

IN THE COURT OF APPEALS OF IOWA

No. 7-742 / 06-1447
Filed February 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LATRON GANT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

Defendant appeals his convictions for first-degree robbery, first-degree burglary, assault causing bodily injury, and possession of a firearm as a felon.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Latron Gant, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, William E. Davis, County Attorney, and Gerald Feuerbach, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ROBINSON, S.J.**I. Background Facts & Proceedings**

On October 22, 2005, Kenyasha Webb, Joseph Ball, and Monsheeka White were in Webb's apartment in Davenport, Iowa. White's boyfriend, the defendant Latron Gant, along with an unknown masked man entered the apartment. Gant was armed with a rifle. The masked man struck Webb and Ball on their heads with a large flashlight. Gant then ordered Webb and Ball onto the floor. Gant and the masked man took cell phones, money, and drugs.¹

The masked assailant went out the back door. White left by the front door. Gant instructed Ball to get up and run, and when Ball did so, Gant shot him in the buttocks.² Gant also ordered Webb to get up and run, but she refused. Gant stated "I should kill you." After Gant left, Webb observed White's white minivan driving away. Hope Stark, a neighbor, saw two males running through the yard and jumping into a white van. She stated the driver was a female. Steven Enfield also saw two figures run to a white van. Gant and White were apprehended in St. Louis, Missouri, on November 2, 2005, near White's minivan.

Gant and White were charged with burglary in the first degree, in violation of Iowa Code section 713.3 (2005); willful injury with serious injury, in violation of section 708.4(1); going armed with intent, in violation of section 708.8; and robbery in the first degree, in violation of section 711.2. In addition, Gant was charged with possession of a firearm as a felon, in violation of section 724.26.

¹ Ball admitted he sold crack cocaine. At the time of Gant's trial Ball was facing federal drug charges.

² Ball testified Gant stated more than once, "I should kill you." Ball stated Gant told him to get up and go upstairs, and when he started walking, Gant shot him.

After a jury was selected, White moved to sever her trial from Gant's, stating there was a conflict in their defenses. The district court granted the motion.

The case proceeded to trial against Gant. Gant's defense was that Ball and Webb had fabricated the incident to get back at him for an earlier argument that had occurred between them in Quincy, Illinois. A jury found Gant guilty of first-degree burglary, assault causing bodily injury, possession of a firearm as a felon, and first-degree robbery. The district court denied Gant's motion for a new trial. Gant now appeals his convictions.

II. Admission of Evidence

A. During a search of the apartment in Moline, Illinois, where Gant and White had been living, police officers found a gray Nokia cell phone that Webb identified as being hers. The inner workings of the phone were missing, so no information could be obtained from the phone itself. The cell phone had small indentations on the front and back, that Gant identified as marks from dog bites.

Prior to trial, Gant filed a motion in limine asking that the cell phone not be admitted into evidence without a detailed description of the unique identifying features of the phone. The court ruled the cell phone could not be shown to the witness in advance, but it could be presented to the witness without requiring a "very specific description." Webb testified she had a gray Nokia cell phone, and the court then allowed the State to present the cell phone to Webb. She identified the phone as hers.

Gant contends the district court erred by allowing the cell phone into evidence without proper identification. He asserts the evidence was prejudicial

because it was the only item admitted into evidence that was purportedly taken during the incident. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003).

Physical evidence is not admissible unless it is properly identified. *State v. Ramirez*, 485 N.W.2d 857, 858 (Iowa Ct. App. 1992). Iowa Rule of Evidence 5.901(a) provides, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evidence may be authenticated through the testimony of a witness with knowledge. Iowa R. Evid. 5.901(b)(1).

"[O]nly a prima facie showing of the identity of the physical evidence and its connection to the crime need be made." *Ramirez*, 485 N.W.2d at 858. The district court determines the sufficiency of physical evidence identification. *State v. Langlet*, 283 N.W.2d 330, 336 (Iowa 1979); *State v. Barger*, 511 N.W.2d 632, 635 (Iowa Ct. App. 1993). Unless the court's decision constitutes a clear abuse of discretion, it will not be overturned. *State v. Bakker*, 262 N.W.2d 538, 543 (Iowa 1978).

We determine the district court did not abuse its discretion by permitting Webb to identify the cell phone. Webb testified she had a gray Nokia cell phone. The cell phone was then shown to her, and she identified it as her cell phone. The State made an adequate prima facie showing of the identity of the cell phone and its connection to the crime.

B. In a pro se brief, Gant asserts the district court erred by admitting certain envelopes and letters into evidence. The State presented letters and envelopes obtained from the Moline apartment of Gant and White and from the white minivan. The names of Gant or White were on the letters and envelopes. Gant objected to these exhibits on the grounds of hearsay.

