

IN THE COURT OF APPEALS OF IOWA

No. 0-948 / 10-0376
Filed February 23, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY CLAY MORRIS, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

Defendant, Jeffery Clay Morris, Jr., appeals claiming he was denied the
effective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams,
Assistant Appellate Defender, for appellant.

Jeffrey Clay Morris, Jr., Anamosa, pro se.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, Michael J. Walton, County Attorney, and Amy Devine, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J.,
takes no part.

SACKETT, C.J.

Defendant, Jeffrey Clay Morris, Jr., appeals from his conviction of robbery in the second degree in violation of Iowa Code sections 711.1 and 711.3 (2009), and using a juvenile to commit certain offenses in violation of section 709A.6. He contends he was denied effective assistance of counsel when his attorney failed to make a sufficiently detailed motion for judgment of acquittal. He claims the evidence was insufficient to support submitting to the jury the charge of using a juvenile to commit certain offenses. Morris also raises various claims in his pro se brief, which will be addressed below. We affirm.

I. BACKGROUND AND PROCEEDINGS. In the evening of September 12, 2009, eleven-year-old J.H. was riding her bike home from a skate park in Davenport. She had missed her curfew and when she arrived home her grandmother told her that her mother had gone out looking for her. J.H. left the home and went to look for her mother. As she was crossing a street, J.H. was stopped by Morris. J.H. told Morris that she was looking for her mom and Morris asked her if she believed in money. Morris informed J.H. that there was a guy who was riding around in a car that had “mad money” who was disgusting and liked little girls. Morris told J.H. that this man always rides around looking for people to pay to do stuff with him. He told J.H. the guy had \$350 and that Morris would split it with her. J.H. told Morris that she wanted to go find her mom, but Morris told her that they would find her mom after this was over and she could trust him. Morris then waved at a small silver car being driven by Marvin Ware and called Ware over to the side of the road.

Ware testified that he was in the area looking for prostitutes. He had been patronizing prostitutes in Davenport for forty years so people in the area recognized him and knew he carried a large amount of cash. When he saw and heard Morris waving him over he pulled up believing Morris was J.D., his friend. Ware testified that he did not initially see J.H. sitting next to Morris.

At first, Morris and Ware spoke through the open passenger side window. Morris then opened the passenger side door, folded the passenger seat forward so J.H. could get in the back and "kind of nudged [her] in." Morris then sat in the front passenger seat of the car next to Ware.

Ware testified that when Morris and J.H. got into the car, Morris told him that he had a girl for him and Morris wanted some money. Ware asked J.H. how old she was. Morris interjected that she was sixteen. J.H. corrected Morris saying that she was almost twelve. Ware testified that he then told Morris and J.H. to get out of his car as he did not want anything to do with it. Ware and Morris argued and J.H. started crying in the back seat stating that she wanted to get out.

When Morris refused to leave the vehicle, Ware reached down to get his wallet and tried to get his car keys out of the ignition. As he did so, Morris reached over and punched Ware in the head, neck and face. Ware's head hit the steering wheel, but he did not lose consciousness. After the altercation Morris got out of the car and moved the front seat forward allowing J.H. to get out. Morris then reentered the car kneeling on the passenger seat looking for Ware's wallet. When he found the wallet, Morris removed \$143 in cash, threw

the wallet back on the passenger seat, and left the scene with J.H. Ware left the scene after regaining his composure and finding his glasses, which had been knocked outside the car. Ware drove home after the incident and did not report the robbery to police.

Still crying, J.H. left on her bike to continue to look for her mother with Morris riding behind her. J.H.'s mother, Toni Bell, located them and asked why J.H. was so upset. Morris informed Bell J.H. had nearly been abducted, but he had intervened by beating up the man and freeing J.H. Before J.H. and her mother went home, Morris handed J.H. twenty dollars and told her to stay safe.

After returning home, Bell contacted the police and informed them of the attempted abduction. The police interviewed J.H. at home that night. She testified at trial that she initially went along with Morris's abduction story because she was afraid Morris would hurt her if she told the truth. Not convinced of J.H.'s explanation, the police followed up with J.H. two more times. At the third interview, J.H. admitted there was no abduction and explained what happened.

Police were able to locate Ware and Morris. Ware denied trying to abduct J.H. stating that Morris tried to sell him J.H. and then beat him up and robbed him. Morris admitted during the interview that he knew of Ware's proclivity for prostitutes and that he knew Ware was trying to pick up young girls. Morris admitted that he and J.H. got into Ware's car, but claimed that he struck Ware when Ware attempted to fondle J.H. Morris also admitted giving J.H. twenty dollars, but claims this was his money. He denied taking any money from Ware.

