IN THE COURT OF APPEALS OF IOWA

No. 2-704 / 11-1412
Filed September 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FRANK DEWON BOURRAGE,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

The defendant appeals from his convictions of burglary and robbery asserting counsel rendered ineffective assistance. **SENTENCES VACATED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy Devine, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Frank Bourrage appeals following his conviction of second-degree burglary and second-degree robbery. He claims counsel rendered ineffective assistance in (1) failing to object to the robbery jury instruction that contained an incorrect statement of the law, (2) failing to object to a superfluous expert witness jury instruction, and (3) permitting him to stipulate to his habitual offender status without ensuring a proper colloquy was conducted. Bourrage also asserts the district court abused its discretion in imposing consecutive sentences where the two crimes charged arose out of a single transaction.

The defendant failed to carry his burden to prove prejudice as to the robbery jury instruction that contained an incorrect statement of the law. We also find no prejudice in the court's inclusion of the superfluous expert witness jury instruction. However, we find the colloquy conducted on the stipulation to Bourrage's habitual offender status was inadequate, and we, therefore, vacate his sentences on the robbery and burglary convictions and remand for further proceedings on the habitual offender enhancement allegations. Because we vacate the sentences on the habitual offender status, we need not reach Bourrage's claim that the court abused its discretion in imposing consecutive sentences.

I. BACKGROUND FACTS AND PROCEEDINGS.

Shanita Morgan awoke in the early morning hours of February 6, 2011, to the sound of two men banging on the glass patio door. She and her four children had fallen asleep in the living room watching a movie earlier in the evening. She

attempted to get her children into one of the bedrooms, but the men soon shattered the glass door and entered her home, wearing ski masks and carrying a golf club. The men yelled, "Where's the shit?" and pushed Morgan to the ground. One man threatened to kill Morgan and choked her with the golf club. She was taken to her bedroom where the men searched through the dresser drawers. The men then left the house. Morgan gathered up her children and went across the street to her uncle's house to call the police.

Morgan testified at trial she recognized one of the men as Bourrage, who was friends with her boyfriend and had been to the house several times in the past few weeks. Morgan's boyfriend, Antwon Crawford, testified $3500 in cash was missing from the dresser drawers.

The State charged Bourrage with first-degree burglary, first-degree robbery, and second-degree theft. The State also alleged Bourrage was an habitual offender subject to the sentencing enhancement in Iowa Code sections 902.8 and 902.9(3) (2011). A jury trial was held on June 27, 2011, where Bourrage asserted an alibi defense. The jury returned a verdict of guilty to second-degree burglary and second-degree robbery; however, it found Bourrage not guilty of theft. Bourrage stipulated to being an habitual offender, and the court sentenced him to a term of incarceration not to exceed fifteen years on each guilty verdict, ordering the sentences to run consecutively. Bourrage was also ordered to serve seventy percent of his sentence on the second-degree robbery conviction before being eligible for parole, pursuant to Iowa Code section 902.12(5). Bourrage appeals seeking a new trial.

II. INEFFECTIVE ASSSTANCE OF COUNSEL: ROBBERY AND EXPERT WITNESS JURY INSTRUCTIONS.

As Bourrage did not object to the robbery or expert witness jury instructions at trial, he presents his claim through the rubric of ineffective assistance of counsel. We review claims of ineffective assistance of counsel de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). To succeed, a defendant must show counsel failed to perform an essential duty, and prejudice resulted. *Id*. at 567. If either element is lacking, the claim will fail. *Id*. Normally we preserve claims of ineffective assistance for postconviction relief proceedings in order to develop a more complete record. *Id*. However, when the record is adequate on direct appeal, as it is here, we will proceed to resolve it. *See id*.

A. Robbery Instruction. The jury instruction on robbery in this case stated:

> The State must prove all of the following elements of Robbery in the First Degree under Count 2:
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> 1. On or about the 6th day of February, 2011, the defendant had the specific intent to commit a theft or assault.
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> 2. To carry out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant (a) committed an assault on another person; or (b) threatened another person with serious injury; or (c) purposefully put another person in fear of immediate serious injury.
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> 3. The defendant: (a) attempted to inflict a serious injury on another person; or (b) was armed with a dangerous weapon.
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> If the State has proved all of the elements, the defendant is guilty of Robbery in the First Degree. If the State has proved elements 1 and 2, but has failed to prove element 3, the defendant is guilty of the included offense of Robbery in the Second Degree. If the State has proved element 2 but has failed to prove elements 1 and 3, the defendant is guilty of the included offense of Assault. If the State has failed to prove element 2, the defendant is not guilty under Count 2.

