IN THE COURT OF APPEALS OF IOWA

No. 3-892 / 12-1873
Filed December 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRAMARUS DEONTAE DIXON,
Defendant-Appellant.

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

A defendant appeals his conviction for first-degree robbery. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, Brad Walz and Joel Dalrymple, Assistant County Attorneys, and Adam Kenworthy, Student Legal Intern, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A jury found Tramarus Dixon guilty of first-degree robbery for his role in an armed hold-up at the Motel 6. Dixon appeals that conviction, arguing the circumstantial evidence he acted as the get-away driver could not be considered substantial proof of guilt. He also maintains he should have been allowed substitute counsel and challenges the effectiveness of his attorney's representation.

Viewing the evidence in the light most favorable to the State, we find sufficient facts to sustain the jury's verdict. We find no error in the district court's denial of substitute counsel. We reject two of Dixon's pro se claims of ineffective assistance on this record and preserve the remaining allegations for possible postconviction relief proceedings so defense counsel may have an opportunity to explain his strategy.

I. Facts and Procedural Background

Waterloo resident Melvin Sickels was walking his dog on the night of January 26, 2009, when a car parked by the Motel 6 on Logan Avenue raised his suspicions. He watched two men exit the back seat, cross the street, and go into the motel, while the driver waited in the car. The third man stood outside the car for a little while and then returned to the driver's seat. Sickels "called the police to see if they'd come check and just see if everything was ok." While on the phone with the police, he saw two men run from the motel and jump into the car, which sped east on Ralston Road.

About the same time Waterloo Police Officer Lisa Campbell was driving by the Motel 6 on her way to work. She saw a car parked at the corner of Logan Avenue and Ralston Road and noticed its brake lights came on. When she later looked at a photograph of the Dixon's car, she believed the lights looked the same.

Joel Johnson was working the front desk of the Motel 6 that night. At 10:15 p.m. two men entered the motel wearing masks over their faces and pointed a gun at him. Johnson, who was very familiar with guns, identified the weapon as a 9 millimeter semiautomatic black handgun with a silver handle. The two men hopped over the counter. One held the gun behind Johnson's head and instructed him to open the cash drawer. Johnson said the motel generally keeps less than $200 on hand. The two men stuffed the money from the drawer into bank deposit bags, each of which was labeled with a motel employee's name. The robbers then asked Johnson where the safe was. When Johnson told them the motel did not have a safe, the armed man struck him on the side of the head with the gun. The two robbers then ran out of the motel with the money. Johnson called 911.

When the police arrived, Johnson gave them a physical description of the two men. Johnson first described the shorter of the two men, recalling he wore blue jeans, a black sweatshirt, a red mask, and Nike sneakers with a blue and black insignia on them. Johnson described the armed man as taller, wearing a blue mask, a dark pullover sweatshirt, blue jeans, and Nike sneakers. Johnson said both robbers wore blue gloves on their hands.

Sickels told police the car which caught his attention was a dark colored four-door sedan. Officer Campbell said the car she saw matched Sickels's description. Police searched the surrounding neighborhoods for the sedan. Officer Aaron McClelland followed Ralston Road and then took Lakeside Street to Niles Street where another officer had discovered a light blue glove discarded in the intersection.

Officer McClelland spotted a blue Chevy Lumina parked in the 4000 block of Niles Street. McClelland questioned the three occupants of the Lumina but did not find any evidence of the robbery. Parked in the nearby driveway of 4039 Niles, Officer McClelland noticed a green Pontiac Bonneville. He touched the car's hood and found it still warm to the touch. When McClelland shined his flashlight into the Bonneville, he saw a semiautomatic handgun in plain view on the back seat.

The driver of the Lumina also directed the officers to the house at 4039 Niles. When Officer McClelland and Sergeant Monty Frana knocked on the door, it was answered by an elderly woman named Annie Davis. Davis, who is Dixon's grandmother, initially told the police no one else was in her house. When the officers told Davis about the robbery and seeing the gun in the Bonneville, she said: "I'm going to tell you the truth. They're in the back bedroom."

