

IN THE COURT OF APPEALS OF IOWA

No. 3-045 / 11-1667
Filed March 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL ALLEN JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Michael Allen appeals his convictions on four counts of robbery in the first
degree. **AFFIRMED.**

Randall L. Jackson of Law Office of Randall L. Jackson, Des Moines, for
appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John Sarcone, County Attorney, and Robert Diblasi, Assistant County
Attorney, for appellee.

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

DANILSON, J.

Michael Allen appeals his convictions on four counts of robbery in the first degree with various assignments of error, including insufficiency of the evidence. Because sufficient evidence supports his convictions and we find no error, we affirm. Allen's claim that his trial counsel was ineffective for failing to file a motion to suppress is preserved for postconviction relief proceedings.

I. Background Facts and Proceedings.

Allen was charged with four counts of robbery in the first degree, in violation of Iowa Code section 711.2 (2009), for his participation in a robbery of four individuals at gunpoint. Four victims and one detective were listed as witnesses on the complaint.¹ A trial information was subsequently filed, which charged four counts of robbery in the first degree with identical language. A jury found Allen guilty on all counts. The district court sentenced Allen to an indeterminate term of twenty-five years on each count, with counts I and II running consecutive to counts III and IV, for a total term of incarceration not to exceed fifty years.

On appeal, Allen advances the following assignments of error by the district court: (1) finding probable cause for arrest despite an unsigned complaint form, (2) failing to grant Allen's motion for directed verdict, (3) admitting the deposition of Kim Wiggins and finding her an unavailable witness, and (4)

¹ Allen argues the complaint was insufficient to provide probable cause for arrest because the form was unsigned. However, because a motion to suppress was never filed, the circumstances of the arrest are not established in the record. The officer who appeared before the court with the complaint may have been under oath, a written record of which is not required.

instructing the jury on four counts despite identical language setting forth each charge in the trial information. In addition, he asserts a claim of ineffective assistance of trial counsel.

II. Standard of Review.

We review challenges to the sufficiency of evidence for errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We review the evidence in the light most favorable to the State, including all reasonable inferences that may be deduced from the record, to determine whether the finding of guilt is supported by substantial evidence. *Id.* Evidence is substantial if it would convince a rational fact-finder of the defendant's guilt beyond a reasonable doubt. *Id.* "In assessing the sufficiency of the evidence, we find circumstantial evidence equally as probative as direct." *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011).

III. Discussion.

A. Suppression.

Allen contends the unsigned complaint used to support his arrest warrant could not provide probable cause to support the arrest; thus, all evidence obtained following the arrest should have been suppressed. However, Allen concedes that trial counsel made no motion to suppress the evidence before trial nor did he object to the evidence when offered at trial.

Before an issue can be reviewed on appeal, it must be both raised and decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). We conclude this issue was not preserved for our review. Allen

alternatively contends that trial counsel was ineffective for failing to file such a motion. As we summarized in *State v. Buchanan*, 800 N.W.2d 743, 747-48 (Iowa Ct. App. 2011):

We conduct a de novo review of ineffective assistance of counsel claims. In order to prevail on his claim of ineffective assistance of counsel, Buchanan must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. Failure to prove either element by a preponderance of the evidence is fatal to Buchanan's claim of ineffective assistance. 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.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. 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.

(Citations omitted.)

In this case, the record is not adequate to address Allen's claim his attorney was ineffective for failing to file a motion to suppress. For instance, we have no record of whether the judicial officer that signed the warrant may have sworn in the officer. Accordingly, we preserve the issue for postconviction relief proceedings.

B. Admission of Wiggins' Deposition Testimony.

Allen contends the court erred in making a finding of unavailability and allowing a redacted copy of witness Kim Wiggins' testimony to be read into evidence. His trial counsel initially objected to the introduction of the deposition; however, she ultimately withdrew the objection and agreed to a determination

that the witness was unavailable. Counsel then worked with the State's attorney to provide an acceptable redacted version of the deposition to the jury.

On appeal, Allen contends trial counsel should have continued to object to admission of the deposition testimony, asserting this error supports a finding of ineffective assistance of counsel. He further claims due to this error he was denied his right to confront a witness against him. Allen's trial counsel made no objection to admission of the evidence on the basis of the right to confrontation.

This assignment of error was not preserved for our review. *Meier*, 641 N.W.2d at 537. Trial counsel withdrew her objection to the admission of the deposition testimony. No objection was made to the judge's determination that the witness was unavailable. To the contrary, after multiple letters from medical professionals proclaiming the witness's unavailability were obtained, Allen's counsel agreed the State had met its burden under Iowa Rule of Evidence 5.804(a)(4).²

We also conclude the testimony provided by Wiggins was cumulative in nature. Much of the testimony received through her deposition was testified to by Officer Hamilton or was related to the ownership of the gun used in the robberies. Had an objection to the admission of her testimony been sustained, it would not have changed the result of the trial. Thus, even if error occurred, Allen suffered no prejudice and counsel was not ineffective. *Strickland v. Washington*, 466 U.S.

² The rule states, in pertinent part: "Unavailability as a witness' includes situations in which the declarant . . . is unable to be present or to testify at the trial or hearing because of . . . then existing physical or mental illness or infirmity."

668, 687 (1984) (stating that the court need not consider whether a breach of duty occurred if the prejudice prong is not met).

C. Marshalling Instructions.

On appeal, Allen contends the court erred by constructively amending the trial information when it provided the names of each victim in the marshalling instructions for the jury. The trial information charging Allen presented four counts of robbery in the first degree, each using identical language. The State did not amend the trial information to describe how each offense was distinct, naming each individual victim.

