IN THE COURT OF APPEALS OF IOWA

No. 0-783 / 09-1798
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSE JOHN PEARSON,
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager (motion to suppress) and James C. Bauch (trial), Judges.

Defendant appeals his convictions for robbery in the first degree and going armed with intent. **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant Appellate Defender, and Jordan T. Smith, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Mansfield, P.J., Danilson, J., and Miller, S.J.* Tabor, J., takes no part.

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

MILLER, S.J.

I. Background Facts & Proceedings

Jesse Pearson, who was then seventeen years old, and D.S., another juvenile, ran away from Bremwood Residential Treatment Facility in Waverly, Iowa. Pearson had been placed at Bremwood as the result of juvenile court proceedings in Buchanan County.[1]

From the evidence presented the jury could find the following facts. D.S. was acquainted with Peter Weiss, a sixty-nine year old mentally disabled man, who lived in Waterloo. On July 14, 2009, D.S. knocked on Weiss's door to ask if they could use the telephone, and Weiss let them in. While D.S. was using the telephone in the kitchen, Pearson started opening drawers, and Weiss told him to stop. Pearson then asked to use the bathroom. D.S. heard Pearson opening drawers in the bedroom. D.S. told him to stop, and Weiss agreed. When Pearson came back to the kitchen he grabbed a cast iron frying pan from the stove, crossed the kitchen, and hit Weiss on the head several times. Weiss suffered lacerations that required fifteen staples and had a slight skull fracture from being hit with the frying pan.

Pearson was apprehended by Waterloo police officers soon after the incident. Weiss's blood was found on his shirt. Pearson told officers he would not talk until he returned to Bremwood and had an opportunity to talk to his attorney. Pearson was returned to Bremwood later that same day. He was

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[1] Pearson had been adjudicated a child in need of assistance (CINA), but had also been subject to juvenile delinquency proceedings. It is not clear from the record whether he had been placed at Bremwood as a result of the CINA proceeding alone, or perhaps the delinquency proceedings as well.

placed in a different cottage than where he had been staying before. He was not locked in, but was placed in a cottage where staff would be able to see him if he left.

Marie Mahler, an employee of the Iowa Department of Human Services who had been Pearson's CINA caseworker in Buchanan County for the past eight years, came to talk to him at about 8:00 a.m. on July 15, 2009.[2] Usually when a child runs away Mahler meets with the child "to see where they were, what they were doing, what they were thinking, why they ran, what happened while they were on the run, and just in general how he was doing." Pearson was sleeping when she arrived and Bremwood staff woke him up. Mahler left the door of the room open while she talked to Pearson. She asked him, "Did you actually do what everybody's saying you did?" and he said, "What did I do?" Mahler said, "Did you actually hit an old man?" and Pearson replied, "Yeah. So? I hit him over the head with a frying pan." Mahler asked Pearson if he knew the person had been hurt and hospitalized, and he said, "So?"

After the interview Mahler contacted the Buchanan County Attorney's Office to determine if there was any action or report she needed to make in regard to Pearson's juvenile court case. Waterloo police officers became aware of Mahler's conversation with Pearson and asked for a statement.[3] Mahler

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[2] Mahler attempted to contact Pearson's attorney from the juvenile court proceedings in Buchanan County prior to talking to Pearson. That attorney was unavailable, and she talked to another attorney, Andrew Thalacker, from the Public Defender's Office. Thalacker told Mahler he would tell Pearson not to talk to the officers or anyone about the incident. He did not, however, tell Mahler not to talk to Pearson.

[3] Mahler testified she discussed the matter with Karl Moorman of the Buchanan County Attorney's Office, and Moorman contacted the Bremer County Sheriff's Department.

refused to give a statement until directed to do so by the Director of the Iowa Department of Human Services. Mahler then made a written statement.

Mahler also spoke with Pearson on August 7, 2009, and asked him what the victim's injuries had been. Pearson stated the victim had fourteen to fifteen staples in his head and had a fractured skull. Mahler stated Pearson showed no remorse. On September 4, 2009, Pearson told Mahler that D.S. told him to hit the victim, so he did. Pearson stated they were trying to get some clothes.