The error in this instruction is found in element one. The jury was instructed that to be guilty of robbery in the first or second degree Bourrage needed to have the specific intent to commit a theft or assault. The code section defining robbery, however, provides the only specific intent that will support a robbery conviction is the specific intent to commit a theft. Iowa Code § 711.1 ("A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts . . . ."). The jury in this case was erroneously instructed that Bourrage could be guilty of robbery if he had the intent to commit an assault. The intent to commit an assault is not an alternative specific intent element of robbery. This instruction permitted the jury to convict Bourrage of robbery without finding an essential element: the intent to commit a theft. The State concedes the error in the jury instruction but asserts such error was harmless.

Even with this error in the jury instruction, a reversal would not be required unless Bourrage was prejudiced. *See State v. Hanes*, 790 N.W.2d 545, 548 (Iowa 2010). As this issue is raised in the vein of ineffective assistance of counsel, the burden to prove such prejudice is on Bourrage. *See id*. at 551 n.2 (stating that when reviewing an instructional error raised as an ineffective-assistance-of-counsel claim, "the defendant has the burden to show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceedings would have been different" (internal quotation marks omitted)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

More recently, in elaborating on the *Strickland* standard, the United States Supreme Court explained: "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 131 S. Ct. 770, 791–92 (2011).

The State argues that Bourrage's defense at trial was not that he did not have the specific intent required, but that he was not the person that committed the act. The State then points to the "very strong evidence" that Bourrage entered the house with the intent to assault, wielding a golf club, and with the intent to steal, asking "Where's the shit?" The State asserts there is no reasonable probability that the outcome of the trial would have been different had the intent to commit an assault element been removed from the robbery marshaling instruction.

Bourrage asserts his acquittal on the theft charge proves the error in the robbery instruction was prejudicial as the jury did not accept the State's claim he stole $3500. In order to evaluate his claim, it is helpful to review the jury verdicts on all three charges. The jury found Bourrage not guilty of theft, but guilty of second-degree robbery and second-degree burglary.

The jury instruction on theft required the jury find: "1. On or about the 6th day of February, 2011, the defendant took possession or control of the property of another. 2. The defendant did so with the specific intent to deprive the other person of the property. 3. The value of the property taken was more than $1,000." The jury was then instructed on the lesser included offenses of theft if they found the value of the property stolen was less than $1000. However, if the

jury found the State failed to prove elements one or two, they were to find the defendant not guilty of theft. The jury found Bourrage not guilty of theft. It therefore found either Bourrage did not take possession or control of the property of another or he did not have the specific intent to deprive the other person of the property.

The jury found the defendant guilty of robbery in the second degree and burglary in the second degree. In order to reach those verdicts, the jury was required to find, among other things, that the State had proved the following element: "The defendant [had] the specific intent to commit a theft or an assault." The jury could have found the defendant guilty of robbery and burglary based on an intent to commit theft, and also found the defendant not guilty of theft based on a lack of evidence as to whether defendant took possession or control of property of another. In other words, the jury may well have found that the defendant intended to commit a theft, but simply did not accomplish same. If that were the case, the guilty verdicts on robbery and burglary and the not guilty verdict on theft are reconcilable.

We readily add that it is also conceivable that the jury relied on the erroneous specific intent to commit an assault alternative in the robbery instruction to convict. This is supported by the fact the jury was also instructed, correctly, that intent to commit an assault was an alternative basis to convict on the burglary charge. That is, the two guilty verdicts may have rested on intent to commit assault instead of intent to commit theft. The problem for Bourrage is that he has the burden to prove that "[t]he likelihood of a different result [is]

substantial, not just conceivable." *See id.* He has not carried that burden. He raised the issue, generated curiosity, and even caused speculation, but he has not proven that a correct robbery jury instruction would likely have resulted in a different verdict. The conviction for robbery is affirmed.

B. Expert Witness Jury Instruction. The defendant also claims that prejudice resulted from the district court's inclusion of a portion of a jury instruction that discussed the impact of testimony from experts. The instruction complained of stated in part:

> You have heard testimony from persons described as experts. Persons who have become experts in a field because of their education and experience may give their opinion on matters in that field and the reasons for their opinions. Consider expert testimony just like any other testimony. You may accept it or reject it. You may give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all other evidence in the case.

Bourrage asserts the problem with this jury instruction is that there were no experts in the case. The only conceivable trial witness who could have qualified as an expert was the officer who testified as to his opinion of the footprint comparison. Officer Lepley testified a footprint in the snow was "very consistent with size, shape, and tread pattern" to the shoe taken from Bourrage after his arrest. On cross-examination, Bourrage's attorney emphasized for the jury that Lepley could not say the imprint and the shoe exactly matched. The shoe-print testimony was also an issue developed pretrial in the motions in limine. The court held, "I believe the proper testimony would be that the shoe would be consistent with the shoe print. I don't think that the science is such that anyone can testify that there is an exact match on that issue."

