IN THE COURT OF APPEALS OF IOWA

No. 0-973 / 09-1366
Filed March 30, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EARL JAMARE GRIFFIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

Appeal from convictions of and sentences for first-degree robbery, second-degree theft, and second-degree kidnapping. **AFFIRMED.**

William S. Morris, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Mary Tabor (until withdrawal), Assistant Attorneys General, John P. Sarcone, County Attorney, and George Karnas and Celene Gogerty, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J. takes no part.

SACKETT, C.J.

Defendant-appellant, Earl Griffin, appeals from his convictions of and sentences for robbery in the first degree, theft in the second degree, and kidnapping in the second degree. He contends the district court erred (1) in limiting the testimony of his expert witness, (2) in admitting photographs and opinion testimony identifying him as the perpetrator, (3) in instructing the jury on kidnapping, (4) in "allowing the State's evidence to convict [him] beyond a reasonable doubt," (5) in imposing consecutive sentences, and (6) in denying his posttrial motion for in arrest of judgment. Griffin's pro se brief contends counsel was ineffective in not raising issues concerning the trial information. We affirm.

I. Background.

On August 17, 2008, a Kentucky Fried Chicken store was robbed after it closed for the night. As employee Jodi Carter was walking to her car, she was accosted by a man with a gun. He forced her to unlock the restaurant door. After they entered the building, the gunman forced the assistant manager, Clinton Hiatt, to open the safe. When Hiatt was unsuccessful in opening a second safe, the gunman said, "I know that it opens up, you know, I used to work here." Carter and Hiatt were then taken downstairs and forced to lie on the floor of the cooler. Carter heard the gunman say, "Do not leave this cooler or I will shoot you and kill you." When Hiatt and Carter left the cooler later, they noticed Carter's car was gone. They called the police and the restaurant manager.

Police issued photographs taken from the restaurant's surveillance video to the local media. On August 19, police were told by Michael Underwood that

he recognized his nephew, defendant Earl Griffin, in the photographs from the video. Carter picked Griffin's photo out of a police photo array. Hiatt was unable to identify the robber from any photos.

On September 18, Griffin was charged by trial information with robbery in the first degree and theft in the second degree. On October 16, an amended trial information added a third count—kidnapping in the second degree. Following a trial, a jury found Griffin guilty of all three charges. Before sentencing, Griffin filed motions in arrest of judgment and for new trial. Following a hearing on the motions, the court denied both motions, and then proceeded to sentencing. The court sentenced Griffin to prison terms not exceeding twenty-five years each for the robbery and kidnapping convictions and not exceeding five years for the theft, all to be served consecutively. This appeal followed.

II. Scope of Review.

Review of evidentiary claims is for an abuse of discretion. *State v. Cox*, 781 N.W.2d 757, 760 (Iowa 2010). An abuse of discretion occurs when the district court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* (quoting *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)). Challenges to jury instructions are reviewed for correction of errors at law. *State v. Millbrook*, 788 N.W.2d 647, 650 (Iowa 2010). Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. *State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010). We uphold a finding of guilt if substantial evidence supports the verdict. *State v. Armstrong*, 787 N.W.2d 472, 475 (Iowa Ct. App. 2010). Substantial evidence is evidence from which a rational

fact finder could find a defendant guilty beyond a reasonable doubt. *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). Review of a district court's decision to impose consecutive sentences is for an abuse of discretion. *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006). Claims counsel was ineffective are reviewed de novo. *State v. Armstrong*, 787 N.W.2d 472, 477 (Iowa Ct. App. 2010). To prevail, a defendant must demonstrate by a preponderance of the evidence that counsel failed to perform an essential duty and prejudice resulted. *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007).

III. Merits.

A. Expert testimony. Griffin contends the district court erred in limiting the testimony of his expert concerning eyewitness misidentification. The State filed a motion in limine seeking to limit or exclude the testimony of Griffin's expert on eyewitness identification, claiming the expert's testimony would not aid the jury and the use of hypotheticals would invade the province of the jury. Griffin resisted the motion. At the hearing on the motions, the court observed,

> I believe counsel have agreed that the State withdraws that motion in limine insofar as it relates to Dr. MacLin's general testimony. But the State would still object if Dr. MacLin were to be asked hypotheticals or testimony regarding the specific facts of this case.

Both counsel agreed. Defense counsel affirmed the expert's testimony would not be about specific facts of this case, but generalized factors concerning how the mind identifies faces. The court left open the option for either counsel "to alert the court" if testimony were sought "that does not comport with this agreement that we've made." The court did not rule on any portion of the State's motion in limine that was not withdrawn.