Pearson was charged with robbery in the first degree, willful injury, and going armed with intent.[4] Pearson filed a motion to suppress the statements he made to Mahler on July 15, 2009. After a hearing the district court denied the motion to suppress. The court found Mahler's interview with Pearson was not custodial in nature. The court noted Mahler was not acting at the behest of law enforcement officers, but as a result of her duties as a CINA caseworker. Also, Pearson was not in a secured setting. The court concluded a Miranda warning was not required. Furthermore, it found Pearson's statements were made willingly and voluntarily.

The case proceeded to a jury trial. Evidence was presented as outlined above. The court denied Pearson's motion for judgment of acquittal. Pearson objected to the instruction on going armed with intent because it did not adequately inform the jury about the element of "going." The district court denied

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She believed it was through this channel that the information came to the attention of Officer Robert Michael of the Waterloo Police Department.

[4] Pearson filed a motion seeking to transfer jurisdiction of the case to juvenile court. The district court denied the motion to transfer.

the motion. The jury found Pearson guilty of first-degree robbery, willful injury, and going armed with intent.

The district court determined the conviction for willful injury should be merged into the conviction for first-degree robbery for purposes of sentencing. Pearson was sentenced to a term of imprisonment not to exceed twenty-five years on the count of first-degree robbery, and five years on the count of going armed with intent, to be served concurrently. Pearson appeals his convictions for first-degree robbery and going armed with intent.

II. Jury Instruction

The district court gave the jury the following instruction on going armed with intent, which was based on the uniform instruction:

> The State must prove all of the following elements of Going Armed With Intent:
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> 1. On or about the 14th day of July, 2009, the defendant was armed with a dangerous weapon.
>
> 2. A frying pan was a dangerous weapon as defined in Instruction No. 34.
>
> 3. The defendant was armed with the specific intent to use the frying pan against another person.
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> If you find the State has proved all of the elements, the defendant is guilty of Going Armed With Intent. If the State has failed to prove any one of the elements, the defendant is not guilty of Going Armed With Intent.

Pearson objected to the instruction on the ground that it did not require proof of movement or "going." Defense counsel stated, "proof of the crime does not require proof of going a certain distance or any required distance while being armed with the requisite intent," but stated "going" was still an essential part of the offense, noting "going from one point to another is distinguishable from simply having a weapon in your possession at one point." The district court

overruled the objection, stating it would use the uniform instructions, "which have been in place for a substantial period of time."

We review objections to jury instructions, other than those based on constitutional grounds, for the correction of errors at law.[5] *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006). Generally, courts should adhere to the uniform instructions. *State v. Mitchell*, 568 N.W.2d 493, 501 (Iowa 1997). A uniform instruction should not be used, however, if it is faulty. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995).

Iowa Code section 708.8 (2009), provides, "A person who goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of another commits a class 'D' felony." The term "armed" means "a conscious and deliberate possession of a dangerous weapon on or about one's person so it is available for immediate use."[6] Iowa Crim. Jury Instruction 800.16 (1999). Regarding "going" armed, the Iowa Supreme Court has stated, "we believe the term necessarily implicates proof of movement." *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994); *see also State v. Taylor*, 596 N.W.2d 55, 57 (Iowa 1999) (stating "going armed with intent involves movement").

We conclude the district court erred in overruling Pearson's objection to the instruction on going armed with intent. One essential part of going armed with intent is proof of movement. *Ray*, 516 N.W.2d at 865. The jury instruction did not reflect this essential part of an element of the offense. As defense

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[5] Pearson's objection raised no constitutional ground.

[6] Iowa Criminal Jury Instruction 800.16 was given as Instruction No. 33.

counsel noted, standing in one place armed with a dangerous weapon is distinguishable from going from one place to another armed with a dangerous weapon.

