

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1035 / 12-1552  
Filed December 5, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JACQUE DONZELL DUKES,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

The defendant appeals from his convictions for first-degree robbery, first-degree burglary, willful injury causing serious injury, and possession of marijuana with intent to deliver while in possession of a firearm following a jury trial.

**AFFIRMED.**

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

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and McDonald, J., and Goodhue, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**GOODHUE, S.J.**

The defendant, Jacque Dukes, appeals from his conviction, judgment, and sentence following a jury trial. He was convicted and sentenced for one count each of robbery in the first degree, burglary in the first degree, willful injury causing serious injury, and possession of marijuana with intent to deliver while in the immediate possession and control of a firearm. The defendant asserts (1) the district court abused its discretion in not granting his motion for a new trial because the verdict was contrary to the weight of the evidence, (2) he received ineffective assistance of counsel, and (3) the district court abused its discretion when it allowed evidence of the defendant's prior crimes. We affirm his convictions.

**I. Factual Background**

Belinda Robinson, the defendant's former girlfriend, was staying with Alonzo Henderson in a trailer located in Cedar Falls, Iowa. She discovered that Henderson was expecting a large shipment of either marijuana or cocaine around January 27, 2011. Robinson decided to steal the drugs and contacted a friend, Crystal Cooper, and the defendant. The defendant, Cooper, and Cooper's boyfriend, Lamario Stokes, made a trip to Cedar Falls to case the trailer.

On January 26, Robinson notified Cooper and the defendant that the shipment had arrived. The defendant, Cooper, Stokes, and Corey Moore, a friend of the defendant, drove to Waterloo to a location near Henderson's trailer. Robinson came home from work and entered the trailer. A little later, Henderson arrived at the trailer with two other men, and the three men began unwrapping

bundles of marijuana. Robinson informed the men she would get cigarettes and plastic bags, and left in the car in which the men had arrived.

While on the errand, Robinson contacted the defendant, with whom she had been in telephone contact all afternoon. Robinson drove to where the defendant and the others were waiting in the defendant's car, and they devised a plan to lure the visitors out of the trailer. The visitor's car was left in a Hy-Vee parking lot. Robinson joined up with the defendant and the others, and told the owner of the car that the car had run out of gas and had been left in the Hy-Vee parking lot. She further told him she had gotten a ride with a friend. The two visitors left the trailer to retrieve the car. The defendant, Stokes, and Moore exited the defendant's car and entered the trailer.

Henderson did not recognize the intruders. He recalled that two guns were trained on him. As he tried to walk away and enter his bedroom, he was struck in the head with a gun and a struggle ensued. A second man hit Henderson in the head, and eventually shots were fired, hitting Henderson twice. All three intruders hurried back to the defendant's car, and the defendant and Moore threw two blue laundry bags into the back of the car.

The group then went to the apartment of Moore's girlfriend, Bridget Johnson, and divided up the marijuana contained in the laundry bags. There was fifty-seven pounds of marijuana, and the defendant took fourteen pounds as his share.

The defendant later told Robinson that during the robbery he hit Henderson with a gun, but the gun flew out of his hand, and he believed it went under the bed. He then hit Henderson with a laptop computer. The police

investigation after the incident found a pistol under the bed and a laptop computer on the floor nearby. The defendant's fingerprints were not found on the gun. Cooper overheard Moore say he had shot Henderson, and the defendant mentioned getting into a struggle with Henderson, hitting him in the face with a gun, which he dropped and left at the trailer.

The evidence as set out above, except for the police investigation and the statements of Henderson, were based on the testimony of Johnson, Robinson, and Cooper. Both Cooper and Robinson received favorable plea bargains in return for their testimony. However, they both had made statements long before the plea agreements had been negotiated and before they had seen any other witness's statements or any other reports. The statements they had given were consistent with their testimony at trial.

The defendant testified at trial that he went to Henderson's trailer to inspect the drugs and for a possible purchase. He claimed he was not involved in the planning or execution of the robbery. He testified he had prior drug charges and had used marijuana, but had no prior history of violence. He further testified he wore no disguise. He stated Henderson picked up a gun and charged him, at which point they wrestled and the gun flew out of Henderson's hand.

Moore was eventually arrested for speeding, and he had in his possession a gun, which was proved to have fired the shots that struck Henderson. Also seized from Moore's car was ammunition matching the ammunition found in the gun found on Henderson's floor. Additionally, cash and a small amount of marijuana were seized from the car.

