

IN THE COURT OF APPEALS OF IOWA

No. 0-344 / 09-0598
Filed July 14, 2010

BRIAN JAY SHEPHERD,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County, William H. Joy,
Judge.

Brian Shepherd appeals a ruling denying his application for postconviction
relief. **AFFIRMED.**

Charles Kenville, Des Moines, and Richard Phelps, Mingo, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Michael K. Jacobsen, County Attorney, and Jim Cleverly Jr., Assistant
County Attorney, for appellee State.

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

VOGEL, P.J.

Brian Shepherd appeals a ruling denying his application for postconviction relief and asserts new grounds for ineffective assistance of trial, appellate, and postconviction counsel following his conviction for robbery in the first degree.

I. Background Facts and Proceedings

On direct appeal, we summarized the facts of this case:

On January 6, 2003 at approximately 9:00 p.m. the Kellogg Country Store in Jasper County was robbed by two men wearing dark ski masks. Nellie Wertz was working as the store clerk at the time of the robbery. She testified at trial that the two men rushed into the store demanding money. One of the men was armed and screamed at Wertz, "I want the money and I want the money now, Goddamn bitch." The men took approximately \$300 from the cash register in bills no higher than \$20, and took the videotape from the security camera. Approximately \$25 in change was included in the money taken from the register. Wertz testified that the two stuffed the money into a plastic bag with the words "Thank You" written in red on it. She also stated that she had checked the surveillance equipment earlier and the videotape in the recorder was labeled "EVE" in pink. She further testified that the robber with the gun was wearing a plaid coat, partly grey with a "little red line."

A.J. Winningham, the store's pizza delivery person, returned to the Kellogg Country Store as two masked men ran out of the store, one carrying a white plastic bag. He testified that the men fled heading west in a dark mid-sized car. He also noticed the car did not have any license plates. Winningham followed the vehicle for a short time and later identified a vehicle for the police as the one he had followed. The robbery was reported and descriptions of the men and their vehicle were given to the police. Winningham initially told the officers the suspects were wearing gray jumpsuits. At trial he stated they were wearing light-colored jackets and gloves.

Chief Deputy John Halferty of the Jasper County Sheriff's Department was given a description of the suspect vehicle. Deputy Halferty spotted a car matching the general description of the vehicle involved in the robbery approximately forty minutes after the robbery and stopped it. Halferty recognized the driver as the defendant, Shepherd, and the passenger was later identified as Zachary Van Dusseldorp. Shepherd was wearing blue jeans and a black t-shirt and Van Dusseldorp was wearing blue jeans and red and blue shirt with "Ali" printed on it. Halferty informed the men that

he had stopped the car because it matched the description of a vehicle used in a robbery and because it was not displaying a license plate.

Halferty testified at trial that Shepherd consented to a search of the car. He called for backup and another officer arrived and assisted Halferty in the search of the car. During the search the deputies found, among other things, two pair of gloves from the Fort Dodge Correctional Facility, a pair of weight-lifting gloves, a videotape labeled "EVE" in pink, a hand drawn general floor plan similar to the Kellogg Country Store, two dark colored ski masks, a piece of gray hosiery, a plastic sack with the words "Thank You" written in red on it, brown insulated coveralls, a black BB gun, a blue insulated flannel shirt, and \$35.64 in change. Shepherd had \$107 on his person and Van Dusseldorp had \$190 on his person.

At the time of the robbery both Shepherd and Van Dusseldorp were residents of the Fort Des Moines Correctional facility. On the day of the robbery both had signed out at 7 a.m. to work at the Public Safety Commission in Des Moines. Their check-in time was to be 11:00 p.m. and under the terms of their work release neither was to be outside of Polk County.

Winningham and Shirley Barr, another cashier at the Kellogg Country Store, also testified they had seen Shepherd and Van Dusseldorp at the store a week before the robbery on the evening of December 29, 2002, with a female. They both testified that Van Dusseldorp purchased a candy bar, backed up next to some shelving and proceeded to stare at Barr for approximately ten minutes. Shepherd and the female then joined Van Dusseldorp and they left the store. Although at trial Barr was not able to identify Shepherd as the other man in the store on December 29, Winningham did positively identify him as being in the store with Van Dusseldorp that evening.

On January 13, 2003, Shepherd and Van Dusseldorp were charged as co-defendants in a joint trial information with robbery in the first degree, in violation of Iowa Code sections 711.1 (2003) and 711.2, and absence from custody, in violation of Iowa Code section 719.3. Jury trial commenced on April 2, 2003 and the jury found Shepherd guilty as charged. Shepherd filed several motions, including a motion for mistrial and a motion for new trial, both based on a claim of prosecutorial misconduct and a claim the verdict was contrary to the evidence. The court denied all of Shepherd's motions in a written ruling. The court sentenced Shepherd to a term of imprisonment not to exceed twenty-five years on the robbery charge and one year on the absence from custody charge. It ordered that the sentences begin at the expiration of any existing sentence.