The officers entered and in the back bedroom found three men identified as Jamarus Wise, Tramarus Dixon, and Orentheo Campbell. The police discovered a fourth man, Malcolm Leflore, in the bathroom, where he told police he was hiding because he possessed marijuana. In patting down Wise, police

found $215. The officers failed to secure the cash, leaving it on the bed in the back bedroom where Dixon remained separated from his companions.

During the investigation, police allowed Antoinette Davis, Dixon's mother, into the house to assist her elderly mother, Annie Davis. Antoinette told the police Dixon suffered a knee injury and the pain caused him to pass out, though no one else saw this occur. Police allowed Antoinette to take her son to the hospital. After Antoinette and Dixon left the back bedroom of the house, police could not locate the $215 seized from Wise.

The State presented evidence that Dixon did not go straight to the hospital. While he left the house around midnight, he did not arrive at the emergency room until 1:04 a.m. According to hospital records, he checked himself out against medical advice at 1:57 a.m. without receiving any treatment. The hospital records also showed Dixon's home address was not 4039 Niles. Around 4 a.m., Dixon came to the police station where he was interviewed for about forty minutes.

In their search of the Davis home, officers found a blue latex glove in a box in the living room which was "identical" to the glove found in the street on the route from the motel. They also found a black hooded sweatshirt in the back bedroom, as well as a pair of Air Jordan athletic shoes which appeared to have been tossed down the basement steps. The police obtained a search warrant for the Bonneville, which was registered to Dixon's mother. Inside the car officers found the handgun, blue latex gloves, a black hat, and other clothing. They also

located Dixon's school ID, cell phone, bank statement, and insurance records inside the car.

The police found four empty deposit bags matching the ones taken from the Motel 6 in a garbage container just north of the Davis home. In addition, police brought Johnson to the house, where he identified Wise as one of the men who robbed him.[1]

Analysts with the Iowa Division of Criminal Investigation (DCI) found the tread from the Bonneville's tires to be consistent with tracks left in the snow outside the Motel 6. They also found a shoeprint from the area where the sedan was parked outside of the motel and determined it was left by a shoe of similar size and tread as the Air Jordan shoes found in the basement of 4039 Niles.

On July 13, 2009, the State filed a trial information charging Dixon with robbery in the first degree, a class "B" felony, in violation of Iowa Code sections 711.1 and 711.2 (2009) in connection with the January 26, 2009 crime (FECR162376). The State also charged Dixon with a robbery which occurred on January 21, 2009 (FECR160560). The court consolidated the cases for trial, which commenced on July 17, 2012. On July 26, 2012, the jury convicted Dixon of the robbery in case number FECR1623756 but acquitted him of the robbery in case number FECR160560. On October 1, 2012, the court entered judgment and sentenced Dixon to an indeterminate twenty-five-year term. Dixon now appeals.

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[1] The DCI criminalists also identified Wise's DNA on a straw from a fast food cup found at the motel.

II. Standard of Review

A motion for judgment of acquittal challenges the sufficiency of the evidence, and we review such claims for correction of errors at law. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005).

"Our review of a district court's denial of a request for substitute counsel is for abuse of discretion." *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001). "To establish an abuse of discretion, [the defendant] must show that 'the court exercised the discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Id*.

We review claims of ineffective assistance of counsel de novo. *State v. Straw*, 709 N.W.2d 128,133 (Iowa 2006).

III. Analysis

A. Motion for Judgment of Acquittal

As a threshold matter, the State argues Dixon's generic motion for judgment of acquittal did not preserve error for appeal. The State argues the defense motion did not highlight for the district court what evidence Dixon alleged to be missing from the prosecution's case.

