IN THE COURT OF APPEALS OF IOWA

No. 1-045 / 10-0039
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERTO RODRIGUEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Roberto Rodriguez appeals his convictions of first-degree murder, first-degree robbery, second-degree robbery, and second-degree burglary. **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, John P. Sarcone, County Attorney, and Jaki Lyn Livingston, Assistant County Attorney, for appellee.

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

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

SACKETT, C.J.

Roberto Rodriguez appeals from the judgment and sentence entered upon jury verdicts finding him guilty of murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2 (2007), robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2, robbery in the second degree, in violation of Iowa Code section 711.3, and burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5. He argues the evidence was insufficient to sustain each of the convictions. He further claims his trial counsel was ineffective for failing to: (1) present expert testimony to support his defense of intoxication, (2) object to the jury instruction providing a definition for "breaking" when the marshaling instruction for burglary did not contain the breaking alternative, and (3) file a motion to sever the four charges. For the reasons stated herein, we affirm.

I. Background Facts and Proceedings.

During the late night and early morning hours of July 25-26, 2008, Roberto Rodriguez, Ryan Higgins, Zachery Kern, Neikalo Holland, Brian Lee, and Bobby Merchant decided to drive around the eastside of Des Moines looking for random people to beat up or fight. The group proceeded to perform three random attacks on unsuspecting victims, the last of which culminated in the death of Dean Davis. Based upon the testimony and evidence presented at trial, a reasonable juror could have found the following facts.

On July 25, 2008, Higgins and his roommate, Mark Gearhart, hosted a party at their house. Gearhart was not drinking that evening because he was caring for his infant son; however, everyone else at the party was drinking

alcohol and smoking marijuana. Gearhart testified that during the party, Rodriguez noticed the pocket knife Gearhart had clipped to his pants and said, "Oh, you got a knife. Check this one out." Rodriguez proceeded to show Gearhart a folding pocket knife with "an old school look to it." Gearhart was later able to draw a picture and identify the knife for police during their investigation.

According to Gearhart, as the night progressed, Higgins became "drunk and fired up and just felt rowdy." Higgins started a discussion with Rodriguez, Kern, Holland, and Merchant about playing "a game of victim." Victim is played by driving around town, finding random people, and attacking them.

Gearhart testified he attempted to dissuade the group from leaving, and initially only Kern was hesitant. However, after some peer pressure by Higgins, Kern decided to join the group, and they piled into Kern's two-door 1998 red Chevrolet cavalier. Kern drove while Higgins sat in the front passenger seat. Merchant sat behind Kern, Holland sat in the middle, and Rodriguez sat behind Higgins in the backseat.

Around midnight, near the intersection of Maple Street and East 27th Street, the group saw Justin Sorter walking by himself. As Sorter walked east on Maple Street, Kern drove the vehicle up behind Sorter and Higgins yelled from the passenger seat for Sorter to give him his cell phone and money. Sorter responded no. Higgins then exited the car, ran over to Sorter, and punched him in the face. Rodriguez also exited the vehicle, but he did not approach Sorter. After being punched, Sorter gave Higgins his cell phone and ran to a friend's house close by. Higgins and Rodriguez got back in Kern's car and the group

returned to Higgins's house where they continued to drink alcohol and smoke marijuana.

At approximately 2:30 a.m., the group decided to play "victim" for a second time. Kern again drove with Higgins in the front passenger seat. However, this time, Rodriguez sat behind Kern, Holland sat in the middle, and Brian Lee (who replaced Merchant) sat behind Higgins.

As they drove around, the group spotted Courtney Lundgren and Michael Smith getting out a vehicle parked on the street near the intersection of Maple Street and East 28th Street. Lundgren and Smith were going to their friend's, Josie Lamont and Rodney Enriquez's, house. As Lundgren was unbuckling her young child from his child seat in the back of her car, the group in Kern's vehicle drove by and yelled at them. Kern then pulled his vehicle in front of Lundgren's vehicle and stopped at an angle in the intersection. The group in Kern's vehicle exited and approached Lundgren's car. Although Holland testified that he just "sat in the backseat with my head down," Higgins, Kern, and Lee testified Holland exited the vehicle with them.