This court affirmed Shepherd's conviction on direct appeal, but preserved his ineffective-assistance-of-counsel claims for postconviction proceedings. The only claim raised on direct appeal relevant to this appeal, is his assertion trial counsel was ineffective for failing to lodge a timely objection to the prosecutor's alleged improper closing argument. On postconviction, the court denied this and all other claims Shepherd raised. He appeals from that ruling and also raises additional claims of ineffective assistance of trial, appellate, and postconviction counsel, as none challenged defective jury instructions.

II. Standard of Review

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, Shepherd 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 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). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id.* A claimant must also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

III. Ineffective Assistance of Counsel

A. Closing Argument

Shepherd asserts trial counsel breached an essential duty in failing to object to seemingly inflammatory comments made by the prosecutor during closing arguments. Our review of this claim is hampered because the reporting of closing arguments was waived. The only record we have is a ruling from the trial court and testimony from the postconviction hearing, acknowledging the general nature of the comments.¹ While defense counsel was not required to have closing arguments reported, Shepherd made no objection, and as such, the postconviction court, as the finder of fact, was free to consider testimony from counsel concerning what alleged statements were made.² See *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Nevertheless, Shepherd argues that counsel should have objected to the prosecutor's inflammatory statements during closing arguments.

Shepherd has failed to identify what specific comments his counsel should have objected to and how each caused him prejudice. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (explaining that the applicant must not simply claim that counsel should have done a better job, but must state the specific ways in

¹ The ruling by the trial court on Shepherd's post-trial motion stated:

The Court finds that while certain comments of the prosecuting attorney were inappropriate, there was no prejudice to either Defendant. The arguments were not reported and no one objected during closing arguments. More importantly, there was overwhelming evidence in this case [detailed inculpatory evidence]. While both defense counsel made a valiant effort to explain away these facts, the Court finds the jury had more than sufficient evidence to find the Defendants guilty beyond a reasonable doubt regardless of what was said during closing arguments.

² Effective August 16, 2010, the reporting of opening statements and final arguments will be required in a criminal trial.

which counsel's performance was inadequate and how competent representation probably would have changed the outcome). Acknowledging that some of the comments were improper, Shepherd's trial counsel testified at the postconviction hearing as to why he did not object, reasoning that he considered the State's argument to be rather poorly delivered. He thought he would be more persuasive in his closing argument, and if necessary could bring up perceived problems with the State's closing argument in a post-trial motion. He also did not want any objections to result in a mistrial, stating, "[U]ntil then I thought we had done pretty well and I didn't want to—I didn't want to have to do it all over again and not do as well, so I was reluctant to ask for a mistrial." In its ruling, the postconviction court detailed the explanation given by trial counsel and found that "[t]he decisions which he made were part of a reasonable trial strategy." The court went on to say, "regardless of the wisdom of applicant's trial counsel's inaction during the prosecution's argument, the result of this trial would not have changed."

Ineffective-assistance-of-counsel claims

involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma, 626 N.W.2d at 143. We agree with the postconviction court. Even if the prosecutor's remarks during closing arguments were inflammatory, such that counsel should have objected, we cannot say that the outcome of the trial would have been changed, as there was overwhelming evidence to support Shepherd's

conviction. *Bugley*, 562 N.W.2d at 178. We find there was no breach of duty nor resulting prejudice.

B. Exculpatory Evidence

Shepherd next claims counsel failed to follow through with his strategy to discredit the eyewitnesses and follow up on areas of potentially exculpatory evidence, thus his performance fell below minimum standards of professional competence. He cites three specific areas in which he claims counsel failed to investigate: a Wal-Mart security tape depicting a man and a woman purchasing similar clothing as was worn by the perpetrators of this robbery; a pair of gloves found in the car Shepherd was driving, with initials of another person; and copies of a Fort Des Moines Correctional Facility administrative record supporting that he was not “casing” the store in the days leading up to the robbery. When complaining about the adequacy of an attorney’s representation, it is not enough to simply claim that counsel should have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). The applicant must state the specific ways in which counsel’s performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* Although Shepherd raised these issues at the postconviction hearing, Shepherd failed to offer evidence of how further investigation into these areas would have changed the outcome of the trial.

