

IN THE COURT OF APPEALS OF IOWA

No. 0-902 / 10-0217
Filed February 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JODIE MONROE JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

Defendant appeals his conviction for robbery in the second degree.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Taylor, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Vogel, J., and Miller, S.J.* Tabor, J., takes no part.

Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.**I. Background Facts & Proceedings**

The following facts were presented during the criminal trial in this case. On September 30, 2009, John Rumley, a vice-president of the bank, was working in his office at Farmers Savings Bank in Burlington, Iowa, when outside his window he saw a man putting a towel over his head and pulling it down over his face. Rumley got up with the intention of locking the front doors of the bank. He went through a set of inside doors, and through a vestibule to the outside doors. Rumley pushed the door open to lock it,¹ and realized the person, later identified as Jodie Johnson, was to his left beside the door.

Rumley testified Johnson pushed him back with his left hand and hit him with his right hand. Rumley went back about a step and Johnson came forward into the vestibule. Johnson said, “this is a robbery.” He held something in his hand, wrapped in a towel, that was pointed toward Rumley. Rumley put Johnson in a bear hug, and the two struggled, falling to the floor. The towel fell off Johnson’s head. A customer, Michael Perry, and a loan officer, Steve Francis, came to assist Rumley and the three men managed to restrain Johnson. Chad Boal, another customer, went out to his car and returned with a handgun, which he pointed toward Johnson.

The incident was observed by Nancy Brueck, a teller at the bank. She testified she saw someone with a towel over his head walk by the front window. She stated, “I saw someone come from the side of—by the window, and they

¹ Rumley testified that to lock the exterior doors, one of the doors had to be pushed open, then a key inserted and this released the locking mechanism.

stood there for a second or two, and then I saw him push John in towards the door, into the vestibule.” She saw Rumley and the person struggling and called for Francis to help Rumley. Francis and two customers responded. Brueck telephoned the police. When police officers arrived they found Johnson being held by Rumley and the others. The officers found two white towels and a hair brush in the vestibule to the bank.

Johnson was taken to the Burlington Police Department, where he was read his Miranda rights. Johnson signed a waiver form and agreed to talk to officer Derek Schwandt. Johnson stated he went to the Farmers Savings Bank to get change for a \$100 bill. He stated he had three \$100 bills that he had received for performing lawn care service. Johnson stated that earlier that day he had gone to McDonalds to purchase some food, but an employee stated she could not break a \$100 bill. He then decided to walk to Farmers Savings Bank, about one-quarter mile away.² Johnson stated that as he approached the bank an employee came out of the bank and assaulted him. No money was found on Johnson during a pat-down search.

Johnson was charged with robbery in the second degree, in violation of Iowa Code sections 711.1(1) and 711.3 (2009). The criminal trial was held on December 15 to 17, 2009. Rumley was questioned on cross-examination about whether he had touched Johnson first. Rumley had talked to Detective Wayne Thomson “15 minutes or less than a half hour after this incident,” and he was asked whether he told Thomson, “[Y]ou grabbed Johnson, who was approaching [you], and tried to take him to the ground?” Rumley admitted making the

² There was a different bank across the street from the McDonalds restaurant.

statement. During cross-examination, Rumley was also questioned about a deposition he gave on December 8, 2009, where he testified, “I don’t recall who touched whom first.” Detective Thomson was called as a defense witness. He was asked about Rumley’s statements, and his written report was offered by the defense as an exhibit. The State objected on the grounds of hearsay, and the court sustained the objections.

The jury returned a verdict finding Johnson guilty of second-degree robbery. Johnson filed a motion for new trial, claiming the court should have admitted Detective Thomson’s investigation report. He also filed a motion in arrest of judgment concerning the applicability of earned time in his sentence. The district court denied both motions. Johnson was sentenced to a term of imprisonment not to exceed ten years. He appeals his conviction.

II. Motion for New Trial

Johnson contends the district court should have granted his motion for a new trial because the verdict was contrary to the weight of the evidence. See Iowa R. Crim. P. 2.24(2)(b)(6) (“When the verdict is contrary to law or evidence.”); *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998) (noting a new trial may be granted if the jury’s verdict is contrary to the weight of the evidence).

Johnson’s motion for new trial, however, was explicitly based on rule 2.24(2)(b)(5), which is based on “[w]hen the court has misdirected the jury in a material matter of law, or has erred in the decision of any question of law during the course of the trial” Johnson claimed the court erred upon a question of law by not admitting the investigation report of Detective Thomson. Furthermore,

the district court did not rule on the issue of whether the verdict was contrary to the weight of the evidence. We conclude Johnson has not preserved error on his claim he was entitled to a new trial because the jury's verdict was contrary to the weight of the evidence. See *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (stating we do not consider issues raised for the first time on appeal).

