IN THE COURT OF APPEALS OF IOWA

No. 0-421 / 09-1042
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DARWIN LENELE BURRAGE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Darwin Burrage appeals from the judgment, conviction, and sentence for possession with intent to deliver powder cocaine. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald Feuerbach and Kelly Cunningham, Assistant County Attorneys, for appellee.

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

POTTERFIELD, J.

I. Background Facts and Proceedings

During all times relevant to this appeal, Officer Ryan Thompson of the Bettendorf Police Department was assigned to a covert unit responsible for making undercover purchases of narcotics. On February 27, 2006, Thompson and an individual he knew as "D" spent approximately one minute with each other in Illinois. After the meeting, Thompson used "D's" phone number, license plate, and vehicle information to check the Pistols Records System in Illinois, the CODY system in Bettendorf and Scott County, and the Davenport records system. Thompson stated he may also have checked monikers and alias names. This search yielded three photographs of an individual and a full name, Darwin Burrage. One of the photographs was dated 2001, one was dated 2002, and a picture received from the Iowa Department of Transportation was dated 2005. Based on this information, Thompson determined "D's" full name was Darwin Burrage.

On March 8, 2006, Thompson met with the same individual in Illinois for approximately two minutes. The next day, March 9, 2006, Thompson arranged to meet this individual again in Davenport. "D" directed Thompson where to park. He then walked up to Thompson's car and got in the passenger seat. "D" completed a sale of four grams of cocaine to Thompson. "D" was in Thompson's car for a total of eleven minutes during this sale. That meeting was surveilled by other officers in the area, although no other identification testimony was given. Burrage resided at a facility operated by the Department of Correctional Services

during this period. The records from that facility confirmed that Burrage was out of the building during all three of these encounters.

Thompson testified that to protect his cover and the confidentiality of the informant, he knew "D" would not be arrested for several months and that he would not testify regarding this sale until later. Therefore, he paid special attention to "D's" facial features. Thompson's vehicle was well lit, and Thompson testified that it was clear that he was dealing with Burrage on March 9 and that he was certain his encounters on February 27 and March 8 had been with Burrage.

Burrage was arrested August 21, 2007. On January 16, 2008, Burrage was charged with possession with intent to deliver powder cocaine in violation of Iowa Code section 124.401(1)(c)(2) (2005). In May 2009, a jury convicted Burrage of the charge. He appeals, arguing: (1) there was insufficient evidence to convict him; and (2) his trial counsel was ineffective in failing to properly object to identification evidence, failing to move to suppress an in-court identification based on unduly suggestive pretrial identification procedures, and failing to request a jury instruction on eyewitness identification.

II. Sufficiency of the Evidence

We review sufficiency of the evidence claims for errors at law. Iowa R. App. P. 6.907. We uphold a verdict if substantial evidence supports it. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). We consider all record evidence, not just the evidence supporting guilt, when making sufficiency

of the evidence determinations. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). We view the evidence in the light most favorable to the State, "including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *Biddle*, 652 N.W.2d at 197. "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). "The State must prove every fact necessary to constitute the crime with which the defendant is charged." *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

Burrage argues that the only testimony linking him to the crime was that of Thompson and that Thompson's identification of Burrage was questionable. He therefore asserts the State failed to prove beyond a reasonable doubt that he was the individual who sold powder cocaine to Thompson.[1] We disagree.

Thompson met with "D" on one occasion before he attempted to determine "D's" name and address. After meeting with "D," Thompson used several methods to learn the full name of the individual with whom he had met. He then had two more face-to-face encounters with Burrage, one of which lasted a total of eleven minutes. Further, Thompson was not merely a casual observer. He testified that he was paying attention to Burrage's facial features. He testified he was certain that the individual with whom he discussed drug purchases on all three occasions was Burrage. Thompson's in-court recognition of Burrage as the man he met with three times was sufficient to support conviction. Our system commits to the jury questions of the reliability and credibility of witnesses, in

[1] Because we find Burrage preserved this argument by making a sufficiently specific motion for judgment of acquittal, we decline to address his alternative argument of ineffective assistance of counsel for failure to preserve error on this claim.

which Burrage grounds his present challenge. *See State v. Walton*, 424 N.W.2d 444, 448 (Iowa 1988). The jury verdict is sustainable and is therefore affirmed.

III. Ineffective Assistance

We review Burrage's claims of ineffective assistance of counsel de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). In order to prove his counsel was ineffective, Burrage must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id*. In order to establish the first prong of the test, Burrage must show that his counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). In evaluating counsel's effectiveness, we require more than a showing that counsel's strategy failed. *Taylor*, 352 N.W.2d at 684. In addition, there is a strong presumption that counsel performed competently. *Id*. To satisfy the second prong, prejudice, Burrage "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Id*. If we can dispose of Burrage's claim under the prejudice prong, we need not evaluate his counsel's performance. *Id*.

