IN THE COURT OF APPEALS OF IOWA

No. 3-991 / 12-0815
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JAMEY MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Marion County (on change of venue to Clarke County), John D. Lloyd, Judge.

The defendant appeals his conviction for murder in the first degree following a jury verdict. **AFFIRMED.**

Paul Rosenberg of Paul Rosenberg, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller and Andrew Prosser, Assistant Attorneys General, and Ed Bull, County Attorney, for appellee.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

Presented with evidence of his murder-for-hire scheme, a jury convicted Michael Miller of aiding and abetting the shooting death of his wife Teresa. Miller appeals his conviction for murder in the first degree, alleging he deserves a new trial for three reasons: improper jury selection, the admission of hearsay statements from accomplice Terry Cobbins, and trial counsel's failure to seek a corroboration instruction.

First, even if the district court wrongly denied trial counsel's challenge for cause to a prospective juror who read a media account of Cobbins's conviction, Miller cannot show prejudice. Second, because the record showed the existence of a conspiracy between Miller and Cobbins, the district court properly admitted Cobbins's coconspirator statements under Iowa Rule of Evidence 5.801(d)(2)(E). Third, because Cobbins did not testify and the State linked Miller to the crime with evidence independent of Bernard Bussey's testimony, counsel was not ineffective for declining to seek a corroboration instruction. Accordingly, we affirm.

I. Factual background and prior proceedings

Just before Christmas of 2010, Michael Miller's girlfriend Neida Pinon gave him an ultimatum: choose me or your wife. Miller supervised Pinon at Marzetti's Frozen Pasta Company in Clive and, within three months of her start date, developed an intimate relationship with her. On their first date at Applebee's Restaurant, Miller lied to Pinon when she asked if he was married. He wooed her with flowers, clothing, and gifts for her children. In February 2010

Miller gave Pinon a ring as a sign of his affection. But Pinon wondered why Miller only came to her house in the early morning hours before work. Eventually, Miller revealed to Pinon that he was married. Hearing that, she broke off their relationship. But she agreed to reconcile when Miller showed her papers purporting to indicate he was divorcing his wife. To assure herself he was not lying again, Pinon went to Knoxville, where she spotted Miller driving his wife home in a sports car. After seeing this Pinon decided to force the issue. When she left to visit family in Mexico for ten days, Pinon told Miller to take that time to decide between his mistress and his marriage.

Miller found the answer to his dilemma in Terry Cobbins, another one of the employees he supervised at Marzetti's Pasta. Miller befriended Cobbins, giving him rides home from work and offering him money to kill Teresa. Cobbins told his neighbor, Tyree Lewis, that Cobbins's boss wanted his wife killed and was willing to pay. Lewis recalled that Cobbins relayed Miller's motive as "marriage, divorce, [and] money." Lewis testified Cobbins offered him $15,000 to help with the murder. Cobbins also discussed the murder-for-hire plot with his friend, Mario McPherson. Cobbins told McPherson he needed to drive down to Knoxville to do the job. Cobbins tried to recruit McPherson to be the driver. McPherson also overheard Cobbins on the phone asking about buying a gun.

During the same time frame that Cobbins was quoting Miller's price for killing his wife, Miller borrowed $10,000 in cash from his friend Billy Jo Chiles. Miller told Chiles he planned to buy a classic car, but Miller never purchased the car nor repaid Chiles.

In the early morning hours of January 7, 2011, Miller loaned his car to former Marzetti's worker Bernard Bussey. Miller directed Bussey to drop him off at Pinon's house, though she was not expecting him. Miller later asked Bussey to pick up Cobbins from the hospital, where he was recovering from an asthma attack. Cobbins and Bussey left the hospital just before 9 a.m. Bussey recalled that he drove Miller's car to Knoxville, following directions given by Cobbins. According to Bussey, Cobbins went to the door of the Miller house and was let in. Cobbins stayed inside for five to ten minutes before returning to the car. Bussey then drove them back to Marzetti's—estimating their arrival at between 11 a.m. and noon.

