IN THE COURT OF APPEALS OF IOWA

No. 6-216 / 05-0204
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUCAS ALLEN MCALISTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn, Judge.

Lucas McAlister appeals from his conviction and sentence for first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

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

HECHT, J.

Lucas McAlister appeals from his conviction and sentence for first-degree robbery. We affirm.

I. Background Facts and Proceedings.

On the evening of February 9, 2004, Darren Taeger was stabbed while riding in a vehicle with Lucas McAlister and Clayton McCormick. McAlister had met McCormick while both were serving in the Iowa National Guard and had agreed to introduce McCormick to Taeger, after McCormick expressed an interest in purchasing a large amount of marijuana. McAlister then called Taeger to set up the details of the drug buy. McAlister and McCormick borrowed the vehicle from a friend in order to facilitate the purchase,[1] and drove around the streets of Burlington in an effort to locate Taeger, who was on foot.

The pair eventually located Taeger, who showed them the marijuana in his possession. McAlister informed Taeger that they needed to drive to a house outside town where another friend reportedly had the cash for the buy. When they arrived there, McAlister approached the house but quickly returned to the vehicle, reporting that the purported buyer was at a different house in Burlington. At this point, Taeger was sitting in the front-passenger seat, McCormick was sitting directly behind him in the back seat, and McAlister was the driver. According to Taeger, when the vehicle came to a stop sign at the intersection of Spring Street and North Fifth in Burlington, McAlister suddenly swung his right arm across and stabbed Taeger in the chest. As Taeger and McAlister struggled

[1] The owner of the vehicle, Derrick Hirsbrunner, testified he lent the vehicle to McAlister in exchange for a half ounce of the marijuana McAlister and McCormick planned on procuring.

with the knife, McAlister ordered McCormick to grab Taeger. As McCormick attempted to restrain Taeger from behind, Taeger eventually let go of the knife and was able to exit the vehicle. Taeger was later found lying in the middle of the street by a resident of the neighborhood and was treated at a local hospital for the stab wound which entered the lung and severed an artery. While officers later recovered the marijuana from the scene, Taeger was unable to recall how he managed to retain possession of the marijuana.[2]

McAlister and McCormick were soon arrested en route to a friend's home in Toledo, Ohio.[3] In a February 10 videotaped interview, McAlister stated that Taeger acted strangely after they picked him up; that Taeger eventually drew a knife; and that McAlister stabbed Taeger following a struggle. McAlister informed the investigator that he offered to drive the wounded Taeger to a hospital, but Taeger chose instead to throw something out of the window and exit the vehicle. When the investigator accused McAlister of intending to rob Taeger, McAlister quickly changed his story, admitting that he had planned the transaction with Taeger and had offered McCormick half of the marijuana McAlister planned to steal in exchange for his assistance. McAlister and McCormick were then charged with first-degree robbery resulting in serious bodily injury.

McAlister was interviewed a second time by investigators on June 11, this time while in the presence of his attorney. McAlister stated that while he was on

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[2] A blood test performed on Taeger while he was being treated for the stab wound indicated that Taeger had cocaine in his blood, although Taeger did not recall using cocaine on the evening in question.

[3] For the two and a half months that followed, McAlister and McCormick shared a jail cell, where according to McCormick, the two agreed to tell investigators that McAlister had stabbed Taeger in self-defense.

National Guard duty he had met with several members of an area drug task force about becoming an informant.[4] According to McAlister, McCormick had subsequently approached him asking whether McAlister could help him set up a large marijuana buy. McAlister stated that he had agreed to contact Taeger on McCormick's behalf in an effort to develop contacts for the drug task force. While McAlister admitted that he had brought along a knife for protection, he claimed he had given the knife to McCormick. McAlister stated that while he was driving, he felt something brush his right arm. When he looked to the right, he saw his knife in Taeger's chest, and had inferred that McCormick had stabbed Taeger from the back seat.

