
Defendant-Appellant.

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

The defendant appeals his judgment and sentence for second-degree robbery. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant Appellate Defender, for appellant.

Murray Ford, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael Hunter, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VAITHESWARAN, P.J.

Murray Ford appeals his judgment and sentence for second-degree robbery. He contends the district court applied the wrong standard in ruling on his motion for new trial. He additionally claims his trial attorney was ineffective in several respects.

I. Background Facts and Proceedings

Two men robbed a Des Moines bank. A woman waiting at the bank's drive-through window saw the robbery in progress and followed the men from the bank to a nearby apartment. There, the men picked up a Chevy Tahoe and drove west. A passerby recorded the license plate number of the vehicle. The Tahoe was associated with Murray Ford.

The police obtained a search warrant for Ford's vehicle and residence. Inside the Tahoe, they found hats marked with Ford's DNA as well as sunglasses. The robbers were wearing hats and sunglasses.

Meanwhile, Ford's girlfriend paid $1700 in cash for a repossessed vehicle. Police examined the cash and found two marked "bait bills" from the bank.

A few days after the robbery, Ford, his girlfriend, and another individual were stopped by security personnel at a mall. Police who were called to assist with the stop discovered that Ford was a suspect in the robbery. They proceeded to take him into custody. As they did so, Ford gave his girlfriend a "wad of cash" totaling $3050. Included in that bundle were additional bait bills. Police also impounded a vehicle belonging to Ford's girlfriend. Inside, they found a bag containing $10,280.

The State charged Ford with first-degree robbery. A jury found him guilty of second-degree robbery.

Ford filed a combined motion for new trial and motion in arrest of judgment, arguing the jury's verdict was "contrary to the law and the weight and sufficiency of the evidence presented." The district court denied the motions. Following imposition of sentence, Ford appealed.

Ford asserts the district court applied the wrong standard in ruling on his motion for new trial. In a pro se brief, he additionally claims his trial attorney was ineffective in failing to (1) challenge the search warrant; (2) adequately cross-examine certain witnesses; and (3) request a lesser-included offense instruction for second-degree robbery.

II. Analysis

A. Motion for New Trial

A court may grant a new trial pursuant to Iowa Rule of Criminal Procedure 2.24(2)(*b*)(6) when "the verdict is contrary to law or evidence." The language "contrary to . . . evidence" means "contrary to the weight of the evidence," rather than unsupported by sufficient evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Under this standard, the district court "may weigh the evidence and consider the credibility of witnesses." *Id.* at 658. In contrast, under a sufficiency-of-the-evidence standard, the court is required to view the evidence in a light most favorable to the State. *Id.*

In denying the new trial motion, the district court stated:

> And also, for the record, I deny the motion for arrest of judgment and, in the alternative, new trial. I find that the record is

> adequate, when taken in its totality, to justify the jury's verdict, so I deny that motion, also.

Ford argues the court improperly "grouped the two motions together as one and ruled up[on] the sufficiency of the evidence."[1] We disagree. While the ruling is brief, the court did not clearly invoke the incorrect standard in ruling on the new trial motion. *Cf. State v. Nitcher*, 720 N.W.2d 547, 560 (Iowa 2006) (noting that court's reference to motions for judgment of acquittal in ruling on new trial motion reflected court's use of incorrect standard); *State v. Scalise*, 660 N.W.2d 58, 66 (Iowa 2003) (noting court "clearly used the sufficiency-of-the-evidence standard rather [than] the weight-of-the-evidence standard"). Under these circumstances, "we are allowed to review the record to determine whether a proper basis exists to affirm the district court's denial of [the defendant's] motion for new trial." *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). "In doing so, we review the trial court's ruling for an abuse of discretion."[2] *Id.*

The State presented several witnesses who described events at the bank. We recognize that only one of these witnesses was able to identify Ford as a participant and this witness's in-court identification was suspect given her inability to identify Ford from a photo array presented to her three hours after the robbery. However, as noted, police later recovered marked "bait bills" in the wad of cash Ford handed to his girlfriend and in money Ford's girlfriend gave to a car dealer.