From there, Miller, Cobbins, and Bussey all went to the Des Moines airport, where Miller rented a Suburban for Cobbins. The car rental agent recalled the trio acting "antsy." Lewis later saw the Cobbins family hurriedly packing their belongings into the rental vehicle.

Meanwhile, Teresa's adult daughter, Shawna Mendenhall, tried to reach her mother the morning of January 7, 2011, and found it unusual she did not answer the telephone. Teresa had severe vision problems and did not have a driver's license. Worried, Mendenhall went to the Millers' Knoxville home just after 10:30 a.m. and found the door uncharacteristically unlocked. She found her mother dead on the kitchen floor, shot once in the head.

Police interviewed Miller about his wife's death on January 7 and again on January 10, 2011. In the first interview Miller tried to hide the fact that he let Bussey use his car, even before investigators knew Bussey and Cobbins had

taken the car to Knoxville. Miller also denied having an affair with Pinon. In the second interview, three days later, Miller told police he had a one-night sexual encounter with Pinon about one year earlier.

On January 8, 2010, the day after his wife's murder, Miller returned to Pinon's residence and professed his love for her. He said soon they could be together and she had "nothing to worry about." That same day, Pinon's children found bullets on the ground next to her car, where Miller had been parked the day of the murder. Miller said the bullets were not his, but still took them from the tequila glass where Pinon's son had stashed them.

Law enforcement officers eventually located Cobbins in Wisconsin and seized a prepaid cell phone from him. An analysis of cell phone records confirmed Cobbins and Bussey arrived in the Knoxville area at the approximate time of Teresa's death. Signals from various cell towers indicated Cobbins's phone was moving from Des Moines to Knoxville between 9:01 a.m. and 10:37 a.m. Then after 10:41 a.m., the cell phone moved back through Pleasantville toward Des Moines. The cell records revealed a number of calls between Cobbins's cell phone and Miller's cell phone or the phone at Marzetti's. Police also found Mapquest directions to Teresa's home in Cobbins's house with notations in Miller's handwriting.

The State filed a trial information on February 18, 2011, charging Miller with murder in the first degree. Miller sought a change of venue based on publicity regarding Cobbins's recent trial. The court granted the change of venue on March 8, 2012, moving the trial from Marion County to Clarke County. Miller's

trial started on March 19, 2012, and on March 29, 2012, the jury returned a guilty verdict on the first-degree murder charge. The court sentenced Miller to life in prison without the possibility of parole. He asks for a new trial in this appeal.

II. Scope and standards of review

We review a district court's rulings on challenges for cause during jury selection for an abuse of discretion. *State v. Mitchell*, 573 N.W.2d 239, 240 (Iowa 1997). We review hearsay claims for correction of errors at law. *State v. Paredes,* 775 N.W.2d 554, 560 (Iowa 2009). Because they implicate constitutional rights, we apply a de-novo standard of review to claims of ineffective assistance of counsel. *State v. Thompson*, 836 N.W.2d 470, 476 (Iowa 2013).

III. Discussion

A. Jury selection

Terry Cobbins's first-degree murder trial ended in a guilty verdict in Marion County about two weeks before attorneys selected a jury for Miller's case. Despite a change of venue to Clarke County, the district court encountered sixteen potential jurors in the sixty-four member pool who had been exposed to media coverage of Cobbins's case. The court decided the attorneys should question those sixteen potential jurors in pairs to probe the extent of their knowledge of the case.

