IN THE COURT OF APPEALS OF IOWA

No. 6-1055 / 06-0044
Filed March 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PATRICK JOHN SULLIVAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, District Associate Judge.

Patrick John Sullivan appeals from his conviction of assault by use or display of a dangerous weapon. **AFFIRMED.**

Patricia Reynolds, Acting Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jill Dashner, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Patrick John Sullivan appeals from his conviction of assault by use or display of a dangerous weapon in violation of Iowa Code sections 708.1 and 708.2(3) (2005). He contends his trial counsel was ineffective in several respects. We affirm.

I. Background Facts and Proceedings

In January 2005 Sullivan was a nonpaying guest of his friend, Joshua Bash, in an apartment Bash shared with Eric Bernstrom. Sullivan slept on the floor in Bash's bedroom, and Bernstrom normally did not have much interaction with Sullivan.

At approximately 2:30 a.m. on January 23, 2005, Bernstrom was sleeping in his bedroom in the apartment. He awoke to find Sullivan standing in his bedroom holding a shotgun. Sullivan asked Bernstrom if he "knew what the most dangerous part about the shotgun was." When Bernstrom said he did not know, Sullivan racked the shotgun and said, "it [is] the man who owns it." Sullivan also told Bernstrom "to never talk behind his back again and to not leave the apartment door unlocked because he had about $500 worth of stuff in Josh's room." Sullivan then said, "[A]re we clear?" When Bernstrom answered, "Yes," Sullivan left the room.

Bernstrom was terrified by the encounter with Sullivan. He lay in bed for approximately five minutes before calling his friend, Nate Osmundson, who lived in a downstairs apartment in the same building. Bernstrom went to Osmundson's apartment without being seen by Sullivan. He told Osmundson and Osmundson's roommate, Sam Goertz, what had transpired. Bernstrom was so

frightened by the encounter that he sat on Osmundson's kitchen floor with his knees clutched to his chest and cried. Bernstrom, Osmundson, and Goertz left the apartment to avoid any further contact with Sullivan. They called the police from another friend's house.

Cedar Falls police officer Martin Beckner interviewed Bernstrom at about 3:20 a.m. After the interview, Officer Beckner applied for a warrant to search for the shotgun. When officers arrived at Bernstrom's apartment to execute the warrant, they knocked and announced their presence. The officers received no answer, so they entered the apartment using Bernstrom's key. Once inside, they discovered Sullivan and Bash asleep in Bash's bedroom. The officers located a Remington 870 shotgun and a single shotgun shell on the floor of the bedroom. They also discovered several knives and a sledgehammer.

The State charged Sullivan with assault by use or display of a dangerous weapon. At trial, Bash testified for the defense. He claimed Sullivan and several friends left a party about 1:30 a.m. on January 23 and returned to the apartment. Bash claimed he was with Sullivan all night playing guitar in his bedroom and never saw Bernstrom. Three of Sullivan's friends—Matt Carlson, Nick Sheldon, and Aaron Mangel—testified they left the party between 2:00 and 2:45 a.m. and stayed with Sullivan in Bash's bedroom until approximately 5:00 a.m. Sullivan's friends also claimed Sullivan never left the room. All of Sullivan's friends admitted Sullivan had shown off his recently acquired shotgun after they met at the apartment. Sullivan denied threatening Bernstrom with the shotgun or seeing Bernstrom at any time that night.

The jury returned a guilty verdict. Sullivan was sentenced on December 5, 2005, to a term of incarceration of two years and a $500 fine; the sentence and fine were suspended, and Sullivan was placed on probation for two years. Sullivan has appealed. He contends his trial counsel was ineffective for failing to object to testimony regarding his post-arrest silence, for failing to give written notice of his alibi defense, and for failing to request alibi and impeachment jury instructions.

II. Scope of Review

We review ineffective assistance of counsel claims de novo. *State v. Collins*, 588 N.W.2d 399, 401 (Iowa 1998).

III. Discussion

Sullivan asserts his trial counsel was ineffective. We typically preserve ineffective assistance claims for postconviction relief; however, if the record sufficiently presents the issues, we will resolve a defendant's claims on direct appeal. *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997). We find the record in this case adequate to rule on Sullivan's ineffective assistance claims.

To establish ineffective assistance of counsel, Sullivan must prove (1) his attorney's performance fell below "an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed.2d 674, 693 (1984). To establish breach of duty, Sullivan must overcome the presumption counsel was competent and prove counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish prejudice, Sullivan must show a reasonable probability that, but for counsel's

errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Sullivan's ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

A. Post*-Miranda *Silence. Sullivan first claims his trial counsel should have objected to police testimony concerning Sullivan's post-*Miranda* silence. At the time Officer Beckner spoke with Sullivan and Bash, they had been given *Miranda* warnings and were handcuffed as a safety precaution while officers searched the premises for the shotgun. On direct examination, Officer Beckner was asked whether Sullivan or Bash spoke to him about the incident. Officer Beckner stated, "They indicated they no longer—or they did not want to answer any questions or make any statements." On cross-examination, defense counsel inquired whether the officer had asked Sullivan or Bash who owned the knives and sledgehammer. The officer answered, "They indicated to me that they did not want to speak with me so I did not ask any specific questions. I was trying to honor their *Miranda* rights." Defense counsel later elicited a statement from Officer Jeff Sitzman that Sullivan made no admissions of guilt. On redirect examination of Officer Sitzman, the prosecutor inquired, "Mr. Sullivan made no statements, did he?," to which the officer replied, "That's correct."

