IN THE COURT OF APPEALS OF IOWA

No. 6-147 / 04-1662
Filed April 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TRENTON ANDREW HOWARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary McKenrick, Judge.

Trenton Howard appeals his convictions for murder in the first degree, robbery in the first degree, theft in the first degree, willful injury with serious injury, and conspiracy to commit a felony. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Trenton Howard appeals following his convictions for murder in the first degree, robbery in the first degree, theft in the first degree, willful injury with serious injury, and conspiracy to commit a felony. He contends there was insufficient evidence to support his convictions and claims his trial counsel was ineffective in several respects. We affirm.

I. Background Facts & Proceedings

Mark Willis was last seen alive at approximately 4:30 p.m. on February 20, 2004, when he stopped at Jack's Brake & Alignment in Davenport to visit with his friends, Cheryl and Terry Weipert, the owners of the business. Around 5 p.m., Willis left the brake shop driving his maroon Jeep Grand Cherokee. He intended to stop at his home to take a nap and eat dinner before reporting for work at FBG, a janitorial service in Davenport, at 10 p.m. After more than ten years of never missing a day of work, Willis did not show up for work that evening. Cheryl Weipert called the police to report Willis missing on February 23, 2004.

Several days later, law enforcement officers located Willis's body lying facedown in a creek at the bottom of a steep incline near a gravel road in rural Scott County. Willis had been repeatedly stabbed and beaten, and the medical examiner opined he died from drowning. Illinois State Troopers found Willis's abandoned Jeep on Interstate 74 near Bloomington, Illinois. Someone had fitted the Jeep with stolen license plates. Willis had kept the Jeep in pristine condition, but when it was discovered, an evidence technician had to sift through layers of food, clothing, cigarettes, and garbage while processing the vehicle for evidence. Howard's fingerprints were found inside the vehicle.

A police investigation revealed that Lance Brady, Kyle Bahnsen, and Kyle Long were gathered at Brady's home on the evening of February 20, 2004. The three friends were playing video games and smoking marijuana. Christopher Langley arrived at Brady's house sometime between 6 and 7 p.m. Langley asked Brady to come outside. Brady left his home and observed a "new Jeep." Langley's friends, Mike Cargill and the defendant, Trenton Howard, were inside the vehicle. Brady got into the Jeep, and the young men left to buy marijuana. Later, the men returned to Brady's house to pick up Bahnsen and Long.

Later that evening, the group decided to go play pool at Miller Time, a local bowling alley. The six young men left the house in the Jeep. Howard told Brady, Bahnsen, and Long that the Jeep belonged to his grandmother; however, the teens were then told the Jeep had been taken from someone who had been killed. In fact, the Jeep in which the group was riding belonged to Mark Willis. At one point, Langley referred to himself, Cargill, and Howard as "thieves and murderers."

Before going to Miller Time, Langley told the group he wanted to check on a dead body. The young men drove to a secluded area on a gravel road. Langley and Cargill exited the Jeep, said they were going to check on a body, and then went down a steep incline and "disappeared." After several minutes, they returned to the Jeep and told the others the man was dead and "still lying face down in a creek." They threatened to kill Brady, Bahnsen, and Long if they told anyone. Before heading to Miller Time to play pool, the group stopped at a mall, and Langley used an ATM machine and purchased a hat. Langley told Long he was using the debit card of the man they killed.

The group of six stayed at Miller Time until 11 p.m. or midnight. Before they left the parking lot, they drove to the rear of the building and stopped. Howard exited the Jeep, retrieved a white bag from the back of the vehicle, and threw the bag into a wooded area behind Miller Time. Langley, Howard, or Cargill told the others in the vehicle the bag contained bloodstained clothing from the man they killed.

Later, Davenport police officers recovered the white bag from the wooded area behind Miller Time. The bag contained bloody clothing, a boot, and a sweatshirt. The sweatshirt had a "mixture of DNA." Howard was identified as a possible contributor to the mixture.[1] Willis's DNA was also found on other bloody clothes in the bag, and a hair discovered in the bag was genetically consistent with Langley.

The group left the Miller Time parking lot in the Jeep with Langley behind the wheel. As they drove away, Howard yelled out the window of the vehicle, "I'll kill you too. You want to race?" Langley then drove the Jeep back to Brady's house and dropped off Brady, Long, and Bahnsen.