Because defense counsel agreed to limit the examination of the expert, any claim the court improperly restricted the expert's testimony is waived. Because the court did not rule on the State's motion, any error is not preserved for our review.

B. Photos of Griffin and testimony of persons who were not crime scene witnesses. Griffin's motion in limine sought to prevent the State from introducing multiple booking photos of Griffin and identifications of Griffin as the robber by persons who were not at the scene of the robbery. The district court overruled the motion as to the testimony of individuals, cautioning counsel to avoid questions that might lead to references to other crimes with which Griffin was charged. The court reserved ruling on the photos until it saw the edited versions that were to remove the background and neutralize the clothing color so it did not appear to be inmate clothing. At trial, the court allowed the photographs to be introduced. Defense counsel had no objection. The officer testified as to the dates of the photos, but did not identify them as "mug shots" or give any indication the photos related to criminal proceedings or encounters with police. Instead, the testimony was focused on the changes in Griffin's appearance among the photos.

On appeal, he argues the photos were inadmissible under Iowa Rule of Evidence 5.404 as evidence of "other crimes, wrongs, or acts." Even if admissible under rule 5.404, Griffin argues they should have been excluded under rule 5.403 because the probative value of the photos was greatly outweighed by the prejudice to him. He asserts the "'practical' effect of showing

the photos to the jury was to inform them of multiple prior run-ins [he] had with the law." He makes only a bare assertion of the effect he claims the photos had on the jury without any support from the record. The two cases he cites for support do not relate to photos or "mug shots." In *State v. Holland*, 485 N.W.2d 652, 655-56 (Iowa 1992), the court determined the admission of a work-release card, clear evidence of a prior criminal conviction, was not prejudicial because of the overwhelming evidence against the defendant. In *State v. Martin*, 704 N.W.2d 674, 675-77 (Iowa 2005), the court determined evidence of the defendant's prior drug conviction, introduced to impeach the defendant, was not harmless because the evidence against him was not overwhelming. The analysis was under rule 5.609 rather than under 5.404 and 5.403. *Id.* at 676.

In contrast, in the case before us, the photos had been modified to remove any indication Griffin was wearing jail clothing. No mention was made of the source or context of the photos. The testimony was just that the photos showed how Griffin had changed his appearance during the preceding year. *See State v. Casady*, 597 N.W.2d 801, 807-08 (Iowa 1999) (allowing mug shot to show defendant's appearance at the time of arrest); *see also State v. Redding*, 169 N.W.2d 788, 791-94 (Iowa 1969) (allowing mug shot from prior arrest to corroborate a witness's identification of defendant and holding the photo did not tend to place defendant's character in issue). We conclude the district court did not abuse its discretion in admitting the photos.

Griffin also argues the court erred in allowing identification testimony from persons who were not witnesses to the crime. Three witnesses, Smith,

Underwood, and Schaffer, were employees at a local business; Underwood is Griffin's uncle. They saw photos made from the surveillance video from the robbery on a local news station's website. Griffin's uncle recognized him from the photos. Smith and Schaffer thought they recognized the person in the photos as someone who had been at their business just a day or two before the robbery. The other challenged witness, Johnson, is the regional manager for the Kentucky Fried Chicken restaurants, who knew Griffin because he had hired him. The district court overruled the motion in limine as to all four witnesses.

The State first contends Griffin did not preserve error on this issue because the motion in limine was based on rules 5.401, .403, and .404, but Griffin's argument in the brief revolves around lay opinion testimony and rule 5.701.

Griffin begins his argument with a citation to rule 5.401 concerning relevant evidence, which is evidence tending to make the existence of any consequential fact "more or less probable than it would without the evidence." Iowa R. Evid. 5.401. Later in his argument concerning the witnesses, he asserts "their identification of Griffin as the person who robbed the KFC store in no way made it any more or less probable that Griffin was the KFC Store robber." We conclude the relevance claim is properly before us. However, because the lay-opinion-testimony claim under rule 5.701 was not presented to and ruled on by the district court, we do not address it. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (noting appellate courts only review issues first presented to and ruled on by the district court); *see also State v. Sanborn*, 564 N.W.2d 813, 815

(Iowa 1997) ("A defendant may not rest an objection on one ground at trial, and rely on another for reversal on appeal.").