On October 13, 2009, the State filed a two-count trial information charging Morris with robbery in the second degree and using a juvenile to commit certain offenses. The State also charged Morris as an habitual offender under Iowa Code section 902.8. Trial commenced on January 11, 2010. At the close of the State's evidence defense counsel moved for a directed verdict stating, "At this time the Defendant would move for a directed verdict based on the—unsubstantiated and contradictory statements by [J.H.] and by Mr. Ware." The State responded that based on all the testimony and evidence, when viewed in the light most favorable to the State, the State had presented a question of fact for the jury. The State went on to outline how the evidence presented met each element of the charged crimes. The court ruled,

[T]he State had presented substantial evidence on each and every essential element of the crimes charged in Counts 1 and 2. And therefore, the Defendant's motion, which the Court will treat as a motion for judgment of acquittal, should be and hereby is denied.

The jury returned a guilty verdict on January 13. Morris stipulated to having two prior felony convictions. Prior to sentencing, Morris filed several pro se motions challenging the verdicts and requesting new counsel. At sentencing on February 25, the district court denied the defendant's motions and imposed consecutive fifteen-year sentences. A notice of appeal was filed the same day.

II. ERROR PRESERVATION. Morris concedes his trial counsel's motion for directed verdict, which the district court treated as a motion for judgment of acquittal, was not sufficient to preserve his sufficiency of the evidence claim. While counsel made a general motion that the testimony of J.H. and Ware was unsubstantiated and contradictory, he did not identify specific elements of the

charges that were not properly supported by the evidence. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). It is true the Iowa Supreme Court has recognized an exception to this error preservation rule for sufficiency of the evidence claims, but we find this exception inapplicable here. See *State v. Williams*, 695 N.W.2d 23, 27–28 (Iowa 2005) (holding that the exception to the error preservation rule is “when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel”).

Recognizing his counsel did not properly preserve the sufficiency of evidence claim, Morris makes his claim by arguing he was deprived of the effective assistance of counsel when his attorney failed to make an adequate motion for judgment of acquittal. Ineffective assistance of counsel claims are not required to be preserved at trial because attorneys are not expected to make objections to their own actions. *State v. Lucas*, 323 N.W.2d 228, 232 (Iowa 1982). Thus, Morris may raise an ineffective assistance of counsel claim for the first time on appeal.

III. SCOPE OF REVIEW. The scope of review for ineffective assistance of counsel claims is de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). Under this review, we independently evaluate the issues considering the totality of the circumstances. *Id.* Normally ineffective assistance of counsel claims are preserved for postconviction relief proceedings in order to develop a more complete record. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). However, this court may address the claim on direct appeal if the record is adequate. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010).

A claim that counsel was ineffective based on his failure to raise a claim of insufficient evidence is a claim that can normally be decided on direct appeal. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). This is because if the trial court record demonstrates there was insufficient evidence to support the conviction, then counsel was ineffective for failing to properly raise and preserve the issue. *Id.* However, if the record shows substantial evidence, then counsel's failure to properly raise the claim could not be prejudicial. *Id.* Thus, we will not preserve the claim for postconviction relief proceedings but will proceed to address Morris' ineffective assistance of counsel claim.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL. To prevail on a claim for ineffective assistance of counsel, Morris must demonstrate 1) his trial counsel failed to perform an essential duty, and 2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). If either element is not met, the claim will fail. *Id.* To demonstrate prejudice, the defendant must show that "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Morris claims his trial counsel was ineffective for failing to adequately raise and preserve his claim that there was insufficient evidence to support submitting to the jury the charge of using a minor to commit certain offenses. Iowa Code section 709A.6(2) provides,

It is unlawful for a person to act with, enter into a common scheme or design with, conspire with, recruit or use a person under the age of eighteen, through threats, monetary payment, or other means, to commit an indictable offense for the profit of the person acting with, entering into the common scheme or design with, conspiring with,

recruiting or using the juvenile. A person who violates this section commits a class "C" felony.

The district court instructed the jury as follows:

Under Count 2, the State must prove all of the following elements of Using a Juvenile to Commit Certain Offenses:

1. That on or about September 12, 2009, the Defendant acted with, or entered into a common scheme or plan with, or conspired with, or recruited, or used,
2. A person under age 18;
3. Through threats, or monetary payment, or other means;
4. To commit robbery;
5. For the profit of the Defendant.

Defendant asserts there was insufficient evidence to find either the first or third element of the crime.