Allen's counsel did not object to the trial information. Counsel did not file a motion to dismiss three of the four counts as charged due to the alleged inadequacies. Counsel made no motion for a bill of particulars and did not object to testimony as it was received. Finally, counsel did not object to the marshalling instructions when they were proposed. In fact, Allen concedes on appeal that the necessary objections were not advanced below. We conclude this argument was not preserved for our review. *Meier*, 641 N.W.2d at 537.

Even though the issue was not properly preserved, the record is adequate to address it. We conclude Allen's assignment of error is without merit. Notice pleading is sufficient if it does not "prejudice a substantial right of the defendant." Iowa R. Crim. P. 2.4(7)(d).³ Had objections been advanced below, they would have been overruled.

³ The rule states, in pertinent part: "No indictment is invalid or insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or

Allen's additional arguments alleging constructive amendment, double jeopardy and multiplicity also fail. Allen argues that because the counts did not each specify a victim, he was convicted of an offense "different from or in addition to" the offenses in the trial information. See *United States v. Barrios-Perez*, 317 F.3d 777, 779 (8th Cir. 2003) (concluding jury instructions cause constructive amendment only if they "allowed the jury to convict the defendant of an offense different from or in addition to the offenses alleged in the indictment").

Contrary to Allen's arguments, the jury did not convict him of the same crime for the same conduct, but rather the same kind of conduct perpetrated on four different victims. The State was authorized to charge all of the offenses, which arose from the same incident, as separate counts in one trial information. Iowa R. Crim. P. 2.6(1).⁴

Moreover, Allen had notice of multiple charges. The complaint identified four victims by name. The minutes of testimony provided further notice of the allegations to which the four witnesses would testify. Separately numbered counts in the trial information provided notice that the State alleged four separate charges arising from a common scheme or plan. Finally, an officer testified in a

imperfection in a matter of form which does not prejudice a substantial right of the defendant."

⁴ The rule provides in pertinent part:

Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

preliminary hearing identifying four victims and testifying as to the distinct allegations pertaining to each individual victim.

Accordingly, Allen was convicted of the same crimes for which he was charged. We do not agree that the court erred in instructing the jury or imposing sentences on four counts of robbery.

D. Sufficiency of the Evidence.

Allen also contends the district court erred in denying his “motion for directed verdict” at the close of the State’s case and his motion at the close of trial, claiming there was insufficient evidence to support his convictions. At trial, Allen’s counsel moved for a “directed verdict” on the grounds of a lack of substantial evidence of identification and “unreliability of the state’s witnesses and the general nature of Mr. Sander’s testimony.”⁵ On appeal, Allen alleges the court should have granted these motions due to what he describes as the State’s convoluted evidence such as inconsistencies in witness testimony, inability of some witnesses to identify Allen in a line-up, and Allen’s assertion that he was with his girlfriend when the crimes were committed.

⁵ Allen’s counsel argued the following in his “motion for directed verdict”:

At this time we ask the court to find in favor of the defendant and take this case—direct verdict in favor of Michael Allen on the grounds that the State has not met its burden even on a prima facie level of demonstrating that there is a jury question regarding the four counts of robbery in the first degree.

I think the evidence specifically that’s lacking is based on identification, and that the unreliability of the State’s witnesses and the general nature of Mr. Sander’s testimony would fall short of even the State’s lesser burden at this point or that the evidence is viewed—even with the evidence viewed in light of the State.

So I would ask that the court find that the jury is not to decide this case and instead that the court will direct verdict in favor of Mr. Allen and end this case right now.

A jury of Allen's peers reviewed the evidence presented and returned guilty verdicts on all four counts. The quintessential function of the jury is to decide questions of fact. See *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). "A jury is free to believe or disbelieve any testimony as it chooses to give as much weight to the evidence as, in its judgment, such evidence should receive." *Id.*

Five eye-witnesses—four victims and one of the participants—testified as to the robberies committed. Although their testimony was not identical, on the whole, the evidence established Allen's participation in the robbery of four separate individuals. Co-conspirator Nikole Sanders testified as a witness for the State and identified Allen as one of the perpetrators.

Evidence obtained from the victims, surveillance video recordings, and other witnesses acquainted with Allen led police to recover the guns used in the crime, one of which was linked to Allen. Several items stolen from the victims were recovered in a home frequented by Allen. A distinctive item of clothing described by the victims as worn by one of the robbers was owned by Allen.

Finally, Allen himself made admissions implicating his guilt. Upon arrest, he inquired if the arrest was for robbing some kids. He referenced the vehicle used during the commission of the crimes. He admitted to meeting the victims earlier in the evening and claimed that he may have been sleeping in the Durango when "something bad" happened. He admitted he likely touched some of the stolen items.

We conclude the district court properly denied the motions for judgment of acquittal, as substantial evidence supports the jury's verdicts. To the extent that Allen was attempting on appeal to raise new claims in support of the lack-of-sufficient-evidence argument premised upon ineffective assistance of counsel, we consider such claims as waived for failure to separately state each issue. Iowa R. App. P. 6.903(2)(c), (g); *Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983) (concluding "issues are deemed waived or abandoned when they are not stated on appeal by brief; random discussion of difficulties, unless assigned as an issue, will not be considered").

IV. Conclusion.

We preserve for postconviction relief proceedings Allen's claim that his trial counsel was ineffective for failing to file a motion to suppress. Because sufficient evidence supports his convictions and we find no other error, we affirm.

AFFIRMED.