After those interviews, defense counsel challenged for cause six prospective jurors who had heard something about the previous trial, identifying

them by their assigned numbers (7, 9, 23, 26, 33 and 37).[1] The district court only granted defense counsel's for-cause challenge to prospective juror number 9, who said he spent time looking at articles about the previous trial where the accomplice was convicted, remembered details like the defendant having a mistress, and was "not real happy about being on a trial like this." Of the five remaining jurors whom defense counsel challenged for cause, two were struck with peremptory challenges by the defense (26 and 33), two were struck with peremptory challenges by the State (23 and 37), and one sat on the jury (7). Juror 7, Brian Stuva, said he "scanned through" a "small article" in the Osceola Sentinel. Stuva said he "didn't pay much attention to it" and did not remember any names of the people involved, only that "there was someone else involved with this, and there was a trial here, and they were found guilty."[2]

In his appellant's brief, counsel argues Miller was prejudiced by "the forced expenditure of five peremptory strikes and the presence of three disqualified jurors on the jury." Those calculations included five prospective jurors (three who were removed with peremptory strikes and two who sat on the jury) not challenged for cause by defense counsel at trial. At oral argument, Miller's counsel clarified he was only contesting the court's denial of the

[1]Trial counsel actually listed seven juror numbers as part of her for-cause challenge, but one of those prospective jurors (18) was not part of the group questioned in pairs. Appellate counsel acknowledges prospective juror 18 appears to have been mistakenly included in the for-cause challenge.

[2]Stuva also said during voir dire that in general he was willing to consider all evidence and open to having his mind changed, giving as an example that he used to favor capital punishment, but read a book that changed his opinion.

challenges for cause, and was not claiming trial counsel was ineffective in connection with jury selection.

For-cause challenges are governed by Iowa Rule of Criminal Procedure 2.18(5)(k). Under that rule, counsel may seek to remove a potential juror for cause if the juror has formed a fixed opinion on the defendant's guilt. If the district court wrongly denies a challenge for cause, an appellate court will not presume prejudice just because the defendant was required to "waste" a peremptory challenge to remedy the error. *See State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993). After *Neuendorf*, the defendant must show not only that the district court erred in denying the for-cause challenge, but also that as a result of the defendant's use of all his peremptory challenges, either the challenged juror sat on the jury or the remaining jury was biased. *State v. Tillman*, 514 N.W.2d 105, 108 (Iowa 1994).

Miller contends the juror's knowledge that Cobbins was convicted in the murder plot "could not reasonably be set aside" because "it supplied a missing link in the State case against Michael Miller." Miller is persuasive is his argument that the publication of information about an accomplice's conviction may be so inherently prejudicial that exposure would taint a prospective juror. But here we do not have to decide if the court erred in denying the defense challenge for cause to juror Stuva because even assuming error, Miller cannot show prejudice.

Miller asked the supreme court to retain this case to clarify the prejudice standard where a disqualified panelist is actually seated on the jury. Miller argues in his brief that *Neuendorf* invalidated earlier cases where prejudice was

presumed because in those cases the disqualified panelists did not actually serve on the jury. Miller suggests even if the loss of a peremptory strike does not give rise to the presumption of prejudice, seating a biased juror should. Miller contends our supreme court, in deciding *State v. Mootz*, 808 N.W.2d 207, 222–26 (Iowa 2012), refined the prejudice test in *Neuendorf*.

Mootz addressed the wrongful denial of a peremptory strike in a reverse *Batson*[3] challenge, and thus did not directly speak to the question of prejudice when a trial court improperly rejects a challenge for cause under *Neuendorf*.

But even before *Neuendorf*, Miller's position would not have prevailed. In *State v. Beckwith*, 46 N.W.2d 20, 23 (Iowa 1951), *overruled by Neuendorf*, 509 N.W.2d at 746, the court described the previous test: "[I]f a disqualified juror is left upon the jury in the face of a proper challenge for cause, so that defendant must either use one of his peremptory challenges or permit the juror to sit, and if defendant does use all of his peremptory challenges, prejudice will be presumed." So it has always been the case that a defendant is required to exhaust his peremptory challenges to remove disqualified jurors, before the court would find prejudice. As the State argues on appeal: "Defendant cannot reap a windfall by declining to strike allegedly biased jurors at trial in the hope that an appellate court will grant him a new trial."