Generally a motion for judgment of acquittal will not preserve error unless it points to specific deficiencies in the evidence. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). But in this case, counsel's motion adequately signaled Dixon's overarching objection that the State's evidence did not prove his identity as a participant in the robberies, either as a principal or as an aider and abetter. We will find error preserved "when the record indicates that the grounds for a

motion were obvious and understood by the trial court and counsel." *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

In determining whether the district court should have granted the motion for judgment of acquittal, it is not our job to resolve conflicts in the record, to assess witness credibility, or to weigh the evidence. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). Those functions rest with the jurors. *Id*. Instead, we decide if the evidence could persuade a rational jury that the defendant was guilty beyond a reasonable doubt. *Id*. We "view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record." *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). But "[e]vidence that raises only a suspicion or generates only speculation is not substantial." *Hutchinson*, 721 N.W.2d at 780.

On appeal, Dixon challenges the sufficiency of the evidence that he aided and abetted the two men who robbed Joel Johnson at gunpoint. Dixon contends "[a]ny connection between [him] and the robbery at the Motel 6 is tenuous and circumstantial."

The State concedes most of the evidence against Dixon is circumstantial—but emphasizes circumstantial evidence is equally probative, and in some circumstances is superior, to direct evidence. Iowa R. App. P. 6.904(3)(p); *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993); *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979). The State argues "there was more than enough evidence provided for a reasonable trier of fact" to determine Dixon was guilty of aiding and abetting the robbery.

The State had the burden to prove, beyond a reasonable doubt, the following elements of first-degree robbery:

> 1. On or about the 26th day of January, 2009, the defendant had the specific intent to commit a theft or aided and abetted another person or persons who the defendant knew had the specific intent to commit a theft.
> 2. To carry out his or another's intention or to assist him in escaping from the scene, with or without the stolen property, the defendant, or the person or persons he aided and abetted:
>
> a. Committed an assault on Joel Johnson, or
>
> b. Threatened Joel Johnson with, or purposely put Joel Johnson, in fear of immediate serious injury.
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> 3. The defendant or the person or persons the defendant aided and abetted was armed with a dangerous weapon.

We conclude a reasonable jury could infer Dixon's intent to commit a theft at the Motel 6 or to lend support to his two accomplices in their endeavor to steal money from the motel clerk by assaulting him or threatening him with a handgun. Substantial evidence supports the State's theory Dixon aided and abetted the armed robbery.

First, the jury heard evidence from Sickels that while two men ran inside the motel, a third man was waiting outside with the car. Sickels testified the third man moved back into the driver's seat as his two companions came rushing out of the motel. All three suspects sped off in the car.

Next, the jury heard testimony from police officers that their investigation quickly zeroed in on a recently driven sedan, matching the description given by Sickels and Officer Campbell, parked at the home of Dixon's grandmother. A handgun rested on the backseat of the car. The car was registered to Dixon's mother and contained several items of his personal property, including his ID and

cell phone. The car's tires left tread marks consistent with tire prints in the snow outside the motel.

The jury also learned Dixon's grandmother initially lied to investigators at her front door, telling them she was home alone. But she soon revealed to police that her grandson and his two companions were in the back bedroom. Dixon's companions matched Johnson's description of his two assailants. Dixon's association with Wise was significant because Wise had $215 in cash in his pocket, was positively identified by Johnson, and left his DNA at the crime scene.

Police found several incriminating items in the house, including a blue latex glove, which was identical to a glove thrown out at an intersection between the motel and the house, as well as matching the victim's description of gloves worn by the robbers. Police also found Air Jordan shoes in the basement with tread patterns consistent with shoe prints left in the snow outside the motel.

Dixon suggests on appeal that even if his car was used in the robbery, the evidence does not show he was the driver or knew the car was borrowed for that purpose. When viewed in the light most favorable to the State, we find the evidence sufficient to link Dixon to the crime. It is conceivable the two robbers raced from the Motel 6 to Dixon's grandmother's house in his car—containing his cell phone and ID—with a different third compatriot, and then dumped the money bags in a garbage bin near the house, left the handgun on the backseat, entered the house, threw the shoes into the basement, left a glove in the living room, and finally found Dixon in the back bedroom just before the police closed in on them.

But the jury could have fairly inferred a more plausible scenario, where Dixon drove his own car to his grandmother's house after the robbery.