Seeing the group exited Kern's vehicle, Lundgren and Smith quickly jumped back into their vehicle and locked the doors. Rodriguez and Higgins approached the passenger side where Smith was sitting and began pounding on the window. Rodriguez punched out the passenger side window and in doing so, sustained several lacerations to his right forearm. Lundgren testified after the glass shattered, someone reached into the vehicle and attempted to grab Smith. Smith reacted by kicking the door open knocking one person back. Lundgren further testified someone else then attempted to grab Smith, but Smith was able

to run from the vehicle. Smith testified he was "not really sure if anyone reached in" and attempted to grab him. Smith ran to Lamont's backyard and Rodriguez chased after him.

By this time, Lamont and Enriquez had heard the commotion and came outside. They saw Rodriguez returning to the front yard after chasing Smith. Rodriguez saw Enriquez and began to walk towards him. Lamont and Enriquez both testified Rodriguez appeared to be holding something, but kept his hands behind his back. As Rodriguez approached Enriquez, Rodriguez stated, "What's up?" in a menacing manner. Enriquez punched Rodriguez in the face and then the other guys in the group rushed him. After a brief attempt to defend himself, Enriquez ran away down the street. Kern and Higgins disputed this testimony and both testified it was only Kern who approached and fought Enriquez. When Enriquez returned home shortly thereafter, he noticed his new t-shirt had a slicing type cut in the chest area.

After the scuffle with Enriquez, the group returned to Kern's vehicle and drove away. Near the intersection of East 24th Street and Des Moines Avenue, the group saw Dean Davis riding his bicycle. According to Higgins, when they saw Davis, someone within the vehicle yelled, "There's one." Higgins then jumped out of the vehicle, chased Davis down, and punched him in the face causing him to fall off his bicycle. Higgins punched Davis again while he was on the ground. Holland again testified he did not leave the vehicle, but Kern, Higgins, and Lee testified he did. The entire group then proceeded to punch and kick Davis as he curled up into a ball and begged, "I have kids." After repeatedly punching and kicking Davis, Lee ran over to Davis's bicycle and grabbed the

handlebar bag Davis carried. Although no one testified they saw Davis get stabbed, it was not disputed that during this attack Davis received a single stab wound to the center of his chest, which punctured his heart causing his death.

After the group returned to the car, they sat in their previous positions with Rodriguez sitting behind the driver, Kern. Blood from both Rodriguez and Davis was found on the back of the driver's headrest in Kern's vehicle. According to Kern, as he drove back to Higgins's house, he heard either Rodriguez or Holland say something about stabbing somebody. When he looked over his shoulder, Kern saw Holland holding a knife. However, at trial Holland denied ever holding the knife or stabbing Davis. Rather, Holland testified he noticed blood on Rodriguez as the group got back into the car and Rodriguez stated, "I think I stabbed him," on the ride back to Higgins's house.

After returning to Higgins's house, the group sat at the dining room table and went through Davis's bag. They found a cell phone, wallet, and identification. According to Gearhart, at some point later in the night, he was in the kitchen with Higgins and Rodriguez when Rodriguez stated, "I think I stabbed that fool." Lee also testified that at Higgins's house, Rodriguez pulled him aside and said he stabbed Davis showing him a bloody shirt.

After the group was involved in a fight at Higgins's house, they fled to the house of Michelle Swain, Merchant's mother. This is also where Rodriguez was staying. Kern testified at Swain's house, he saw Rodriguez holding a knife. The night ended with Kern and Lee going home, and Higgins and Holland spending the night with Rodriguez at Swain's.

According to Holland, when he woke up the next morning, he saw Rodriguez and Swain in the bathroom trying to clean the knife. Holland testified he helped clean the knife by pouring rubbing alcohol on it. Rodriguez also did his laundry in an attempt to clean the blood off his clothes.

Later in the morning, Ashley Bacon and Shelby Robbins came over to Swain's house. Robbins was Rodriguez's girlfriend and was pregnant with his child at the time of his trial. Bacon and Robbins both testified as they sat in the living room, Swain was looking for news reports about the previous night on the computer. At this time, Holland came into the living room and said, "The only thing that I had to do with this was I got out of the car and stabbed the guy and I got back in the car."

Around noon, Higgins and Rodriguez walked back to Higgins's house. Higgins testified that during this walk, Rodriguez told him, "I stabbed that fool." Higgins also testified as Gearhart drove him and Rodriguez to a gas station, they passed the scene where Davis was attacked and Rodriguez told him, "That's where it happened."

