IN THE COURT OF APPEALS OF IOWA

No. 1-858 / 11-0183
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH ALLEN TATE,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

Defendant appeals, contending the evidence is insufficient to support his first-degree robbery conviction and his trial counsel was ineffective. **AFFIRMED IN PART AND VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Jennifer Miller, County Attorney, and Paul G. Crawford, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

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

EISENHAUER, J.

Keith Tate challenges his convictions for first-degree robbery, going armed with intent, possession of burglar's tools, and aggravated assault.[1]

Tate argues there is insufficient evidence of his intent to commit a theft to support his first-degree robbery conviction. Tate also argues his counsel was ineffective in failing to challenge: (1) the sufficiency of the evidence of a "dangerous weapon"; (2) the sufficiency of the evidence of a "burglar's tool"; and (3) the aggravated assault conviction as "a proscribed offense" when going armed with intent is charged. *See* Iowa Code § 708.2(3) (2009).

I. Substantial Evidence—Intent to Commit Theft.

In order to convict Tate of first-degree robbery, the State was required to prove he acted with the specific intent to commit a theft. Tate admits the evidence showed he "assaulted the young woman repeatedly and viciously" after he broke into her apartment, but argues there is insufficient evidence he intended to commit a theft. Tate claims: "Nothing was taken. Nothing was disturbed other than the bed area as a result of the attack." Tate also notes he did not ask the victim's teenage neighbors about the victim's property or possessions when he questioned them about the victim on the evening the victim was attacked.

We review Tate's insufficient evidence claim for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will "uphold a finding of guilt if 'substantial evidence' supports the verdict." *Id.* "'Substantial evidence' is

---

[1] Tate does not appeal his conviction for first-degree burglary. At sentencing, the court merged Tate's conviction for assault while participating in a felony with first-degree burglary. The sentencing court also merged Tate's conviction for willful injury with first-degree robbery.

evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* "We review the facts in the light most favorable to the State." *Id.*

"A conviction of robbery requires proof of the intent to commit a theft and not proof of the actual theft." *State v. Boley*, 456 N.W.2d 674, 679 (Iowa 1990). "It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen." Iowa Code § 711.1.

The victim lives in an upstairs apartment, and her landlord lives in the house's bottom floor. In May 2010, the victim was sitting on her front porch smoking a cigarette when she and her two teenage neighbors saw Tate walking near the victim's apartment around 11:00 p.m. on the night of the attack. The victim did not know Tate, but later identified him as the attacker and the pedestrian who "was creeping me out" by walking up and down the sidewalk and continually looking at her.

The victim's seventeen-year-old neighbor testified Tate approached him and his fifteen-year-old cousin as they were standing outside, Tate knew his cousin, and Tate started asking questions about the victim:

> [Tate] asked if we knew the girl that was with the long blonde hair that was sitting on the porch over there, and [my cousin] said . . . we don't know her too well, but we talk to her occasionally . . . . [Tate was] asking questions like he wanted to, you know, start to get to know her . . . maybe have a relationship with her . . . because he was asking like did—did we know about her or what kind of person she was, you know. He had asked if she had a boyfriend. He had asked . . . did we know if anybody came to her house at nighttime. He asked does anybody live with her . . . .

The victim's fifteen-year-old neighbor also testified Tate asked:

> [I]f I knew the girl a couple houses down . . . . He was like, Do you know if she got a boyfriend? I was like, Honestly, no. And then he asked me if she lived alone. I said, Honestly, I do believe so . . . . And . . . I said, You're talking about the girl with the blonde hair; right? And he said, Yes . . . .
>
> . . . .
>
> . . . I don't believe [Tate] pointed at [the victim]. He may have. I do not really remember it but—I had pointed to [the victim] prior to that asking him if that's the girl and he said yes.