Sullivan maintains he was under arrest at the time he refused to speak with the police and defense counsel should have objected to testimony the prosecutor elicited regarding his post-arrest, post-*Miranda* silence.[1] Even if we

[1] The State maintains Sullivan was not under arrest at the time he refused to speak with the police.

assume defense counsel could have successfully objected to the disputed testimony, we find Sullivan was not prejudiced by this alleged omission.

The prosecutor asked only two questions about any statement Sullivan might have made to the police, and Sullivan points to no evidence that the prosecutor made use of the responsive testimony, during either witness examination or closing statements, to impeach Sullivan's version of events. *Cf. State v. Metz*, 636 N.W.2d 94, 97 (Iowa 2001) (quoting *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 96 (1976)) ("[I]t [is] fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."). In addition, defense counsel elicited testimony that Sullivan had made no admissions of guilt. Finally, and perhaps most importantly, the record contains strong evidence of Sullivan's guilt. Bernstrom testified in detail regarding his encounter with Sullivan, and the record reveals Bernstrom was clearly terrified by the incident. In addition, the police found a shotgun matching Bernstrom's description next to Sullivan in Bash's bedroom, and Sullivan's friends admitted he had shown off his shotgun that night.

In light of the foregoing, Sullivan has not proved the result of the proceeding would have differed if his trial counsel had objected to testimony regarding his refusal to speak with the police. Because Sullivan has not demonstrated prejudice, we reject this assignment of error.

B. Notice of Alibi Defense and Alibi and Impeachment Instructions.

Sullivan claims his trial counsel was also ineffective for failing to give written notice of his alibi defense and for failing to request alibi and witness-

impeachment jury instructions. Sullivan asserts he was prejudiced by the failure to give the written alibi notice and request the alibi jury instruction because the jury "was not allowed to consider the legal ramifications of his theory of defense." He contends he was prejudiced by counsel's failure to request an impeachment instruction because the jury was not allowed to evaluate Bernstrom's testimony in light of the fact Bernstrom had been convicted of simple misdemeanor theft when he was eighteen or nineteen years old.[2] Again, we find the defendant was not prejudiced by these alleged omissions.

Even though trial counsel did not file a written notice of an alibi defense, Sullivan was allowed to present the testimony of four witnesses who stated Sullivan never left Bash's room and never encountered Bernstrom the night of the incident. In addition, even if an alibi instruction and an impeachment instruction were available in Sullivan's case, as a legal proposition, "not every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency." *Wycoff v. State*, 382 N.W.2d 462, 472 (Iowa 1986) (citation omitted). We have reviewed the totality of the instructions submitted to the jury, and we conclude they adequately drew the jury's attention to questions of witness credibility and allowed the jury to properly assess the credibility of all the witnesses. *See State v. Shanahan*, 712 N.W.2d 121, 140 (Iowa 2006) ("In evaluating a challenge to jury instructions, we consider

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[2] Sullivan claims his trial counsel should have requested the following instruction:

> [The witness (name of witness) has admitted [he] [she]] [You have heard evidence claiming that the witness (name of witness)] was convicted of a crime. You may use that evidence only to help you to decide whether to believe the witness and how much weight to give their testimony.

Iowa Crim. Jury Instruction 200.36.

the instructions as a whole and not separately.").[3] Accordingly, Sullivan has failed to demonstrate a reasonable probability that the jury would have reached a different verdict if defense counsel had filed a written notice or requested alibi and impeachment jury instructions.

IV. Conclusion

Because Sullivan has failed to demonstrate any alleged breach of an essential duty by his trial counsel affected the outcome of his trial, we reject his claim of ineffective assistance of counsel and affirm his conviction and sentence for assault by use or display of a dangerous weapon.

AFFIRMED.

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[3] In particular, Jury Instruction No. 16 stated:

> Decide the facts from the evidence. Consider the evidence using your observations, common sense and experience. Try to reconcile any conflicts in the evidence; but if you cannot, accept the evidence you find more believable.
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> In determining the facts, you may have to decide what testimony you believe. You may believe all, part or none of any witness's testimony.
>
> There are many factors which you may consider in deciding what testimony to believe, for example:
>
> 1. Whether the testimony is reasonable and consistent with other evidence you believe.
> 2. Whether a witness has made inconsistent statements.
> 3. The witness's appearance, conduct, age, intelligence, memory and knowledge of the facts.
> 4. The witness's interest in the trial, their motive, candor, bias and prejudice.