IN THE COURT OF APPEALS OF IOWA

No. 1-328 / 10-1104
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EARL AARON GRIFFIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Henry County, John G. Linn, Judge.

Earl Griffin appeals his conviction for three counts of delivery of marijuana as a habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Darin Stater, County Attorney, and Edward Harvey, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Earl Griffin appeals his conviction for three counts of delivery of marijuana as a habitual offender, in violation of Iowa Code sections 124.401(1)(d), 902.8, and 902.9 (2009). He contends the district court abused its discretion in declining to sequester the primary investigating officer during trial. Alternatively, Griffin claims his trial counsel was ineffective for failing to adequately preserve error on the issue. Upon our review, we find error was not preserved on the sequestering issue. However, we conclude Griffin's ineffective assistance of counsel claim must fail because Griffin has not shown he was prejudiced by his counsel's failure. We therefore affirm Griffin's conviction and sentence.

I. Background Facts and Proceedings.

Earl Griffin met twenty-two-year-old Gary Ruth while they were both serving time in the county jail in 2007. In January 2010, Ruth was on probation and earned twenty dollars each time he helped the Mount Pleasant Police Department by participating in controlled drug purchases. Ruth encountered Griffin at Z's Convenience Store in Mount Pleasant on January 15, 2010. Griffin had just gotten out of jail and told Ruth he was "looking to sell" some marijuana. He showed Ruth eight "dime" bags of marijuana. Ruth said he "might know some people who want to buy" and would get back to Griffin.

Ruth went home and called Mount Pleasant Police Officer Lyle Murray, with whom he had previously worked executing controlled buys. Officer Murray was familiar with Griffin. He directed Ruth to set up a purchase with Griffin. Ruth was searched and then outfitted with a recording and transmitting device and

given serialized money. Ruth met Griffin behind Z's where they exchanged eighty dollars for eight grams of marijuana.

Officer Murray watched and listened to the transaction from a parked vehicle less than a block away. He recognized Griffin when he watched Ruth meet him briefly and shake hands, and he also recognized Griffin's voice from the recording device while they talked. Officer Marc McConnell also recognized Griffin and witnessed the transaction from the police department. Ruth met with Officer Murray immediately after the buy. Ruth handed him the marijuana, received twenty dollars compensation, and debriefed.

A second transaction occurred the next day, January 16, after Ruth informed Officer Murray that Griffin had more marijuana to sell. Just like the first buy, Ruth met with Officer Murray to be searched and outfitted with a recorder, transmitter, and serialized money. Ruth walked to Z's and then got into a vehicle driven by a mutual friend, Micaiah Mullen. Griffin was in the vehicle. Mullen drove Ruth home, and en route Ruth purchased four or five grams of marijuana for forty or fifty dollars from Griffin. Immediately after the buy, Ruth met with Officer Murray to debrief, hand over the marijuana, and receive his twenty dollars compensation.

A third transaction occurred on January 20, 2010. Again, prior to the buy, Ruth met with Officer Murray to be searched, outfitted with recording devices, and given serialized money. Ruth met Griffin at Casey's General Store on the west side of Mount Pleasant. Ruth entered a van and handed Griffin forty or fifty dollars in exchange for four or five grams of marijuana. Officer Murray observed

the transaction from an unmarked vehicle. Again, Ruth met with Officer Murray immediately afterward and gave him the marijuana. Officer Edward Cardenas also observed the transaction between Ruth and Griffin.

On January 22, 2010, Officer Murray executed a search warrant on the residence of Griffin and Charity Albright. Officers seized a digital scale and small plastic bags in the home, as well as money and Griffin's ID from a pair of men's pants. One of the bills seized from the pants was serialized buy money from the third transaction.

On February 1, 2010, the State charged Griffin with three counts of delivery of marijuana as a habitual offender, in violation of Iowa Code sections 124.401(1)(d), 902.8, and 902.9. Griffin stipulated to his prior convictions. A bench trial commenced on April 20, 2010. The district court issued its verdict on May 6, 2010, finding Griffin guilty of all three counts. He was sentenced to three concurrent prison terms of fifteen years with a mandatory three years and no fine. Griffin now appeals.

II. Sequestration of Officer Murray.

Griffin argues the district court abused its discretion by denying his request to sequester witnesses and failing to exclude Officer Murray from the courtroom during trial. Griffin further urges us to find that "prejudice is presumed" unless the State can demonstrate Officer Murray's presence was harmless. Griffin alleges he should be granted a new trial.

The State contends Griffin's trial counsel failed to adequately preserve error on the sequestering issue. At the beginning of trial, the court asked

defense counsel to take up any preliminary matters. The following colloquy ensued:

> DEFENSE COUNSEL: Only that witnesses be sequestered, your Honor, and except for Mr. Murray they are, and these are not witnesses. They are family members.
>
> COURT: The rule on witnesses being invoked, the attorneys should keep the witnesses out in the hallway except during the testimony. The State is allowed to have one officer or representative at counsel table, but otherwise witnesses should remain outside, and of course, the defendant would be present at all times.