McAlister admitted that after the stabbing, he had driven to his mother's home and informed his brother that he had stabbed someone in self-defense. McAlister posited, however, that his self-defense claim had been procured through McCormick's persistent threats of physical violence against both McAlister and his family.[5] McAlister also claimed that while he and McCormick shared a jail cell, McCormick had monitored his phone calls and mail to ensure McAlister's continued adherence to the self-defense story.

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[4] Deputy Dean Salsberry, a member of the drug task force, confirmed that McAlister had signed a written informant agreement and had listed Taeger as a potential source of drugs. Salsberry, however, had instructed McAlister that he was not yet authorized to set up any drug buys without task force involvement and that he would be subject to prosecution for any unauthorized deals.

[5] McAlister's father testified that McAlister had called from jail requesting him to place money in McCormick's jail account. His mother testified that when McAlister had arrived at her home shortly after the stabbing, he told her to call police, but later retracted that request when he saw McCormick waiting outside.

At trial, both Taeger and McCormick[6] testified on behalf of the State, claiming McAlister had set up the drug buy and had stabbed Taeger in an effort to facilitate the theft. Derrick Hirsbrunner, the friend who had loaned his vehicle to McAlister, testified that a few days before the stabbing, McAlister had mentioned stealing drugs from someone. During that conversation, McAlister had allegedly made a stabbing motion with his arm, but at that time Hirsbrunner believed McAlister was joking. Detective Swore, who had conducted the two interviews with McAlister, testified to multiple inconsistencies in McAlister's versions of the events. Swore also testified that he did not believe McCormick could have stabbed Taeger because the location, angle and depth of the stab wound inflicted was inconsistent with McCormick's backseat position. Swore also noted the numerous similarities between Taeger and McCormick's versions of the incident.

McAlister was ultimately convicted of first-degree robbery and was sentenced to twenty-five years in prison and a $7,500 fine. On appeal, McAlister asserts several claims of ineffective assistance of counsel, including counsel's failure to (1) assert a detailed motion for judgment of acquittal, (2) move to suppress his interview statements, (3) request a limiting instruction in connection with his videotaped interview, (4) object to certain questions posed to Taeger, and (5) request inconsistent statement instructions concerning the testimony of Taeger and Hirsbrunner. McAlister also contends the district court erred in

[6] We note that McCormick's testimony was secured as part of a plea agreement to a lesser charge. We also note that Taeger's testimony was secured as a result of an immunity guarantee.

refusing to include a specific reference to Taeger in jury instruction 10a regarding prior inconsistent statements.

II. Scope and Standard of Review.

We review claims asserting trial counsel's ineffective assistance de novo. *Ledezma v. State,* 626 N.W.2d 134, 142 (Iowa 2001). Claims of ineffective assistance of counsel raised on direct appeal are generally preserved for postconviction relief proceedings so that a sufficient record can be developed, and so attorneys whose ineffectiveness is alleged may have an opportunity to defend their actions. *State v. Allen,* 348 N.W.2d 243, 248 (Iowa 1984). We note claims of ineffective assistance of counsel need not be raised on direct appeal to preserve them for postconviction proceedings. Iowa Code § 814.7 (2005). But where such claims are advanced on direct appeal, and the record is adequate to permit our review of them, or where the record permits us to determine whether prejudice resulted from counsel's alleged unprofessional error, we may decide them on direct appeal. *Allen,* 348 N.W.2d at 248.

We review for correction of errors at law the district court's refusal to include a specific reference to Taeger's testimony in the jury instruction that addressed prior inconsistent statements. *See* Iowa R. App. P. 6.4; *State v. Murphy*, 462 N.W.2d 715, 716 (Iowa Ct. App. 1990).

III. Discussion.

A. Ineffective Assistance of Counsel.

A defendant receives ineffective assistance of counsel when (1) trial counsel fails in an essential duty and (2) prejudice results. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693

(1984). The defendant bears the burden of demonstrating ineffective assistance of counsel, and both prongs of the claim must be established by a preponderance of the evidence before relief can be granted. *Ledezma,* 626 N.W.2d at 142. To prove prejudice from an alleged breach, McAllister must convince us "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. If McAlister fails to meet his burden with respect to either prong, his claim is without merit, and will be dismissed. *Id.* at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

1) Failure to Properly Articulate Motion for Judgment of Acquittal.

