

IN THE COURT OF APPEALS OF IOWA

No. 1-732 / 10-1254
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DWAYNE WILLIAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Dwayne Williams appeals his first-degree robbery conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

Dwayne Williams appeals from the judgment and sentence entered upon a jury verdict finding him guilty of robbery in the first degree in violation of Iowa Code section 711.2 (2009). Williams argues his trial counsel was ineffective for failing to file a motion to suppress on the grounds that the show up identification procedure used in the present case violated his due process rights under the Iowa Constitution. See Iowa Const. art. 1, § 9. Because we find that Williams cannot show that he was prejudiced by counsel's alleged failure to move to suppress the show up identification, we affirm.

I. Background Facts and Proceedings.

The jury trial revealed the following facts. At about 10:50 p.m. on January 25, 2009, Michael Ohlenkamp went to the Kwik Star gas station on Franklin Street in Waterloo to buy some groceries. When Ohlenkamp went into the store, he left his vehicle unlocked with the engine running. As Ohlenkamp was inside, video surveillance from the gas station shows a person wearing a black coat with an unfastened belt hanging from it, a white hooded sweatshirt, dark pants, white tennis shoes, and a dark baseball cap open the passenger door to Ohlenkamp's two-door vehicle and get into the backseat.

After purchasing his items, Ohlenkamp returned to his car and began to drive home. As Ohlenkamp exited the gas station parking lot, the person in his backseat grabbed his hair, pulled his head back, and held a knife to his throat. Ohlenkamp attempted to grab the knife, but the knife was tightened against his

throat and a male voice told him to let go or he would be killed. The man then demanded money, to which Ohlenkamp replied that he did not have any.

Ohlenkamp was instructed to pull into a Kum & Go gas station approximately five to six blocks down Franklin Street. Ohlenkamp did and parked in front of the store. The man demanded Ohlenkamp's change. Ohlenkamp complied and grabbed "a couple bucks" in coins from his pockets. As Ohlenkamp handed the change to the man in the back seat, some of the coins fell onto the floor. When the man let go of Ohlenkamp's hair to pick up the coins, Ohlenkamp exited his vehicle, shut the door, and stood by the driver's side door watching the man. After the man picked up the coins, he exited from the vehicle's passenger side. Ohlenkamp looked directly at the man for a few seconds and was able to see him "perfectly clear," before the man flipped his white hood over his head and calmly walked away.

Lori Snyder, the Kum & Go sales manager, noticed something was wrong as soon as she saw Ohlenkamp park his vehicle. She could see Ohlenkamp leaning back toward the backseat and suspected that someone else was in the car. She called 911 at 10:56 p.m. As Snyder was speaking with the 911 dispatcher, she walked out of the store. At this time, Ohlenkamp was exiting his vehicle followed by another person crawling out of the backseat through the passenger side door. Although Snyder did not see the face of the person crawling from the backseat, she did observe that the person was a tall and skinny black male wearing a black jacket with a white hooded sweatshirt pulled over his

head. Snyder watched the man nonchalantly walk around the west side of the store.

As Snyder continued to speak with the dispatcher, others were able to flag down a police officer driving by. The officer was given a description of the man, which was broadcasted as a black male wearing a white hooded sweatshirt. The officer was also pointed in the direction that the man fled.

At 10:58 p.m., approximately three blocks away from the Kum & Go gas station, police saw a man fitting the suspect's description walking down the street by himself. The police turned a spotlight on him and ordered the man to show his hands and get on the ground, but the man ignored them and continued to walk. The officers then noticed the man fidgeting with something in his pockets. When the police officers yelled for a second time, the man stopped and fell into a snow bank with his hands pushed into the snow underneath him. The man was handcuffed and identified as Williams. After Williams was placed into the back of a squad car, officers discovered a knife buried in the snow bank.

At 11:07 p.m., the officers returned Williams to the Kum & Go to see if Ohlenkamp or Snyder could make an identification. As they drove back to the gas station, Williams shook the baseball cap from his head.

At 11:08 pm, Williams was removed from the squad car in handcuffs and his baseball cap was returned to his head. Williams stood by the gas pumps under the lighting of the canopy, while Ohlenkamp and Snyder stood inside the gas station's front doors. As Williams stood by the pumps, his hood was put over his head. Ohlenkamp identified Williams as the robber and told the police that he

was positive. Snyder confirmed that Williams' clothing and build was "a perfect match" to the robber. Ohlenkamp and Snyder were later taken to the police station where they provided written statements.

At the police station, Williams's clothing was seized. He was wearing a black leather coat with a missing belt, a dark baseball cap with a white star on the front of it, a white hooded sweatshirt, dark jeans, and white tennis shoes. Williams was also found with \$2.15 in coins on his person.

Weeks after the incident, Ohlenkamp discovered a black belt on the floor of the back seat of his vehicle. The belt did not belong to him, and no one had been in his car since the incident. Ohlenkamp believed the belt belonged to the robber, so he took it to the police. The belt matched Williams' black coat, and pictures from the night of the incident confirmed that it was in Ohlenkamp's vehicle at that time.

