IN THE COURT OF APPEALS OF IOWA

No. 0-270 / 09-0102
Filed May 26, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH LEROY HEARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

A defendant appeals his conviction and sentence for first-degree murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Kenneth Heard, Fort Madison, pro se appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and George N. Karnas and Michael T. Hunter, Assistant County Attorneys, 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).

DOYLE, J.

Kenneth Heard appeals his conviction and sentence for first-degree murder. He claims the district court erred in denying his motion for new trial and imposing surcharges as part of his sentence. He additionally claims his trial counsel was ineffective in several respects. We affirm Heard's conviction and sentence and preserve all but one of his ineffective-assistance-of-counsel claims for postconviction relief proceedings.

I. Background Facts and Proceedings.

On the morning of December 13, 2007, Joshua Hutchinson's body was found lying in the snow near an apartment complex on Center Street in Des Moines. He had been shot to death. Hutchinson was a member of a group called "3 in 3 out" that committed robberies together. Other members included Kenneth Heard, Marco Brown, and Phillip Findley. Heard was viewed as the leader of the group.

On the day Hutchinson was killed, he was with Heard, Brown, and a woman named Jaqisha Majors. They spent the day at a friend's house smoking marijuana, listening to music, and planning a robbery. Later that day, they went to Majors's apartment. Before they left their friend's apartment, Heard gave Brown a gun to carry.

When they arrived at Majors's apartment, Hutchinson went to the bedroom to lie down. Heard then called Findley and told him to come to the apartment. After Findley arrived, Heard met with him and Brown in the bathroom. He told them he wanted to kill Hutchinson "because he knows too much." He had also heard that Hutchinson was planning to rob him. Heard took back the gun he had

given Brown earlier. Sometime later, Brown woke Hutchinson up and told him it was time to go. Hutchinson thought they were going to commit the robbery they had spent the day planning. Heard asked Majors to drive him and Hutchinson. Brown and Findley followed in their car.

Heard directed Majors to the apartment complex on Center Street. He had her drive to the back of the parking lot and told her his cousin would pick them up from there. Hutchinson and Heard got out of the car and walked towards a tree a short distance from the parking lot. Brown and Findley also got out of their car. Findley heard Hutchinson say he had to pee. Brown then saw Heard walk up to Hutchinson and raise a gun to his head. He heard a bang and saw Hutchinson go to the ground. Brown saw Heard shoot Hutchinson three more times. Heard ran away, gave the gun to Brown, and got into Majors's car.

Heard told Majors to drive him to a friend's house. Once there, he changed out of his clothes and removed a rubber glove from his right hand. Heard and Majors returned to her apartment where they found Brown waiting for them. Brown had hidden the gun in a garage near his father's house before having Findley drop him off at Majors's apartment.

The next morning, Majors received a telephone call from a police officer informing her they had found Hutchinson's body and the last number on his telephone was hers. Majors told the officer she did not know of anyone that would have wanted to hurt Hutchinson. After she spoke to the police, Heard started talking about leaving town. A few days later, Majors took Heard to his cousin's house in Des Moines and that was the last she saw of him. The police

eventually located Heard in Texas where he was arrested and brought back to Iowa to face a first-degree murder charge for Hutchinson's death.

A jury trial was held in November 2008. Majors, Brown, and Findley all testified that Heard shot Hutchinson. Heard testified on his own behalf, denying their claims. He admitted to having been at the apartment complex with Hutchinson and the others when Hutchinson was shot. He testified that he and Hutchinson got out of Majors's car to wait for Heard's cousin to pick them up. Heard stated that Hutchinson said he needed to go to the bathroom. Heard did as well. While Heard was urinating, he heard a gunshot. He ran to Majors's car, got in, and told her to drive away. He testified he did not see who shot Hutchinson and denied having a gun with him that evening.

The jury found Heard guilty of first-degree murder. Heard filed a motion for new trial under Iowa Rule of Civil Procedure 2.24(2)(*b*)(6), arguing the verdict was contrary to the law and the evidence. The district court denied the motion and sentenced Heard to life imprisonment. Heard appeals.

II. Discussion.

A. Motion for New Trial.

Heard first claims the district court erred in denying his motion for new trial. He argues the verdict was contrary to the weight of the evidence because the State's witnesses were not credible. The district court disagreed and declined to grant Heard a 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 the law or evidence." "A verdict is contrary to the weight of the evidence where 'a greater amount of credible

evidence supports one side of an issue of cause than the other.'" *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (citation omitted). In ruling on a motion for new trial, the district court

> may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2004) (citations omitted). The district court has broad discretion making such determinations, and we reverse only where that discretion has been abused. *Id*.