In this class "A" felony trial, Miller's attorneys and the prosecution each had ten strikes to exercise on prospective jurors. Iowa R. Crim P. 2.18(9). As discussed above, defense counsel used two of their ten peremptory strikes to

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[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

remove prospective jurors who had been listed in their challenge for cause. Defense counsel chose not to use any of their remaining eight peremptory strikes to remove juror Stuva. If Miller's trial attorneys had been concerned about Stuva's ability to be fair given his knowledge of Cobbins's trial, they could have used a peremptory strike to ensure he did not sit on the jury. Because they opted to exercise their peremptory strikes on other prospective jurors, Miller cannot show prejudice on appeal.

B. Coconspirator statements

In a pretrial motion in limine, defense counsel addressed the State's intent to offer statements Cobbins allegedly made to his neighbor, Tyree Lewis, and to his friend, Mario McPherson, recruiting them to participate in the conspiracy to kill Teresa. Trial counsel made the following argument:

> . . . I expect that these witnesses will at some point testify that Terry Cobbins solicited them to help him in his endeavor. I would anticipate that the court would allow those statements as coconspirator statements made in furtherance of a conspiracy.
>
> However, my concern is—beyond that we'll probably make an objection just to preserve the record. But I am especially concerned with anything beyond statements that are explicit solicitations to further the conspiracy.

The State argued the statements were admissible because Cobbins, a coconspirator, was trying to line up the help of Lewis and McPherson in furtherance of the conspiracy to murder Teresa. *See* Iowa Rule of Evidence 5.801(d)(2)(E). Defense counsel pointed out the distinction in the case law between statements soliciting assistance and idle chatter. *See State v. Kidd*, 239 N.W.2d 860, 865 (Iowa 1976).

The district court deferred a final ruling on the admissibility of the testimony until those witnesses were called to the stand. During the testimony of both Lewis and McPherson, defense counsel lodged objections to questions calling for out-of-court statements from Cobbins. The court overruled the objections and allowed those witnesses to repeat Cobbins's comments regarding his boss's desire to have his wife killed and Cobbins's solicitation of help in the endeavor. Where a district court admits coconspirator statements over a hearsay objection, the implication is that the court found a preponderance of the evidence pointing to the existence of a conspiracy. *State v. Florie*, 411 N.W.2d 689, 695 (Iowa 1987).

In his appellant's brief, Miller contends the district court mistakenly admitted those hearsay statements from Cobbins. He argues for the first time on appeal that the State did not prove the existence of a conspiracy. He emphasizes the State had no eyewitnesses to the crime and no DNA or other physical evidence from the scene directly linking Miller to his wife's murder. He asserts Miller, Bussey, and Cobbins worked together and "interacted as a matter of course"—undermining the theory that their contact before and after the killing contributed to the finding of a conspiracy.

The State contests Miller's preservation of error on this issue, pointing out Miller does not indicate in his brief how the issue was raised and decided at trial. *See* Iowa R. App. P. 6.903(2)(g)(1). The State also claims Cobbins's statements are not hearsay under rule 5.801(d)(2)(E) because they were offered against

Miller and made by a coconspirator during the course and in furtherance of the conspiracy.

Miller is urging a different theory on appeal than he did at trial. At trial, defense counsel did not question the existence of a conspiracy. Instead Miller's trial attorney argued some of Cobbins's remarks to Lewis and McPherson may have been "idle chatter" rather than serious invitations for them to join the conspiracy. *See United States v. Beech–Nut Nutrition Corp.,* 871 F.2d 1181, 1199 (2d Cir. 1989) (holding declarations must "aid or assist toward the consummation of the object of the conspiracy" and neither "idle chatter" nor a "merely narrative" description amount to furtherance of a conspiracy). On appeal, Miller attacks the district court's determination that a conspiracy existed and abandons the argument that Cobbins did not make the statements in furtherance of the conspiracy. A party must be consistent in his legal theory for relief. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) ("Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us [on appeal] that was not first sung in trial court."). We find Miller failed to preserve error.