III. Ineffective Assistance of Counsel

Johnson contends he received ineffective assistance because his defense counsel did not adequately argue against the State's hearsay objections to questions posed to Detective Thomson about Rumley's statements to Thomson and to Thomson's investigation report. He claims Rumley's statements to Thomson and the written report were admissible under the excited utterance and present sense impression exceptions to the hearsay rule. See Iowa R. Evid. 5.803(1), (2). He appears to argue, as defense counsel did at trial, that the evidence in question was admissible to impeach Rumley's trial testimony.

Claims of ineffective assistance of counsel are reviewed 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 fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). We presume that representation by counsel is competent, and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

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)).

We determine that even if defense counsel breached an essential duty by failing to raise these exceptions to the hearsay rule, Johnson was not prejudiced by counsel's performance. Although Detective Thomson's investigation report was not admitted as an exhibit, defense counsel quoted from the report in asking Rumley several questions, and Rumley admitted making the statements in the report, as follows:

Q. Do you recall talking to Detective Thomson of the Burlington Police Department on September 30th, 2009, about, oh 15 minutes or less than a half hour after this incident? A. Yes.

Q. And isn't it in fact correct that you told Detective Thomson, just several minutes after this happened, that you grabbed Johnson, who was approaching him, and tried to take him to the ground? That's what you told him, wasn't it? A. I said that, and that's in a different sequence. That's after I was pushed, then I—then I grabbed him, yes.

Q. Well, the very next thing that Detective Thomson attributes to you, after you grabbed him and tried to take him to the ground, is that Rumley stated that after grabbing Johnson, Johnson overpowered him and pushed him into the foyer area and against the wall.

Is that what you told Detective Thomson, that you grabbed Johnson and then he pushed you into the foyer area and against

the wall? A. I don't believe that's—the time line I don't believe is accurate on the way that's presented.

Q. And then it's reported that Rumley stated he and Johnson began fighting in the foyer. That's true, correct, that you and Mr. Johnson began fighting in the foyer? A. I would—whatever you want to call it. I put a bear hug on him.

Later during the cross-examination, Rumley was asked again, “And do you dispute telling Detective Thomson that after grabbing Johnson, Johnson pushed you into the foyer area?” and Rumley responded, “I don't dispute that.”

Additionally, Detective Thomson affirmed that the investigation report was a fair and accurate statement of what Rumley told him on September 30, 2009. He testified he took great care in accurately putting in a report what a witness had told him. Detective Thomson stated Rumley was shaking and visibly upset when he stated that after grabbing Johnson, Johnson overpowered him and pushed him into the foyer area, against the wall.

Defense counsel was able to argue in closing arguments, “[t]he evidence shows that the Defendant did not assault Mr. Rumley because it is the—the evidence has shown that it was Rumley that touched Mr. Johnson first, by grabbing the Defendant in a bear hug” Defense counsel emphasized the evidence that, contrary to Rumley's testimony at trial, in his statement to Detective Thomson he appeared to have indicated that he first made contact with Johnson, and in his deposition he said he could not recall whether he or Johnson had first touched the other. Defense counsel referred to and discussed a jury instruction,³ Instruction Number 13, which provided:

³ Another jury instruction provided:

Sometimes, during a trial, references are made to pretrial statements and reports, witnesses' depositions, or other miscellaneous

You have heard evidence claiming witnesses made statements before this trial while under oath which were inconsistent with what they said in this trial. If you find these statements were made and were inconsistent, then you may consider them as part of the evidence, just as if they had been made at this trial.

You may also use these statements to help you decide if you believe these witnesses. You may disregard all or any part of the testimony if you find the statements were made and were inconsistent with the testimony given at trial, but you are not required to do so. Do not disregard the trial testimony if other evidence you believe supports it or you believe it for any other reason.

We conclude Johnson has not shown there was a reasonable probability the result of the trial would have been different if defense counsel had argued for the admissibility of Detective Thomson's testimony in question and investigation report on different grounds than those raised during the trial. The evidence in question was presented to the jury, and under the jury instructions the jury was permitted to consider this evidence.⁴ Johnson does not argue that there was anything in the investigation report that he was not able to discuss before the jury. Furthermore, he does not explain how the result of the trial would have been different if the jury had been able to take a physical copy of the investigation report to the jury room during deliberations.

items. Only those things formally offered and received by the court are physically available to you during your deliberations. Documents or items read from or referred to, which were not offered and received into evidence, are not available to you.

This instruction does not prohibit the consideration of pretrial statements or reports, but informs the jury that only exhibits received by the court are taken to the jury room.

⁴ Under Instruction Number 13, the jury was allowed to consider Rumley's statements to Detective Thomson for impeachment purposes, and was allowed to consider Rumley's deposition testimony as substantive evidence that Rumley, rather than Johnson, had initiated the physical contact between the two of them.

We conclude Johnson has failed to show he received ineffective assistance of counsel. We affirm his conviction for second-degree robbery.

AFFIRMED.