The State asserts that even if the district court erred, the error was harmless. Pearson is not claiming the error is of a constitutional magnitude, and therefore we consider whether "the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice." *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010) (citation omitted). We consider whether the "jury instruction could reasonably have misled or misdirected the jury." *State v. Hanes*, ___ N.W.2d ___, ___ (Iowa 2010). "[W]e presume prejudice and reverse unless the record affirmatively establishes there was no prejudice." *Id.*

The record in this case does not affirmatively establish there was no prejudice to Pearson based on the improper jury instruction. "[T]he validity of a verdict based upon facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing legal error." *See State v. Schuler*, 774 N.W.2d 294, 300 (Iowa 2009) (quoting *State v. Martens*, 569 N.W.2d 482, 485 (Iowa 1997)). Because the jury was improperly instructed, the jury could have found Pearson guilty without finding he engaged in movement while armed. We conclude Pearson's conviction for going armed with intent should be reversed and the matter should be remanded for a new trial on that count. The jury instruction for

going armed with intent should reflect the requirement that the State must prove the defendant engaged in movement while armed with a dangerous weapon.

III. Sufficiency of the Evidence

Pearson contends his conviction for going armed with intent is not supported by the evidence. He points out that he was not armed with a dangerous weapon when he went to Weiss's home. Pearson also states there is not substantial evidence to show he went anywhere after he picked up the frying pan at Weiss's home. He asserts there is no evidence he "had to go anywhere, take any steps, or make any movement toward Weiss while armed with the frying pan in order to hit Weiss." Pearson contends the case should not be remanded for a retrial on the offense of going armed with intent because there was insufficient evidence to support a conviction. *See State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003) (noting that when an appellate court determines that prejudicial error occurred in a criminal trial, the case will not be remanded for retrial when the evidence at trial was insufficient to support the conviction). For this reason we must address the issue. *See id.*

The State contends Pearson did not preserve error on this argument. As part of the motion for judgment of acquittal, defense counsel noted Pearson did not go to Weiss's house armed with a weapon. Defense counsel also argued:

> Mr. Pearson was not taking a dangerous weapon from point A to point B; even if it was an insignificant distance, even if it was just from a sink or from a countertop to a table, during that distance from the sink, from the countertop, from the stove top to the table, at the time that that item is going from one point to the other, it's not a dangerous weapon yet because it hasn't been used in that fashion yet.

We conclude Pearson's argument included the concept that there was no evidence of movement while armed with a dangerous weapon. We determine Pearson's argument has been adequately preserved for our review.

We review challenges to the sufficiency of the evidence in a criminal case for the correction of errors at law. *State v. Heuser*, 661 N.W.2d 157, 165 (Iowa 2003). The fact-finder's verdict will be upheld if it is supported by substantial evidence. *Id.* at 165-66. Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). We consider all the evidence, and view the evidence in the light most favorable to the State. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008).

Evidence was presented that there were three doorways in Weiss's kitchen. There was one doorway to the porch area. In walking in from the porch, there would be a doorway to the left to a bedroom and bathroom. Then, at the other end of the kitchen from the porch there was a doorway into a dining room/living room area, with a kitchen table near that doorway. Weiss testified he was sitting in a chair by the kitchen table. D.S., however, testified Weiss was standing near the entrance to the living room. D.S. was standing by a table using the telephone. He testified Pearson "went past me, past the refrigerator into the left where the bathroom is and then there's a bedroom on the right." He stated Pearson came out of this same doorway, took the frying pan off the stove, and struck Weiss in the head with the frying pan. From pictures of the kitchen that were admitted as exhibits it is clear the stove was not immediately adjacent to

doorway to the living room. Also, the stove is not right next to the table at which Weiss was sitting or standing.

The jury could have found Pearson would have needed to walk from next to the stove either to the doorway to the living room or the chair at the kitchen table near the door to the living room. We determine there is sufficient evidence in the record to support the conviction.

