

IN THE COURT OF APPEALS OF IOWA

No. 2-1058 / 11-1887
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAMAUR LEE SIMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II (jurisdiction) and Robert A. Hutchison (trial), Judges.

Defendant appeals his convictions. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, Jaki Livingston and Mike Salvner, Assistant County Attorneys, for appellee.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Following a jury trial, Shamaur Sims was convicted of assault with intent to inflict serious injury, first-degree robbery, and willful injury causing serious injury. Sims argues his robbery conviction should be reversed because trial counsel rendered ineffective assistance in not objecting to the jury instructions. Sims also argues all convictions should be reversed due to the court excluding expert witness testimony and failing to transfer jurisdiction to the juvenile court. Finding counsel rendered ineffective assistance, we reverse and remand for a new trial on the robbery charge.¹ We affirm the remaining convictions.

I. Background Facts and Proceedings.

On August 9, 2010, Juan Carlos Urquizo was beaten and seriously injured by a group of teenage boys outside the Des Moines Asian Food store. Urquizo remained in a near-vegetative state due to blunt force trauma and was unable to testify at Sims's September 2011 trial on charges of attempted murder, first-degree robbery, and willful injury causing serious injury.

During the investigation, Sims was identified as a suspect, along with Kevin Scott, Kevin's younger brother Jaray Scott, and Shaquille Scheuermann. Sims was interviewed by Detective Frentress and would not admit to hitting, kicking, or stomping Urquizo. At trial, Detective Frentress testified about Sims's interview statements:

Q. What did Mr. Sims tell you about this event? A. [Sims] states it's him and Jermaine [Ware] are standing back as he watches Kevin [Scott], Shaq [Scheuermann], Jaray [Scott] assault the victim.

¹ Sims also argues the evidence is insufficient to support his robbery conviction. We find no merit to this claim.

....
Q. Did he tell you . . . how the assault started? A. [Sims] states that Kevin confronts the victim, asked the victim for fifty cents. The victim gives him a blank stare and at that point Kevin punches him.

....
Q. What does [Sims] say happened after Kevin struck him?
A. The victim falls to the ground and that's where he says they begin to start "heading him," which I clarify as meaning they started kicking him in the head.

Q. . . . Then what does [Sims] tell you happens, if anything?
A. Basically, [Sims] says that he believes Kevin gets \$6, he thinks, from the victim. Then after that they scatter.

Fifteen-year-old Jawon Eubanks was present during the assault and testified at trial. Eubanks is friends with Scheuermann and Jermaine Ware. Eubanks knew Scheuermann was friends with Sims and Kevin Scott. On August 9, 2010, Eubanks was watching television with Scheuermann when Sims called. Eubanks and Scheuermann left to meet Sims, Kevin Scott, Jaray Scott, and Jermaine Ware at Eighth and Franklin and "hang out." Eubanks thought the group was "going to go play basketball or whatever, but they started talking about . . . going to go jump somebody. I didn't know if they were messing around or not." Eubanks did not identify whom "they" encompassed.

Eubanks testified Urquizo was sitting at the back of the Asian Food store "and I think Kevin asked the dude for a dollar." Urquizo shook his head no, and the boys "just walked away and then we went to the Shop 'n Save." At the Shop 'n Save, Kevin started a conversation about going back and jumping Urquizo, while the other boys "didn't say nothing." Eubanks testified the boys returned to the Asian Food store area and he saw Urquizo walking toward them. Eubanks heard Kevin tell Urquizo to go towards the back of the building, and Urquizo

replied, “What?” Next, “Kevin just hit him” in his jaw, and Urquizo fell on his back. “Kevin just told everybody to come on and they just all started kicking him. But me, Shaq [Scheuermann], and Jermaine [Ware] stood back.” Eubanks acknowledged his deposition statements differed in that he described only himself and Jermaine Ware, not Scheuermann, standing back after Kevin knocked Urquizo down. Eubanks then testified while he and Jermaine Ware continued to stand back and just watch, Scheuermann joined in “towards the end.” Eubanks testified the assault stopped and “we just told each other to leave and I said, ‘run.’”

