

IN THE COURT OF APPEALS OF IOWA

No. 8-513 / 07-0599
Filed August 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FLOYD EUGENE CROSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

Floyd Cross appeals his convictions for robbery in the first degree and
willful injury causing serious injury. **AFFIRMED.**

Patricia M. Hulting, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bruce L. Kempkes, Assistant Attorney
General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant
County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, J.

Floyd Cross appeals his convictions, following jury trial, for robbery in the first degree and willful injury causing serious injury. He claims, both through appellate counsel and in a pro se brief, the evidence was insufficient to show that he was in possession of a dangerous weapon, his actions caused the victim's injury, or the victim suffered serious injury. Cross also makes several claims of ineffective assistance of trial counsel. We affirm his convictions and preserve his specified claims of ineffective assistance for a possible postconviction proceeding.

On September 15, 2006, the State charged Cross with robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (2005). On November 6, 2006, the charge was amended to include a charge of willful injury causing serious injury, in violation of section 708.4(1). The charges stem from allegations that on August 24, 2006, Cross robbed Jimmie Cameron by hitting him in the face with a pipe, breaking his jaw, and taking his cocaine. Cross's first trial ended on January 12, 2007, with a hung jury and mistrial. He was retried in early February 2007.

At the close of all the testimony in the second trial, Cross made a motion for judgment of acquittal, alleging the State failed to meet its burden of proof on "all the elements" of either charge. The only argument made by Cross in his motion for judgment of acquittal was that the testimony of the victim lacked credibility. The district court denied the motion and submitted the case to the jury. The jury found Cross guilty as charged.

Through appellate counsel, Cross first claims that there was insufficient evidence he was in possession of a dangerous weapon, his actions caused Cameron's injury, or Cameron suffered serious injury. These claims are reiterated in Cross's pro se brief.

The State argues that Cross's motion for judgment of acquittal was too general to preserve his challenge to the sufficiency of the evidence for our review. To preserve error on a claim of insufficient evidence for appellate review in a jury-tried criminal case, the defendant must at trial make a motion for judgment of acquittal that identifies the specific grounds raised on appeal. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004); *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). Error is not preserved when a motion for judgment of acquittal does not point out the specific elements of the charge that are alleged to be insufficiently supported by the evidence. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

As set forth above, Cross's sole argument on his motion for judgment of acquittal was that the victim's testimony lacked credibility. Specifically, he argued only that the State could not prove "all the elements" of either charge because "the victim's credibility has been attacked, and the victim acknowledges that he was under the influence on the night in question, under the influence of alcohol and under the influence of crack." Cross did not point out the specific elements of the charges that he now on appeal alleges to have been insufficiently supported by the evidence. Accordingly, we conclude error was not preserved on the sufficiency of the evidence claims raised in either brief.

Cross contends, in his pro se brief, that the district court erred in denying his motion for new trial counsel. We review the district court's denial of substitute counsel for an abuse of discretion. *State v. Martin*, 608 N.W.2d 445, 449 (Iowa 2000).

To successfully attack a district court's denial of substitute counsel, a defendant must meet a standard two-prong test. See *id.* First, the defendant must show sufficient cause to justify the substitution of new counsel. *Id.* "Such justifiable dissatisfaction with appointed counsel includes 'a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'" *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994) (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir.1991)). Next, the defendant must ordinarily show prejudice as a result of the denied motion. *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997). Finally, in evaluating whether the defendant has carried his burden, the court must balance the defendant's right to counsel of choice and the public's interest in prompt and efficient administration of justice. *Martin*, 608 N.W.2d at 449.

Cross filed a motion for new counsel on November 7, 2006. The district court heard arguments on the motion on November 30, 2006. In support of his motion, Cross cites to his argument that his attorney failed to do things he asked, discuss trial strategy with him, communicate with him, or talk to witnesses. Cross further argued he had no trust in his counsel and that counsel showed no interest in his case.

The district court denied Cross's motion for substitute counsel, both on the record and in a subsequent written ruling. On the record the court concluded "counsel has acted appropriately both in the effort to contact [the] client and the discovery and investigative efforts that have been undertaken up to this point." In its written ruling the court further concluded "there has not been an irretrievable breakdown in the attorney-client relationship and there is no conflict of interest."

We agree with the district court that Cross did not show sufficient cause to justify the substitution of counsel. The court reasonably found Cross's attorney to have acted appropriately in having contact with Cross, in his discovery and investigative efforts, and noted no conflict of interest or breakdown in the attorney-client relationship. We cannot conclude the trial court abused its discretion in denying Cross's motion for substitute counsel.

Finally, Cross raises several claims of ineffective assistance of trial counsel. Through appellate counsel he claims his trial counsel was ineffective for (1) failing to object to the introduction of medical records with inadequate foundation and, (2) failing to object to the victim testifying as his own medical expert concerning the cause of his injury. Cross makes these same two claims of ineffective assistance in his pro se brief, and additionally claims his trial counsel was ineffective for failing to (1) "object or challenge jury selection for cause," (2) properly object to the jury being instructed on joint criminal conduct, and (3) properly argue his motion for new trial.

We review claims of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prove trial counsel was ineffective

the defendant must show that counsel breached an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Griffin*, 691 N.W.2d 734, 736-37 (Iowa 2005).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). “[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims.” *Biddle*, 652 N.W.2d at 203.

We conclude the record before us is inadequate to address one or more of Cross's claims of ineffective assistance on direct appeal. Under these circumstances, we pass these issues in this direct appeal and preserve them for a possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). Accordingly, we preserve the specified claims of ineffective assistance of trial counsel set forth above for a possible postconviction proceeding.

For the reasons set forth above, we conclude Cross has failed to properly preserve error on his claims of insufficient evidence, and that the district court did not abuse its discretion in denying Cross's motion for substitute counsel. We

affirm Cross's convictions and preserve his specified claims of ineffective assistance of counsel set forth above for a possible postconviction proceeding.

AFFIRMED.