Bourrage claims the expert witness jury instruction "magnified the importance of Lepley's shoe impression testimony far beyond its probative value" and was prejudicial. The State concedes Lepley was not an expert at trial and that the instruction should not have been given due to the absence of expert witnesses. However, the State asserts Bourrage cannot prove he was prejudiced by the inclusion of this instruction, and we agree.

The statement in the jury instruction was a correct statement of the law, even though it was not necessarily applicable to the evidence the jury heard. It did not identify Lepley as an expert. The instruction simply informed the jury that it was free to accept or reject expert testimony just like any other testimony from lay witnesses. While "an instruction submitting an issue unsubstantiated by the evidence is generally prejudicial," when the error is raised as an ineffective-assistance-of-counsel claim, we must determine whether the superfluous jury instruction affected the outcome of the trial. *State v. Tejeda*, 677 N.W.2d 744, 754–55 (Iowa 2004). Here, there is no reasonable probability the result of the trial would have been different had the instruction not been given. As a result we find Bourrage cannot prove he suffered prejudice as a result of the inclusion of the superfluous jury instruction. *See id*. at 755 (finding the defendant failed to prove prejudice in his claim that trial counsel was ineffective for failing to object to the inclusion of an instruction on admissions made by the defendant when there was no evidence submitted that the defendant made an admission).

III. INEFFECTIVE ASSSTANCE OF COUNSEL: SENTENCING ENHANCEMENT COLLOQUY.

The trial information alleged that Bourrage was subject to the habitual offender sentencing enhancements under Iowa Code sections 902.8 and 902.9(3),[1] as he had been convicted of felonies in Rock Island County, Illinois, and Scott County, Iowa. The minutes of evidence provided the State would rely on the testimony of the Scott County clerk of court or her designee and the Rock Island clerk of court or designee to testify Bourrage "has been convicted of at least two prior felonies in Rock Island County on 12/11/1998 and 7/09/2002" and "convicted of a felony in Scott County, Iowa on 9/14/2006." No other information regarding the previous felony convictions was contained in the record.

On the morning of the first day of trial, before the jury was selected, Bourrage's attorney informed the court Bourrage would stipulate to his status as an habitual offender. The court inquired of Bourrage whether that was correct, and Bourrage responded, "Yes, sir." Counsel then continued,

> [DEFENSE COUNSEL]: Frank, you and I discussed that you could have a hearing to determine whether or not you have two prior convictions for felonies, a class "C" or class "D" here in Scott County or anywhere else in the State of Iowa or the country. But by stipulating you're saying that the State doesn't have to prove that. Is that right?
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> THE DEFENDANT: Right.

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[1] Iowa Code section 902.8 defines an habitual offender as a person "convicted of a class "C" or a class "D" felony, who has twice before been convicted of any felony in a court of this or any other state, or of the United States." This section further provides that if someone is sentenced as an habitual offender, that person is not eligible for parole until the person has served a minimum sentence of three year. Iowa Code § 902.8. Iowa Code section 902.9(3) provides the maximum term of incarceration for an habitual offender is fifteen years.

> [DEFENSE COUNSEL]: And you don't—It's not your intent to have the State prove that issue, is that correct.
>
> THE DEFENDANT: Right.

After the jury verdict was returned, the issue of Bourrage's habitual offender status was again brought up to the court. The court stated:

> As previously indicated, the State had charged you as habitual offender, Mr. Bourrage, and our discussion prior to the trial indicated that you had a right to separate determination of those issues if you wanted, that being whether you had previously been convicted on two separate occasions of other felony offenses. Prior to the trial, you had indicated to the Court that you understood those rights and that it was your intent to stipulate that you had been convicted previously of—on two separate occasions of felony offenses. Is that all true, sir?
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> THE DEFENDANT: Yes, sir.
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> THE COURT: And you stand by that stipulation at this time.
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> THE DEFENDANT: Yes, sir.
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> THE COURT: The Court then will accept the stipulation that the defendant's status is an habitual offender.

Bourrage contends his stipulation was neither voluntary nor intelligent as the colloquy conducted by his attorney and the court was insufficient. He asserts counsel was ineffective in failing to bring to the court's attention that the colloquy did not (1) identify the prior felony convictions to which he was stipulating; (2) inform him of the accompanying fifteen-year sentence attached to each of the charges; and (3) inform him of the maximum penalty that could be imposed.

The State asserts Bourrage cannot show a breach of a duty as he was informed of his right to a separate trial on the enhancements but affirmatively told counsel and the court that he did not want a trial on this issue. Bourrage does not now claim he was ignorant of the consequences of his admission, and as a result, the State asserts he has failed to overcome the presumption that his counsel performed competently. The State also claims Bourrage cannot prove

he suffered prejudice from the lack of a more extensive colloquy because the evidence demonstrates the State was ready and able to prove Bourrage's prior convictions as evidenced by the designation of the clerk of court of both Scott and Rock Island Counties.