Q. Okay. So you are all at this point—you are thinking it’s kind of over with? A. Yeah.

....
Q. What does [Sims] do at that point? A. Well, he stayed back a few seconds and stomped his head in.

....
Q. Okay. I know stomp can mean a lot of things, but you are saying [Sims] took the bottom of his foot and was stomping down on the victim’s head? A. Yeah.

....
Q. Okay. How many times did [Sims] do this? A. Twice.

Eubanks also testified he saw Kevin take Urquizo’s wallet out of his pocket, but the wallet “didn’t have [anything] in it.” Eubanks was surprised when Kevin punched Urquizo and was not expecting that to happen. In his deposition testimony, Eubanks stated he did not have an “idea that they wanted to get money from this guy.”

Sixteen-year-old Jermaine Ware testified he was hanging out with Jaray Scott in the afternoon of August 9 when Kevin Scott, Sims, Scheuermann, and Eubanks stopped by. “First, we just walked around and stuff. And then they was

talking about beating people and taking their money.” Ware did not testify to the identities of “they.” Near the Asian Food store, Sims approached Urquizo, and the “first time [Sims] asked [Urquizo] did he have any change on him.” Urquizo said “no,” and the boys walked around the block. Next, “we saw [Urquizo] again.” As Urquizo was walking towards the boys, Kevin said, “I’m going to punch him.” Kevin “punched [Urquizo] and he fell on the ground and [Scheuermann and Kevin] got to beating him up.” Ware testified he and Eubanks were standing and watching, and Sims was standing right by Kevin and Scheuermann, but Sims was not doing anything at first. After “they were done beating him up, then [Sims] came in and then . . . he was stomping [Urquizo’s] face.” Ware did not remember how many times he saw Sims “stomp his face,” but it was more than one time. Ware did not remember if he saw anyone take anything from Urquizo.

Sims sought to have Dr. Rypma testify to the brain development of teenagers. The court did not allow Dr. Rypma to testify.

The jury found Sims guilty of assault with intent to inflict serious injury, a lesser-included offense of attempted murder; first-degree robbery; and willful injury causing serious injury. The court merged the sentences² and imposed a twenty-five-year sentence for first-degree robbery. The court fined Sims \$625 for the assault and \$1000 for the willful injury convictions and suspended the fines. This appeal followed.

² The court stated, “as a matter of law the sentences for Count I and Count III would merge into the sentence for Count II, which is the robbery first charge.” The court “is imposing the prison sentence on Count I and Count III, two years and ten years respectively, but that merges into the twenty-five year sentence on . . . Count II.”

II. Robbery—Ineffective Assistance of Counsel.

The court instructed on aiding and abetting by submitting the first four paragraphs of the uniform instruction. Sims seeks a reversal of his first-degree robbery conviction, arguing his trial counsel failed to perform an essential duty in not objecting to the jury instructions and requesting an additional paragraph be included (*italicized below*). Iowa Uniform Jury Instruction 200.8, Aiding and Abetting, provides:

All persons involved in the commission of a crime, whether they directly commit the crime or knowingly “aid and abet” its commission, shall be treated in the same way.

“Aid and abet” means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant’s earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not “aiding and abetting.” Likewise, mere knowledge of the crime is not enough to prove “aiding and abetting.”

The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person’s guilt.

If you find the State has proved the defendant directly committed the crime, or knowingly “aided and abetted” other person(s) in the commission of the crime, then the defendant is guilty of the crime charged.

Comment

Note: Add the following paragraph if the offense involves specific intent: *“The crime charged requires a specific intent. Therefore, before you can find the defendant ‘aided and abetted’ the commission of the crime, the State must prove the defendant either has such specific intent or ‘aided and abetted’ with the knowledge the others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or knowledge the others had such specific intent, [he] [she] is not guilty.”*

Sims argues the jury likely improperly concluded Sims aided and abetted others without knowing that others had the specific intent to commit a theft. Sims asserts the eye-witness testimony regarding conversation about “jumping the victim and taking his money, lacked any connection to or any indication of participation by Sims.”