Even if we were to overlook the error preservation problem, we would reject Miller's assertion the trial record did not reveal a conspiracy. A conspiracy is an agreement between two or more persons to accomplish an unlawful act or to do a lawful act in an unlawful manner. *State v. Ross*, 573 N.W.2d 906, 914 (Iowa 1998). The agreement may be shown by direct or circumstantial evidence. *Id*. Here, the State offered substantial evidence of a conspiracy among Miller,

Cobbins, and Bussey. For example, the State presented testimony from Amber Lyons, a cousin who frequently babysat for the Cobbins, that she often saw Cobbins and Miller sitting together in Miller's car in the driveway and once saw Miller leave a package for Cobbins in his car. Bussey's testimony suggested an agreement among the three men; Miller told him to pick up Cobbins at the hospital the morning of the murder and then Cobbins directed him to the Millers' house. Cell tower records showed continued phone contact between Cobbins and Miller during the trip to and from Knoxville. The three men went together to the rental car company after the murder. In addition, police found Mapquest directions to the Miller home, annotated by Miller, in Cobbins's residence. Miller also acknowledged during his interviews with police that he had been in contact with Cobbins. A wealth of evidence suggested an agreement among the three accomplices. Accordingly, the district court properly allowed Cobbins's coconspirator statements under rule 5.801(d)(2)(E)

C. Accomplice testimony

In his third assignment of error, Miller argues his trial counsel provided ineffective assistance by not asking for an instruction requiring the jurors to find evidence to corroborate the out-of-court statements attributed to Terry Cobbins, as well as the in-court testimony of Bernard Bussey. Miller asserts both Cobbins and Bussey qualify as accomplices under Iowa law.

To prove his claim of ineffective assistance of counsel, Miller must show his trial attorneys failed to carry out a material duty and, as a result, Miller's defense suffered prejudice. *See Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa

2012); *see also Strickland v. Washington*, 466 U.S. 688, 687 (1984). Miller must prove both prongs by a preponderance of the evidence. *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). To establish his counsel breached a duty, Miller must show their performance fell below the standard of reasonably competent attorneys. *See Strickland*, 466 U.S. at 687. To establish prejudice, he must show but for the absence of the corroboration instruction, a reasonable probability existed the outcome of the trial would have been different. *See id*. at 694.

Generally, we do not resolve ineffective-assistance issues on direct appeal, preferring to leave them for postconviction relief proceedings. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Those proceedings allow the parties to develop an adequate record and the attorneys accused of error to respond to the applicant's claims. *Id*. But we will decide ineffective-assistance claims on direct appeal when the record is sufficient to resolve them. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). The record here is adequate to reject Miller's ineffectiveness claim.

Miller rests his ineffective-assistance claim on Iowa Rule of Criminal Procedure 2.21(3), which provides, in pertinent part:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The problem with Miller's argument is Cobbins did not testify. As discussed above, Cobbins's out-of-court accusations that Miller wanted his wife killed and

Miller was willing to pay Cobbins to handle the situation were admitted as coconspirator statements under Rule 5.801(d)(2)(E).

We read the term "testimony" in Rule 2.21(3) as meaning the declaration of a witness under oath. *Cf. In re Marriage of Hutchison*, 558 N.W.2d 442, 446 (Iowa 1999) (defining "testimony" in Iowa Code section 622.10). The Texas Court of Criminal Appeals has interpreted its rule requiring the corroboration of accomplice testimony to apply only to in-court testimony, not to out-of-court statements. *Bingham v. State*, 913 N.W.2d 208, 211 (Tex. Crim. App. 1995); *but see People v. Williams,* 940 P.2d 710, 772 (Cal. 1997) (interpreting "testimony" within the meaning of California's corroboration statute as including all oral statements made by an accomplice or coconspirator under oath in a court proceeding and all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt "which are made under suspect circumstances"—for example, when the accomplice is being questioned by police.).

