IN THE COURT OF APPEALS OF IOWA

No. 0-453 / 09-1085
Filed July 28, 2010

LATRON Q. GANT,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, Judge.

The applicant appeals from the district court's order dismissing his application for postconviction relief. **AFFIRMED.**

Lori Kieffer-Garrison, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Michael J. Walton, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee State.

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

VOGEL, P.J.

Latron Gant appeals from the district court's dismissal of his application for postconviction relief claiming his trial counsel was ineffective because (1) Gant was only able to utilize three peremptory challenges; (2) trial counsel did not request a jury instruction defining theft; and (3) trial counsel did not object to a jury instruction on joint criminal conduct.

We review ineffective-assistance-of-counsel claims de novo. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the 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); *Kirchner v. State*, 756 N.W.2d 202, 204 (Iowa 2008). We may resolve the claim on either prong. *Kirchner*, 756 N.W.2d at 204.

Our court previously summarized the facts of the case:

> On October 22, 2005, Kenyasha Webb, Joseph Ball, and Monsheeka White were in Webb's apartment in Davenport, Iowa. White's boyfriend, the defendant Latron Gant, along with an unknown masked man entered the apartment. Gant was armed with a rifle. The masked man struck Webb and Ball on their heads with a large flashlight. Gant then ordered Webb and Ball onto the floor. Gant and the masked man took cell phones, money, and drugs.
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> The masked assailant went out the back door. White left by the front door. Gant instructed Ball to get up and run, and when Ball did so, Gant shot him in the buttocks. Gant also ordered Webb to get up and run, but she refused. Gant stated "I should kill you." After Gant left, Webb observed White's white minivan driving away. Hope Stark, a neighbor, saw two males running through the yard and jumping into a white van. She stated the driver was a female. Steven Enfield also saw two figures run to a white van. Gant and White were apprehended in St. Louis, Missouri, on November 2, 2005, near White's minivan.

State v. Gant, No. 06-1447 (Iowa Ct. App. Feb. 13, 2008). Gant and White were charged with first-degree burglary, first-degree robbery, willful injury causing serious injury, and going armed with intent. *Id*. Gant was also charged with possession of a firearm by a felon. *Id*. Scheduled to be tried together as co-defendants, Gant and White both participated in selecting a jury and each was allocated three peremptory strikes. White later moved to sever her trial from Gant's, which Gant resisted. The district court granted White's motion and trial proceeded against Gant. *Id*.

A jury found Gant guilty of first-degree burglary in violation of Iowa Code section 713.3 (2005), first-degree robbery in violation of Iowa Code section 711.2, possession of a firearm by a felon in violation of Iowa Code section 724.26, and assault causing bodily injury in violation of Iowa Code section 708.2(2). The district court entered judgment and sentence on the convictions. Gant appealed and our court affirmed his convictions. *Id*. On May 21, 2008, Gant filed an application for postconviction relief, which was amended on November 17, 2008. A hearing was held on March 4, 2009. In its June 10, 2009 ruling, the district court found that Gant's claims had no merit and denied Gant's application. Gant appeals.

A. Peremptory Challenges.

Gant asserts pro se that his trial counsel[1] was ineffective because at trial Gant was only able to exercise three peremptory challenges. "The right of peremptory challenge is not a constitutional right. It exists only by virtue of the

[1] Gant's trial counsel raised this issue in a motion for a new trial, but it does not appear that it was raised on direct appeal.

statute." *State v. Smith*, 132 Iowa 645, 109 N.W. 115, 116 (1906). Under Iowa Rule of Criminal Procedure 2.18(9), a defendant charged with a felony other than a class A felony is allocated six peremptory strikes. When there are co-defendants, each defendant is allocated one-half of those strikes. Iowa R. Crim. P. 2.18(11). In this case, Gant and White were co-defendants and were properly allocated three peremptory strikes each when choosing the jury. *See State v. Snodgrass*, 346 N.W.2d 472, 478 (Iowa 1984) (discussing that the reduction in peremptory challenges under Iowa Rule of Criminal Procedure 2.18 does not result in prejudice entitling a defendant to severance).

After jury selection, White moved to sever the trial asserting that the co-defendants had inconsistent defenses. Gant's defense was that it was not he who committed the burglary/robbery; White's defense was that Gant committed the burglary/robbery and although she was present, she had nothing to do with the criminal activity. At the time of the hearing on White's motion, Gant's trial attorney explained on the record that he had recommended to Gant that he either move for Gant and White's trials to be severed or he move for a mistrial once it became clear that Gant and White's defenses were inconsistent. Gant, however, did not want his trial attorney to do either, but wanted the case "to go to this one jury right here that we picked yesterday." The district court granted White's motion and severed the co-defendants' trials.

On appeal Gant challenged the severance and requested that he be granted a new trial so that he and White could be tried jointly. Our court found that because White had already been tried, the issue was moot and not subject to adjudication. Gant now asserts that his trial counsel was ineffective because

"the jury was jointly selected . . . as a result, [Gant] was denied half of his peremptory strikes."