Due to Tate's behavior, the victim did not finish her cigarette and instead went inside. She locked the deadbolt on the beveled-glass entry to her apartment and fell asleep watching television. Later, the victim was awakened by a "really loud glass crashing sound," heard pounding up the stairs, and saw Tate's face as he was straddling her in her bed with "a rectangular light-colored brick in his hand." Tate hit the victim "20 or 30 times in the head, but I was blocking as much as I could." She testified:

> Q. What were you saying? A. No; stop; just take whatever you want; please just stop; just take whatever you want.
>
> . . . .
>
> Q. What do you remember your attacker saying?
>
> . . . .
>
> A. . . . [S]hut up; just shut up, and he'd do it every time I—I tried to yell for help or yell stop or just say anything. At one point I told him just take the whole . . . house; I don't care; just stop.
>
> Q. Did he stop? A. No. He kept hitting, and then I—one last time I just said, Just take whatever you want, and he said . . . *shut up first*, and he yanked me up, and . . . started choking me . . . and I started passing out . . . and then he jumped up, and . . . I crawled out of my bedroom and I heard [my landlord], and I heard the guy who attacked me say, I'm her boyfriend; someone just broke in . . . and then I just crawled down the little stairs to the landing . . . and [the landlord] saw me . . . .

(Emphasis added.)

The victim's landlord testified he was awakened by the sound of breaking glass and heard a scream from upstairs as he was walking towards his front door with a baseball bat.

> I opened my door, looked to the [victim's] door, and about 80 percent of the door glass is on the ground. I open the screen door, try the door. It is locked. Reach through the broken opening, undo the deadbolt. The door opens real easy, and right then there's [Tate]. He is still in the apartment. He's not out of the apartment, and I get a chance to step into the apartment, take the baseball bat, put it up against his chest . . . .
>
> . . . .
>
> Q. What did he say? A. He was calm, cool, tilted his head to the left and said, She's my girlfriend.
>
> Q. What was your reaction? A. Amazement. Confusion. Didn't know if he was or wasn't.
>
> Q. What happened next? A. I must have relaxed or he sensed that, and I was directly in front of the door, and he scooted in between me and the door and ran . . . .

Later, the landlord discovered several of the landscape rocks near the side of his house had been removed. The rock Tate used to attack the victim, estimated to weigh five pounds, was still in her bed when police arrived.

The police located Tate hiding in a bedroom in his wife's home. After Tate's injuries were treated, he was questioned by Officer Kessler. Officer Kessler testified Tate told him three different stories. Tate first stated he was walking around because he had been in an argument with his wife. A "Mexican guy drove up in a truck," they got into a fight, and the guy pulled out a knife and cut up Tate's hands.

When Officer Kessler told Tate his blood was all over the crime scene, Tate admitted he "had been to the victim's house and had broken in and there was no fight with a Mexican guy." Rather, Tate got in Brandon Blackford's vehicle. Officer Kessler testified Tate told him:

> Brandon says that he needs some money, and he wants to go rob somebody and drives [Tate] right back to the blonde girl's house that [Tate] had been asking about earlier. [Tate] said the intention was to rob her. He broke the glass on the door with the rock and decided he couldn't go through with it so he walked off, and Brandon went in.

Eventually, Tate changed his statement to his third/final version and told Officer Kessler he and Brandon drove around and it was Tate's idea to rob the blonde girl because he needed money. He knew where she lived and knew she lived alone. Tate repeated his admission he broke out the glass door with the rock and again asserted he couldn't go through with the crime.

Officer Kessler made numerous efforts to find Brandon Blackford and finally concluded he did not exist. The blood on two separate pillowcases from the victim's bedroom matched Tate's DNA.

While it appears most of Tate's statements to the police were untruthful and were made in an attempt to avoid responsibility, the jury was entitled to give credit to Tate's two separate statements to Officer Kessler that his purpose in the break-in was to rob the victim. The jury is "free to reject certain evidence and credit other evidence." *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

Additionally, Tate's questioning of the teenage neighbors appears designed to learn whether the victim would be alone in her apartment and evinces an attempt to case her apartment. The victim's statements to Tate to take whatever he wanted show she understood Tate's intent to include theft. Tate's statement telling the victim to be quiet *first* bolsters the victim's impression of a theft intent. "Circumstantial and direct evidence are equally probative and either are sufficient to support a conviction." *Boley*, 456 N.W.2d at 679. The jury

could infer Tate's failure to actually commit a theft was due to the refusal of the victim to stop yelling and fighting and the unexpected arrival of the landlord, forcing Tate to leave empty-handed.

