

IN THE COURT OF APPEALS OF IOWA

No. 7-575 / 06-0582
Filed November 15, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RAYMOND EUGENE THOMAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

Raymond Eugene Thomas appeals his convictions of third-degree kidnapping, first-degree burglary, second-degree robbery, assault with intent to commit sexual abuse causing bodily injury, and two counts of assault on a peace officer. **AFFIRMED.**

Paul Rosenberg of Rosenberg & Associates, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Raymond Eugene Thomas appeals following his convictions of third-degree kidnapping in violation of Iowa Code section 710.1 and 710.4 (2003), first-degree burglary in violation of section 713.1 and 713.3, second-degree robbery in violation of section 711.1 and 711.3, assault with intent to commit sexual abuse causing bodily injury in violation of section 709.11, and two counts of assault on a peace officer in violation of section 708.3A(4). He contends there was insufficient evidence to support his convictions of kidnapping, burglary, robbery, and assault with intent to commit sexual abuse. He also contends the district court abused its discretion in failing to grant a new trial on the ground that the verdict was contrary to the weight of the evidence. Finally, he contends his trial counsel rendered ineffective assistance. Because we find no merit in any of Thomas's appellate claims, we affirm.

I. Background Facts and Proceedings.

Viewing the evidence in the light most favorable to the State, a jury could have found the following facts from the evidence presented at trial. In July 2004 Thomas first met Richard Hoosman, his younger brother, at a family reunion. Thomas and Hoosman became friends. Thomas began visiting Hoosman's residence,¹ staying there overnight an average of two times a week. Thomas's residence was the YMCA.

In October 2004 Thomas met Katie Ann Hupke, who had recently bought the house next door to Hoosman. Thomas and Hupke had several encounters

¹ Hoosman's residence was a house rented by his girlfriend, Melissa Groves. Groves, her three children, and her coworker also lived in the house.

following their meeting. On Sunday, October 24, Hupke and Thomas had a two-hour conversation on the front steps of her home. During this conversation, Thomas asked Hupke if she had a boyfriend or had ever been married. He also asked her if she had a dog or a burglar alarm. Hupke told Thomas she did not have a dog or an alarm.

During the afternoon of October 29, Mary Lou MacKinnon, who lived across the street from Hoosman and Hupke, observed Thomas come out of his brother's house and go to Hupke's garage where he began twisting the doorknob. According to MacKinnon, he "spent about five minutes . . . trying to open up the door." Unsuccessful at opening the locked garage door, Thomas went back over to Hoosman's house before returning approximately ten minutes later and trying to open Hupke's door once again. MacKinnon's son also observed Thomas trying to open the door.

Later that night, Hupke returned to her house after work. She found a note from Thomas taped on her garage door. The note stated:

Katie, I sincerely enjoyed our conversation last! If at all possible, I look forward to delight myself with your presence. If you're not doing anything tonight, maybe we could go somewhere to play a game or two of pool. If so, call me [next door at Hoosman's phone number]. Sincerely, Raymond

Hupke did not respond to Thomas's note, and she went to bed between 9:00 and 10:00 p.m. Because that day had been unseasonably hot, she placed a fan in her bedroom window before turning in for the night.

On this same day, Thomas was next door at his brother's residence. Hoosman and his girlfriend testified that Thomas wrote Hupke a note and took it next door. Thomas then left Hoosman's residence. He returned to his brother's

home later that evening. Before Hoosman went to bed, he observed Thomas drinking Hennessy cognac. Thomas was still awake when Hoosman went to bed at 11:30 p.m.

At approximately 4:00 a.m., Hupke awoke and heard noises coming from the direction of her bedroom window. She went to the window to investigate, using the light from her cell phone to try to illuminate the outside. Unable to see anything, she laid back down on her bed. At that point, she heard “clicking” and “rustling” noises and saw a figure outside her window. Thinking it might be neighbor kids out early for Halloween, she yelled, “Get away from my window.” Suddenly her fan came flying through her window and a hooded man lunged through the window. Hupke began screaming loudly as she jumped on top of her bed.