The postconviction court found,

The record reflects that the applicant’s trial counsel used those matters to further the unified trial defense. The applicant fails to show that a reasonable probability exists that the trial outcome would have been different if these collateral matters had been presented differently by his trial counsel.

The postconviction court further found that “[t]he prosecution’s evidence was substantial, and covered all the elements of the crime of Robbery in the First Degree.” Moreover, Shepherd’s counsel provided strategic reasons for his decisions on what evidence and testimony to present and what would not be helpful to the defense. Where counsel’s decisions are made pursuant to reasonable trial strategy, we will not find ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). We agree with the postconviction court that Shepherd has failed to establish either a breach of his counsel’s duty nor resulting prejudice.

C. Aiding and Abetting Jury Instruction

Shepherd next argues his trial counsel, postconviction counsel, and appellate counsel were ineffective for failing to object to or raise a claim regarding the aiding and abetting instruction, as it omitted critical language concerning the specific intent necessary. Shepherd was tried together with Zacary Van Dusseldorp;³ both charged with robbery in the first degree, a crime necessitating a finding of specific intent. Iowa Code § 711.1 (stating that a person must have the specific intent to commit a theft in order to be guilty of robbery); See *State v. Hickman*, 623 N.W.2d 847, 852 (Iowa 2001) (explaining that a person commits robbery in the first degree when the person purposely inflicts or intends to inflict serious injury while perpetrating a robbery, which is a specific intent crime). “When intent is an element of the crime charged, a person may be convicted on a theory of aiding and abetting if he participates with either

³ We note a discrepancy in the spelling of Zacary Van Dusseldorp’s name in our opinion on direct appeal. This is the correct spelling.

the requisite intent, or with knowledge the principal possesses the required intent. *State v. Tangie*, 616 N.W.2d 564, 574 (Iowa 2000). The instruction given to the jury on robbery in the first degree included an aiding and abetting alternative:

As to each Defendant, the State must prove all of the following elements of Robbery in the First Degree as to that Defendant:

1. On or about the 6th day of January, 2003, the Defendant had the specific intent to commit a theft or to aid and abet another in the commission of a theft.

-and-

2. To carry out his intention or to assist himself or another in escaping from the scene, with or without the stolen property, the Defendant or the person whom he aided and abetted:

a. Committed an assault on Nellie Wertz.

-or-

b. Threatened Nellie Wertz with serious injury, or purposely put Nellie Wertz in fear of immediate serious injury.

-and-

3. The Defendant or the person whom he aided and abetted was either armed with a firearm or represented to Nellie Wertz that he was armed with a firearm.

If the State has proved all of the elements, as to a Defendant, that Defendant is guilty of Robbery in the First Degree. If the State has failed to prove any one of the elements as to a Defendant then that Defendant is not guilty of Robbery in the First Degree and you will then consider the charge of Robbery in the Second Degree as explained in instruction 23.

Shepherd asserts that a comment to the uniform jury instruction on aiding and abetting should have been included in the instructions given because he was charged with a specific intent crime. The comment reads:

Note: Add the following paragraph if the offense involves specific intent: "The crime charged requires a specific intent. Therefore, before you can find the defendant 'aided and abetted' the commission of the crime, the State must prove the defendant either has such specific intent or 'aided and abetted' with the knowledge the others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or

knowledge the others had such specific intent, [he] [she] is not guilty.”

Iowa Crim. Jury Instr. 200.8 (Comment).

Shepherd argues his counsel was ineffective for failing to object to the given instruction on the ground that it did not fully explain the requisite intent. During trial, Shepherd and codefendant Van Dusseldorp pursued a general denial defense, and their defense strategy was to claim innocence, asserting that the wrong persons were being accused and tried for this crime. As they both claimed total innocence, Shepherd did not assert during trial nor on postconviction that Van Dusseldorp had committed the crime and acted without Shepherd’s knowledge. Substantial evidence was presented that demonstrated both codefendants worked in harmony to carry out the robbery. Therefore, changing the intent language on the jury instruction would not change the way it was presented to the jury nor aid Shepherd’s general denial defense strategy.

The additional comment to the instruction would have been useful, had Shepherd claimed Van Dusseldorp committed the crime, but without Shepherd’s knowledge of Van Dusseldorp’s specific intent. However, to add that language would have been inapposite to the defense strategy. See *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999) (explaining that where counsel employs a reasonable trial strategy in dealing with jury instructions, we presume counsel acted competently). Moreover, our examination turns upon “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692-93

(1984). Shepherd failed to show that there was a reasonable probability that, had counsel objected, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). Shepherd has failed to establish a breach of his trial counsel's duty or resulting prejudice, and therefore has failed to establish a breach of duty by his appellate or postconviction counsel.