McAlister's first claim of ineffective assistance challenges trial counsel's failure in the motion for judgment of acquittal to identify the specific elements of first-degree robbery that McAlister contends were not supported by substantial evidence. *See State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (noting that unless there is a total failure of proof, a motion for judgment of acquittal must fully set forth those elements for which substantial evidence is lacking). We note that evidence is sufficient to withstand a motion for judgment of acquittal when, viewing the evidence in the light most favorable to the State, "there is substantial evidence in the record to support a finding of the challenged element." *State v. Reynolds,* 670 N.W.2d 405, 409 (Iowa 2003). Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* at 410.

After de novo review of the entire record and drawing all reasonable inferences in favor of the State, we conclude there was sufficient evidence to instruct the jury on first-degree robbery. We note that Hirsbrunner testified that McAlister revealed his plan to steal marijuana several days before the stabbing incident occurred, and that he was promised a share of the spoils in exchange for the use of his vehicle. McCormick also testified that he and McAlister had no intention to pay for the marijuana and had devised a plan to procure the marijuana through either threats or violence. As such, there was sufficient evidence from which the jury could have concluded McAlister had the specific intent to commit a theft.

We also believe the State adduced sufficient evidence from which the jury could have concluded McAlister (1) carried out the attempted theft while in possession of a dangerous weapon, and (2) used that weapon to inflict serious injury on Taeger. Both Taeger and McCormick testified that McAlister was the person who stabbed Taeger, and McAlister himself admitted to stabbing Taeger on at least two occasions, albeit while claiming self-defense. While we acknowledge that (1) Taeger admitted that he suffered from some memory deficiencies and (2) McCormick's veracity was subject to some doubt, we cannot conclude that both men's testimony that McAlister stabbed Taeger should be disregarded as a matter of law. See *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993) (noting that it is a rare case where testimony is "so impossible and absurd and self-contradictory that it should be deemed a nullity by the court"). Both Taeger's and McCormick's statements identifying McAlister as the assailant remained consistent throughout the investigation and trial. It is the jury's

province to weigh the evidence and assess the credibility of each witness, and Taeger's apparent memory deficiencies and McCormick's self-interested testimony were legitimate grist for cross-examination. We conclude the State adduced sufficient evidence to support McAlister's conviction on the assault resulting in serious injury charge.

Because we conclude substantial evidence supports each element of the charge of first-degree robbery, McAlister cannot prove trial counsel's failure to properly articulate the motion for judgment of acquittal would have precluded his conviction. *State v. Miller*, 590 N.W.2d 724, 725 (Iowa 1999).

2) Failure to Move to Suppress Interview Statements.

McAlister next challenges trial counsel's failure to file a motion to suppress the contents of the February 10 videotaped interview that was admitted into evidence in its entirety. McAlister contends he was (1) in custody for purposes of the Fifth Amendment, (2) not properly instructed on his rights prior to making several inculpatory statements, and (3) subjected to coercive tactics designed to undercut the exercise of his privilege against self-incrimination.

Assuming for purposes of discussion that McAlister was indeed subjected to a custodial interrogation of February 10 such that his Fifth Amendment rights had attached, our review of the videotaped interview does not support McAlister's claim that if a motion to suppress had been interposed by trial counsel it would have been meritorious. First, McAlister was read his Miranda rights and was informed that he did not have to answer any of the questions he was asked by the investigator. McAlister was also informed that he could terminate the interview at any time. McAlister was shown, and he signed, a written waiver. He

appeared eager to relate his version of the previous night's events. We find McAlister was informed of and knowingly waived his privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 475, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694, 720 (1966).