The intruder immediately attacked Hupke, grabbing her arms and forcing them behind her back. The intruder was wearing dark sweatpants and a reddish-orange “sweatshirt hoody,” with the hood covering his head. The intruder put Hupke in a chokehold with his gloved hands and dragged her off the bed.

A neighbor awoke when she heard Hupke scream. The neighbor’s boyfriend went outside to find the source of screaming. However, he was unsuccessful in finding the source of the screams because Hupke was being choked by her attacker and could no longer scream.

Inside her home, Hupke thought that the attacker was going to make her pass out and feared he would then try to kill her. The attacker told her, “This is what you get for living alone.” Upon hearing his voice and this comment, Hupke “thought, ‘My God, this guy knows me.’ I’m like, ‘I know this voice. I mean, it’s

got to be. It's Raymond.'" Once Hupke realized she knew her attacker, she made a concerted effort not to look at his face, so that he wouldn't "have a clue I knew who it was."

Thomas forced Hupke out of her bedroom and onto her living room couch. As he smothered her face in a pillow, Hupke struggled in an effort to breathe. Thomas then forced Hupke into her kitchen and down the steps into her basement, where he pushed her face down onto the carpeted floor. Thomas straddled Hupke as she sobbed hysterically. Thomas demanded that Hupke "knock it off or else."

Thomas yanked down Hupke's pajama bottoms and underwear. Hupke tried to compose herself and pled with Thomas to wear a condom if he was going to rape her. Thomas indicated that he was wearing a condom. Thomas pulled down his own pants and began "humping" Hupke. As he leaned over her, Hupke "could feel his penis kind of touching [her] lower back upper buttocks region." Thomas then pulled Hupke's pants back up and dragged her back upstairs in a chokehold.

Upstairs, Thomas demanded to know where Hupke's purse and money were located. Thomas then forced Hupke back downstairs, again shoving her face-down on the floor. Thomas used duct tape he brought with him to restrain Hupke's hands behind her back. He then forced his victim back up to her bedroom, where he tossed her onto her bed and closed the bedroom window and blind. Eventually, Thomas forced Hupke back to the basement and taped her feet together. As Thomas went upstairs he threatened Hupke saying, "Don't move. Don't say anything. You know I can snap [your] neck." Hupke noticed

Thomas's size and his "strong build" as he walked up the stairs toward the glow of the kitchen light.

Hupke could hear Thomas walking through the upstairs rooms and opening cabinets, as she struggled to free her taped hands. Thomas eventually came back downstairs and told Hupke he was going to duct tape her mouth shut. Trying to divert Thomas and realizing he had a "crush" on her, Hupke asked for a glass of water. Thomas brought her a glass of water and then struck up a conversation with his victim. He asked Hupke if she had ever been married before. Hupke immediately remembered that Thomas had asked her the same question a few days earlier.

Thomas went back upstairs, but came running down the stairs when the lights in the house went off and an alarm sounded somewhere in the distance. Thomas asked Hupke if she had gotten an alarm. Hupke told him she had not. Thomas stated, "Plans are going to change now." Trying to calm Thomas down, Hupke told him, "There's nothing different here. The lights may be off everywhere." Thomas ran upstairs and came back down with a scarf, which he tied around Hupke's eyes. Thomas then went upstairs, and Hupke heard him leave the house through the back door.

Hupke was eventually able to make her way upstairs, where she cut the duct tape from her hands, feet, and head. She went to her bedroom to retrieve her cell phone, but it was gone. She noticed that her bedroom, which had been in disarray following her attack, had been cleaned up. Hupke looked out her window and saw Thomas, in the orange-reddish sweatshirt, coming toward her. Hupke ran to her dark living room to get her keys, but they were also gone. As

she searched for her keys around her couch she found a silver fold-up knife that did not belong to her.