IV. Motion to Suppress

Pearson claims the district court should have granted his motion to suppress the statements he made to Mahler. Pearson's motion to suppress stated, "On July 15, 2009, at about 8:00 a.m., prior to the Defendant's arrest by the Waterloo police officer, the Defendant's caseworker from the Iowa Department of Human Services went to speak to the Defendant at Bremwood."[7] He asserted that Mahler should have given him a "Miranda warning" prior to questioning him. Pearson claimed "[a]ny statements made by the Defendant to the DHS caseworker were involuntary, were not the product of a valid waiver of the Defendant's Miranda rights, and were obtained in violation of the Defendant's constitutional rights."[8]

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[7] The motion to suppress clearly references only the statements made by Pearson on July 15, 2009. We conclude Pearson has not preserved error regarding statements made by him to Mahler on August 7, 2009, and September 4, 2009, because the motion to suppress expressly mentions only the July 15 statements and the trial court's ruling on the motion addressed only the July 15 statements. *See State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001) (stating an adverse ruling on a motion to suppress preserves error for appellate review).

[8] The State asserts Pearson did not preserve error on a Sixth Amendment challenge to the admission of the statements because the motion to suppress refers only to the Fifth Amendment. Although the motion to suppress refers broadly to Pearson's constitutional rights, the district court's ruling was based solely on the Fifth Amendment. We conclude Pearson has not preserved error on the Sixth Amendment claims he raises on appeal due to the lack of a district court ruling on this issue. *See State v. Breuer*, 577 N.W.2d

The district court denied the motion to suppress, finding, "[t]he record before the Court yields no support for the conclusion that Mahler's interview with Pearson was custodial in nature." The court concluded Miranda warnings were not required because Pearson was not in custody. The court also found Pearson's statements were willingly and voluntarily given.

Our review of constitutional claims is de novo. *State v. Peterson*, 663 N.W.2d 417, 423 (Iowa 2003). Under the Fifth Amendment, when a person is questioned by officers while in custody, the person must be warned "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966). This requirement is made applicable to the states through the Fourteenth Amendment. *State v. Simmons*, 714 N.W.2d 264, 274 (Iowa 2006). If there has been a violation of this rule, no evidence obtained as a result of the interrogation may be used against the person. *State v. Trigon, Inc.*, 657 N.W.2d 441, 444 (Iowa 2003).

A. The status of the interrogating official does not determine whether a Miranda warning should be given. *See id.* Our supreme court has stated, "when a state official conducts a custodial interrogation that would require a *Miranda* warning if undertaken by a police officer, then the official is similarly required to give a *Miranda* warning." *State v. Deases*, 518 N.W.2d 784, 790 (Iowa 1994). "Any other conclusion would allow the State to ignore a defendant's constitutional

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41, 44 (Iowa 1998) (noting the need for an adverse ruling by the district court to preserve error on a motion to suppress).

rights merely by having the interrogation conducted by someone who lacks the title 'law enforcement officer' but who is otherwise performing the interrogation of such an officer." *Id.*

Miranda warnings do not need to be given unless there is both custody and interrogation. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). A person is in custody if the person has been formally arrested or the person's freedom of movement is restricted to a degree normally associated with a formal arrest. *State v. Bogan*, 774 N.W.2d 676, 680 (Iowa 2009). We apply an objective test to determine how a reasonable person in the suspect's position would have understood the situation. *Simmons*, 714 N.W.2d at 274. We consider the following factors in determining whether a person is in custody: (1) the language used to summon the individual; (2) the purpose, place, and manner of interrogation; (3) the extent to which the person is confronted with evidence of his guilt; and (4) whether the person is free to leave the place of questioning. *State v. Ortiz*, 766 N.W.2d 244, 252 (Iowa 2009) (citing *State v. Miranda*, 672 N.W.2d 753, 759 (Iowa 2003)).

Pearson was not summoned to speak to Mahler; she went to the cottage at Bremwood where he was staying to speak to him. The purpose, place, and manner of questioning were based on Mahler's position as the caseworker in Pearson's CINA case. Mahler testified she was worried Pearson might be asked to leave Bremwood and she would need to look for another placement for him. She was not acting as a representative of law enforcement officials. Pearson was not confronted with evidence of his guilt to any substantial degree—Mahler

asked him whether he had done what people were saying he did, and then asked, "Did you actually hit an old man?" Finally, the evidence shows Pearson was free to leave the place of questioning. Mahler testified that as a CINA, Pearson could not be placed in a locked facility. The door to the room where Mahler questioned Pearson was open. Pearson could walk out of the room, although he had been placed in a room where staff would be sure to see him if he left the cottage.

