

IN THE COURT OF APPEALS OF IOWA

No. 3-096 / 11-2014
Filed March 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL EUGENE WILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn,
Judge.

Daniel Wilson appeals from his convictions and sentences for assault on a
jailer and assault by an inmate. **AFFIRMED.**

Daniel Eugene Wilson, Coralville, appellant pro se.

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Patrick C. Jackson, County Attorney, and Lisa K. Schaefer, Assistant
County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Daniel Wilson appeals from his convictions and sentences for assault on a jailer and assault by an inmate. He contends he was provided with ineffective assistance of counsel at sentencing when his attorney allowed the court to consider a character statement from his sister attached to the presentence investigation report. He also contends in a pro se brief that there was insufficient evidence to support his conviction, among other arguments. We affirm, finding Wilson was provided with effective assistance of counsel, sufficient evidence supports Wilson's conviction, and the remaining pro se arguments are not preserved for our review.

I. Facts and Proceedings

On April 11, 2011, Wilson was serving a misdemeanor sentence in the Des Moines County jail. That day, he threw a bodily fluid he had stored in milk cartons in his jail cell at a group of correctional officers. He was charged by trial information with five counts of assault by an inmate—bodily fluids or secretions, one count for each officer. Wilson pleaded not guilty and waived his right to a speedy trial. He filed notice of defenses of self-defense, entrapment, and diminished capacity. A psychiatric examination was requested and conducted. He also filed a pro se motion for change of venue, which was denied. A jury trial took place October 4–6, 2011. The jury found Wilson guilty of three counts of “D” felony assault by an inmate (bodily fluids or secretions), and two counts of the lesser-included serious misdemeanor offenses of assault on a jailer.

Sentencing was held November 21, 2011. The court considered a presentence investigation report, which included a “character statement” from

Wilson's sister. The character statement outlined Wilson's history of mental illness, substance abuse, social difficulties, and his willingness to help others. The statement also made reference to Wilson's prior act of violence against his parent. The court sentenced Wilson to consecutive terms of imprisonment of one year for each assault on a jailer, and terms not to exceed five years for each count of inmate assault. Wilson appeals from these proceedings.

II. Analysis

"A claim of ineffective assistance of counsel is reviewed de novo. We review sufficiency-of-the-evidence claims for correction of errors at law. We will uphold a verdict if it is supported by substantial evidence." *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011) (internal citations omitted).

A. Ineffective Assistance

Wilson claims his trial counsel provided ineffective assistance when he failed to object to the court's consideration of his sister's narrative attached to the presentence investigation report. He contends this statement—referred to in the presentence investigation report as a "character statement"—reads instead like a victim impact statement. Therefore, he argues, because his sister was neither a victim nor an immediate family member of a victim of his actions in the jail, consideration of the statement was improper and prejudicial.

"To establish an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted." *Id.* "We recognize that an attorney need not be a 'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." *State v.*

Effler, 769 N.W.2d 880, 889 (Iowa 2009) (quoting *State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1981)). The Iowa Code lists proper factors for presentence investigation, including: “The defendant’s characteristics, family and financial circumstances, needs, and potentialities”; “[t]he defendant’s criminal record and social history”; and “[w]hether the defendant has a history of mental health or substance abuse problems.” Iowa Code § 901.3 (2011). “In exercising its [sentencing] discretion, the district court is to weigh all pertinent matters in determining a proper sentence including the nature of the offense, the attending circumstances, the defendant’s age, character, and propensities or chances for reform.” *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). (internal quotation marks and citation omitted).

The presentence investigation report presented to the court contains a five page attachment apparently completed by Wilson’s sister, Linda. The form contains spaces for parents and siblings’ names and addresses, and a final page captioned “character of defendant,” which asks for strengths and weaknesses of the defendant, mental health, and substance abuse information and/or treatment. Wilson’s sister provided several paragraphs titled “mental health and substance abuse,” “weaknesses,” “strengths,” and “other.” The information does not include any reference to the three counts of “D” felony assault by an inmate (bodily fluids or secretions), and two counts of the lesser-included offense of assault on a jailer. Wilson and his counsel made numerous objections and corrections to the presentence report on the sentencing record. The court stated it had reviewed “the presentence investigation and various attachments,” but did not make reference to the sister’s statement.

Wilson provides us with no authority to support his theory that the court considered his sister's information to be a victim impact statement. Further, the information provided in the statement included the statutory factors for a presentence report listed in Iowa Code section 901.3. Failure to object to the consideration of Wilson's sister's statement did not constitute a failure of Wilson's counsel to perform an essential duty. See *Brubaker*, 805 N.W.2d at 171. Nor is there any indication Wilson was prejudiced by the sister's statement. See *id.*

B. Sufficiency of the Evidence

In his pro se brief, Wilson argues that various items of physical evidence should have been introduced or preserved for trial, and their absence from the State's case resulted in insufficient evidence to support the jury verdict. "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). At trial, a defendant must identify the specific elements of the charge that were insufficiently supported by the evidence. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

At the close of evidence, Wilson's counsel moved for acquittal stating,

The defense would move for the five counts of assault by inmate–bodily fluids or secretions contained in the Trial Information to be dismissed for failure of the State to show that Mr. Wilson did indeed throw urine out of the food hatch at the jail, and additionally, we would move that . . . Count III . . . be dismissed, because one of the elements of the crime is . . . that the correctional officer has to be hit . . . we believe . . . that he didn't get hit by anything.

On appeal, Wilson argues neither clothes nor other physical evidence with the bodily fluid, nor any container with his vomit (he contends he threw vomit rather

than urine at the officers) were entered into evidence. He also argues the amount of fluid thrown could not have hit five officers, only two or three.

At trial, the jury heard officers' testimony, testimony from Wilson, and watched a video of the incident. The jury found Wilson guilty of three counts of "D" felony assault by an inmate (bodily fluids or secretions), and two counts of the lesser-included offense of assault on a jailer, apparently agreeing with Wilson that not all of the officers were hit by the bodily fluids. The jury received sufficient evidence to support Wilson's convictions. See *Brubaker*, 805 N.W.2d at 171.

Wilson raises several other points in his brief, but does not further explain or cite authority expanding on these points. "When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived." *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001); see also Iowa R. App. P. 6.903(2)(g)(3) (stating the argument section shall include "[a]n argument containing the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record . . . [and] failure to cite authority in support of an issue may be deemed waiver of that issue"). We find these issues waived.

AFFIRMED.