

**IN THE COURT OF APPEALS OF IOWA**

No. 3-854 / 12-0868  
Filed October 23, 2013

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

**vs.**

**LESTER TALSHAWN RICHARDSON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Richard G. Blane II,  
Judge.

Defendant appeals his conviction for murder in the first degree.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,  
Assistant Appellate Defender, for appellant.

Lester Richardson, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney  
General, John Sarcone, County Attorney, and Daniel C. Voogt and Jeffrey K.  
Noble, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Miller, S.J.\*

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

**MILLER, S.J.****I. Background Facts and Proceedings**

On September 26, 2010, an incident occurred at the Hangover, also known as the Boom Boom Room, a bar in West Des Moines, where Lakita Portwood received a fairly large laceration to her forehead from a man with a beer bottle. Portwood's half-brother, Lester Richardson, stated he wanted to get back at the person who injured Portwood.

On October 14, 2010, Jamarcus Lee, Bobby Woods, and Martin Turks drove in a black Jeep Cherokee to a laundromat/liquor store on University Avenue in Des Moines. Lee was driving, Woods was in the front passenger seat, while Turks was in the backseat. Lee backed into a parking space. Turks went into the store to buy some alcohol and cigars. While Turks was in the store, Lee and Woods began talking to some women who had parked in an adjacent parking space.

Richardson came up and spoke to Woods, who he knew. When Turks returned to the car, Woods introduced him to Richardson. Turks told Richardson he liked to go to the Boom Boom Room, and he considered himself a ladies' man. Richardson then walked away and went over to a different vehicle. Turks remained standing between the two cars, talking to the women.

Casino McDonald, who was the long-time boyfriend of the mother of Portwood and Richardson, testified Richardson called him from the laundromat/liquor store and asked him to pick him up to give him a ride home. McDonald stated that when he arrived at the scene, Richardson told him that the

men in the Jeep Cherokee were involved in the incident when Portwood got hit in the head with a bottle. McDonald stated he then went over to speak to the person in the driver's seat.

Lee testified that a man walked up to the driver's side window of the Jeep Cherokee, where Lee was sitting, and said, "What was that sh\*t you and your cousin was talking about laughing at the club when my daughter got hit in the face with a bottle?" While Lee and Woods were talking to McDonald, a shot was fired which struck Turks in the head and killed him.

When the shot was fired, Lee and Woods drove out of the parking lot. Additional shots were fired at the back of the Jeep Cherokee. Woods was struck by a bullet which did not penetrate the skin, but caused bruising. Lee testified that if he had been sitting up straight in the vehicle, he would have been shot in the back because a bullet went through the driver's seat. A bullet penetrated the gas tank of the Jeep Cherokee, causing gas leakage. Lee and Woods circled the block, and then parked at a gas station adjacent to the laundromat/liquor store.

McDonald gave Richardson a ride to McDonald's home. McDonald stated he took Keo Way down to 235 east-bound. He testified Richardson said, "f\*ck, f\*ck, f\*ck," as they were driving. Richardson asked his girlfriend, Tara Jones, to pick him up from McDonald's home. Richardson spent the night at Jones's home. He did not mention anything about the shooting to Jones. The next day he dropped out of school and left town.

Turks died as a result of a gunshot wound to the head. Police officers obtained a videotape from the laundromat/liquor store which showed a man with

his arm extended pointing towards the back of the Jeep Cherokee, and they believed this was the gunman. Officers found Richardson's cell phone in the weeds near the Keo Way entrance to the freeway. By tracing telephone numbers on Jones's cell phone, officers were able to track Richardson to Minneapolis, Minnesota. When officers found Richardson he was hiding on some stairs in a home.

Richardson was charged with murder in the first degree, in violation of Iowa Code section 707.2 (2009). At the criminal trial, Courtney Chestnut testified he was standing at the corner of the laundromat/liquor store and saw Richardson shoot Turks. Woods testified he did not see the shooting as it occurred, but after watching the videotape he told officers that most likely Richardson was the shooter. Lee also testified that he did not see the shooting as it happened, but after watching the videotape he believed Turks had been shot by Richardson. He stated the videotape showed Richardson with his arm raised, shooting at the back of the Jeep Cherokee.