On our de novo review, we agree with the district court's conclusion Pearson was not in custody at the time he was questioned by Mahler. Pearson had not been formally arrested at that time, and his freedom of movement was not notably restricted. A reasonable person in Pearson's position would not believe he or she was in custody. Because Pearson was not in custody at the time he was questioned by Mahler, there was no need for a Miranda warning.

B. In his motion to suppress Pearson also asserted he had already invoked his right not to answer further questions, and he should not have been subjected to further questioning. Once Miranda warnings have been given, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74, 86 S. Ct. at 1627, 16 L. Ed. 2d at 723. "[T]he prosecution cannot establish a valid waiver of that right by showing that the accused responded to further police-initiated *custodial* interrogation even if the accused has been advised or his or her rights." *Peterson*, 663 N.W.2d at 425 (emphasis added)

(citing *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S. Ct. 1880, 1884-85, 68 L. Ed. 2d 378, 386 (1981)).[9]

This rule applies when a person is interrogated while in custody. *See Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307-08 (1980) ("We conclude that the Miranda safeguards come into play whenever a person *in custody* is subjected to either express questioning or its functional equivalent." (emphasis added)). We have already determined Pearson was not in custody at the time he was questioned by Mahler. We conclude Pearson's Fifth Amendment rights were not violated when he was questioned by Mahler outside a custodial setting. We conclude the district court properly denied Pearson's motion to suppress.

V. Ineffective Assistance

Pearson asserts that if we find he has not preserved error on his claims that the August 7, 2009, and September 4, 2009, interviews with Mahler violated his Sixth Amendment rights, then his failure to preserve error was due to ineffective assistance of counsel. He claims that if defense counsel had properly moved to suppress these statements the result of the trial would have been different because the statements played a central role in the State's case.

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a

[9] Although the right being discussed in *Peterson* was the Fifth Amendment right to remain silent, the right at issue in the cited portion of *Edwards* was the Sixth Amendment right to counsel.

fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992); *State v. Mott*, 759 N.W.2d 140, 146 (Iowa Ct. App. 2008). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

We may address the issue of prejudice first. *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). A defendant must establish that counsel's errors had an adverse impact on the defense. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). The defendant must show "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." *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

Pearson has not shown that but for defense counsel's failure to object on Sixth Amendment grounds to the statements he made during the August 7, 2009, and September 4, 2009, interviews with Mahler there is a reasonable probability that the result of the proceeding would have been different. During the August 7 interview, Pearson had identified the victim's injuries. This evidence was cumulative to Weiss's own testimony and that of Dr. Michael Nguyen, who testified about his treatment of Weiss's injuries. Pearson's lack of remorse was already apparent from his responses during the July 15 interview. On September 4, Pearson had stated he and D.S. were trying to get some clothes. This evidence went only to motive, and similar evidence is also in the record through

the testimony of D.S. and Weiss that Pearson had opened drawers in Weiss's bedroom.[10]

Generally, a defendant is not prejudiced by the admission of evidence that, as in this case, is cumulative to other properly admitted evidence. *See State v. Schaer*, 757 N.W.2d 630, 633 (Iowa 2008). We conclude Pearson was not prejudiced by counsel's failure to file a motion to suppress or object to this evidence. We determine Pearson has not shown he received ineffective assistance of counsel.

We affirm Pearson's conviction for first-degree robbery. We conclude his conviction for going armed with intent should be reversed and the case remanded for retrial in the district court using a jury instruction that incorporates the concept of movement or "going."

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

[10] We also note that counsel not objecting to evidence of Pearson's statement that D.S. told him to hit Weiss cannot have resulted in such prejudice as to deny Pearson a fair trial, given the strong evidence that Pearson in fact struck Weiss with a frying pan.