Dixon urges one more drawback to the State's theory. He claims he was injured and on crutches at the time of the robbery, and because the State did not introduce testimony that any of the robbers limped or used crutches, he could not have taken part in the crime. Dixon's premise lacks support in the record. Both Officer McClelland and Leflore testified that they did not see Dixon limping or using crutches the night of the crime. The hospital records indicate Dixon left without receiving treatment in the early morning hours following the robbery. The jury had the opportunity to weigh the credibility of the witnesses and evidence presented. As an appellate court, we defer to the fact finder's credibility determinations. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive.").

Because we find substantial evidence in the record that Dixon aided and abetted the robbery, we decline to disturb the jury's verdict.

B. Request for Substitute Counsel

In his second assignment of error, Dixon claims the district court abused its discretion in declining to allow him to apply for new counsel when he sought to do so midway through the sentencing hearing. At trial Dixon was represented by Eric Parrish, who was retained counsel.[2] On September 14, 2012, two weeks before the sentencing hearing, Parrish filed a written withdrawal from his

[2] Eric Parrish filed an appearance with the court on November 6, 2009.

representation of Dixon, asserting Dixon had failed to meet his financial obligation under the attorney/client contract. The withdrawal asserted the time for filing post trial motions had not yet expired. Despite the notice of withdrawal, on September 26, 2012, Parrish filed a motion for new trial on Dixon's behalf.[3]

At the September 28, 2012, sentencing hearing, Eric Parrish told the court that Dixon expressed a desire "to talk to other counsel." But when asked for his opinion about the attorney-client relationship, Dixon told the court something different.

> THE COURT: Is it true that . . . you'd like to have Mr. Eric Parrish continue to represent you?
> THE DEFENDANT: Yeah, he can—Yes, sir.

As the colloquy with the court continued, Dixon explained that he thought Alfredo Parrish would be his attorney. Eventually, Dixon asked the court: "Is there any way I can file for a new lawyer?" The court responded that Eric Parrish had represented Dixon for at least two years, had represented him through the trial, and the time for sentencing had come. The court said: "I'm not going to allow you at this late date to make application—I mean three times now you've just told me that you want him to continue—you want Mr. Parrish to continue to represent you."

Although Dixon had earlier been equivocal about continuing to retain Eric Parrish, he eventually made a definitive request for substitute counsel: "I want a

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[3] Under Iowa Rule of Criminal Procedure 2.24(2)(a), a motion for new trial must be made within forty-five days after the rendering of the verdict. In this case the jury returned its verdict on July 26, 2012. Eric Parish filed his withdrawal motion on September 14, 2012—fifty days later, and filed the motion for new trial on September 26, 2012—sixty-two days after the verdict.

new lawyer. . . . I would like to do an application to do a new lawyer." The court declined the request:

> Well, I'm not going to continue this matter to give you the—to take the time to fill out an application for court-appointed counsel. The request is too late in time. It is now 60 days past the time of your—the guilty verdict. You've had numerous opportunities to talk with Mr. Parrish, with your family, and file that application or follow through with this in some meaningful way. I'm not going to do that.

In deciding whether to grant a defendant's request for substitute counsel, the district court must strike a balance between the defendant's right to counsel of choice and the public's interest in the prompt and efficient administration of justice. *Lopez*, 633 N.W.2d at 779. The opportunity to choose counsel "is a right and a proper tool of the defendant; it cannot be used merely as a manipulative monkey wrench." *Gandy v. Alabama.*, 569 F.2d 1318, 1323 (5th Cir. 1978). The court has discretion to deny a last-minute request for substitute counsel which works as a tactic for delay. *United States v. Swinney*, 970 F.2d 494, 499 (8th Cir. 1992).