Later in the afternoon on July 26th, Rodriguez and Higgins returned to Swain's house. According to Higgins, at this time, he met with Rodriguez and Swain in Swain's bedroom to talk about the night before and to try "to come up with a story." Higgins testified Rodriguez again stated he stabbed Davis during this conversation.

Eventually, Kern came over to Swain's house. He had already been questioned by the police because Lundgren was able to write down Kern's license plate number during the second attack. Kern testified he told Rodriguez,

Higgins, and Swain that he told the police about breaking the window in Lundgren's vehicle, but not about the attack on Davis. Higgins testified he and Rodriguez then decided to base their story off Kern. Kern testified he was told "they were going to put something together." Kern further testified Rodriguez "pulled me aside, told me that he stabbed some guy last night and that he was dead."

Higgins, Rodriguez, Kern, and Swain were soon joined by Holland and Randy Jones to discuss disposing of Rodriguez's bloody clothes, the knife, and Davis's cell phone. Holland broke the cell phone with a hammer. The phone and knife were then wrapped in the shirt, and the items were given to Holland to dispose of them. Higgins and Jones both testified when they saw the knife, they recognized it as belonging to Rodriguez.

On the night of July 26th, Holland took the clothes, knife and cell phone to Bacon's rural home because she was hosting a bonfire. Holland threw the knife and cell phone into a wooden area in the back portion of Bacon's property. The knife was eventually recovered by the police. Holland also burned the clothes in the bonfire. Bacon and her fiancé, Chris Battani, testified during the bonfire, Holland informed them, "The only part he had in it is that he got out and he stabbed the guy and he got back in."

Over the next few days, Kern and Higgins turn themselves in to the police. On the night that Higgins turned himself into police, Gearhart, accompanied by his girlfriend Kristen Duffy, went to confront Rodriguez and have him turn himself in as well. Duffy testified as Gearhart confronted Rodriguez, she overheard Rodriguez say that he stabbed him. Gearhart and Duffy also testified Rodriguez

stated that he wanted to go to California. Gearhart called the police later that night, and Rodriguez was arrested.

On September 10, 2008, the State charged Rodriguez, Higgins, Kern, and Lee by joint trial information with first degree murder, first degree robbery, second degree robbery, and first degree burglary. The charges against the individual defendants were later severed. Rodriguez filed a notice of intoxication defense on August 14, 2009.

Trial commenced on October 5, 2010. A jury found Rodriguez guilty on all four counts. Rodriguez was sentenced to incarceration for life on the murder charge, a term of twenty-five years on the first degree robbery charge, and ten years apiece on the second degree robbery and second degree burglary charges. All sentences are to run consecutively.

Rodriguez appeals asserting there was insufficient evidence to sustain each of the convictions. He also asserts his trial counsel was ineffective by failing to: (1) present expert testimony to support his defense of intoxication, (2) object to the jury instruction providing a definition for "breaking" when the marshaling instruction for burglary did not contain the breaking alternative, and (3) file a motion to sever the four charges.

II. Sufficiency of the Evidence.

A. Standard of Review.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010). The jury's verdict is binding on appeal if it is supported by substantial evidence. *Id*. "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). In making this determination, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions that may be fairly and reasonably deduced from the evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). Finally, we give consideration to all evidence, not just the evidence that supports the verdict. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998).

B. Robbery of Justin Sorter.

Rodriguez initially challenges his conviction for the robbery of Justin Sorter. Rodriguez argues he did not know Higgins was going to rob Sorter.

The evidence shows before the group left Higgins's house for the first time, Rodriguez, Higgins, Kern, Holland, and Merchant decided they were going to drive around town looking for random people to beat up. When the group saw Sorter, Higgins yelled out the window demanding Sorter's cell phone and money. Knowing the plan to assault random people and hearing Higgins demand Sorter's cell phone and money, Rodriguez nonetheless exited the car with Higgins and watched Higgins punch Sorter and take his cell phone. We find this to be sufficient evidence showing that either Rodriguez had the specific intent or aided and abetted Higgins with the knowledge Higgins had the specific intent to steal from Sorter and assaulted him to further that intent. Accordingly, we affirm the second degree robbery conviction.

C. Burglary of Courtney Lundgren and Michael Smith's Vehicle.

Under the burglary conviction, Rodriguez claims the State failed to prove he entered the vehicle or had the intent to commit an assault. We disagree.