Regarding the items found in the van, the State alleged these items were not offered to show the truth of the matter asserted, but were offered to show items with the names of Gant and White were found in the white minivan and the apartment, thereby linking the minivan and apartment to them. The district court ruled the items found in the minivan and apartment were admissible for the reasons asserted by the State.

On issues regarding the admission of hearsay evidence, we review for errors of law. *State v. Long*, 628 N.W.2d 440, 447 (Iowa 2001). Generally, hearsay evidence is not admissible. Iowa R. Evid. 5.802. Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Iowa R. Evid. 5.801(c). Thus, evidence is excluded from the definition of hearsay if it is not a statement, or is not offered to prove the truth of the matter asserted. *State v. Dullard*, 668 N.W.2d 585, 589-90 (Iowa 2003).

We conclude the district court did not err in finding the letters and envelopes in this case were not hearsay because they were not presented for the truth of the matter asserted. The evidence was not admitted for its content; the

evidence was admitted to show items with the names of Gant and White were found in the white minivan and in the apartment in Moline.

III. Severing Trials

In another pro se issue, Gant contends the district court abused its discretion by severing his trial from that of White. The State asserts this argument is moot because White has already had her own separate trial. *See In re M.T.*, 625 N.W.2d 702, 704 (Iowa 2001) (noting a matter is considered moot if a judgment would have no practical legal effect upon the existing controversy). Gant requests a new trial where he and White would be tried together, but White is not a party to this appeal. We agree with the State's contention that this issue is moot, and not subject to adjudication.

IV. Ineffective Assistance of Counsel

Gant claims he received ineffective assistance from trial counsel. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. Ball initially told police officers \$2500 in cash had been taken during the incident. Detective William Thomas testified he interviewed Ball on

December 19, 2005, and Ball told him it had been cocaine that had been taken. On cross-examination, defense counsel questioned Detective Thomas as follows:

Q. Initially you went up with the impression that it was money that was taken. Is that correct? A. That's what we were told at the beginning, yes.

Q. So he wasn't very truthful with you at the beginning of this, was he? A. No. He was truthful with me. It was the first time I talked to him, and he told me that it was cocaine that was taken from him. He never misled me.

Gant claimed he received ineffective assistance from his defense counsel because counsel improperly asked Detective Thomas to comment on the truthfulness of another witness. In *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003), the supreme court determined it was improper to ask a defendant whether another witness had lied. The court stated there were no exceptions to this rule. *Graves*, 668 N.W.2d at 873.

Even if defense counsel improperly asked Detective Thomas about Ball's truthfulness, in order to establish that he received ineffective assistance of counsel, Gant must still show he was prejudiced by counsel's conduct. See *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006). We determine Gant has failed to show a reasonable probability the result of the proceeding would have been different if defense counsel had not asked Detective Thomas this question. We note Detective Thomas did not comment on Ball's overall truthfulness; only about Ball's truthfulness in answering a specific question. It is unlikely the jury found Detective Thomas's statement bolstered Ball's credibility. Both Detective Thomas and Ball testified that Ball first told police officers that cash had been

stolen, and then he admitted it had been cocaine. We conclude Gant has failed to show he was prejudiced by counsel's conduct, or that he received ineffective assistance on this issue.

B. Gant also claims he received ineffective assistance because defense counsel failed to raise the evidentiary issue regarding the cell phone in a timely manner. Gant's motion in limine regarding the cell phone was granted in part and denied in part. It was not denied, however, because it was untimely. The district court considered the motion on its merits. Gant has failed to show he received ineffective assistance of this ground.

C. In his pro se brief, Gant claims he received ineffective assistance due to counsel's failure to properly object to the jury instruction on aiding and abetting.³ Based on the facts in the case, the district court proposed including a jury instruction on aiding and abetting. Defense counsel objected on the ground the instruction would be confusing to jurors. The district court overruled the objection, stating:

[T]he members of the jury have been made aware through the jury selection process that there is a co-defendant who did not go to trial with Mr. Gant and also in the evidence that was presented the members of the jury have been advised that an additional person may have been involved in this matter, and there are allegations that an additional person did act in an injurious way to persons present at the scene of this matter. So for that reason, the Court is going to overrule the objection and leave the aiding and abetting instruction.

³ Gant first raises this issue outside the context of an ineffective assistance of counsel claim. We find error was not preserved on the issue Gant raises on appeal, because the sole objection to the aiding and abetting jury instruction was that it would be confusing. In the alternative, Gant asserts that if error was not preserved, the issue should be raised as a claim of ineffective assistance of counsel. It is on this basis that we address this issue.