If Dixon had timely sought to discharge his retained counsel and to apply for a court-appointed attorney, he would have had the right to do so, even without showing inadequate representation or identifying an irreconcilable conflict. *See People v. Ortiz*, 800 P.2d 547, 553 (Cal. 1990); *People v. Abernathy*, 926 N.E.2d 435, 444 (Ill. App. Ct. 2010); *Dixon v. Owens*, 865 P.2d 1250, 1252 (Okla. Crim. App. 1993); *State v. Barber*, 206 P.3d 1223 (Utah Ct. App. 2009); *see also United States v. Gonzalez–Lopez,* 548 U.S. 140, 148 (2006). But he did not have the absolute right to seek new counsel as a means to disrupt the orderly process of the case or to delay the sentencing proceedings. Eric Parrish

represented Dixon for more than two years, yet Dixon did not raise concerns until the time set for sentencing. The district court did not abuse its discretion in refusing to continue the sentencing hearing to allow Dixon to explore his options for court-appointed counsel. *See Abernathy*, 926 N.E.2d at 445 (observing that "the right to choice of counsel is limited when abused").

C. Ineffective Assistance of Counsel

To establish a claim of ineffective assistance, a defendant must satisfy a two-prong test: (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). If either prong is unsatisfied, we affirm. *Anfinson v. State*, 758 N.W.2d 496, 499 (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). To show prejudice, a defendant must show that, but for counsel's unprofessional errors, it is reasonably probable that the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012). If the defendant asks us to decide the claim on direct appeal, we will decide if the record is adequate to resolve the issue. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Dixon's appellate counsel contends Dixon's trial attorney was ineffective for not timely filing the motion for new trial. The new trial motion raised five issues: (1) the district court erred when it forced Dixon into the position of requesting severance of cases never formally joined for trial, (2) Dixon's Sixth Amendment right was violated when the court allowed State witnesses to be

called to testify once and then recalled to present the facts chronologically, thus limiting cross-examination, (3) the prosecution engaged in misconduct when it introduced a photograph during closing arguments that was not admitted at trial, (4) the State did not amend the trial information to charge Dixon with aiding and abetting as considered by the jury and therefore the weight of the evidence fails to support the verdict, and (5) the district court committed error when it failed to publicly disclose prior conflicts with Dixon, or provide this information to counsel.

In his pro se brief, Dixon argues his counsel failed to perform effectively in five ways: (1) by allowing Dixon to agree to the consolidation of two different felony charges into one trial, (2) by not objecting to the State's admission of a gun into evidence; (3) by not impeaching Waterloo police officer Michael Rasmussen concerning his identification of a suspect vehicle; (4) by not challenging the impartiality of a juror; and (5) by not seeking the recusal of Andrea Dryer as presiding judge.

The severance and judicial disqualification issues are common to both the pro se and appellate counsel's brief. We find the record adequate to reject both of those claims.

On the severance (or consolidation) issue, the district court recessed the pretrial proceedings so Dixon could consult with his attorney regarding the issue of a single trial on his two robbery charges. Under Iowa Rule of Criminal Procedure 2.6(1) two or more offenses may be joined if they are part of a common scheme or plan. *See State v. Elston*, 735 N.W.2d 196, 198–99 (Iowa 2007) (considering continuing motive and intent, as well as temporal and

geographic proximity of the crimes). After conferring with counsel, Dixon personally told the judge: "I would like to try them together." The court persisted: "Okay, so are you telling me that it's your true and voluntary sole decision that you'd like to try these cases together?" Dixon responded: Yes, your Honor." Dixon confirmed for the court that he understood the pros and cons of trying the cases together and did not need additional time to discuss the issue with his attorney.

In assessing claims of ineffective assistance of counsel, we examine a defendant's own conduct as well as that of his attorney. *State v. Rice*, 543 N.W.2d 884, 888–89 (Iowa 1996). Dixon is complaining on appeal about his own decision, verified by the district court on the record. Based on his personal colloquy with the court, Dixon cannot show trial counsel breached a material duty.

We also reject Dixon's claim concerning Judge Dryer. He asserts she should have disqualified herself from the case because of her prior position with the public defender's office where she was appointed to represent him. Judge Dryer did not preside over Dixon's trial or sentencing. Dixon does not assert she issued any rulings in his case. Accordingly, he cannot show prejudice.

We preserve Dixon's remaining six claims of ineffective assistance of counsel for possible postconviction relief proceedings.

AFFIRMED.