It makes sense to assign the word "testimony" its ordinary meaning given the policy behind the corroboration rule, as articulated in 7 Wigmore, Evidence § 2057 (Chadbourn rev. 1978) at 417:

> The reasons which have led to this distrust of an accomplice's testimony are not far to seek. He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself, and in that respect he has burned his ships. But he can escape the consequences of this acknowledgment, if the prosecuting authorities choose to release him provided he helps them to secure the conviction of his partner in crime: . . . It is true that this promise of immunity or leniency is usually denied, and may not exist; but its existence is always suspected. The essential element, however, it must be

> remembered, is this supposed promise or expectation of conditional clemency. If that is lacking, the whole basis of distrust fails. We have passed beyond the stage of thought in which his commission of crime, self-confessed, is deemed to render him radically a liar.

Only when an accomplice takes the witness stand will the "supposed promise or expectation of clemency" that justifies the rule become apparent. *See Bingham*, 913 S.W.2d at 211. The same concern does not arise when the statement of the accomplice is extra-judicial. Because the rule only addresses in-court testimony, Miller's counsel had no duty to seek a corroboration instruction concerning the statements of accomplice Cobbins.

To the extent Miller is arguing counsel should have asked for a corroboration instruction to address Bussey's testimony, we find he is unable to satisfy the prejudice prong of the *Strickland* test. Miller's brief highlights the perceived prejudice from the out-of-court declarations by Cobbins, calling them "the most damning evidence offered by the State." But Miller does not address any prejudice from Bussey's testimony and we find none.

Bussey testified he drove Cobbins to the Millers' home in Knoxville. The record does not show the State charged Bussey with any crime or that Bussey had the knowledge or intent necessary to charge him with any crime. But we will assume without deciding that Bussey was Miller's accomplice. *See State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004) (stating an accomplice is a person who could be charged with and convicted of the specific offense for which an accused is on trial).

The question then is whether the State offered sufficient independent evidence to corroborate Bussey's testimony. *See State v. Barnes*, 791 N.W.2d

817, 824 (Iowa 2010). If the State presented sufficient independent evidence, counsel's failure to challenge the corroboration would not be prejudicial. *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Our cases do not require corroborative evidence to be strong as long as it connects the accused to the crime and supports the accomplice's credibility. *See Barnes*, 791 N.W.2d at 824; *see also State v. Bugley*, 562 N.W.2d 173, 176 (Iowa 1997) (explaining corroborative evidence may be direct or circumstantial).

We find the State presented strong evidence corroborating Bussey's testimony. The analysis of cell phone records showing Cobbins's movements the morning of the murder and his connection with Miller link Miller to Cobbins's crime and support Bussey's truthfulness. Testimony from the rental car agent also connects Miller to Bussey and Cobbins. *See State v. Palmer*, 569 N.W.2d 614, 616 (Iowa Ct. App. 1997) (stating independent evidence that a defendant is seen in the company of the other perpetrators close in time to the crime corroborates accomplice testimony). The Mapquest printout found at Cobbins's house also provides a link between the shooter and the motivated husband. Moreover, Miller's own shifting version of events in his interviews with law enforcement corroborate Bussey's testimony. *See State v. Douglas*, 675 N.W.2d 567, 572 (Iowa 2004) (holding a defendant himself may furnish required corroboration). No reasonable probability exists that the outcome of the prosecution would have been different had counsel requested a jury instruction on corroboration. *See Barnes*, 791 N.W.2d at 824.

In conclusion, we find Miller failed to show he was entitled to a new trial as a result of either the denial of defense counsel's challenge for cause to juror Stuva, or the district court's admission of Cobbins's coconspirator statements, or counsel's failure to seek a corroboration instruction.

AFFIRMED.