Police sought the public's help in identifying the robber shown on the surveillance tape from the restaurant by releasing photos taken from the video to local news outlets. Griffin's uncle saw the photos and recognized his nephew. His testimony was relevant to the identity of the robber and to explain why police included a photo of his nephew in the second photographic identification array shown to Carter and Hiatt. The area manager for the restaurant, Johnson, also identified Griffin as the person shown on the video. He had met Griffin during the hiring process. Like Griffin's uncle, Underwood, Johnson's testimony was relevant to identifying the robber shown on the surveillance video. The district court did not abuse its discretion in allowing their testimony.

The other challenged witness, Smith, is Underwood's coworker at a local car dealership. Just days before the robbery, Smith saw an African-American man with dreadlocks wearing pants with lime-green pockets at the car dealership. When Smith saw the photos from the surveillance video, he noted the similarity of the person shown to the person he saw at the car dealership. When Underwood, who was viewing the photos with Smith, identified the person as his nephew, Smith called police and gave them Griffin's name. At trial, Smith testified that when he saw the photos, he noticed the similarity, but "not enough to call the police directly." It was not until Underwood recognized his nephew that Smith called the police. Although Smith's testimony may have carried less

weight, we cannot say the court abused its discretion in allowing the testimony as relevant.

We affirm the district court's evidentiary rulings to allow the testimony of these witnesses.

C. Jury instruction on kidnapping. The district court instructed the jury on the elements of kidnapping in instruction 31 and 33. Both instructions contained this element:

> 2. The defendant did so with the specific intent to use Jodi Carter as a shield or hostage; or the defendant did so with the specific intent to secretly confine her.

During deliberations, the jury sent the question, "What is the definition of hostage?" to the judge. The judge met with counsel about the question and the proposed response. Griffin's counsel had met with him and discussed the issue, and stated to the court that Griffin had "no objection" to the court's proposed response. The court responded to the jury's question with, "You will not receive any additional instructions or definitions in this case. Please continue your deliberations."

On appeal, Griffin contends the court erred in not defining "hostage" because the court has a duty to correct instructions if they are confusing to the jury. *See State v. McCall*, 754 N.W.2d 868, 872 (Iowa Ct. App. 2008) ("Beyond the duty of instructing the jury, the trial court also has the duty to ensure the jury understands both the issues and the law it must apply."). He argues the Iowa Code does not define hostage and none of the common dictionary definitions "in the context of the kidnapping statute, means to tell a person to lay [sic] down on the floor of a cooler in the business that's being robbed."

We conclude Griffin waived error on this claim. Trial counsel discussed the question from the jury and the court's proposed response with Griffin.

> *Court:* Mr. Oliver, did you have an opportunity to discuss this question with your client? *Mr. Oliver:* Your Honor, I did. I met with him at the main jail or the holding jail over here across the street. Informed him of the question, discussed this matter with him, suggested what the Court would most probably do would just instruct the jury to continue with the instructions they have. Asked him if he wanted to be present for this record. He did not. And I proceeded over here to the courthouse. So he is aware of the question, is aware of the approach that the Court will take, and *has no objection to that*.

(Emphasis added.) "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). "When an instruction is correct as given but is not as complete or explicit as a party would like, he must request an additional instruction designed to remedy the defect . . . . *State v. Smith*, 240 N.W.2d 693, 695 (Iowa 1976). Griffin not only did not object to the court's response to the jury question, but affirmatively stated he had no objection. *See State v. Schmidt*, 312 N.W.2d 517, 518 (Iowa 1981). He cannot now complain that the court did not give an additional instruction defining "hostage."

D. Sufficiency of the evidence. At the end of the State's case, Griffin moved for a directed verdict of acquittal on all three counts. The court denied the motion, citing "the videotape, the photographs, and the testimony of the witnesses." At the conclusion of all evidence he renewed the motion. The court denied the motion and submitted the case to the jury. The jury found Griffin

guilty. On appeal, Griffin contends the court "erred in allowing the State's evidence to convict [him] beyond a reasonable doubt."

"Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). 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 evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). The evidence must raise at least a fair inference of guilt on each element of the crime. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Evidence merely raising suspicion, speculation, or conjecture is insufficient. *Id.*

Griffin's primary challenge is to the identification of him as the robber. He asserts the "only evidence the State has that Griffin was the perpetrator is Carter's testimony" and "there is not a fair inference of Griffin's guilt aside from Carter's testimony." Griffin does not directly challenge Carter's credibility, but implies she misidentified him as the perpetrator.