On February 5, 2009, the State filed a trial information charging Williams with robbery in the first degree, a class "B" felony, in violation of Iowa Code section 711.2. The case was tried to a jury on June 22-25, 2010.

At trial, Ohlenkamp again identified Williams as the robber and stated, "I am one hundred percent positive that's him." In his defense, Williams presented testimony from University of Northern Iowa associate professor in the psychology department, Otto MacLin. Professor MacLin performs eye witness identification research, and testified about how memory works and the ways in which memory errors can lead to mistaken eyewitness identifications. Professor MacLin testified that in order to prevent "contamination" of identifications, guidelines have been

established for law enforcement in conducting photo arrays, line-ups, or show-up identification procedures. Professor MacLin did not offer an opinion on any of the identifications or procedures used in this case.

On June 25, 2010, the jury returned a guilty verdict. Williams was sentenced to twenty-five years imprisonment with a mandatory minimum requiring seventy percent of the sentence be served. See Iowa Code §§ 902.9(2), 902.12(5). Williams appeals.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Although we generally preserve such claims for postconviction relief, where the record is sufficient to address the issues, we may resolve the claims on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). We find the record is adequate in this case.

III. Analysis.

In order to prevail on a claim for ineffective assistance of counsel, Williams must show (1) his trial counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Maxwell*, 743 N.W.2d at 195. Failure to prove either element by a preponderance of the evidence is fatal. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

Williams initially asserts his counsel failed to perform an essential duty when he did not move to suppress the show up identification on state due process grounds. Williams recognizes Iowa courts have consistently followed

the two-step federal due process “reliability” standard requiring courts to determine: (1) whether the out-of-court identification procedure was “impermissibly suggestive,” and (2) if so, whether the suggestive procedure, under the totality of the circumstances, gave rise to “a very substantial likelihood of irreparable misidentification.” See *Manson v. Brathwaite*, 432 U.S. 98, 107, 97 S. Ct. 2243, 2249, 53 L. Ed. 2d 140, 149 (1977); *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1972) (setting forth five reliability factors to consider under the totality of the circumstances); see also *State v. Folkerts*, 703 N.W.2d 761, 763-64 (Iowa 2005); *State v. Webb*, 516 N.W.2d 824, 829-30 (Iowa 1994); *State v. Neal*, 353 N.W.2d 83, 87-89 (Iowa 1984); *State v. Mark*, 286 N.W.2d 396, 403-07 (Iowa 1979); *State v. Salazar*, 213 N.W.2d 490, 493-95 (Iowa 1973). However, Williams argues this approach is unpersuasive and significantly flawed in light of new scientific research on memory and identification. Therefore, Williams argues we should use our state constitution to adopt the “necessity” standard adopted in Wisconsin as follows:

[E]vidence obtained from an out-of-court show up is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary. A show up will not be necessary, however, unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.

State v. Dubose, 699 N.W.2d 582, 593-94 (Wis. 2005).¹ However, we find that we need not address this issue, because even assuming, arguendo, that

¹ A third approach, the “pro se” approach, requires exclusion of the out-of-court identification if the procedure used is shown to be unnecessarily suggestive. See, e.g., *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260-65 (Mass. 1985); *People v. Adams*,

Williams's counsel failed to perform an essential duty by not moving to suppress the show up identification procedure, we find he has not shown he was prejudiced by counsel's breach.

To prove prejudice, Williams must establish “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *State v. Graves*, 668 N.W.2d 860, 882 (Iowa 2003) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698). This does not require Williams to show counsel's deficient conduct more likely than not altered the outcome of the case, but only that “the probability of a different result is ‘sufficient to undermine confidence in the outcome.’” *Id.* “In determining whether this standard has been met, we must consider the totality of the evidence, what factual findings would have been affected by counsel's error, and whether the effect was pervasive or isolated and trivial.” *Id.* at 882-83. Upon our review, our confidence in the outcome of the trial is not undermined.

Video surveillance from the Kwik Star independently shows the robber's clothing, and Williams was found to be wearing matching clothing. In addition, the video clearly shows the man who got into Ohlenkamp's vehicle had a black belt hanging from his coat. When Williams was arrested he was missing the black belt from his coat, and a black belt was later found in the back seat of Ohlenkamp's vehicle. Photographs from the night of the incident confirmed the belt was in the vehicle that night. Williams was also found approximately three blocks from the Kum & Go two minutes after the 911 call was placed. Further,

423 N.E.2d 379, 383-84 (N.Y. 1981). Williams makes no argument regarding this approach.

when Williams was ordered by the police to stop, he ignored them and fidgeted with something in his pockets. He then fell into a snow bank with his hands underneath him. A knife was found in the snow bank where Williams fell. Finally, Ohlenkamp testified that he only gave the robber “a couple bucks” in change, and Williams was found with \$2.15 in coins on his person when he was arrested. Accordingly, we find that even if we assume Williams’ counsel performed deficiently, the totality of the evidence does not show the probability of a different result sufficient to undermine our confidence in the outcome of this case. Thus, we affirm Williams’s conviction for first-degree robbery.

AFFIRMED.