First, defendant asserts that there was no evidence to prove that he acted with, entered into a common scheme or plan with, conspired with, recruited or used J.H. He asserts that these words all require some degree of knowledge and cooperation on the part of the juvenile. Morris insists that all these words require that the juvenile must recognize some act would be preformed and must agree to participate in the act. Morris insists the first element has not been met because J.H. did not know that he intended to rob Ware.

While we agree that entering into a common scheme or plan or conspiring requires the juvenile to be made aware of some kind of plan, the term "use" does not require such an awareness. Someone can be used by another to accomplish a specific purpose without being made aware that she is being used. We think the evidence in this case is sufficient to prove Morris used J.H. to commit the robbery. We believe there was sufficient evidence a jury could conclude that Morris, knowing Ware's proclivity for young girls and prostitutes, stopped J.H.

and detained her in order to entice Ware to pull over and stop. He nudged J.H. into Ware's car and demanded payment for J.H. saying "I got a girl for you. I want some money." Morris lied about J.H.'s age in order to continue the ruse. Then after taking Ware's money, he used J.H. to cover his tracks by concocting an abduction story.

Morris contends he could not be found to have used J.H. because the evidence demonstrates that J.H. did not have any real part in the robbery. Morris points out that Ware testified he did not see J.H. standing there when Morris waved him over and Ware pulled over because he thought Morris was his friend J.D. not because Morris was offering him J.H. Whether Ware initially saw J.H. or thought Morris was J.D. when he initially pulled the car over is beside the point. The evidence is sufficient to establish that once Ware pulled over, Morris attempted to sell J.H. to Ware and gained access into Ware's car by doing so. We believe there was sufficient evidence for the jury to conclude he was using J.H. to commit a robbery.

Next, Morris claims there was insufficient evidence to support the third element of the crime—he used J.H. through threats, monetary payment, or other means. Morris again claims that this element requires the juvenile to have knowledge of the intent of the defendant and to agree to do some act. Again, Morris misinterprets the requirements. There is no language in this element that requires the juvenile to have knowledge of the defendant's intent or be in agreement with the defendant's plan. The element simply requires the defendant to employ threats, money or other means, to secure the use of the minor.

We conclude there was sufficient evidence for the jury to conclude that Morris employed threats, money or other means to secure J.H. presence at the scene of the robbery. First, J.H. testified that Morris told her Ware had \$350 and Morris would split it with her. When J.H. wanted to leave, Morris stopped her and prevented her from crossing the street. J.H. testified that Morris was pushy and kept trying to make her do something she did not want to do. Morris promised her that they would find J.H.'s mom "after it's all over" and told J.H. to trust him. J.H. testified that Morris pushed her toward the car and "nudged" her into the back seat. After getting out of Ware's car, J.H. went along with Morris' story about the abduction because she was afraid Morris would find her and hurt her. Finally, Morris gave J.H. twenty dollars after they found J.H.'s mother. Based on this testimony, we find that a jury could conclude that Morris employed threats, money or other means such as force, intimidation and false reassurances to secure J.H.'s presence at the scene of the robbery.

Because we find there was sufficient evidence to support Morris' conviction of using a juvenile to commit certain offenses, Morris' claim for ineffective assistance of counsel must fail. The record shows substantial evidence, so counsel's failure to make a proper motion for judgment of acquittal is not prejudicial. *Truesdell*, 679 N.W.2d at 616. Morris fails to demonstrate how he was prejudiced by his counsel's alleged failure to perform an essential duty.

V. PRO SE BRIEF. Morris files a separate pro se brief in which he appears to challenge the sufficiency of the evidence on the robbery second charge. He first asserts that there was no specific intent to commit a theft proven

because Ware believed Morris was trying to sell him a little girl. Morris appears to misunderstand the element of specific intent. The specific intent element of robbery is focused on Morris's state of mind not on Ware's belief of what Morris was doing. We find there was sufficient evidence for the jury to conclude Morris had the specific intent to commit a theft.

Next, Morris alleges he never put Ware in fear of serious injury. Morris states that Ware only became fearful when he committed the assault on Ware. Again Morris misunderstands the elements of robbery. Under robbery the State has to prove Morris had the intent to commit a theft and does one of three acts to further the commission of the theft or escape from the scene. While one of the three possible acts the State can use to support a robbery charge is to put another in fear of immediate serious injury, it is not the only way to prove robbery. One of the other acts the State can use to prove robbery is committing an assault upon another, which Morris admits he committed. There is sufficient evidence to prove the elements of robbery.

Finally, Morris alleges his counsel failed to bring to light certain facts which Morris believes affect both Ware's and J.H.'s credibility. In addition, it appears Morris wanted to assert the defense of justification. To the extent that Morris claims he was denied the effective assistance of counsel, the claim is preserved for postconviction relief proceedings.

AFFIRMED.