When it is alleged a defendant is an habitual offender, the defendant must first be convicted of the current offense, then, if found guilty, a second trial is conducted on the prior convictions. *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005). The State is held to the same burden of proof and this burden can be sustained by "introducing certified records of the convictions, along with evidence that the defendant is the same person named in the convictions." *Id*. "The State must also establish that the defendant was either represented by counsel when previously convicted or knowingly waived counsel." *Id*.

Iowa Rule of Criminal Procedure 2.19(9) provides an opportunity for the defendant to affirm or deny the previous convictions. However, providing an affirmative response to the court's inquiry "does not necessarily serve as an admission to support the imposition of an enhanced penalty as a multiple offender. The court has a duty to conduct a further inquiry, *similar to the colloquy required under rule 2.8(2)*, prior to sentencing to ensure that the affirmation is voluntary and intelligent." *Kukowski*, 704 N.W.2d at 692 (emphasis added).

Rule 2.8(2) outlines the issues the district court must address with the defendant prior to accepting a guilty plea, which include among other things the nature of the charge to which the plea is offered, the mandatory minimum and maximum possible punishments, and the defendant's trial rights. The court in

Kukowski stated, "In order to knowingly stipulate, a defendant should have an adequate grasp of the implications of his or her stipulation." 704 N.W.2d at 692; *see also State v. Oetken*, 613 N.W.2d 679, 688 (Iowa 2000) (noting the court "discharged its duty to inform the defendant as to the *ramifications* of an habitual offender adjudication" (emphasis added)).

Here the district court and defense counsel clearly advised Bourrage of his right to a second trial on the habitual offender enhancement and the State's obligation to prove the prior felonies. However, nowhere was Bourrage advised of the ramifications of his stipulation. Neither was he advised of the nature of the underlying offenses that he was admitting. The trial information contained dates of convictions, but failed to identify or describe the offenses to ensure the convictions met the felony requirement under section 902.8—"An offense is a felony if, by the law under which the person is convicted, it is so classified at the time of the person's conviction." Considering the record made both before and after the verdict, we find counsel failed to perform an essential duty in failing to ensure a proper colloquy was conducted on the habitual offender enhancement.

The State asserts Bourrage cannot establish prejudice because the evidence demonstrates it was ready and able to prove Bourrage's prior convictions. It relies on several cases to support it position that there is no prejudice in this case. In *State v. Bumpus*, 459 N.W.2d 619, 626 (Iowa 1990), the supreme court found no prejudice when a defendant was not advised of the consequences of his stipulation to prior convictions because the State introduced a judgment entry of the previous conviction and the minutes of testimony

indicated the State intended to call Bumpus's former attorney to testify as to Bumpus's identity in connection with the earlier conviction.

In *State v. Vesey*, 482 N.W.2d 165, 168 (Iowa Ct. App. 1991), our court found no prejudice because the "Notice of Introduction of Witnesses" included the clerk of court of two counties and the defendant's parole officer to testify to his prior felony convictions, his identity, and his prior representation by counsel. As the State "had the ability to prove all the facts necessary to show the defendant's habitual offender status," the defendant failed to demonstrate prejudice from the absence of a more extensive colloquy. *Vesey*, 482 N.W.2d at 168. In *State v. McBride*, 625 N.W.2d 372, 375 (Iowa Ct. App. 2001), our court again found no prejudice when the defendant was not advised of the implications of his stipulation to prior offenses because the State was prepared to offer the testimony of the clerk of court and the defendant had admitted to the prior convictions during his direct and cross-examination during trial.

One critical distinction exists between this case and *Bumpus*, *Vesey*, and *McBride*. In those cases, the State identified individuals who could testify as to the defendant's identity as the person who was previously convicted or the defendant had already admitted during the trial to being the person who previously committed the offenses. In this case, there was no admission by Bourrage and the State did not designate any person in the trial information who could testify as to Bourrage's identity as the person previously convicted in Scott County and Rock Island County. Thus, we cannot say there was no prejudice due to the State being ready and able to prove the habitual offender status. As

we cannot say Bourrage did not suffer prejudice as a result of counsel's failure to ensure Bourrage was informed of the ramifications of his stipulation, we vacate the sentences imposed on the second-degree robbery and second-degree burglary convictions and remand the case for further proceedings on the habitual offender enhancement allegations and for resentencing.

Because we have vacated the sentences previously imposed, we need not address Bourrage's claim that the court abused its discretion in imposing consecutive sentences.

SENTENCES VACATED AND REMANDED.