Hupke ran and barricaded her doors. She then grabbed two butcher knives from her kitchen and locked herself in her windowless bathroom to wait for sunrise. After waiting half an hour without hearing anything, Hupke went to her garage to use a spare ignition key to drive away. However, her garage door would not open without power. Fearing Thomas might still be outside her house or next door at Hoosman's, she decided to make a dash for the neighbor's house across the street. Once she reached her neighbor's house, the neighbor tried to console Hupke in the dark while they waited for the police.

When the police arrived, Hupke told them she was "pretty damn sure" that her attacker was Thomas. An investigation revealed that Hupke's cell phone, keys, ID badge, a coin jar full of change, and a clay bowl she made as a little girl were missing from her house. The screen from her bedroom window was also missing.

Hoosman allowed the responding police officers to search his next-door residence. The police discovered a reddish-orange sweatshirt in the front closet. In the garage, behind a chest freezer, the police discovered the missing window from Hupke's bedroom, with its mesh screen cut and damaged. Hoosman later discovered a used condom on his living room couch, which he turned over to the police. Subsequent DNA testing revealed Thomas's sperm and DNA on both the inside and the outside of the used condom.

After the police left, Hoosman left several messages for Thomas at the YMCA. When Thomas called back, Hoosman told him "the police are looking for

you” and Thomas replied, “Yeah, I know.” Hoosman told Thomas about the window screen found in the garage, stating, “They got you cold,” to which Thomas replied, “Yeah, I figured that.” Thomas commented the “Hennessy had him.” He told Hoosman that he wanted to “get out of here.”

Two detectives went to Thomas’s fourth floor room at the YMCA. They observed a loaded dolly cart in the hallway and found Thomas in the process of moving out. The officers and Thomas went into his room where he confessed that he had committed the burglary and explained that he did it because he was “angry and frustrated with the world.” As the detectives went to pat-down and handcuff Thomas, he charged them and a fight began. Thomas escaped his room and tried to trap the detectives inside by wedging the luggage dolly handle against the door of his room. Thomas then ran down the hall toward the arriving elevator. After the officers broke free out of his room, they chased him down the hall yelling “stop.”

Two YMCA employees exited the elevator and tackled Thomas. Another fight ensued. The two detectives arrived at the elevator and joined in the effort to subdue Thomas. Both officers tumbled into the elevator with Thomas as the fight continued. Although pepper mace was used on Thomas, he could not be restrained. It was not until another four officers arrived on the fourth floor that the officers were able to get Thomas under control. It eventually required three sets of handcuffs to contain him. All four of the men who initially fought with Thomas were injured by him. One of the YMCA employees was evacuated by ambulance due to a blow to his head.

After Thomas was taken to jail he contacted Hoosman. In an effort to explain the used condom recovered at his brother's house, he asked his brother to tell police officers that a hooker had been over at his place that night. Also while in jail, Thomas discussed the charges against him with a cellmate, commenting that "he was drinking, and he can never drink again."

On February 21, 2006, a jury found Thomas guilty of third-degree kidnapping, first-degree burglary, second-degree robbery, assault with intent to commit sexual abuse causing bodily injury, and two counts of assault on a peace officer. On March 31, 2006, the district court sentenced Thomas to thirty-five years in prison. The offense of assault with intent to commit sexual abuse causing bodily injury merged into the first-degree burglary conviction, and Thomas was sentenced for the latter. The sentences for the third-degree kidnapping conviction and the second-degree robbery conviction were ordered to run concurrent with each other and concurrent with the first-degree burglary conviction. The sentences for the two counts of assault on a police officer were ordered to run concurrent with each other and concurrent with the sentences for the other convictions. Thomas now appeals.

II. Discussion.

Thomas contends there was insufficient evidence to support his convictions of kidnapping, burglary, robbery, and assault with intent to commit sexual abuse.² He also contends the district court abused its discretion in failing

² In making his sufficiency of the evidence argument, Thomas also asserts that his inculpatory statements lacked corroboration. However, because no such issue was raised to the district court, we do not review this claim. See *Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401-02 (Iowa 1992) ("Ordinarily, issues must be raised and decided by

to grant a new trial on the ground that the verdict was contrary to the weight of the evidence. Further, he contends his trial counsel rendered ineffective assistance. We address each of his contentions in turn.

