

IN THE COURT OF APPEALS OF IOWA

No. 2-457 / 11-0594
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HARVEY LEE RICKS III,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas C. Staskal,
Judge.

Defendant appeals his conviction and sentencing for possession of a
simulated controlled substance with intent to deliver as a habitual offender.

AFFIRMED.

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant
Appellate Defender, and Renner K. Walker, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, John P. Sarcone, County Attorney, and Stephen Bayens, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

Harvey Lee Ricks III appeals his conviction and sentencing for possession of a simulated controlled substance with intent to deliver as a habitual offender. Ricks argues the court's reasonable doubt instruction violated his due process rights and, alternatively, his trial counsel was ineffective. We conclude Ricks waived a constitutional challenge to the instruction and trial counsel was not ineffective in failing to make a meritless objection.

I. Background Facts and Proceedings.

In August 2010, Ricks was arrested on an outstanding warrant for assault. Ricks asked the arresting officer to hand a package of cigarettes to his sister. The officer agreed, but found approximately twenty rocks of what appeared to be crack cocaine in the cigarette package. The rocks were tested and did not contain any controlled substances.

In September 2010, Ricks was charged with possession of a simulated controlled substance with intent to deliver and failure to possess a drug tax stamp. In November 2010, Ricks's first trial counsel, attorney Trotter, filed an application to withdraw as counsel. The court granted the application, and attorney Prine entered his appearance.

Ricks filed a combined motion to suppress the seizure of the cigarette package and its contents and motion to dismiss. In February 2011, after hearing, the court denied both motions.

Before the trial commenced on February 28, the court granted the State's motion to amend the trial information to charge Ricks as a habitual offender. The

jury found Ricks guilty of possession of a simulated controlled substance and not guilty of failure to possess a drug tax stamp. This appeal followed.

II. Jury Instruction on Reasonable Doubt.

At trial, the parties contested the appropriate jury instruction on reasonable doubt. Ricks proposed the court use Iowa Uniform Jury Instruction No. 100.10, as revised in March 2009. The State asked the court to use the prior version of the uniform instruction. The district court declined Ricks's request, used the pre-2009 uniform jury instruction, and instructed:

The State has the burden of proving the defendant guilty beyond a reasonable doubt. A reasonable doubt is one that fairly and naturally arises from the evidence or lack of State's evidence in the case. If, after a full and fair consideration of all the evidence in the case, you are firmly convinced of the defendant's guilt, then you may be said to have no reasonable doubt, and you should find the defendant guilty. But if, after full and fair consideration of all the evidence or lack of the State's evidence in the case, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.¹

On appeal, Ricks argues the "reasonable doubt instruction . . . inaccurately stated the law, rendering it constitutionally defective." However, Ricks admits trial counsel did not object to the reasonable doubt instruction on due process grounds. Therefore, Ricks alternatively argues trial counsel was ineffective for failing to make a due process challenge to this instruction.

¹ The 2009 revision adds the following paragraph to the instruction:
A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

See Iowa Crim. Jury Inst. 100.10 (March 2009).

Trial counsel did not argue the failure to give the requested instruction violated Ricks's right to due process or the instruction given was constitutionally infirm. Ricks cannot raise constitutional issues for the first time on appeal. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997); see *State v. Spates*, 779 N.W.2d 770, 776 (Iowa 2010) (concluding although defendant objected to jury instruction at trial, it was not on the same ground raised on appeal and issue was not preserved). Therefore, we turn to his alternative claim of ineffective assistance of trial counsel.

Ricks contends trial counsel was ineffective for failing to object to the instruction on due process grounds. Ricks finds fault with the phrase "firmly convinced" and argues due process requires the jury be instructed using the phrase "firmly and abidingly convinced." See *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980).

We review an ineffective-assistance claim de novo. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006). To be successful, Ricks must establish: (1) trial counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Barnes*, 791 N.W.2d 817, 822 (Iowa 2010). His inability to prove either element is fatal to the claim. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Trial counsel has no duty to raise a meritless issue. *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009).

"[A]n understanding of reasonable doubt is crucial to the deliberations of the jury in nearly every criminal case." *State v. McGranahan*, 206 N.W.2d 88, 92 (Iowa 1973) (stating trial courts are not "bound by any model or form" in crafting reasonable doubt instructions). The trial court may phrase the instructions in its

own words as long as the instructions fully and fairly advise the jury. *State v. Stallings*, 541 N.W.2d 855, 857 (Iowa 1995). Because trial courts have broad discretion in crafting jury instructions, there is no error where the court's "choice of words" does not result in an incorrect statement of law or omit a matter essential for the jury's consideration. *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994). An instruction correctly stating the law "will be deemed proper even though an alternative wording is possible." *State v. Morrison*, 368 N.W.2d 173, 175 (Iowa 1985). Specifically, "no particular model or form is required in advising the jury concerning the meaning of reasonable doubt as long as a suitable standard is given." *State v. Finnegan*, 237 N.W.2d 459, 460 (Iowa 1976) (rejecting claim reasonable doubt instruction was defective for failing to state "reasonable doubt must be found 'to a moral certainty'").

We cannot conclude the instruction is constitutionally invalid. We note both the 2009 revised uniform instruction and the pre-2009 uniform instruction explain reasonable doubt by using the phrase "firmly convinced" instead of "firmly and abidingly convinced." Additionally, the "instruction submitted to the [Ricks] jury set out an objective standard for measuring the jurors' doubts. It was not deficient for failing to provide more than one standard." See *McFarland*, 287 N.W.2d at 163. Finally, one commentator has noted, "[a]lthough the abiding conviction phraseology is still employed in a few jurisdictions, including California, its use has been on the decline" R. Jason Richards, *Reasonable Doubt: An Overview and Examination of Jury Instructions in Colorado*, 33 Colo. Law. 85, 86 (Aug. 2004); see *Foreman v. U.S.*, 633 A.2d 792, 794 (D.C. 1993) (noting "the adjective 'abiding' borders on the archaic [and] may carry little

precise meaning to modern ears” and encouraging trial courts to substitute the “firmly convinced” phrase “employed in the federal pattern instruction”).

We conclude the instruction given accurately states the law and adequately explained reasonable doubt. Accordingly, trial counsel was not ineffective for failing to make a meritless due process objection to the instruction.²

AFFIRMED.

² Ricks filed a pro se appellate brief arguing: (1) the court erred in granting the State’s motion to amend the trial information; (2) Trotter, his first trial attorney, was ineffective; (3) Prine, his subsequent trial attorney, was ineffective in failing to file a motion to dismiss based on the ineffective assistance of attorney Trotter; (4) “the court erred in not dismissing both charges in light of the ineffective assistance of [attorney] Trotter”; and (5) the court erred in denying his motion to suppress/dismiss. Ricks has waived appellate consideration of these issues by failing to cite any authority. See Iowa R. App. P. 6.903(2)(g)(3). We do not assume a partisan role and undertake the appellant’s research and advocacy. *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999).

Citing authority, Ricks also contends he is entitled to a new trial due to the State’s dilatory motion to amend to include a habitual offender enhancement. We note the State’s motion to amend was filed prior to trial and find no merit to this claim. See *State v. Bruce*, 795 N.W.2d 1, 5 (Iowa 2011) (holding criminal rule of procedure permitting amendment “during the trial” did not permit habitual offender amendment on State’s motion *after* jury returned verdict).