D. Robbery in the First Degree Jury Instruction

Finally, Shepherd asserts trial counsel, postconviction counsel, and appellate counsel were ineffective for failing to object or raise a claim that the jury was improperly instructed on the law regarding use of a dangerous weapon. "Even without a request, the court must instruct fully on all material issues, stating applicable legal principles supported by requisite evidence." *State v. Thomas*, 262 N.W.2d 607 (Iowa 1978).

The jury was instructed in jury instruction eighteen, subsection three, on the dangerous weapon element for robbery in the first degree: "The Defendant or the person whom he aided and abetted was either armed with a firearm or represented to Nellie Wertz that he was armed with a firearm." The jury was further instructed in instruction nineteen,

If you find a Defendant guilty, you must decide if he or any person who aided or abetted him in the commission of the offense represented that either such person had a firearm.

To represent that a person had a firearm means to state, or act as if, a firearm was in such person's possession at the time of the crime. It is not necessary there actually was a firearm, or that it was shown. However, there must have been an act or statement by such person which would cause the victim, Nellie Wertz, to reasonably believe that such person had a firearm.

The State must prove beyond a reasonable doubt that a Defendant or a person who aided and abetted that Defendant in the commission of the offense represented that he had a firearm.

Shepherd asserts these instructions misstate the law and allowed the jury to convict him without proof that he actually had a dangerous weapon, but instead by merely *representing* that he had one. Therefore he claims his trial counsel was ineffective for failing to object to the instruction, and in turn, his appellate and postconviction counsel were ineffective for failing to raise the claim.

Robbery is defined in Iowa Code section 711.1:

A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony.

It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

Robbery in the first degree is defined in Iowa Code section 711.2:

A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or *is armed with a dangerous weapon*. Robbery in the first degree is a class "B" felony.

(emphasis added).

Shepherd correctly asserts that robbery in the first degree does not contain an element of the "representation" of possession of a firearm, as included in the jury instructions, but actually being "armed" with a dangerous weapon.

The instructions were clearly wrong and his counsel was ineffective in failing to object to instructions eighteen and nineteen.

Next we must determine whether the incorrect instructions worked to Shepherd's prejudice. The State had the burden to prove, under the statute, that Shepherd was "armed with a dangerous weapon." Iowa Code § 711.2. Therefore, we look to the trial transcript to see whether the jury was given sufficient evidence to support this element, beyond a reasonable doubt.

Nellie Wertz, the store clerk present during the robbery, testified to the object used during the commission of the robbery. She stated, "I recognized the gun. I've seen enough guns." She described the gun as being silver, and expressed her knowledge of the distinction between long guns and short guns, stating that her brothers and sons have guns. Wertz was able to explain the differences between a revolver and a pistol, and identified the gun used during the robbery as a pistol because it did not have a revolving cylinder. The gunman was pointing the gun towards her head as he stood on one side of the store counter and Wertz stood on the other side. She testified this gave her a plain view of the weapon. When asked whether she was sure the object pointed at her was a gun and not, for example, a flashlight, she firmly responded, "No, it was a gun."

While the instruction incorrectly stated that the State only had to prove Shepherd "represented" that he had a firearm, Wertz was decisive in her testimony that the object used during the robbery was a gun. *State v. Bone*, 429 N.W.2d 123, 127 (Iowa 1988) (explaining that error in jury instructions "is presumed prejudicial unless the contrary appears beyond a reasonable doubt

from a review of the whole case.”). Had Wertz been equivocal in her responses, we may have questioned whether the jury could have clearly determined a gun was used, or just a “representation” of such. However Wertz was unwavering in her responses, definitively testifying that there was a gun in the robber’s hand. As such, the correct jury instruction would not have changed the outcome of the jury’s verdict. Shepherd cannot demonstrate prejudice due to the incorrect jury instruction.

IV. Conclusion

Shepherd has failed to establish his claims of ineffective assistance of trial, appellate, or postconviction counsel. We agree with the postconviction court that trial counsel was not ineffective for failing to object to the prosecutor’s alleged inflammatory statements during closing arguments or follow up on areas of potentially exculpatory evidence, as counsel’s decisions were part of a reasonable trial strategy. Counsel was not ineffective for failing to object to the aiding and abetting instruction as it was inapposite to Shepherd’s general denial defense strategy. Finally, while counsel was ineffective in failing to object to a jury instruction regarding a dangerous weapon, Shepherd did not demonstrate prejudice, as the jury was given sufficient evidence to support this element beyond a reasonable doubt.

AFFIRMED.