A. Sufficiency of Evidence.

We review sufficiency-of-evidence claims for the correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). We uphold the jury's verdict if the record reveals evidence that would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.* In making this determination, "[w]e view the evidence in the light most favorable to the verdict," including all reasonable inferences. *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). Weighing the evidence and assessing the credibility of witnesses are matters left to the jury, and not this court on appeal. See *State v. Wells*, 629 N.W.2d 346, 356 (Iowa 2001); *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001).

Thomas specifically asserts that insufficient evidence established his identity as the intruder at Hupke's residence. For the reasons which follow, we find no merit to his contention.

Throughout this case, Hupke was unwavering in her identification of Thomas as her attacker.³ Less than one week before her attack, Hupke had a two-hour conversation with Thomas on the front steps of her home. During the attack, Hupke spoke with the intruder several times. She testified that early

the trial court before they may be raised and decided on appeal."). We do, however, address this issue as it relates to Thomas's ineffective counsel claim.

³ "[T]he identification evidence and its . . . credibility are for the jury to weigh" as it sees fit. *State v. Neal*, 353 N.W.2d 83, 87 (Iowa 1984).

during the attack, when the intruder said, "This is what you get for living alone," she recognized the voice to be Thomas's. Hupke again recognized Thomas's voice when he brought up the topic of marriage, as he had done during their earlier conversation. Additionally, Hupke told Thomas several days earlier that she did not have a burglar alarm. While she was being attacked, her assailant asked her if she had gotten an alarm. It can be reasonably inferred that Hupke's attacker would not have known Hupke lived alone and did not have an alarm had he not spoken with her at an earlier time.

After realizing she knew her attacker, Hupke chose not to look at Thomas's face in an effort to increase her chances of survival. However, she was able to observe Thomas's size and his "strong build" during the attack. Hupke also testified that when the intruder first broke through her bedroom window she could tell he was a black man wearing a hooded sweatshirt.

As we have already mentioned, other evidence in the record supports Hupke's identification of Thomas as her attacker. As Hupke pled with her attacker to wear a condom if he was going to rape her, Thomas indicated that he was wearing one. The next day, Thomas's brother discovered a used condom on a couch in his home. He turned the condom over to the police who determined that the DNA found on the inside and the outside of the condom belonged to Thomas. After he was incarcerated, Thomas asked Hoosman to tell police that a hooker had been to Hoosman's house, in an attempt to explain how the used condom ended up on the couch. During a search of Hoosman's home, Hupke's window screen, which was damaged when the intruder broke through the window, was found hidden behind a chest freezer in Hoosman's garage.

Thomas's character traits also matched the intruder's. Hoosman's girlfriend testified that Thomas was "forever cleaning." For no apparent reason, Hupke's attacker cleaned up Hupke's bedroom, rearranged her bed and headboard, and straightened up the broken pieces of the fan he smashed.

The jury's verdicts also find substantial support in the inculpatory statements Thomas made to his brother, police officers, and his cellmate following the attack on Hupke. Finally, evidence placed by Thomas at Hupke's house before she was attacked, and testimony from a neighbor that she and her son saw Thomas trying to open Hupke's locked garage door on the day before she was attacked provide support for the jury's guilty verdicts.

When we view all of the evidence in the light most favorable to the State, we believe a rational jury could find Thomas was guilty of kidnapping, burglary, robbery, and assault with intent to commit sexual abuse against Hupke. Upon our examination of the record, we conclude there was sufficient evidence to support Thomas's convictions.

B. Weight of the Evidence.

Thomas moved for a new trial contending the verdict in this case was contrary to the weight of the evidence. The district court denied the motion.

A court may grant a new trial pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b)(6) when "the verdict is contrary to the law or evidence." Our supreme court has held a verdict is contrary to the evidence under this rule if it is "contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than

the other.” *Id.* at 658 (citing *Tibbs v. Florida*, 457 U.S. 31, 37-38, 102 S.Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). The trial court has wide discretion in deciding whether a new trial should be granted on such grounds. *Id.* at 659. Nevertheless, trial courts should exercise this discretion carefully and sparingly when deciding a motion for new trial based on the ground that the verdict is contrary to the weight of the evidence. *Id.* In applying the weight of the evidence standard, if the trial court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. *Id.* at 658-59.