The State responds that there was not a breach of duty because Gant wanted the jury that ultimately heard the case and therefore, he cannot now challenge the composition of the jury. Further, the State argues that there is no showing of prejudice. As we only need to address one prong of an ineffective-assistance-of-counsel claim, we resolve this claim on the prejudice prong. *See Kirchner*, 756 N.W.2d at 204 ("The court need not address both components if the [applicant] makes an insufficient showing on one of the prongs."). Gant does not argue that the jury that heard the case was biased. *See State v. Tillman*, 514 N.W.2d 105, 108 (Iowa 1994) (discussing that where a challenge for cause was erroneously overruled and then the defendant used a peremptory strike to remove the challenged juror, the defendant must show a biased juror was seated in order to establish prejudice). In fact, Gant does not argue that he was prejudiced in any way by having only three peremptory strikes. *See Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (stating a defendant must show there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (discussing that a defendant must "identify how competent representation probably would have changed the outcome"). Because Gant cannot show prejudice, this ineffective-assistance-of-counsel claim must fail.

B. Jury Instruction Defining Theft.

Next, Gant asserts pro se that his trial counsel was ineffective for failing to request a jury instruction defining theft because both robbery under Iowa Code section 711.1 and burglary under Iowa Code section 713.1 state that the person commits such crime "having the intent to commit a theft."[2]

> Generally, a court is required to instruct the jury as to the pertinent issues, the law, and the definitions of the crime. Particular terms need not be defined, though, if readily understood by persons of ordinary intelligence. Only technical terms or legal terms of art must be explained.

State v. Oetken, 613 N.W.2d 679, 686 (Iowa 2000).

Roman Oetken, the defendant, was convicted on two counts of burglary in the second degree in violation of Iowa Code sections 713.1 and 713.5(1) (1997). *Id.* at 682–83. In affirming Oetken's convictions, the court did not determine "whether 'theft' is a term readily understood by person of ordinary intelligence or whether it is a legal term of art warranting a definitional instruction." *Id*. at 686.

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[2] Iowa Code section 711.1 defines robbery:

> 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.

Iowa Code section 713.1 defines burglary:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

See also State v. Oetken, 613 N.W.2d 679, 686 (Iowa 2000) ("To commit burglary in Iowa, a person unlawfully entering a premises must have the intent to commit a felony, assault, or theft therein.").

Rather, the court found that even if an instruction defining theft should have been given, the defendant suffered no prejudice from the absence of such an instruction and therefore could not prevail on his claim. *Id*. We find that analysis applicable here. As the postconviction court found, "The theft in this case is the taking of property belonging to another, which would be the most simple definition of theft and could have been easily understood by a jury." We agree and find Gant was not prejudiced by his counsel's failure to request an instruction on the definition of theft such that the jury would have misunderstood the instructions given. *See id*.; *State v. Propps*, 376 N.W.2d 619, 623 (Iowa 1985) ("[P]ractical considerations make it unlikely that the inclusion of a particular element in the marshalling instruction would have produced any difference in the verdict of the jury."). Because Gant cannot show prejudice, he cannot prevail on his ineffective-assistance-of-counsel claim.

C. Joint Criminal Conduct Jury Instruction.

Finally, Gant through counsel asserts that there was insufficient evidence to support the joint criminal conduct jury instruction given and therefore, his trial counsel was ineffective for failing to object to the instruction. We need not determine whether sufficient evidence supported the jury instruction[3] because as with the previous issues discussed, Gant cannot prevail on the prejudice prong.

[3] The trial court instructed the jury as follows:

> When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The defendant's guilt is the same as the other person's unless the act could not reasonably be expected to be done in aiding the commission of the crime.

See Iowa Crim. Jury Inst. No. 200.7 (2005); *see also State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998).

Where a similar claim was raised in *State v. Jackson* on direct appeal, our supreme court stated,

> [T]he giving of a joint criminal conduct instruction in instances in which the alleged multiple participants are either principals or aiders and abettors in the same crime does not require reversal if there is no opportunity for the defendant to have been found guilty based on anything other than his own conduct as a principal or an aider and abettor of the crime with which he is charged.

State v. Jackson, 587 N.W.2d 764, 766 (Iowa 1998); *see also State v. Smith*, 739 N.W.2d 289, 295 (Iowa 2007) ("[A] reversal is required if the district court erroneously gives a joint criminal conduct instruction and there is an opportunity for the jury to find the defendant guilty based on anything other than the defendant's own conduct as a principal or aider and abettor of the crime charged.").

In this case, our court previously determined that the marshalling instructions for the crimes charged referred to the conduct of Gant alone. *See State v. Gant*, No. 06-1447 (Iowa Ct. App. Feb. 13, 2008).[4] As the postconviction court discussed, "Under the jury instructions, the jury assessed Gant's guilt based upon his own conduct." "There was no opportunity for the defendant to

[4] Our court on direct appeal examined the jury instructions and made the following statement,

> Contrary to Gant's assertion, the trial information and amended trial information do not allege Gant committed the offenses by joint criminal conduct, or by aiding and abetting. Each of the marshalling instructions refers to the conduct of defendant alone. The marshalling instructions for first-degree burglary and its lesser included offenses, willful injury, and first-degree robbery and its lesser included offenses require the jury to find Gant had the specific intent to commit a crime. Under the jury instructions, the jury assessed Gant's guilt based on his own conduct.

State v. Gant, No. 06-1447 (Iowa Ct. App. Feb. 13, 2008). The postconviction court took judicial notice of "the underlying criminal file, including the trial transcript." However, the jury instructions are not included in our record. We find our previous finding made on direct appeal is controlling.

have been found guilty based on anything other than his own conduct as a principal." *Jackson*, 587 N.W.2d at 766. Because Gant cannot show prejudice, this ineffective-assistance-of-counsel claim must fail. We affirm the district court's denial of Gant's application for postconviction relief.

AFFIRMED.