We conclude the district court did not err in denying Griffin's motions and submitting the case to the jury. Carter was shown two arrays of photographs, one containing Griffin's photo, and the other containing the photo of a different suspect. She immediately identified Griffin as the robber. She further identified him as a former coworker. The robber was familiar with the layout of the restaurant, knew how the safe worked, and referred to Carter as "Judy," suggesting prior contact with Jodi. The regional manager also identified Griffin

and knew him as a former employee. The jury watched the surveillance video of the robbery. When Griffin's uncle saw photographs of the perpetrator that police released to local media in an attempt to identify the person, he recognized the photos as his nephew. The jury heard police testimony on how photographic arrays are put together and shown to witnesses. The jury heard the defense expert testify about factors that affect the accuracy of eyewitness identifications. There was substantial evidence from which the jury could find Griffin was the perpetrator beyond a reasonable doubt.

E. Consecutive sentences. Griffin contends the district court erred in imposing consecutive sentences for his three convictions. He argues the presentence investigation report did not make any recommendation regarding how the sentences should be served. He further argues consecutive sentences are "disproportionate to the crimes committed," but does not now and did not at sentencing make a constitutional cruel-and-unusual argument. Griffin contends he did not threaten either Carter or Hiatt with physical harm, but an "individual with a gun in his hand simply took personal property of Carter and Hiatt."

When a challenged sentence does not fall outside the statutory limits, we review the trial court's sentencing decision for an abuse of discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). The court's sentencing decisions are "cloaked with a strong presumption" in their favor. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). An abuse of discretion is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

Under Iowa Rule of Criminal Procedure 2.23(3)(*d*), "[t]he court shall state on the record its reason for selecting the particular sentence." The district court must also give its reasons for imposing consecutive, rather than concurrent, sentences. *State v. Uthe*, 542 N.W.2d 810, 816 (Iowa 1996). "Although the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action." *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000).

In the case before us, the district court considered the nature and circumstances of the crime. Griffin brandished a gun, threatened Carter and Hiatt with death if they left the cooler, and turned against a former employer and a former coworker who had tried to befriend and help him. This was more than merely taking personal property while holding a gun. The court also considered Griffin's age and criminal history. Although he was only twenty-two, Griffin had both a juvenile and adult criminal history. His repeated offenses showed he had not taken advantage of the opportunities he had to obey the law and had not been rehabilitated by any prior sentences. His repeated offenses also demonstrate a greater need to protect society from further offenses. The individual sentences imposed are all within the statutory limits set by the legislature. The district court considered the relevant factors, did not consider improper factors, and tailored the sentences to Griffin's need for rehabilitation and the need of the community for protection from Griffin. The court provided us with an adequate record for its sentencing decisions. We find no abuse of discretion in the district court's imposition of consecutive sentences.

F. Motion in arrest of judgment. Griffin contends the court erred in denying his motion in arrest of judgment. He cites to his claims on appeal that we have resolved above and asserts, "When all of the complaints of Griffin's prejudice are added together, the only conclusion that can be reached is that he did not receive a fair trial." In his motion, however, he claimed "insufficiency of the evidence to support the verdict."

"A motion in arrest of judgment may not be used to challenge the sufficiency of evidence." *State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990) (citing *State v. Oldfather*, 306 N.W.2d 760, 762 (Iowa 1981) and *State v. Young*, 153 Iowa 4, 6, 132 N.W. 813, 814 (1911)). In his reply brief, Griffin changes the statement of the issue to a claim of error "in denying Griffin's post-trial *motions*." Yet he still argues only that the court should not have denied his motion in arrest of judgment. The district court did not err in denying the motion in arrest of judgment based on the sufficiency of the evidence. *See id.*

G. Ineffective assistance. In his pro se supplemental brief, Griffin contends trial counsel was ineffective in not raising issues concerning the trial informations. Ordinarily, ineffective-assistance-of-counsel claims are not resolved on direct appeal. *See State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). Such questions are usually preserved for postconviction proceedings so a defendant's trial counsel can defend against the charge. *Id.* However, we may depart from this preference in cases where the record is adequate to evaluate the ineffective-assistance claim. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982); *State v. Ogilvie*, 310 N.W.2d 192, 197 (Iowa 1981); Iowa Code § 814.7(3)

("If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim . . . ."). Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (stating claims of ineffective assistance of counsel raised on direct appeal are ordinarily reserved for postconviction proceedings to allow full development of the facts surrounding counsel's conduct); *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

There is no indication in the record whether the amendment to the trial information was made in the context of plea negotiations or what the circumstances surrounding the amendment were. We conclude the trial court record is insufficient for us to address this claim and we preserve it for possible postconviction relief proceedings. *See State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006).

AFFIRMED.