In his brief on appeal, Thomas argues, without elaboration, that Hupke’s voice identification, as well as the testimony of Thomas’s brother, his cellmate, and the two detectives who arrested Thomas was not credible and a new trial should have been granted. We disagree. The verdicts returned by the jury demonstrate the jury found the testimony of Hupke and the other prosecution witnesses to be credible. Thomas’s brother, Thomas’s cellmate, and the two detectives all testified to inculpatory statements made by Thomas. Early on during the attack, Hupke recognized her attacker’s voice based on a two-hour conversation she had with Thomas several days earlier. Evidence from the crime, including a used condom with Thomas’s DNA and the damaged screen from Hupke’s bedroom window, were found at Hoosman’s residence where Thomas frequently stayed overnight and had been seen by multiple people on the day of the attack. In addition, other evidence which we have already discussed supports the jury’s verdicts. The evidence in this case simply does not preponderate against the verdicts returned by the jury. The trial court did not

abuse its discretion in overruling Thomas's motion for new trial. We reject this assignment of error.

C. Ineffective Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). To establish ineffective assistance of counsel, Thomas 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, Thomas must overcome the presumption that counsel was competent and prove that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Thomas may establish prejudice by showing 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 Thomas's ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Thomas asserts that trial counsel rendered ineffective assistance in failing to argue to the court and to a properly instructed jury that Thomas's "confessions" were not corroborated. We conclude this argument is without merit.

The two detectives who arrested Thomas at the YMCA testified that Thomas made inculpatory statements regarding his motives for the crimes committed at Hupke's residence. Out-of-court confessions must be corroborated

by other evidence in order to support a conviction. *State v. White*, 319 N.W.2d 213, 214 (Iowa 1982). Corroboration evidence need only “confirm[] some material fact connecting the defendant with the crime.” *Id.* Only a small amount of corroborative evidence is required and it may be direct or circumstantial. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998).

Each of the prosecution’s witnesses provided corroboration of Thomas’s confessions to police. The record reveals that Thomas made inculpatory statements to his cellmate and his brother. Other witnesses were able to link Thomas to the scene of the attack. Hoosman’s girlfriend testified that on the day before Hupke was attacked, Thomas had taken a note next door to Hupke’s house. The neighbor across the street from Hoosman’s and Hupke’s residences testified that she and her son observed Thomas trying to open Hupke’s garage door on the day before the attack. Hupke’s testimony, beyond her identification of Thomas as her attacker, also linked Thomas to the attack. When Hupke pled with her attacker to wear a condom, he replied, “Yeah, that’s taken care of.” A used condom with Thomas’s DNA was found next door. *See State v. Cornwell*, 189 N.W.2d 611, 612 (Iowa 1971) (stating there may be a “combination of circumstances” that lead the jury to conclude testimony has been corroborated). Additionally, Thomas’s effort to flee the YMCA just after his confession also provided corroboration. *See State v. Palmer*, 569 N.W.2d 614, 616 (Iowa Ct. App. 1997) (finding events after a crime may provide corroborative evidence). Requesting the uniform jury instruction on corroboration would only have emphasized the fact that Thomas made incriminating statements and would arguably have drawn the jury’s attention to a plethora of other evidence that

Thomas committed the crimes with which he was charged. We conclude Thomas has failed to demonstrate a breach of duty by his counsel.

We also conclude Thomas has failed to demonstrated prejudice. Thomas has not shown that there is a reasonable probability that the outcome of the proceeding would have been different if counsel requested a jury instruction regarding corroboration. Accordingly, we reject Thomas's claim of ineffective assistance of counsel.

III. Conclusion.

Because we find no merit in any of Thomas's appellate claims, we affirm the judgment and sentence of the district court.

AFFIRMED.