McAlister further claims tactics employed by the interrogators were so draconian that his will to assert his Fifth Amendment rights was overborne. Custodial interrogation by definition does place some pressure on a suspect. *See Miranda*, 384 U.S. at 474, 86 S. Ct. at 1628, 16 L. Ed. 2d at 720 (stating "[w]ithout the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked"). However, the indicia of coerciveness necessary to void a Fifth Amendment waiver must rise above the inherent coercion of the interview's setting. *See State v. Ware*, 205 N.W.2d 700, 703 (Iowa 1973) (holding that confessions "extracted by any sort of threats or violence," or obtained by either promises of leniency or the "exertion of any improper influence" violate the Fifth Amendment, and could not be used at trial). We note that McAlister fails to enumerate on appeal any specific tactic or ruse employed by investigators that could have possibly had an improperly coercive effect on even a young man of eighteen. McAlister was not subjected to physical threats nor was any degree of leniency promised in exchange for his willingness to openly talk with investigators.

Finding no basis upon which a motion to suppress McAlister's inculpatory statements made during the February 10 interview would have been meritorious,

we conclude trial counsel was under no duty to make such a motion. *State v. Greene,* 592 N.W.2d 24, 29 (Iowa 1999).

3) Failure to Request a Limiting Instruction.

McAlister also challenges trial counsel's failure to request a limiting instruction concerning several of the investigator's videotaped statements asserting McAlister was lying about his motive for stabbing Taeger. As we noted above, the videotape was admitted into evidence in its entirety and was twice shown to the jury. McAlister contends that because the investigator did not testify at trial concerning the basis for his recorded assertions that McAlister stabbed Taeger with the intent to rob him, the investigator's statements constituted inadmissible hearsay that should have at least been the subject of a limiting instruction.

The State, however, argues that trial counsel may have had a strategic reason for wanting the entire interview considered by the jury, noting that McAlister testified at trial that he only told the investigators he stabbed Taeger in self-defense because he was afraid of McCormick, the "real" assailant. We conclude the record is insufficient to permit our review of this claim and we therefore preserve it for possible postconviction proceedings.

4) Failure to Object to Alleged Prosecutorial Misconduct.

McAlister next contends trial counsel was ineffective for failing to object to certain statements made by the prosecutor while conducting the redirect examination of Taeger. Specifically, the prosecutor expressed a desire to ask Taeger about a "couple of your statements during your testimony that I think perhaps may have been mischaracterized by [trial counsel]." McAlister contends

trial counsel had a duty to object to this statement because it had the effect of disparaging the defense. *See State v. Wilkins*, 693 N.W.2d 348, 352 (Iowa 2005) (stating that a lawyer "should not attempt to disparage the dignity of other participants in the trial process").

We do not believe, however, that the prosecutor's comment constituted an attack on the intelligence or the veracity of McAlister's trial counsel. We find it was intended, instead, to achieve the very purpose of redirect examination: to respond to attacks leveled by the opposition during cross-examination in an effort to rehabilitate a witness's credibility. *See State v. Deshaw*, 404 N.W.2d 156, 158 (Iowa 1987) (noting that proper redirect examination takes the form of explanation, avoidance, or qualification of matters brought out on cross-examination.) McAlister's trial counsel therefore had no duty to object to what was in essence an articulation of a legitimate purpose of redirect examination.

5) Failure to Request Prior Inconsistent Statement Instruction.

The final allegation of ineffective assistance of trial counsel challenges trial counsel's failure to request a specific jury instruction focusing the jury's attention on inconsistencies between Taeger's trial testimony and his deposition testimony. The alleged inconsistencies which McAlister contends warrant the specific instruction address Taeger's cocaine use immediately prior to the altercation and his generalized memory problems. We note that trial counsel did request that Taeger's name be added to Jury Instruction 10A dealing with both McCormick's and McAlister's prior inconsistent statements that were not under oath, but did not request an instruction based on Uniform Jury Instruction 200.43

that would have permitted the jury to consider Taeger's inconsistent statements as substantive evidence.

Following de novo review, we believe McAlister has not shown that but for trial counsel's failure to request an instruction based on Uniform Jury Instruction 200.43, he would have been acquitted. First, Jury Instruction 10 required the jury to consider prior inconsistent statements when assessing witness credibility. Second, Taeger's claimed memory problems and his inconsistent statements concerning cocaine use were subjected to vigorous cross-examination. As such, the jury was thoroughly apprised of the claimed deficiencies inherent in Taeger's trial testimony and was free, consistent with Instruction 10, to believe all, part, or none of it. Because we conclude a prior inconsistent statement instruction in the form McAlister proffers would not have given rise to a reasonable probability of his acquittal, McAlister has failed to demonstrate the requisite prejudice necessary for a new trial. We therefore find no merit in this claim of ineffective assistance. *Miller*, 590 N.W.2d at 725.