Ordinarily, we preserve ineffective-assistance-of-counsel claims for postconviction proceedings to enable full development of the record and to afford trial counsel an opportunity to respond to the claims that have been made. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). We may resolve the claim of ineffective assistance of counsel on direct appeal if we find the record is sufficient to do so. *State v. Hildebrant*, 405 N.W.2d 839, 840-41 (Iowa 1987).

Upon review of the record here, we conclude the record is adequate to address the claim on direct appeal.

A. Laboratory Report

Burrage claims his trial counsel was ineffective for failing to object on hearsay grounds to a laboratory report offered into evidence by the State. Thompson testified that the drug he purchased from Burrage was sent to the Illinois State Police Forensic Lab for testing. Thompson then identified the lab report from the Illinois lab, which stated that four grams of white powder submitted by Special Agent Chris Endress on March 16, 2006, were determined to be cocaine. The district court overruled the objection of Burrage's counsel on the ground of lack of foundation.[2]

The Illinois laboratory report listed the offense as "Violation of Controlled Substances Act" and listed Burrage's name as the "case title." Burrage asserts that because his defense was based on a theory of misidentification, trial counsel's failure to object to these two aspects of the report on hearsay grounds was prejudicial.

Burrage analogizes the laboratory report to an evidence tag, which our courts have held should not be submitted to juries because they may contain hearsay and unfairly emphasize the State's case. *See State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005) ("We have long held it is error for the district court to allow the prosecution to submit evidence to the jury with statements written on attached evidence tags."). Burrage bases his argument on three evidence tag

[2] The State concedes that Iowa Code section 691.2 presumably would not apply to allow the admission into evidence of an Illinois crime lab report notwithstanding its hearsay nature.

cases: *State v. Gallup*, 500 N.W.2d 437 (Iowa 1993); *State v. Shultz*, 231 N.W.2d 585 (Iowa 1975); and *State v. Branch*, 222 N.W.2d 423 (Iowa 1974).

In *Branch*, the supreme court reversed a conviction for delivery of a controlled substance because an evidence tag submitted to the jury contained "a neat condensation of the [State's] whole case against the defendant." 222 N.W.2d at 427. The evidence tag in *Branch* contained the name of the drug, the times and dates of the sale and delivery, the name of the defendant, the purchase price, and the names of the police officers and special agent involved in the sting. *Id*. at 425.

In *Shultz*, the supreme court reversed a conviction for breaking and entering because an evidence tag submitted to the jury contained comprehensive information about the case, including the place where the evidence was found, the date and time of its recovery, the defendant's name, the charge, the name of the victim, and the name of the officer who recovered the evidence. 231 N.W.2d at 587.

In *Gallup*, the supreme court repeated, "Generally, the admission of incriminating evidence with an evidence tag still attached is prejudicial error." 500 N.W.2d at 441. However, the court found in *Gallup* that any error in submitting an evidence tag to the jury was harmless because defendant had admitted to committing the crime with which he was charged. *Id*. Burrage asserts that because he made no admission, his name's appearance on the laboratory report was prejudicial.

In *Martin*, the supreme court found that because the evidence tag did not provide the jury with "a neat condensation of the [State's] whole case against the

defendant," Martin could not show he was prejudiced by the admission of an evidence tag. 704 N.W.2d at 669. The supreme court further distinguished *Martin* from *Branch* and *Shultz* because *Branch* and *Shultz* were analyzed for an abuse of discretion, whereas *Martin* was analyzed under ineffective-assistance-of-counsel principles. *Id.* at 668-69.

Here, as in *Martin*, Burrage has not carried his burden to show prejudice from the admission of his name and the offense on the laboratory report.[3] *See Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); *Martin*, 704 N.W.2d at 670. Burrage complains that his counsel was ineffective for failing to object to the admission of the laboratory report because it contains the name of the offense and his name—two pieces of information that were given to the jury at the outset of the trial. This information does not constitute a "neat condensation" of the State's case. Unlike the evidence tags in *Branch* and *Shultz*, the report does not contain the time or date of the drug transaction, the purchase price, or the location. Burrage cannot show he was prejudiced by the inclusion of his name and the type of offense on the laboratory report. *See Martin*, 704 N.W.2d at 669.

B. Identification Procedure

Burrage claims that Thompson's in-court identification testimony was tainted by a prior out-of-court identification using single photographs. He therefore asserts that his counsel was ineffective for failing to move to suppress

[3] In making this finding, we do not conclude that a laboratory report is analogous to an evidence tag. However, we address the argument as presented by Burrage.

the in-court identification testimony on the ground it was based on unduly suggestive pretrial identification procedures.