From the testimony presented, the jury could reasonably conclude Rodriguez punched out the window, and attempted to reach inside the vehicle and grab Smith. Smith kicked the door open knocking Rodriguez back. Higgins also attempted to grab Smith before Smith fled the vehicle. By reaching into the vehicle, Rodriguez "entered" it. *See, e.g.*, *State v. Taylor*, 689 N.W.2d 116, 133 (Iowa 2004) (finding sufficient evidence to affirm a burglary conviction when a husband broke the window on a vehicle and reached in and grabbed his wife).

Further, there is sufficient evidence showing Rodriguez and Higgins had the intent to commit an assault. Higgins admitted when he and Rodriguez were banging on the passenger side window, their plan was to "try to beat up the guy." Further, Rodriguez knew from the earlier conversation about playing "victim," the plan for the night was to assault random people. Accordingly, there is sufficient evidence to sustain Rodriguez's burglary in the second degree conviction.

D. Murder and Robbery of Dean Davis.

Rodriguez first argues the evidence is insufficient to support his conviction for murder. To support his argument, Rodriguez points to several statements and pieces of evidence that could support a finding Holland actually stabbed Davis. Specifically, Rodriguez argues Kern testified he saw Holland holding the knife in the car on the way back to Higgins's house, and Robbins, Bacon, and Battani each testified Holland admitted to stabbing Davis. Holland also admitted to disposing of the bloody clothes, knife, and Davis's cell phone. Rodriguez also points out Holland's testimony he did not leave the car during the assault of Davis was disputed by the testimony of Higgins, Kern, and Lee.

Although this evidence, if found credible by the jury, would serve to acquit Rodriguez, "the jury is at liberty to believe or disbelieve the testimony of witnesses as it chooses, and give such weight to the evidence as in its judgment the evidence was entitled to receive." *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984) (citation omitted). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." *Id*. In addition, the existence of evidence that might support a different verdict does not negate the existence of substantial evidence sufficient to support the verdict. *See State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990). There is substantial evidence in this record to support Rodriguez's conviction for first-degree murder.

Gearhart, Duffy, Higgins, Lee, Kern, and Holland all testified Rodriguez admitted to stabbing Davis. Gearhart also testified he saw Rodriguez with the knife prior to the group leaving the house to play "victim." Higgins and Jones also testified they recognized the knife as belonging to Rodriguez. Rodriguez was also seen washing his bloody clothes and cleaning the knife the day after the attacks. Finally, blood from both Rodriguez and Davis was found in Kern's vehicle on the back of the driver's seat head rest, directly in front of where Rodriguez was sitting. This evidence is sufficient to sustain the murder conviction.

Rodriguez also argues he had no idea Lee was going to steal Davis's bag. However, Rodriguez watched Higgins steal from Sorter, and still decided to play a second round of "victim." The jury did not err in inferring Rodriguez had the specific intent or aided and abetted Lee with the knowledge Lee had the specific

intent to steal from Davis during the attack. Thus, Rodriguez's conviction for robbery in the first degree is affirmed.

III. Ineffective Assistance of Counsel.

Rodriguez also claims his trial counsel was ineffective for: (1) failing to present expert testimony to support his defense of intoxication, (2) failing to object to the jury instruction providing a definition for "breaking" when the marshaling instruction for burglary did not contain the breaking alternative, and (3) failing to file a motion to sever the four counts.

A. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although we generally preserve such claims for postconviction relief, where the record is sufficient to address the issues, we may resolve the claims on direct appeal. *Id*. We find the record here is adequate to address the issues.

To prevail on a claim of ineffective assistance of counsel, Rodriguez must show by a preponderance of the evidence: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Id*. at 195-96.

B. Expert Testimony.

Rodriguez claims "[i]n light of the testimony of the witnesses that defendant was intoxicated, it was error for counsel to fail to present expert testimony regarding the defendant's intoxication." However, Rodriguez does not set forth any argument concerning what evidence an expert would have offered or how such testimony would have made a difference at trial.

We note from our review of the trial record defense counsel did present some testimony regarding defendant's intoxication. Counsel also asked the medical examiner several question regarding the effects of alcohol and marijuana.

> Q. So is it true that alcohol and drugs can cause blackouts? A. That is certainly my understanding, yes.
>
> . . . .
>
> Q. [I]s it true that substantial amounts . . . of alcohol consumed can affect an individual or impair their impulses? A. Yes, that is my understanding, that at certain levels alcohol and drugs certainly can impair one's judgment.