McAlister also asserts trial counsel was ineffective in failing to request that Hirsbrunner's name be added to Jury Instruction 10a. As was mentioned above, Hirsbrunner testified at trial that McAlister had disclosed in advance his plan to rob a drug-dealer, and that McAlister had made a stabbing gesture when he made the disclosure. On cross-examination at the time of trial, however, Hirsbrunner admitted that he waited several days before informing police about his knowledge of McAlister's plans.

Although McAlister's and McCormick's trial testimony directly contradicted key elements of their pre-trial statements to investigators, Hirsbrunner's trial

testimony merely went beyond the substance of his incomplete pre-trial statement. As Hirsbrunner's pre-trial statement was merely incomplete rather than inconsistent with his trial testimony, McAlister's trial counsel had no duty to request a specific instruction on inconsistency. *See State v. Murphy*, 462 N.W.2d 715, 717 (Iowa Ct. App. 1990).

B. Prior Inconsistent Statement Instruction.

Finally, McAlister contends the district court erred in failing to include Taeger's name in Jury Instruction 10a in the list of witnesses who gave trial testimony that was inconsistent with statements they made before trial. That instruction informed the jury that both McAlister and McCormick, while not under oath, allegedly made prior inconsistent statements at variance with their trial testimony, and suggested any such inconsistencies could be considered by the jury in assessing the credibility of those witnesses. McAlister urged the district court to add Taeger's name to instruction 10a because (1) Taeger's pre-trial statement suggesting he had only met Derrick Hirsbrunner on only one occasion was inconsistent with Taeger's trial testimony suggesting that he had provided drugs to Hirsbrunner, and (2) Taeger's statement to police suggesting the marijuana belonged to McAlister conflicted with Taeger's immunized admission at trial that he owned the contraband.

So long as the requested instruction correctly states the law, has application to the case, is supported by the evidence, and does not duplicate the other instructions given to the jury, the district court is without discretion to refuse the request. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). A prior inconsistent statement instruction specific to a particular witness should be given

where the prior statements differ materially from those made at trial. *State v. Cuevas,* 282 N.W.2d 74, 81-82 (Iowa 1979).

In assessing whether the inconsistency is material or not in the criminal context, we believe it is important to review whether the inconsistency had any bearing on the actual elements of the crime alleged. Here, Taeger consistently maintained throughout the investigation that McAlister was the assailant who stabbed and attempted to rob him. Although Taeger's testimony as to his pre-trial contacts with Hirsbrunner was not identical to his pre-trial statements, we conclude there was no frank inconsistency on this point as would require the court to instruct as McAlister contends.

We also find no reversible error resulted from the district court's refusal to include Taeger's name in instruction 10a as a consequence of Taeger's admission at trial that he owned the marijuana seized by the police in this case notwithstanding his pre-trial claim that McAlister was the owner. Unlike the inconsistent statements made by McAlister and McCormick, Taeger's had no bearing on the actual elements of the first degree robbery charge. Furthermore, Jury Instruction 10, a separate general witness credibility instruction, did inform the jurors that they could consider inconsistent statements as they evaluated the credibility of witnesses' testimony. On this record, we conclude the subjects of Taeger's inconsistent statements and their relationship to the declarant's credibility were adequately addressed in the instructions. *Murphy*, 462 N.W.2d at 717.

IV. Conclusion.

Finding no legal error was sustained by the district court's refusal to include Taeger's name within Jury Instruction 10a, we affirm McAlister's conviction and sentence. With the exception of trial counsel's failure to request a limiting instruction concerning the hearsay statements included in the February 10 videotaped interview, which we have preserved for possible postconviction relief proceedings, McAlister's ineffective assistance claims are without merit.

AFFIRMED.