As the foregoing passage from *Reeves* demonstrates, "credibility of the witnesses is key in a weight-of-the-evidence determination." *Id.* at 207. However, appellate review of such claims "is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *Id.* at 203. Viewed in that manner, we find no abuse of discretion in the district court's denial of Heard's motion.

This is not a case in which the testimony of the witnesses that otherwise supports the conviction is so lacking in credibility that the testimony cannot support a guilty verdict. *See State v. Adney*, 639 N.W.2d 246, 253 (Iowa Ct. App. 2001). Three of the State's witnesses, who were present when Hutchinson was murdered, testified Heard shot him. Although Heard disputed this testimony, the jury's guilty verdict demonstrates it found the testimony of the State's witnesses to be more credible than Heard's testimony. *See Shanahan*, 712 N.W.2d at 135 ("Except in the extraordinary case where the evidence

preponderates heavily against the verdict, trial courts should not lessen the jury's role as the primary trier of facts and invoke their power to grant a new trial.").

Neither is this a case in which the evidence supporting the guilty verdict is so scanty, or the evidence opposed to a guilty verdict so compelling, that the verdict can be seen as contrary to the evidence. *Adney*, 639 N.W.2d at 253. Heard argues there was no physical evidence linking him to the crime. However, there was circumstantial evidence, including Heard's flight from Iowa following Hutchinson's death, from which the jury could conclude Heard had murdered Hutchinson. *See, e.g.*, *State v. Ash*, 244 N.W.2d 812, 816 (Iowa 1976) ("Evidence of flight may be considered in determining guilt or innocence."). Where, as here, the evidence considered by the jury "is nearly balanced or is such that different minds could fairly arrive at different conclusions," our supreme court has said a "trial court should not disturb the jury's findings." *Shanahan*, 712 N.W.2d at 135. We accordingly affirm the district court's ruling on Heard's motion for new trial.

B. Ineffective Assistance of Counsel.

Heard next raises a number of ineffective-assistance-of-counsel claims. Our review of such claims is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). We typically preserve these claims for postconviction relief, although we will resolve them on direct appeal if the record is adequate. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). We conclude the record in this case is adequate to resolve the ineffective-assistance-of-counsel claim raised by Heard's counsel on appeal, and we preserve the remainder of the claims raised by Heard in his pro se briefs for possible postconviction relief proceedings.

In order to establish his trial counsel was ineffective, Heard must show both that his attorney failed in an essential duty and that the failure resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To prove the first prong, Heard needs to prove the attorney's performance fell outside the normal range of competency. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). "The second prong—prejudice—exists 'when it is reasonably probable that the result of the proceeding would have been different.'" *Id.* (citations omitted). We may resolve the claim on either prong. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Heard claims his trial counsel was ineffective for failing to request an instruction that accomplice testimony must be corroborated in order to support a conviction. This claim is based on Iowa Rule of Criminal Procedure 2.21(3), which provides:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

See also Iowa Uniform Criminal Jury Instruction 200.4. The purpose of requiring corroborating evidence is two-fold: (1) it tends to connect the accused with the crime charged and (2) it serves as a counterweight against the dubious credibility of an accomplice, whose motivation to testify is suspect because the person would have a natural self interest in focusing the blame on the defendant. *State v. Berney*, 378 N.W.2d 915, 918 (Iowa 1985).

Heard argues both Brown and Findley were accomplices. *See State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004) ("An accomplice is a person who

'could be charged with and convicted of the specific offense for which an accused is on trial.'" (citation omitted)). Assuming arguendo that Brown and Findley were accomplices, the State asserts Heard was not prejudiced by his counsel's failure to request a corroboration instruction because there was ample other non-accomplice evidence corroborating their testimony. *See id.* at 572 (Iowa 2004) ("[T]he testimony of one accomplice may not corroborate the testimony of another accomplice . . . ."). We agree.

Corroborative evidence may be direct or circumstantial. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). It need not be strong or confirm each material fact of the accomplice's testimony. *State v. Brown*, 397 N.W.2d 689, 695 (Iowa 1986). Evidence asserted as corroborative of an accomplice's testimony will be sufficient "if that evidence corroborates some material aspect of the accomplice's testimony tending to connect defendant to the commission of the crime and thereby supports the credibility of the accomplice." *Id.*

Majors, who Heard does not assert was an accomplice, testified that she drove Heard and Hutchinson to the apartment complex on Center Street the night Hutchinson was shot. She stated that after both men got out of her car, she watched them walk "to an area further behind the apartment." She then turned the music up in her car and began backing out of the parking lot. As she was backing up, she heard gunshots. She testified that when she turned around to see what had happened, she saw Brown, Findley, and Heard running away from the area behind the apartment complex. Heard was a little behind Brown and Findley.