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[1] Ford appears to conflate a motion in arrest of judgment, which may not be used to challenge the sufficiency of the evidence, *see State v. Oldfather*, 306 N.W.2d 760, 762 (Iowa 1981), with a motion for judgment of acquittal, which is used to challenge the sufficiency of the evidence. *Ellis*, 578 N.W.2d at 658.

[2] The State asserts that we need not reach the merits of the motion because Ford's attorney "invited error" by specifying an incorrect standard at the hearing on the new trial motion. We disagree. Ford's attorney set forth the pertinent rule and the State, in its resistance, cited the correct standard. Accordingly, the district court was not led astray by defense counsel's statements at the hearing on the motion.

Additionally, the Chevy Tahoe driven by the robbers was recovered in the garage of Ford's duplex.

Ford's effort to explain the cash in his possession was internally inconsistent and inconsistent with a prior statement he gave police. He attempted to pin the robbery on a man he identified as "Joe-Joe," who he said was staying in his house. However, his story about Joe-Joe changed over time; after the robbery, he told police that Joe-Joe was staying alone in the basement of his duplex. At trial, he stated the man had a companion who was staying with him in the basement. When asked about the use of the Tahoe in the robbery, he asserted that he had left it running at his residence while he went to a clinic and breakfast. He assumed "Joe-Joe" used it in the robbery. He said he returned to find a bag of money under a barbeque grill outside his house. He did not explain why Joe-Joe, after robbing a bank, would leave the cash behind.

These inconsistencies in Ford's testimony combined with the marked bait bills that could be traced to him lead us to conclude that the district court did not abuse its discretion in denying Ford's new trial motion based on the weight of the evidence.

B. Ineffective Assistance of Counsel

We turn to Ford's ineffective-assistance-of-counsel claims. Ford must show that trial counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Our review is de novo. *Nitcher*, 720 N.W.2d at 553.

1. Search Warrant. Ford asserts the search "warrant c[a]me from non-credible information," "was never served on the defendant," and lacked detail

regarding the "informant's 'veracity,' 'reliability,' and 'basis of knowledge.'" Ford cannot establish *Strickland* prejudice. Although the search warrant uncovered several items that helped connect Ford to the robbery, additional key information tying Ford to the crime was obtained independently. For example, two witnesses saw the Tahoe leaving the scene of the robbery. One of the witnesses, who coincidentally happened to be Ford's neighbor, jotted down the license plate number of the vehicle as it headed away from the bank. She later identified the Tahoe as the vehicle Ford drove. Additionally, police officers testified that they saw Ford passing the cash containing marked bills to his girlfriend. Based on this evidence, there is no reasonable probability the trial outcome would have been different if defense counsel had challenged the search warrant application and prevailed.

2. Cross-Examination. Ford next challenges his trial attorney's cross-examination of two State witnesses. The first State witness was the woman at the bank's drive-up window. As noted, this witness was unable to identify Ford from a photo array. Later, she independently perused public court records pertaining to him, attended a pre-trial court hearing involving him, and, during her trial testimony, identified him as one of the participants in the bank robbery.

Ford contends his attorney should have pointed out that this witness "could never pick [him] out" and knew details about him that could only have been furnished by "the police, county attorney or someone closely associated with the case." Ford's defense attorney in fact made an effort to impeach this witness's in-court identification by eliciting an acknowledgment that the police showed her a picture of Ford shortly after the robbery. He also attacked her

credibility by pointing out that her business was robbed on two occasions just before the bank robbery and she was upset by those robberies and nervous at the time of the bank robbery. This cross-examination served the same purpose as the cross-examination Ford would have liked.

The second witness whose cross-examination Ford challenges was a Des Moines police officer. Ford faults his attorney for failing to question the officer about a police investigation of Joe-Joe. However, details about that investigation were elicited through other witnesses. This witness simply identified items that were recovered pursuant to the search warrant.

We conclude counsel did not breach an essential duty in his cross-examination of these witnesses. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

3. Jury Instruction. Ford finally claims his trial attorney should have objected to the second-degree robbery verdict on the ground that "[n]owhere does the lesser-included charge of robbery in the second degree enter into the readings [of the jury instructions]." In fact, the jury was instructed on the lesser-included offense of second-degree robbery. Therefore, this ineffective-assistance-of-counsel claim is not viable.

We affirm Ford's judgment and sentence for second-degree robbery.

AFFIRMED.