The State argues even if defense counsel breached a duty in not objecting to the omission of this paragraph, Sims has not established he was prejudiced. “Reasonable jurors could see Sims’s conduct during the assault as the culmination of what he himself intended, or knew Kevin Scott intended, all along.” A reasonable jury “would have found Sims guilty of first-degree robbery, even if they had been fully instructed as to that crime.”

“Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution.” *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). We review de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005). To prevail, Sims must prove by a preponderance of the evidence his trial attorney failed to perform an essential duty and this failure resulted in prejudice. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Courts always have the option to decide the claim on the prejudice prong without deciding whether the attorney performed deficiently. *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). We believe the record is adequate to resolve the issue. See *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004).

We conclude trial counsel breached an essential duty resulting in prejudice to Sims on the first-degree robbery charge. The Eubanks and Ware

testimony describing general conversation about jumping/beating a person and taking money lacked any connection to or any indication of participation by Sims. While the jury was instructed on aiding and abetting, the jury was not instructed how an aiding and abetting theory applied and related to robbery's essential element of specific intent to commit a theft. Without this additional, specific instruction, the jury could find Sims guilty of aiding and abetting a robbery by finding Sims aided another person who had the requisite specific intent to commit a theft, *even though* Sims himself did not have such intent and was not aware of the other person's intent. The proper jury instruction would have made it clear the State was required to prove either Sims had the specific intent to commit a theft or aided and abetted with the knowledge that those who committed the crime had the specific intent. We reverse the first-degree robbery conviction and remand for a new trial on that charge.

III. Expert Testimony—Juvenile Brain Development.

Sims was sixteen years, three months old at the time of the August 2010 assault. Sims argues Dr. Rympa's testimony concerning "the brain development and thinking of defendant around the time of the offense would have shed light on the complex decisions the jury needed to make regarding specific intent and aiding and abetting." Sims seeks a new trial on all convictions with the admission of Dr. Rympa's expert testimony. Sims does not argue the relevance of Dr. Rympa's testimony in the context of a diminished capacity instruction, which he did not assert as a defense.

We review a district court's decision to admit or exclude evidence for an abuse of discretion. *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009). The jury was instructed:

"Specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.

Because determining the defendant's specific intent requires you to decide what he was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's specific intent. You may, but are not required to, conclude that a person intends the natural results of his acts.

In resisting the State's motion to exclude the testimony, defense counsel argued:

Dr. Rypma's intended testimony is not to talk about what Shamaur Sims's brain looked like back in August of last year. At no point do we intend to ask [Dr. Rypma] what his opinion was about [Sims's] specific intent, what specific intent he may have had for what particular crime His role as an expert is to educate . . . the jury about the development of juveniles which is very much different from the brain of a fully-developed adult. And he can talk about the prefrontal cortex, how that develops, what that affects, the implications of that, understanding consequences, moral development, things like that.

The State argued Sims has "not urged diminished capacity, but that's exactly what [he] is trying to establish for the jury; that he should somehow be held less accountable because he has a juvenile brain that is undeveloped." The court ruled:

The fact is that people develop at different rates. And to have an expert come in and just testify in a vacuum about juveniles, regardless of age or even if it's specific to age seventeen, I think is meaningless to this jury. Dr. Rypma, if he is going to offer an opinion like this, needs to do it in a context of a specific defendant So this testimony may be relevant at a sentencing phase of a

case in a general sense, but I do not think it's relevant under the facts and circumstances of this case.

During trial, Sims made an offer of proof in which Dr. Rympa testified "adolescents make immature, risky decisions that are not based on appropriate reward, risk analysis." Dr. Rympa did not find Sims to have an individual mental abnormality or psychiatric diagnosis, but thought "there [were] some very clear signs of impulsive behavior." Further, "based on my interview with Mr. Sims, I was not comfortable in offering an opinion regarding mental state. I did believe that there was enough planning involved that I could not . . . within a reasonable degree of professional certainty offer an opinion that would be helpful to Mr. Sims." Dr. Rympa opined Sims is in the mid-adolescent range of psychosocial development and is "a follower much more than a leader."