The "credibility of witnesses is for the factfinder to decide except those rare circumstances where the testimony is absurd, impossible, or self-contradictory." *State v. Neitzel,* 801 N.W.2d 612, 624 (Iowa Ct. App. 2011). A reasonable juror could conclude Tate broke into the victim's apartment with the specific intent to commit a theft. Substantial evidence supports the first-degree robbery conviction.

II. Ineffective Assistance of Counsel.

To prove trial counsel was ineffective Tate must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). Tate's inability to prove either element is fatal. *See State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392.

While we normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings, when the record is adequate to determine the defendant will be unable to establish his claim as a matter of law, then resolution on direct appeal is appropriate. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Here, the record is adequate to resolve Tate's claims on direct appeal.

A. Dangerous Weapon. Tate first argues counsel was ineffective in not moving for acquittal based on insufficient evidence proving the landscape rock found in the victim's bed and used to hit the victim in the head is a "dangerous weapon" as statutorily defined.

Iowa Code section 702.7 defines "dangerous weapon" as including:

> [A]ny instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being . . . .

Under this language, "the test is whether the device is used in such a way as to show an intent to kill or injure a person." *State v. Greene*, 709 N.W.2d 535, 537-38 (Iowa 2006). We consider whether the defendant "objectively manifests to the victim" his intent "to inflict serious harm upon the victim." *State v. Ortiz*, 789 N.W.2d 761, 766-767 (Iowa 2010) (discussing "dangerous weapon in manner used"). Accordingly, "[d]angerous weapons, in fact, can encompass almost any instrumentality under certain circumstances." *Greene*, 709 N.W.2d at 537 (recognizing a stick, stone, or hoe could meet the definition "according to the manner in which it is used").

Under the facts detailed above, Tate used the five-pound, rectangular rock in a manner which objectively indicates he intended to inflict death or serious injury on the victim and, when used to strike the victim in the head, the five-pound rock was capable of killing the victim. Therefore, whether the rock Tate used is a dangerous weapon is an issue of fact for the jury. *See id.* Tate's trial counsel had no duty to make a meritless motion challenging the sufficiency of the evidence of the "dangerous weapon" element. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

B. Possession of Burglar's Tools. Tate also argues counsel was ineffective in not moving for acquittal on the possession of a burglar's tools charge based on the State's insufficient evidence proving the rock is a "burglar's

tool." Iowa Code section 713.7 outlaws the possession of burglar's tools: "Any person who possesses any key, tool, instrument, device or any explosive, with the intent to use it in the perpetration of a burglary . . . ." Tate argues a "rock is not a tool as the term is commonly used."

Under the circumstances of this case, where Tate used the landscaping rock located on the landlord's property to break the door's glass in order to gain entry, we disagree. In *People v. Jones*, 495 N.Y.S.2d 718, 719 (N.Y. App. Div. 1985), the defendant used a brick located under the house's drainpipe to break a window and was convicted of attempted burglary and possession of burglar's tools. The court ruled: "The question of whether a brick could be considered a burglar's tool was properly submitted to the jury . . . ." *Id.* *See Thompson v. State*, 514 S.E.2d 870, 871 (Ga. Ct. App. 1999) (finding possession of burglary tools includes bricks used to break glass in convenience store door). Accordingly, Tate's counsel was not ineffective in failing to make a meritless motion for judgment of acquittal. *See Ortiz*, 789 N.W.2d at 768 (ruling "defense counsel does not have a duty to assert challenges that lack merit").

C. Aggravated Assault. The State concedes Tate's aggravated assault conviction should be vacated if his conviction for going armed with intent is upheld. *See* Iowa Code § 708.2(3). We affirm Tate's convictions for first-degree robbery, going armed with intent, and possession of burglar's tools. Without further discussion, we vacate his conviction for aggravated assault and set aside the accompanying sentence.

AFFIRMED IN PART AND VACATED IN PART.