In addition, the court submitted an intoxication instruction to the jury. It is unclear what other evidence an expert could have offered in support of Rodriguez's intoxication defense.

There was also substantial evidence Rodriguez was not severely intoxicated at the time of the crimes. According to the testimony of several witnesses, Rodriguez admitted to stabbing Davis. Several admissions were made in the days following the incident. This testimony reveals that Rodriguez clearly had memory of the incident and what happened. *Heaton v. State*, 420 N.W.2d 429, 432 (Iowa 1988); *Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa Ct. App. 1989). Had defense called an expert on intoxication, Rodriguez fails to demonstrate it would have made a difference in the outcome of the trial.

We also note Rodriguez's main defense at trial was identification, not intoxication. In fact, an intoxication defense would have been at odds with his main defense of identity. Rodriguez presented testimony Holland actually stabbed Davis. He did not present evidence he stabbed Davis, but blacked out or did not understand what he was doing. An intoxication defense admits to the

act, but negates whether the person acted with specific intent. *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986) ("It has long been the general rule in Iowa that, although voluntary intoxication cannot constitute a defense to a crime, it may negate criminal intent if such intent is an element of the crime charged."). Rodriguez's defense at trial was he did not commit the offense.

"[A]n attorney's decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel." *State v. Wilkins*, 346 N.W.2d 16, 18 (Iowa 1984). When trial counsel acts reasonably in selecting and following through on a chosen strategy, the claim of ineffective assistance is without merit. *Id*. at 19. Because we find defense counsel acted reasonably in selecting a defense strategy and Rodriguez failed to show he was prejudiced by counsel's failure to call an expert on intoxication, we deny this claim of ineffective assistance of counsel.

C. "Breaking" Jury Instruction.

Rodriguez also claims his counsel was ineffective for failing to object to the jury instruction providing a definition for "breaking" when the marshaling instruction for burglary only contained the "entering" alternative.

As stated above, there is sufficient evidence in the record to support the jury's finding that after breaking of the passenger window, Rodriguez "entered" the vehicle when he attempted to grab Smith. Thus, the "breaking" instruction was merely superfluous, and does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel objected to the error. *Maxwell*, 743 N.W.2d at 197 ("[W]hen there is no suggestion the instruction contradicts another instruction or misstates the law there cannot be a

showing of prejudice for the purposes of an ineffective-assistance-of-counsel claim."). Accordingly, we find Rodriguez has failed to show any prejudice from the alleged error. *Id*.

D. Motion to Sever.

Rodriguez further asserts his counsel was ineffective for failing to move to sever the three incidents under Iowa Rule of Criminal Procedure 2.6(1). Rule 2.6(1) states in pertinent part:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

"[T]ransactions or occurrences are part of a 'common scheme or plan' under Iowa Rule of Criminal Procedure 2.6(1) when they are the 'products of a single or continuing motive.'" *State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007) (quoting *State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000)). In making this determination, we "consider factors such as intent, modus operandi, and the temporal and geographic proximity of the crimes." *Id*. at 199.

In this case, we conclude the occurrences constitute parts of a common scheme or plan. The transactions were clearly linked by the common scheme or motive of playing game of "victim." The transactions also occurred within a few blocks of each other and were performed within approximately three hours.

Although the existence of a "common scheme or plan" indicates the charges should be joined, the district court nonetheless has discretion to sever the charges for "good cause." Iowa R. Crim. P. 2.6(1). "To prove the district

court abused its discretion in refusing to sever charges, [the defendant] bears the burden of showing prejudice resulting from joinder outweighed the State's interest in judicial economy." *Elston*, 735 N.W.2d at 199.

Rodriguez argues the incidents should have been severed because the jury may not have been able to properly "compartmentalize" the evidence. Rodriguez asserts the jury could have been lead to believe because the defendant had a role in one incident, he was probably involved in the other incidents as well. However, the jury was specifically instructed to determine Rodriguez's innocence or guilt "separately on each count." *See State v. Delaney*, 526 N.W.2d 170, 175 (Iowa Ct. App. 1994); *see also State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010) ("We presume juries follow the court's instructions."). Accordingly, Rodriguez has failed to show he was prejudiced by defense counsel's failure to make a motion to sever the incidents.

IV. Conclusion.

Because we find the evidence is sufficient to support Rodriguez's convictions and that his counsel was not ineffective, we affirm.

AFFIRMED.