IN THE COURT OF APPEALS OF IOWA

No. 0-943 / 10-0167
Filed January 20, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY WAYNE OTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Joel D. Yates, Judge.

Jeremy Ott appeals following conviction and sentence for robbery in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul and Rachel C. Regenold, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Allen Cook, County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

I. Background Facts and Proceedings

On July 21, 2008, around 3:40 a.m., Norman Boswell was working alone at a convenience store in Ottumwa when a man entered with a gun and instructed Boswell to give him cash and two cartons of cigarettes. After taking the money and cigarettes, the robber told Boswell to follow him out of the store and to lock the door from the outside. When Boswell stated the door could not be locked from the outside, the robber tossed the keys across the parking lot and ran away.

Boswell called the police and described the robber as a "scrawny" man in his twenties with a "partial beard" wearing an oversized "greenish brownish shirt." A surveillance camera captured the robbery but was not of sufficient quality to positively identify the robber. Police found a shirt matching the description given by Boswell in the middle of the street approximately two blocks from the store. The shirt was not wet or damp despite rainy weather several hours before the robbery.

Alicia Anders, a former girlfriend of Jeremy Ott, saw a television report about the robbery and believed the robber in the video was Ott, though she was not certain. She told her sister, who informed police. The police contacted Anders, who informed police that Ott looked like the robber on the tape, owned a handgun, and lived in Newton. Anders also identified the t-shirt recovered near the convenience store as Ott's shirt.

Officers questioned Ott about the shirt. He stated he had a similar shirt, but it was in storage in Ottumwa. Officers then conducted a DNA analysis and

found that Ott's DNA matched DNA from the shirt found near the convenience store. Officers questioned Ott about the shirt again. Ott then admitted it was his shirt.

The State charged Ott with first-degree robbery on August 24, 2009. Ott gave notice of an alibi defense. Trial took place November 17-19, 2009.

Officers asked Boswell to identify the robber from two photographic line-ups containing Ott's picture. Boswell selected a man who was not Ott and stated that he looked most like the robber but that "it wasn't him." At trial, Boswell testified he could not positively identify Ott and also could not exonerate him. At trial Boswell also did not identify the t-shirt as the shirt worn by the robber.

During the investigation, an Ottumwa police officer discovered that Ott had recently pawned a handgun at a Newton pawn shop. The officer testified the gun pawned by Ott was different from many other guns because the back of the handgun was rounded. He also testified the gun in the surveillance video appeared to be rounded in the back.

At trial, seven alibi witnesses testified that Ott was in Newton on July 20, 2008, at a party that went late into the evening. Witnesses testified to seeing Ott until 1:30 a.m. on July 21, 2008. Several witnesses also testified to seeing him in Newton during the day on July 21, 2008. However, the State introduced evidence that Ott signed an affidavit of personal service for an unrelated case in Ottumwa at 12:31 p.m. on July 21, 2008. Ott's sister testified that she gave Ott a ride back to Ottumwa just before noon on July 21, 2008, so he could look for his wallet. She stated she dropped Ott off at his apartment for about an hour before she picked him up. They then returned to Newton.

The jury returned a verdict of guilty of first-degree robbery. Ott filed a motion for new trial in which he argued he did not receive a fair trial because during closing arguments "the State improperly affixed its own labels to certain of the State's exhibits published to the jury that did not appear in the original form of the exhibits." The exhibits involved photographs of the robber, which Ott asserts the State improperly labeled to compare the photographs with a tattoo on Ott's left wrist that reads "Ott." Ott's counsel did not object to the admission of these exhibits during trial. The district court overruled Ott's motion for new trial.

Ott now appeals, alleging his counsel was ineffective for failing to object to an exhibit label used by the State.

II. Standard of Review

We review ineffective-assistance-of-counsel claims de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To prevail, Ott must demonstrate: (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the first prong, Ott "must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *Id*. To establish the second prong, Ott must show counsel's failure worked to his actual and substantial disadvantage so that a reasonable probability exists that but for counsel's error the result of the proceeding would have differed. *Id*. Ott must prove both elements by a preponderance of the evidence. *Ledezma*, 626 N.W.2d at 142.

III. Ineffective Assistance of Counsel

Ott asserts his trial counsel was ineffective for failing to object to the State's exhibit 21, which was used during closing arguments. The exhibit is a still shot of surveillance video footage. The screen in the photograph is divided into quadrants, each with an image from a different camera angle. The top left quadrant contains a picture of the robber's left arm, wrist, and hand reaching toward the cash register. There apparently is a mark or a shadow on the wrist in approximately the same place as a tattoo on Ott's wrist. The bottom right quadrant depicts shelves in the store without any people. In that quadrant, the State superimposed Ott's last name in capital letters and quotations marks over the image of the store. The exhibit was displayed to the jury during the State's closing argument.

Ott asserts his attorney should have objected to the exhibit because it constituted evidence created by the State. Ott contends that by superimposing his name onto the photograph and claiming it matched his tattoo, the State created misleading evidence that suggested to the jury that the tattoo on the robber's hand read "OTT." "In closing arguments, counsel is allowed some latitude. Counsel may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented." *State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993) (citations omitted). "However, counsel has no right to create evidence . . . ." *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006).

We do not believe the exhibit misled the jury or constituted a creation of evidence. Ott's name is not placed near the robber's tattoo and is not even in the same quadrant as the pictures of the robber. We do not believe the placement of

Ott's name suggests that it is an interpretation of what is tattooed on the robber's wrist. Further, the record before us indicates the prosecutor informed the jury that he could not read the tattoo on the robber's left hand because the quality of the surveillance footage was poor. To the extent the State argued the mark depicted in the photograph was the tattoo on Ott's wrist, we believe this opinion is "strongly suggested by common sense" and was "based on the reasonable inferences and conclusions to be drawn from the evidence." *See Carey*, 709 N.W.2d at 554 (internal quotations omitted).

Additionally, the exhibit was presented only in final arguments. "Under the court's instruction, arguments of counsel were not to be considered as evidence." *Carey*, 709 N.W.2d at 554 (considering the court's instructions in determining a statement made by a prosecutor during closing arguments did not constitute misconduct). Ott has not met his burden of proving that the result of the proceeding would have differed had his attorney objected to this exhibit.

We also find this is not a case, as Ott argues, where an identification tag summarizes the State's entire case against the defendant. *See State v. Martin*, 704 N.W.2d 665, 669 (Iowa 2005) (finding defendant could not show prejudice by counsel's failure to object to the admission of an evidence tag that did not provide the jury with "a neat condensation of the [State's] whole case against the defendant"); *State v. Reese*, 259 N.W.2d 771, 777 (Iowa 1977) (finding that where notations "did not in any manner emphasize or summarize the State's case," there was no merit to defendant's claim that allowing the jury to see the notations on the exhibits was error).

In addition, the State's case against Ott was strong. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). Ott's former girlfriend believed the robber on the surveillance tape looked like Ott. Ott owned and was in the process of pawning a gun with distinctive characteristics consistent with the gun used in the robbery. A t-shirt found in the street near the convenience store shortly after the robbery contained DNA matching Ott's. Ott's alibi witnesses were discredited in many ways, including by evidence that Ott had signed an affidavit of personal service in Ottumwa on the day of the robbery. Given the strength of the State's case, we find that even if counsel should have objected to the exhibit, Ott was not prejudiced by its publication to the jury.

AFFIRMED.