On appeal, Gant claims the State alleged he and White committed the offenses individually, by joint criminal conduct, or by aiding and abetting. He asserts the marshalling instructions should have included the alternative of aiding and abetting. Furthermore, he claims his defense counsel should have requested an additional instruction on specific intent in relation to aiding and abetting. See *State v. Salkil*, 441 N.W.2d 386, 387 (Iowa Ct. App. 1989) (noting that when a defendant is charged with aiding and abetting a crime in which intent is an element, there must be substantial evidence defendant had the intent, or had knowledge the principal had the required intent). He states that because the jury was not properly instructed on specific intent, he could have been found guilty based solely on White's acts, and the fact he was found with her in St. Louis.

Contrary to Gant's assertion, the trial information and amended trial information do not allege Gant committed the offenses by joint criminal conduct, or by aiding and abetting. Each of the marshalling instructions refers to the conduct of defendant alone. The marshalling instructions for first-degree burglary and its lesser included offenses, willful injury, and first-degree robbery and its lesser included offenses require the jury to find Gant had the specific intent to commit a crime. Under the jury instructions, the jury assessed Gant's guilt based on his own conduct.⁴

The aiding and abetting instruction was not included because the State alleged Gant aided and abetted another person in committing the crimes in

⁴ Although the unknown man assaulted Webb, Gant was not charged with any crimes against Webb. The jury instructions referred only to Ball.

question. As the district court noted, the instruction was included to help explain the presence of White and the unknown masked man in the case. Based on the posture of the case, Gant has not shown defense counsel breached an essential duty by not requesting an additional instruction on aiding and abetting. We conclude he has failed to show he received ineffective assistance on this issue.

D. Gant asserts he received ineffective assistance because his counsel did not request a limiting instruction on the use of evidence. Gant believes his counsel should have requested the court to instruct the jury that none of the evidence implicating White could be used as direct evidence to show Gant's guilt.

In his pro se brief, Gant bases several arguments on the theory that the State presented evidence of White's guilt, and then through the letters and envelopes showed Gant was associated with White, which led to the jury finding Gant guilty of the crimes in question. The evidence in the case, however, directly pointed to Gant's guilt. Webb and Ball testified Gant came into Webb's apartment with a rifle, threatened both of them, took several items, and shot Ball in the buttocks. Furthermore, as noted above, the jury instructions required the jury to consider Gant's acts alone in determining his guilt. Gant has failed to show he received ineffective assistance due to counsel's failure to request a limiting instruction.

E. Gant contends his trial counsel should have sought to sever the charge of possession of a firearm as a felon from the other charges in the case.

He claims the jury was prejudiced against him in the other charges because of evidence he had previously committed a felony.

We consider if defense counsel had made a motion to sever, whether it would have been an abuse of discretion for the district court to deny the motion. *See State v. Owens*, 635 N.W.2d 478, 482 (Iowa 2001). Prior to trial Gant signed a stipulation which stated, "Latron Gant stipulates that he had been convicted of a felony prior to October 22, 2005." Thus, none of the specifics about the prior felony conviction were presented to the jury. The district court instructed the jury "defendant's innocence or guilt must be determined separately on each count." These factors are similar to those presented in *Owens*, and like that case, we find it would not be an abuse of discretion for the district court to deny a motion to sever the charge of possession of a firearm as a felon. *See id.* at 483. We conclude Gant has failed to show ineffective assistance of counsel on this issue.

F. Finally, Gant contends he received ineffective assistance due to counsel's failure to object to prosecutorial misconduct and/or request rebuttal argument. During closing arguments the prosecutor stated:

Why wasn't Mr. Gant wearing a mask? Well, a few possible reasons. Mr. Gant wanted Mr. Ball to know it was him because he was mad from what happened in Quincy.

Maybe Mr. Gant intended on killing Mr. Ball and Webb so it didn't matter if they did see him or maybe we rob a drug dealer, he's not gonna go to the police.

Gant claims the prosecutor engaged in misconduct because there was no evidence to show his intent was to commit murder. Webb testified that before Gant left the house he stated, "I should kill you." Ball also testified Gant said, "I

should kill you.” Ball further testified, “Latron was talking. He said, I should kill you again.” Therefore, there is substantial evidence in the record to support the prosecutor’s statement that Gant may have intended to kill Webb and Ball. Gant has failed to show he received ineffective assistance due to counsel’s failure to object to the prosecutor’s statement.

On all claims of ineffective assistance of counsel, Gant has failed to show he was prejudiced by counsel’s conduct.

We affirm Gant’s convictions.

AFFIRMED.