Vernon Glass testified he was just walking up to say "what's up" to Turks, when Turks was shot and killed. Glass testified that he saw Richardson shoot Turks. The videotape shows Glass running away from the scene while the shooter is still aiming at the back of the Jeep Cherokee. Glass also testified that after the shooting Richardson called him and said, "That's my work. Did you see my work? That's my work." Additionally, McDonald identified Richardson as the person on the videotape with his arm extended pointing at the back of the Jeep Cherokee. Richardson's cousin, Kenyatta Taylor, who was present at the

laundromat/liquor store, testified he saw Richardson shooting at the Jeep Cherokee, but did not see him shoot anyone. Scott Edwards, who was also at the scene, testified that when officers showed him the videotape, he agreed with their statement that the shooter was Richardson.

During the jury trial, the district court denied the defendant's motions for judgment of acquittal. The jury found Richardson guilty of first-degree murder. The court also denied defendant's motion for new trial. Richardson was sentenced to life in prison. He now appeals, claiming there is insufficient evidence in the record to support his conviction.

## **II. Standard of Review**

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 evidence that could convince a rational fact finder that 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).

## **III. Sufficiency of the Evidence**

Richardson asserts the evidence does not support his conviction for first-degree murder. In particular, he claims the two witnesses for the State that

testified that they directly observed him shoot Turks were not credible. He points out that no other witnesses verified that Chestnut was even present at the scene at the time of the shooting. He also notes that Chestnut stated he was hoping to get a better deal on criminal charges against him because of his testimony against Richardson. Likewise, Richardson asserts Glass was not a credible witness, stating Glass had been worried he would be charged with the crime because he had been standing next to Turks when he was shot. He states Glass received a favorable plea bargain from the State in exchange for his testimony against Richardson. He also notes the State did not produce any telephone records to substantiate Glass's statement that Richardson called him after the shooting.

“[A] court must be careful not to usurp the role of a jury by making credibility determinations that are outside the proper scope of the judicial role.” *State v. Paredes*, 775 N.W.2d 554, 567 (Iowa 2009). It is for the jury to determine the credibility of witnesses and to weigh the evidence. *State v. Schooley*, 804 N.W.2d 105, 106 (Iowa Ct. App. 2011). The jury is free to believe or disbelieve the testimony of witnesses, and to give that testimony as much weight as it determines the testimony should receive. *State v. Hunt*, 801 N.W.2d 366, 377 (Iowa Ct. App. 2011). “The very function of the jury is to sort out the evidence and place credibility where it belongs.” *Id.*

We conclude it was for the jury to determine the credibility of the testimony of Chestnut and Glass. Defense counsel thoroughly explored through cross-examination Chestnut's desire to obtain a better deal in his criminal case based

on his testimony against Richardson. Chestnut testified he did not receive a beneficial plea bargain, and in fact had not received anything in exchange for his testimony. Also, defense counsel discussed on cross-examination with Glass the beneficial plea bargain he received. Glass also stated he agreed to give testimony against Richardson because he was worried he would be blamed for the shooting. The lack of a telephone record to support Glass's testimony that Richardson called him after the shooting was also explored by defense counsel during the criminal trial. Thus, the jury was fully aware of the issues Richardson now raises to attack the credibility of these witnesses.

Furthermore, the record from the criminal trial shows several other witnesses identified Richardson from the videotape as the person who was the shooter. Woods, Lee, McDonald, and Taylor all testified that the videotape showed Richardson shooting at the back of the Jeep Cherokee. The jury could find that if Richardson was the person who had shot at the Jeep Cherokee, he was also the person that had shot Turks. Only one type of shell casing was found at the scene.