Defense counsel made no further requests or comments in regard to the sequestering issue. Significantly, counsel did not take issue with the presence of Officer Murray, or argue Officer Murray should be excluded. Counsel did not object to the court's announcement that "one officer or representative" may sit at counsel table. We conclude counsel's ambiguous request was not sufficient to preserve this alleged error for our review. Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997); *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995). Because we conclude error has not been preserved, we turn to his alternative argument that defense counsel was ineffective in failing to preserve error on the claim.

III. Ineffective Assistance of Counsel.

Griffin contends defense counsel was ineffective in failing to preserve an appellate challenge to the sequestration of witnesses issue. The State contends defense counsel did fail to preserve error on this claim, but such failure did not

constitute ineffective assistance because Griffin did not prove he was prejudiced by counsel's failure.

"Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules." *State v. Fountain*, 786 N.W.2d 260, 262-63 (Iowa 2010). We conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In order to prevail on his claim of ineffective assistance of counsel, Griffin must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id*. Failure to prove either element by a preponderance of the evidence is fatal to Griffin's claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). If we determine the claim cannot be addressed on appeal, we must preserve it for a postconviction relief proceeding, regardless of our view of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). We prefer to leave ineffective assistance of counsel claims for postconviction relief proceedings. *Id*. Those proceedings allow an adequate record of the claim to be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims and explain his or her conduct, strategies, and tactical decisions. *Id*.; *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). In this case, we deem the record adequate to address Griffin's claim. *See* Iowa Code § 814.7(3). We therefore turn to the merits of the claim. *See Johnson*, 784 N.W.2d at 198 ("If the defendant requests that the court

decide the claim on direct appeal, it is for the court to determine whether the record is adequate and, if so, to resolve the claim.").

Courts have long recognized the practice of excluding witnesses from the courtroom when not testifying "as a means of preventing a witness from shaping his testimony to conform with that of earlier witnesses." *State v. Sharkey*, 311 N.W.2d 68, 70 (Iowa 1981). As our supreme court has observed:

> The purpose of an order of exclusion is "to lessen the danger of perjury, or at least of a suggestion to following witnesses of what their testimony should be to correspond with that previously given; to put each witness on his own knowledge of the facts to which he testifies rather than to have his memory refreshed, even guided, and his testimony colored by what has gone before."

State v. Pierce, 287 N.W.2d 570, 574 (Iowa 1980) (quoting *In re Will of Smith*, 245 Iowa 38, 42, 60 N.W.2d 866, 869 (1953)).

"In Iowa, however, a party is not entitled as a matter of right to exclusion of witnesses from the courtroom." *Id*. Our supreme court has observed that "the granting of such an order rests within the sound discretion of the trial court." *Id*. (citing *State v. Sampson*, 220 Iowa 142, 143, 261 N.W. 769, 770 (1935); *State v. Christy*, 154 Iowa 514, 519, 133 N.W. 1074, 1076 (1912); *State v. Worthen*, 124 Iowa 408, 410-11, 100 N.W. 330, 331 (1904); *State v. Davis*, 110 Iowa 746, 748, 82 N.W. 328, 329 (1900)). Iowa Rule of Evidence 5.615 provides:

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of any of the following:
>
> (1) A party who is a natural person.
>
> (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney.
>
> (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

(4) A person authorized by statute to be present.

In reviewing cases where a defendant's motion to sequester witnesses was denied by the trial court, our supreme court requires defendants to prove prejudice or harm resulted from the court's denial. *See, e.g.*, *Sharkey*, 311 N.W.2d at 70 ("In short, defendant has failed to demonstrate that he was in any manner harmed by the denial of the motion to exclude. In the absence of prejudice we cannot say that a reversal is required.").

A. Presumed Prejudice. Griffin urges us to adopt the minority position in federal courts that prejudice is presumed when a sequestration error has occurred. We decline Griffin's invitation, however, because our supreme court has provided sufficient guidance to reach the conclusion that Iowa courts do not presume prejudice in cases of a sequestration error. *See, e.g.*, *Sharkey*, 311 N.W.2d at 70; *Pierce*, 287 N.W.2d at 574; *State v. Pardock*, 215 N.W.2d 344, 347 (Iowa 1974); *Sampson*, 220 Iowa at 143, 261 N.W. at 770; *State v. Bittner*, 209 Iowa 109, 111, 227 N.W. 601, 603 (1929); *Christy*, 154 Iowa at 519, 133 N.W. at 1076; *Worthen*, 124 Iowa at 410-11, 100 N.W. at 331; *Davis*, 110 Iowa at 748, 82 N.W. at 329.