Langley, Cargill, and Howard embarked on a trip to Florida in Willis's Jeep. Trial testimony revealed Willis's debit card was used in Iowa, Illinois, Florida, Mississippi, Tennessee, Georgia, and Kentucky. Receipts from a variety of purchases matched many of the items found in the Jeep. Langley hired a limousine driver in Bloomington, Illinois, where Willis's Jeep was found

[1] A criminalist testified that if this was a two-person mixture, then Howard, as well as 1 out of 77,000 unrelated individuals were included as possible contributors to this mixture of DNA. Willis, Langley, and Cargill were eliminated as possible DNA contributors to the mixture.

abandoned on the side of the road, to drive him and his friends to the Quad Cities area. Howard was witnessed using Willis's debit card to purchase gas at a Casey's store in Davenport.

On March 25, 2004, the State charged Howard with the offenses of murder in the first degree in violation of Iowa Code sections 707.2(1)-(2) and 708.4 (2003); robbery in the first degree in violation of sections 711.1-.2; theft in the first degree in violation of sections 714.1(1) and 714.2(1)-(2); willful injury with serious injury in violation of section 708.4(1); conspiracy to commit a felony in violation of section 706.1(1); and kidnapping in the first degree in violation of sections 710.1-.2. Jury trial commenced on August 30, 2004. The jury convicted Howard of murder, robbery, theft, willful injury, and conspiracy charges, but acquitted him of the kidnapping charge.

Howard was sentenced to a life term for the first-degree murder conviction, twenty-five years in prison for the first-degree robbery conviction, and ten years in prison for the theft conviction. The offenses of willful injury and conspiracy merged into Howard's other convictions. All sentences were imposed concurrently. Howard now appeals.

II. Discussion

Howard contends there was insufficient evidence to support the guilty verdicts and claims he was denied effective assistance of counsel.

A. Sufficiency of the Evidence

Howard claims the record contains insufficient evidence to support his convictions because no evidence shows he was involved in the murder and robbery other than the DNA mixture. We review this claim for the correction of

errors at law and uphold the jury's verdict if substantial evidence supports it. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). Substantial evidence is evidence that could convince a trier of fact the defendant is guilty of the crimes charged beyond a reasonable doubt. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). We consider all the evidence in the record, not just the evidence supporting guilt. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). We also consider legitimate inferences and presumptions that may reasonably be deduced from the evidence in the record. *Id.* We view the evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Circumstantial and direct evidence are equally probative, but evidence that merely raises suspicion, speculation, or conjecture is insufficient. Iowa R. App. P. 6.14(6)(*p*); *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa Ct. App. 1999).

We find the record contains ample evidence supporting Howard's convictions for first-degree murder, robbery, theft, willful injury, and conspiracy. Mark Willis was last seen alive at about 5 p.m. on February 20, 2004. Later that evening, Howard, Langley, and Cargill arrived at Brady's house driving Willis's Jeep. Howard boasted to Brady, Long, and Bahsen that they had killed someone for the Jeep. A short time later, the group checked on a body in a creek bed. Brady, Long, and Bahnsen were threatened with harm if they told anyone about the murder. Howard disposed of a bag containing bloody clothing with his DNA and other clothing containing the victim's DNA behind the Miller Time building. After Howard left Miller Time with his friends in Willis's Jeep, he yelled out the window, "I'll kill you too." In addition, Langley referred to himself, Cargill, and Howard as "thieves and murderers."

Howard fled to Florida with his friends in the victim's Jeep, using the victim's debit card to purchase items along the way. When the Jeep was found abandoned, Howard's fingerprints were inside, as well as items matching receipts from purchases made with the victim's stolen debit card. Furthermore, a witness saw Howard use the victim's debit card to purchase gas. Based on this and other evidence which we have already discussed, the jury could have reasonably concluded Howard participated in the murder and robbery of Mark Willis. We conclude substantial evidence supports all of Howard's convictions.

B. Ineffective Assistance of Counsel Claims

Howard contends he was denied effective assistance of counsel. He claims his trial counsel was ineffective for failing to make a proper record because a videotaped deposition was not played in full; for failing to object to testimony discussing the use of marijuana; and for allowing testimony of the State's DNA expert to be read into the record because the cross-examination was conducted by co-defendant's counsel. Howard also claims there was an unreported incident involving the judge having improper contact with a juror.