Majors testified Heard got into her car and told her to go. She drove him to a friend's house where he changed his clothes. He also removed a rubber glove from his right hand, which she did not remember seeing him wear before then. *See State v. Palmer*, 569 N.W.2d 614, 616 (Iowa Ct. App. 1997) (recognizing events after a crime may be corroborative evidence). After Heard changed his clothes, she drove him to her apartment. Once there, Majors testified Heard said "he wanted to go back to see if Josh was dead because if he wasn't dead, he didn't want to have Josh finger him as, you know, shooting him." She stated Heard later told her that he shot Hutchinson:

> He had told me that—you know, where they were standing. As far as where they were standing, it was back behind the apartment or building complex. Josh said . . . something about he had to use the bathroom, and [Heard] told him no and shot him in the head. He said his body fell and kind of, you know, slumped over and he shot him again after that.

See State v. Jones, 511 N.W.2d 400, 405 (Iowa Ct. App. 1993) ("A defendant's admissions may be considered corroboration."). This testimony matches the testimony of Brown and Findley regarding the events surrounding Hutchinson's death.

The autopsy report also corroborated Brown's account of the shooting. The medical examiner testified Heard was shot at least four times: "Once to the head, once to the chest, once to the left eye and once to the right eye." Brown testified he watched Heard walk

> up beside [Hutchinson] and raise[ ] a gun to his head and that's when I turned around and then I heard a bang and that's when I took off running, and then I turned around and then Kenneth Heard shot him three more times.

See State v. Yeo, 659 N.W.2d 544, 549 (Iowa 2003) (finding medical evidence of injuries corroborated accomplice's account of how injuries had been inflicted).

Given this non-accomplice evidence, we do not believe Heard has shown a reasonable probability the result would have been different if the jury had received a corroboration instruction. Heard's claim thus fails on the prejudice prong. *See State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) (finding no prejudice resulted from trial counsel's failure to request a jury instruction on corroboration of a confession); *see also Herron v. State*, 86 S.W.3d 621, 633-34 (Tex Crim. App. 2002) (holding that trial court's failure to give accomplice instructions as to two witnesses in murder prosecution was harmless error where accomplices' testimony was corroborated by non-accomplice evidence).

We do not find the record adequate to address the remaining ineffective-assistance-of-counsel claims raised in Heard's pro se brief.[1] Those claims are accordingly preserved for possible postconviction relief proceedings.

C. Surcharges.

The sentencing order provided: "The Clerk of Court shall assess the DARE surcharge pursuant to Iowa Code section 911.2 and the Law Enforcement Initiative surcharge pursuant to Iowa Code section 911.2 *to each applicable offense*." (Emphasis added.)

[1] Those claims include counsel's failure to (1) "object to prosecutorial misconduct for presenting false testimony of State witnesses 'Jaquisha Majors' and 'Marco Brown' and 'Philip Findley'"; (2) call "promising witnesses, Volin Johnson, Albert Harrison, and Charles Webster to establish the defendant's innocence"; (3) "object to prosecutorial misconduct for 'vouching for witness'"; (4) "object to the introduction of the gun at trial"; (5) "investigate 'Marco Brown's' deal from the State"; and (6) prevent Heard from taking the stand.

Heard argues, "Because the Iowa Code does not authorize the District Court to impose the DARE or Law Enforcement Initiative surcharges for a violation of Chapter 707, the District court's imposition of the surcharge is illegal and must be vacated." The State agrees the surcharges are not applicable in this case. *See* Iowa Code §§ 911.2, .3 (2007) (listing offenses subject to the surcharges). However, we find no need to vacate that portion of Heard's sentence or remand for resentencing, as the sentencing order provides that the surcharges are to be assessed only to applicable offenses. Heard was not convicted of an applicable offense, so no surcharges should be assessed in this case.

III. Conclusion.

We affirm the district court's ruling on Heard's motion for new trial and reject the ineffective-assistance-of-counsel claim based on counsel's failure to request an accomplice corroboration instruction. We preserve the other claims of ineffective assistance of counsel for possible postconviction relief proceedings. Heard's conviction and sentence for first-degree murder are affirmed.

AFFIRMED.