"When unnecessarily suggestive pretrial out-of-court identification procedures conducive to mistaken identification that are incapable of repair are used, the Due Process Clause requires exclusion of the testimony of the identification." *State v. Folkerts*, 703 N.W.2d 761, 763 (Iowa 2005). "[T]he totality of the circumstances must be examined to determine if a defendant's due process rights were violated as a result of the identification procedure." *Id*. We employ a two-part test to determine whether in-court identification testimony is admissible.

> The first part of the analysis requires the court to decide whether the identification procedure was in fact impermissibly suggestive. Second, if the court finds that the procedure was impermissibly suggestive, then the court must determine whether, under the totality of the circumstances, an identification made by the witness at the time of trial is irreparably tainted. Concerning the second step, the court's focus is on whether the initial identification was reliable.

Id. at 764. With respect to the reliability prong, the court gives weight to five factors:

> (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Id. We consider these factors in order.

Thompson met with Burrage on three separate occasions over a period of ten days. Between the first and second meetings, Thompson used photo identification cards to learn the full name of the person he knew as "D." On the

last occasion, Burrage and Thompson sat face to face in the front seat of a well-lit car for eleven minutes. Thompson had ample opportunity to view Burrage throughout these meetings. *See State v. Hicks*, 277 N.W.2d 889, 892 (Iowa 1979) (finding witness had ample opportunity to observe perpetrator because they were within close proximity in a well-lit room for approximately ten minutes). Approximately three years later, Thompson gave a discovery deposition to defense counsel, where Burrage was present. At Thompson's request during the deposition, Burrage showed the officer his teeth, which were a feature Thompson especially remembered. About a month after the deposition, Thompson made an in-court identification of Burrage.

Thompson is a trained observer and knew in advance that Burrage would not be arrested immediately. The undercover officer consciously paid careful attention to Burrage's appearance. Thompson was not "merely a casual inattentive observer." *See State v. Mark*, 286 N.W.2d 396, 406 (Iowa 1979) (finding a maintenance man was "not merely a casual inattentive observer" where maintenance man thought perpetrator was a hitchhiker and his job duties required him to be on the lookout for hitchhikers).

There is no direct testimony concerning Thompson's description of Burrage prior to seeing the pictures.

Thompson testified that when he looked at the photographs of Burrage, it was clear to him that Burrage was the person with whom he had met. Thompson further testified that he was certain he met with Burrage on each of the three occasions. He testified that every time he met with "D," Burrage showed up.

Thompson saw photographs of Burrage within one week of first meeting with him. After obtaining the photographs, Thompson met with Burrage two additional times and confirmed his belief that Burrage's photographs were pictures of the man with whom he was meeting. Thompson's identification was ongoing as Thompson and Burrage's meetings continued.

We cannot say that under the totality of the circumstances the identification procedures gave rise to a "very substantial likelihood of irreparable misidentification." *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Therefore, Burrage cannot prove prejudice as required to succeed on his claim of ineffective assistance of counsel.

C. Jury Instruction

Finally, Burrage claims his trial counsel was ineffective for failing to request Iowa Uniform Jury Instruction 200.45, an approved instruction that informs the jury concerning the special importance of eyewitness identification and delineates methods of testing it.

> The instruction is in accordance with the holding in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), and reminds jurors that '[o]ne of the most important issues in this case is the identification of the defendant as the perpetrator of the crime' and that identity must be proven beyond a reasonable doubt.

State v. Hohle, 510 N.W.2d 847, 849 (Iowa 1994) (quoting *U.S. v. Telfaire*, 469 F.2d at 558).

> It advises that many factors should be taken into account in evaluating identification testimony, including capacity and opportunity to observe, circumstances under which the initial and subsequent identifications were made, length of time between the event and the identification, subsequent ability or inability to identify, and credibility.

State v. Tobin, 338 N.W.2d 879, 880 (Iowa 1983).

The State contends Burrage cannot show he was prejudiced by counsel's failure to request this instruction. We agree. Our discussion above includes a description of the facts relevant to Thompson's reliability as an eyewitness. After considering the factors suggested by the instruction, we find they weigh in favor of Thompson's eyewitness testimony and would have emphasized the strongest aspects of the State's case against Burrage. Further, the court's marshalling instruction informed the jury that the state was required to prove beyond a reasonable doubt that Burrage possessed the cocaine with intent to deliver. Thus, the jury understood that the State had to prove Burrage's identity beyond a reasonable doubt. *See State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995) (stating that jury instructions are to be considered as a whole and that a court may phrase instructions in its own words as long as the instructions "fully and fairly advise the jury of the issues they are to decide and the law which is applicable.") Because Burrage cannot show prejudice from counsel's failure to request the jury instruction, his claim of ineffective assistance fails.

AFFIRMED.