The defendant, through counsel, filed a motion to suppress the items found in Moore's car, but the motion was overruled. The court also overruled counsel's objection to the admission of the evidence at trial on relevance grounds. The defendant's counsel filed a motion in limine to exclude the defendant's record of prior criminal convictions, crimes, and arrests, but it was agreed that admissibility would be determined later. In fact, the court never ruled on the issue. The defendant's own counsel, on cross-examination of Robinson, brought up the defendant's prior drug usage. In response to questions from his own counsel, the defendant testified as to his criminal record involving drugs, presumably in support of his defense that he was a user and was at Henderson's trailer for the purpose of checking out, and possibly purchasing, drugs.

## **II. Preservation of Error**

The State concedes the defendant has preserved error relative to the failure to grant a new trial. The ordinary rules of error preservation have no application to a claim of ineffective assistance of counsel in a direct appeal. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). The defendant failed to preserve error relative to the receipt of evidence of the defendant's prior crimes. The court was never required to rule on the admissibility of the defendant's prior records of crimes, convictions, and arrests. The evidence of the defendant's prior criminal record was in response to questions asked by the defendant's own counsel. Issues not raised and decided by the district court are not reviewed on appeal. *State v. DeWitt*, 811 N.W.2d 460, 467 (Iowa 2012).

### III. Standard of Review

On motions for new trial the court's review is for abuse of discretion. *State v. LaDouceur*, 366 N.W.2d 174, 178 (Iowa 1985). Ineffective-assistance-of-counsel claims are reviewed de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

### IV. Discussion

A. The court may grant a new trial when the verdict is contrary to the evidence. Iowa R. Crim. P. 2.24(2)(b)(6). Contrary to the evidence means contrary to the "weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). In considering a motion for a new trial the court must weigh the evidence and consider the credibility of the witnesses. *State v. Maxwell*, 743 N.W.2d 185, 192 (Iowa 2008).

When the evidence is nearly balanced the trial court should not disturb the jury's findings. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). In this case, the facts as stated above are not balanced but are strongly supportive of the verdict reached. The defendant's testimony is not supported or corroborated by any other witnesses or the physical facts introduced into evidence. The defendant, in effect, asks us to disregard the testimony of Robinson, Cooper, and Johnson because of Robinson and Cooper's favorable plea agreements. Robinson's, Johnson's, and Cooper's testimonies were consistent with each other, with statements they made long before any plea agreement, and consistent with the physical evidence introduced. The jury's verdict is supported by the weight of the evidence, and the district court did not abuse its discretion by failing to grant a new trial.

**B.** To support an ineffective-assistance-of-counsel claim a proponent must prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Clark*, 814 N.W.2d 551, 567 (Iowa 2012). The trial record alone will rarely be adequate to resolve a claim of ineffective assistance of counsel on an appeal. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). As to the narrow issues raised in this appeal, we conclude the record is sufficient.

The defendant asserts his counsel was ineffective for failing to object to the introduction of the gun seized from Moore's car. Counsel did file a motion to suppress, but it was overruled on the basis that the defendant had no expectation of privacy as to Moore's car. Counsel further objected to the admission of the gun on the grounds that it was not relevant, but counsel's objection was overruled. Lack of success does not constitute ineffective assistance of counsel. *Osborn v. State*, 573 N.W.2d 917, 924 (Iowa 1998).

The defendant further asserts counsel was ineffective for failing to object to Robinson's testimony about the defendant selling drugs, but the testimony he is challenging was admitted in response to his counsel's own questions.

Finally, the defendant asserts counsel failed to object to the prosecution's cross-examination when it became argumentative. The record reflects such objections were made, some sustained and some overruled. The defendant fails to point out where such an objection should have been made but was not, in fact, made. It is the defendant's obligation to state specifically where counsel's performance was inadequate, and he cannot rely on a general assertion. *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983); see also *Dunbar v. State*, 515

N.W.2d 12, 15 (Iowa 1994) (noting a defendant “must state the specific ways in which counsel’s performance was inadequate and identify how competent representation probably would have changed the outcome”). The defendant has not sustained his claim of ineffective assistance of counsel as to the issues raised.

New issues were set out in the defendant’s pro se reply brief. New issues cannot be asserted in a reply brief. See *Young v. Gregg*, 480 N.W.2d 75, 78 (Iowa 1992). To the extent the defendant has attempted to introduce new issues in the reply brief, they are being disregarded.

**AFFIRMED.**