The evidence showed Richardson had a motive for shooting Turks because he believed Turks was involved in the incident that resulted in an injury to his half-sister, Portwood. Additionally, the day after the shooting Richardson dropped out of school and left the state. Police officers obtained the cell phone of Richardson's girlfriend, Jones, which was receiving text messages from Richardson. One of the messages was, "Erase all the messages on the phone." Police officers texted back to Richardson, pretending to be Jones. Richardson

apparently discovered this ruse because he texted, “you ain’t never gonna find me.” He was discovered hiding in a home in Minneapolis. See *State v. Bone*, 429 N.W.2d 123, 126 (Iowa 1988) (noting that evidence of flight or concealment may show a consciousness of guilt, but is not sufficient in itself to establish guilt).

Even if the jury had concluded Chestnut and Glass were not credible, there was plenty of other evidence in the record to support the jury’s finding that Richardson shot Turks. We conclude there is substantial evidence in the record to support the jury’s verdict finding Richardson guilty of first-degree murder.

#### **IV. Pro Se Issues**

**A.** Richardson has filed a pro se brief asserting the district court erred by giving the jury instructions on willful injury that misstated the law. The jury was instructed on willful injury causing serious injury as a lesser-included offense of first-degree murder. The record shows defense counsel made no objection to the jury instructions. We conclude, therefore, that this issue has not been preserved for our review. See *State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993) (noting the failure to make a specific objection to instructions in their final form waives any alleged error).

**B.** In the alternative, Richardson claims he received ineffective assistance because defense counsel did not object to the jury instructions on willful injury. 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, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied



applicant 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, an applicant 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).

Richardson claims he received ineffective assistance because defense counsel did not object when the district court improperly instructed the jury on willful injury causing serious injury. The jury, however, did not find Richardson guilty of the lesser-included offenses of second-degree murder, attempt to commit murder, or voluntary manslaughter, which would all be greater-included offenses than willful injury causing serious injury.

An analogous situation arose in *State v. Negrete*, 486 N.W.2d 297, 298 (Iowa 1992), where the defendant was charged with first-degree murder and the court did not give the defendant’s requested instruction on simple assault. The Iowa Supreme Court noted that the jury had not convicted the defendant of the other lesser-included offenses of second-degree murder or involuntary manslaughter. *Negrete*, 486 N.W.2d at 299. The court stated, “We have followed the general rule that the jury’s rejection of a greater-included offense negates a defendant’s claim of prejudice due to a trial court’s failure to submit an instruction on a lesser-included offense.” *Id.*; see also *State v. Nowlin*, 244 N.W.2d 591, 596 (Iowa 1976) (“Where both first and second-degree murder

verdicts are submitted and a first-degree murder conviction is returned there is no prejudice for failure to instruct on manslaughter.”); *Everett v. Brewer*, 215 N.W.2d 244, 248 (Iowa 1974) (“Neither can a defendant, after conviction of a major offense, complain of the failure to submit an included offense if another included offense greater than the one omitted was submitted.”). We determine these cases involving a failure to submit a lesser-included offense provide useful insight on the issue in this case involving a misstatement in the instruction for a lesser-included offense.

We conclude Richardson has not shown he was prejudiced because defense counsel did not object to the jury instructions on the lesser-included offense of willful injury. Richardson has not shown that even if defense counsel had objected to the jury instructions there is a reasonable probability the result of the proceeding would have been different, that is, that he would not have been found guilty of first-degree murder.

Richardson also claims he received ineffective assistance because defense counsel: (1) did not conduct a deposition of Chestnut; (2) did not object to the State permitting witnesses to observe the videotape before their depositions; and (3) did not object when the prosecutor stated Turks was killed by the same weapon that shot the Jeep Cherokee. We conclude the present record is not adequate to address these issues, and they should be preserved for a possible postconviction proceeding. See *State v. Feregrino*, 756 N.W.2d 700, 708 (Iowa 2008) (noting that where the record is inadequate to address a claim

of ineffective assistance of counsel, we preserve the issue for a possible postconviction relief action).

We affirm Richardson's conviction for first-degree murder.

**AFFIRMED.**