In *State v. Bittner*, our supreme court reviewed the trial court's decision to allow a witness, a sheriff, to remain in the courtroom during trial, denying the defendant's sequestration request. 209 Iowa at 111, 227 N.W. at 603-04. The court determined it would "not presume error" by the sheriff's presence, because the issue did "not affect the substantial rights" of the defendant. *Id*. at 111, 227 N.W. at 604-05. As the court observed:

> Clearly, the sheriff had a right to be present as an officer of the court. The sheriff was a necessary person to assist the public prosecutor in the case. In any event, these matters rested in the sound discretion of the trial judge, and there is no abuse of discretion shown. This court will not presume error, and will, on the appeal taken by the defendant . . . , examine the record, "without regard to technical errors or defects which do not affect the substantial rights" of the defendant, and "render such judgment on the record as the law demands." In the instant case, we will not reverse on a mere technicality, as the point raised does not affect the substantial rights of this defendant.

Id. Because error will not be presumed by counsel's failure to object to Officer Murray's presence, we turn to whether actual prejudice occurred in this case.

B. Actual Prejudice. Upon our review, we conclude Griffin has not shown prejudice resulted from defense counsel's failure. There is no reasonable likelihood of a different outcome had counsel preserved the issue. *See Sharkey*, 311 N.W.2d at 70 ("[D]efendant has failed to demonstrate that he was in any manner harmed by the denial of the motion to exclude."). Considering the nature of this case, the evidence against Griffin, and the testimony of the witnesses taken as a whole, Griffin is unable to show he would have likely been acquitted if Officer Murray had been sequestered.

We also observe the absence of evidence in the record to indicate Officer Murray's testimony was affected in any way by his presence while other witnesses testified. *See id.* ("The record does not suggest the State's witnesses engaged in collusion or that any witness was influenced in his testimony by the testimony of other witnesses."); *Pierce*, 287 N.W.2d at 574 (noting the unsequestered witness had previously read the report of the witness "and he heard nothing in the testimony which he had not previously read in the report");

Pardock, 215 N.W.2d at 347 ("There is no showing of [prejudice] from the records; the witness, under cross-examination by defense counsel, stated he had not discussed the case with any one during the recess."). In fact, Officer Murray's responses clearly indicate he did not tailor his testimony to match the testimony of witness Gary Ruth:

> Q. [DEFENSE COUNSEL]: Now, in the first buy we heard Mr. Ruth say—the informant say that he pulled out money from his back pocket and handed it to whom he claims is Earl Griffin; is that correct? A. [OFFICER MURRAY]: He says that on tape or—
> Q. No. He said this—that in testimony in court today. A. Yeah, that's what he said. Yes.
> Q. But that's not what you recall seeing; is it? A. I don't remember seeing him pull it out of his pocket. I just remember seeing him shaking hands with Mr. Griffin.

Upon our review of the testimony of Officer Murray as a whole, we do not find this is a case where a witness materially changed his version of events after listening to another witness. *See, e.g.*, *Sharkey*, 311 N.W.2d at 70.

We further note that even if defense counsel had specifically objected to Officer Murray's presence in the courtroom, there is no indication the court would have ruled differently and ordered Officer Murray to be excluded. At trial, the court determined, "[t]he State is allowed to have one officer or representative at counsel table." This ruling is consistent with Iowa Rule of Evidence 5.615 (not authorizing exclusion to "an officer or employee of a party" or "a person whose presence is shown by a party to be essential to the presentation" of its case), as well as our supreme court's finding in *Bittner*, 209 Iowa at 111, 227 N.W. at 604-05 ("Clearly, the sheriff had a right to be present as an officer of the court. The

sheriff was a necessary person to assist the public prosecutor in the case."); *see also Sharkey*, 311 N.W.2d at 70; *Pierce*, 287 N.W.2d at 574.

Under these facts, Griffin has failed to establish the court abused its discretion by not sequestering Officer Murray. The standard for finding abuse requires us to find the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Teeters*, 487 N.W.2d 346, 349 (Iowa 1992); *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982). The court's exercise of discretion here cannot be described as "clearly unreasonable." *Teeters*, 487 N.W.2d at 349.

Finally, in light of the evidence of his guilt, Griffin cannot show the outcome of trial would have been different if all of the State's witnesses had been sequestered. *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (observing prejudice exists when it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged breach). Griffin was caught with serialized drug money in his possession when officers searched his home. Officers also found a digital scale and small plastic bags. Both Officer Murray and Gary Ruth described the drug transactions with Griffin in detail, emphasizing different aspects of the transactions. Their testimony indicates neither witness was affected by the other's testimony. The court specifically noted that it found Ruth's testimony to be corroborated, consistent, and believable. Further, Officers McConnell and Cardenas also observed the first and third transactions, respectively. They recognized Griffin, and their testimony corroborated the fact that Griffin was the individual who met with Ruth for the buys.

Because there was no violation of the sequestration order and Griffin was not unfairly prejudiced by Officer Murray's presence in the courtroom during trial, we find his claim as to defense counsel's effectiveness on this issue must fail. *See Polly*, 657 N.W.2d at 465 (observing that a failure to prove prejudice by a preponderance of the evidence is fatal to a defendant's claim of ineffective assistance). We therefore conclude defense counsel was not ineffective for failing to preserve this issue for appellate review. Upon consideration of the issues raised on appeal, we affirm Griffin's conviction and sentence.

AFFIRMED.