Because Howard's ineffective assistance claims arise from his Sixth Amendment right to counsel, our review is de novo. *State v. Scalise*, 660 N.W.2d 58, 61 (Iowa 2003). Howard bears the burden of demonstrating ineffective assistance of counsel. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). To establish his ineffective assistance claim, Howard must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted from this omission. *State v. Constable*, 505 N.W.2d 473, 479 (Iowa 1993). To prove the first prong, Howard must overcome

the presumption counsel was competent and show counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove the second prong, Howard must show a reasonable probability that but for counsel's errors, the result of the proceeding would have differed. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We may dispose of Howard's ineffective assistance claims if he fails to prove either breach of duty or prejudice. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Generally, we preserve ineffective assistance claims for postconviction relief because this affords the defendant an evidentiary hearing and permits the development of a more complete record. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).[2] However, if the record sufficiently presents the issues, we will resolve Howard's claims on direct appeal. *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997). With these principles in mind, we now turn to Howard's claims.

Howard first contends his trial counsel was ineffective for failing make a proper record when a videotaped deposition was allegedly not played in full at trial. Howard's appellate brief states that Howard and his trial counsel "have each asserted, off the record," that "at least one video-tape deposition was not played in full when presented to the jury."[3] On appeal, Howard does not identify

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[2] Pursuant to a recent statutory change, an ineffective assistance of counsel claim in a criminal case "need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for possible postconviction relief purposes." Iowa Code § 814.7(1) (2005).

[3] Howard does not identify the videotape in his brief; however, we assume from his reference to the appendix that his complaint concerns the videotaped deposition of an Illinois State Trooper. The appellate record reveals the State attempted to show the videotaped deposition of Illinois State Trooper Vernon Smith at trial. When the videotape player malfunctioned, the deposition was read to the jury by counsel, but the

any alleged discrepancy between the deposition testimony read to the jury by counsel and the videotaped deposition which was played for the jury. In addition, Howard does not explain why his trial counsel failed to perform an essential duty by failing to make a record regarding this evidence, and he does not argue he suffered any prejudice. Because Howard has failed to demonstrate either a breach of duty or prejudice, we reject this assignment of error.

Howard next claims his trial counsel was ineffective for failing to object to testimony regarding marijuana use. The record contains testimony that Long and Bahnsen were at Brady's house smoking marijuana when Langley arrived. Langley left with Brady to get more marijuana. Cargill and Howard were in the car at that time. There was no testimony establishing Howard used marijuana, and there was no further mention of marijuana use by anyone that night. Because the testimony regarding marijuana use did not directly implicate Howard and arguably diminished the credibility of several of the State's witnesses, we conclude trial counsel could reasonably have decided not to object to testimony regarding drug consumption. *See State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999) ("Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel."). In addition, Howard has failed to establish prejudice. We find no reasonable probability that Howard would not have been convicted of the offenses submitted to the jury if his counsel had successfully objected to testimony regarding the use of marijuana by others. Consequently, we reject this claim of ineffective assistance of counsel.

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court reporter did not transcribe it. The following day, after the video equipment had been repaired, the videotaped deposition was played for the jury without objection.

Howard's third claim of ineffective assistance is that his trial counsel should not have relied on co-defendant's counsel's cross-examination of the State's DNA expert. He claims his counsel should have personally questioned the expert regarding the mixture of DNA on the sweatshirt discovered in the bag containing bloody clothing. We conclude Howard has failed to establish either a breach of duty or prejudice. Trial counsel could have decided not to cross-examine the DNA expert in an attempt to minimize the impact of the testimony about the DNA evidence, or he could have determined that all pertinent questions had already been asked of the expert, given the technical nature of his testimony. We presume counsel's conduct falls within the wide range of reasonable professional assistance, and we will not second guess reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). We also conclude Howard has failed to demonstrate prejudice. Upon careful review of the record, we find no reason to believe the outcome of the case would have been different if Howard's trial counsel had conducted his own cross-examination of the State's DNA expert.

Howard presents his final claim of ineffective assistance of counsel in the following two sentences: "Defendant also asserts there was an un-reported instance where the Judge had improper contact with a juror. There is nothing on the record, nor is there any evidence that trial counsel was aware of said contact." We find Howard's unsupported claim is insufficient to address on direct appeal or preserve for possible postconviction relief. *State v. Alloway*, 707 N.W.2d 582, 587 (Iowa 2006) (holding ineffective assistance claims asserted on direct appeal will only be preserved for postconviction relief if the defendant

makes a minimal showing of the potential viability of the claim). Howard's bald assertion is insufficient to preserve this claim for postconviction relief. *Id*. We conclude Howard has waived this claim.

III. Conclusion

Because we find no merit in any of Howard's appellate claims, we affirm his convictions for murder in the first degree, robbery in the first degree, theft in the first degree, willful injury with serious injury, and conspiracy to commit a felony.

AFFIRMED.