

IN THE COURT OF APPEALS OF IOWA

No. 3-664 / 11-1957
Filed August 21, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BOBBY EARL THOMPSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

Defendant appeals his convictions for first-degree burglary, first-degree robbery, and assault causing serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael J. Walton, County Attorney, Kelly Cunningham, Assistant County Attorney, and Mary Triick, Student Legal Intern, for appellee.

Considered by Danilson, P.J., Tabor, J., and Huitink, S.J.*

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

HUITINK, S.J.**I. Background Facts & Proceedings.**

The record includes evidence of the following. Nikolas Bender was a drug dealer in Davenport, Iowa, and Derrick Pena was one of his clients. A few weeks before the incidents involved in this case, Pena came to Bender's home to purchase illegal drugs and observed Bender get the drugs out of a safe in his basement. Pena was one of only two clients Bender permitted into his home.

On January 17, 2011, Pena texted Bender and stated his uncle wanted to purchase a half ounce of cocaine. Bender texted that was about all he had left and it would cost \$700. Pena responded that he would tell his uncle and would get back to Bender. However, Pena never took any further action to consummate the sale. Bender spent the evening playing videogames with his roommates and smoking marijuana.

At about 10:00 p.m., Bender responded to a knock at his back door and saw a person he recognized as Bobby Thompson, who he had known in intermediate school about eight or nine years previously.¹ Thompson stated his car had broken down, and he asked to use Bender's telephone. A person wearing a mask then approached Bender from the side of the house and pointed a shotgun at him. Bender went back into the living room. The person with the gun, another person wearing a mask, and Thompson, now also wearing a mask, followed Bender.

¹ At the time Thompson came to the back door, Bender only remembered his name was Bobby. After looking on Facebook, Bender saw his last name was Thompson. Bender stated intermediate school encompassed grades six, seven, and eight. There was evidence Thompson had only attended this school in sixth and seventh grades, and he attended eighth grade in Alabama.

Thompson hit Bender on the top of the head with black-covered brass knuckles. The three men asked Bender and his roommates to empty their pockets and lay on the floor. Thompson and one of the men went to Bender's room in the basement, then came up and asked for the code to his safe. Thompson tried to take Bender downstairs to open the safe, and Bender started struggling and yelled out for someone to call the police. The person with the gun then came from the living room and shot Bender in the leg. Thompson and the other two men ran away.

As Officer Bryan Butt of the Davenport Police Department was responding to the scene, he saw a vehicle with four occupants driving away. He saw one of the passengers in the vehicle had a hairstyle consistent with that of Thompson. Bender was hospitalized to receive medical treatment for his gunshot wound. After the incident, Bender saw on Facebook that Thompson and Pena were associated. Bender showed the Facebook page to police officers. He also picked Thompson's picture out of a photographic line-up.

On January 26, 2011, Officer Butt conducted a traffic stop, and Thompson was a passenger in the vehicle. The officer observed Thompson had a black ski mask and gloves in his pocket. The officer also found black-colored brass knuckles on Thompson. Thompson's cell phone showed an unusually large number of calls between himself and Pena on January 17, 2011.

Thompson was charged with first-degree burglary, first-degree robbery, conspiracy to commit a forcible felony, willful injury causing serious injury, and assault while participating in a felony resulting in serious injury. Thompson was

tried jointly with co-defendant Pena.² A jury found Thompson guilty of first-degree burglary, first-degree robbery, conspiracy to commit a forcible felony, assault causing serious injury, and assault while participating in a felony resulting in serious injury.

The district court merged the convictions for conspiracy to commit a forcible felony and assault while participating in a felony resulting in serious injury into the other counts. Thompson was sentenced to a term of imprisonment not to exceed twenty-five years on the convictions for first-degree burglary and first-degree robbery, and five years on the conviction for assault causing serious injury, all to be served concurrently. Thompson now appeals his convictions.

II. Sufficiency of the Evidence.

Thompson claims there is insufficient evidence in the record to support his convictions. In particular, he claims there was a likelihood of false eyewitness identification. Thompson points out that Bender had not seen him for eight or nine years, when they attended the same intermediate school. He points out that Bender had been smoking marijuana before the three men came into his home. Thompson also points out he and Bender are of different racial groups and states this adds to the likelihood of misidentification.

We will review a challenge to the sufficiency of the evidence for the correction of errors at law. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). The fact-finder's verdict will be upheld if it is supported by substantial evidence. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). Substantial evidence means

² The third person was identified as Albert Butler. He was tried in separate proceedings.

evidence that could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v. Heuser*, 661 N.W.2d 157, 165-66 (Iowa 2003). In reviewing challenges to the sufficiency of the evidence, we give consideration to all the evidence, not just that supporting the verdict, and view the evidence in the light most favorable to the State. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

Resolution of conflicts in the evidence is for the jury to decide. *State v. Fetters*, 562 N.W.2d 770, 775 (Iowa Ct. App. 1997). The jury was free to believe or disbelieve the testimony of the witnesses and to determine the weight to be given to the evidence. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993); *State v. Hunt*, 801 N.W.2d 366, 377 (Iowa Ct. App. 2011). It is the function of the jury to weigh the evidence and place credibility where it belongs. *State v. Bower*, 725 N.W.2d 435, 445 (Iowa 2006).

It is clear the jury found Bender's testimony that he recognized Thompson to be credible. Furthermore, other evidence supported the eyewitness testimony that Thompson was one of the assailants. The evidence showed Pena was one of only a few people who knew Bender kept drugs in a safe in his basement, Pena contacted Bender and determined he had cocaine worth \$700 on hand, and Thompson and Pena contacted each other multiple times that day. Additionally, when officers apprehended Thompson he was in possession of a black ski mask and black-colored brass knuckles, similar to those used in the offenses. We determine there is substantial evidence in the record to support the jury's finding that Thompson was one of the people who committed the crimes charged in this case.

III. Ineffective Assistance.

Thompson contends he received ineffective assistance because his defense counsel did not request an expert witness to testify on the issue of eyewitness identification. He contends that if such an expert had testified on the problems with eyewitness identification, the result of the trial would likely have been different. Subject to the discretion of the district court, expert testimony on eyewitness identification may be presented in a criminal trial. *State v. Schutz*, 579 N.W.2d 317, 320 (Iowa 1998).

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). “In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy.” *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, a defendant must show that, but for counsel’s unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

We conclude Thompson has not shown he was prejudiced by his attorney’s performance. See *State v. Ledezma*, 626 N.W.2d 134, 142 (Iowa 2001) (noting we may first consider the prejudice prong of a claim of ineffective assistance of counsel). As noted above, in addition to the eyewitness testimony of Bender, there was other evidence linking Thompson to the crimes. Thompson

has not shown there is a reasonable probability the result of the trial would have been different if an expert on eyewitness identification had testified.³ We conclude Thompson has not shown he received ineffective assistance due to defense counsel's failure to request the testimony of an expert on eyewitness identification.

We affirm Thompson's convictions.

AFFIRMED.

³ We also note this case does not involve a victim's eyewitness identification of a stranger from a photographic lineup, which is the usual circumstance in cases involving eyewitness identification. See *Schutz*, 579 N.W.2d at 318. Bender testified that he recognized Thompson as someone he knew from intermediate school the moment he first saw him at his back door.