Q. You said in your deposition that you believed that Mr. Sims planned to do the assault, but didn't understand at the time that he was committing the assault how serious his behavior was; correct? A. That's correct.

Q. How do you come to that conclusion? A. I came to that conclusion based on the fact that I believed after I had interviewed [Sims] that he was certainly capable of showing remorse. He had little understanding in my opinion of the permanency of the injury. He made . . . child-like comments that you might hear from an immature person who was incapable of fully understanding the gravity of what happened.

The State argued Dr. Rympa's testimony would confuse the issues of Sims's capability to form specific intent and capability to appreciate the consequences of his actions. The court reaffirmed its prior ruling excluding the testimony, finding Dr. Rympa did not testify in the offer of proof as to Sims's specific mental state, but rather testified to the mental abilities of teenage or

juvenile defendants in general to appreciate the consequences of their acts. “That is not the same thing as the ability to form specific intent.”

We find no abuse of discretion. The fact in issue was whether Sims specifically intended to commit the acts constituting the crimes. Dr. Rympa consistently stated he could not give any testimony helpful to the defense on the subject of specific intent, and defense counsel did not seek his opinion on Sims’s capacity to form specific intent. Dr. Rympa’s general testimony on juvenile brain development is not relevant to Sims’s ability to form specific intent and is potentially misleading to a jury.

IV. Transfer to Juvenile Court.

As a child age sixteen or older charged with a forcible felony, Sims is subject to the jurisdiction of adult court “unless the court transfers jurisdiction of the child to the juvenile court upon motion and for good cause.” See Iowa Code § 232.8(1)(c) (2009). Sims bears the burden of showing good cause. See *State v. Neitzel*, 801 N.W.2d 612, 618 (Iowa Ct. App. 2011).

Sims’s motion to transfer involved the attempted murder, first-degree robbery, and willful injury causing serious injury charges herein and two first-degree robbery charges involving other victims and tried separately. Sims argues the court erred in failing to transfer jurisdiction and asserts “the nature and the circumstances of the offense were mitigated by the involvement of others,” and Sims’s juvenile probation officer “considered Sims a moderate risk at the time of the hearing.” We review for abuse of discretion. *Id.*

In ruling on a motion to transfer to juvenile court, the district court considers, among other factors: “(1) the nature and circumstances of the act; (2) the child’s prior involvement with juvenile authorities and response to past rehabilitation efforts; and (3) the programs and facilities available for rehabilitation and treatment in the adult and juvenile courts.” *Id.*

Sims’s probation officer testified Sims was working within his second juvenile deferral program at the time the five charged felonies occurred. Further:

My determination . . . not to support the waiver is [based on] the seriousness of the charges. We’re looking at two counts of robbery, first And this potentially—in my mind, this potentially represented serious harm to someone in the community.

Then the fact that even more serious charges at that point in time had been filed and alleged one month prior suggests to me that it’s a pattern of criminal thinking and behavior rather than an isolated event.

. . . .

It also appears that the victims [were] chosen randomly rather than some extenuating circumstances that had been going on. And then strong consideration for me was given to what was the best, what was appropriate, for [Sims] given the potential length of time juvenile court would have jurisdiction.

The allegations . . . represent, again, criminal thinking and behaviors and most likely the presence of attitudes, values, and skill deficits that would be difficult to remedy in the length of time [juvenile court services] has, which could be less than two years at best

The district court noted the “juvenile court has previously utilized a variety of resources to rehabilitate [Sims] without success.” Further, Sims’s conduct, despite the prior services, “has escalated in severity and frequency” indicating any additional services “would have to be more intense and for a significantly longer time frame.” The court ruled, Sims, at age sixteen years and eight months, would “age-out of juvenile court jurisdiction before rehabilitative services

are likely to be effective. The best interests of [Sims] and the community/public are served by retaining jurisdiction in the district court.”

We find the district court considered the appropriate factors and did not abuse its discretion in denying Sims’s motion to transfer to juvenile court.

V. Conclusion.

We reverse Sims’s first-degree robbery conviction and remand for a new trial. We affirm his convictions for assault with intent to inflict serious injury and willful injury causing serious injury.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.