IN THE COURT OF APPEALS OF IOWA

No. 1-799 / 10-0640
Filed December 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN JACIEL ZAZUETA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek, Judge.

A defendant appeals from his conviction of second-degree robbery. **AFFIRMED.**

Jack A. Schwartz of Jack A. Schwartz & Associates, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Kyle P. 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 Eisenhauer, JJ. Tabor, J., takes no part.

VOGEL, J.

Jonathan Zazueta appeals from his conviction for second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (2009), raising an ineffective-assistance-of-counsel claim. Our review is de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must demonstrate (1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). A defendant's inability to prove either element is fatal and therefore, we may resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

While an ineffective-assistance-of-counsel claim need not be raised on direct appeal, the defendant may do so if he had reasonable grounds to believe the record is adequate to address his claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). We may either decide the record is adequate to reach the claim, or preserve the claim for postconviction relief proceedings. *Id.* We find the record is sufficient to address Zazueta's claim.

Zazueta argues that his trial counsel breached a duty by "allow[ing] a biased juror to remain on the jury." Although Zazueta waived reporting of voir dire, during the trial and on the record, the parties described what occurred in context to the relevant juror. During voir dire, the juror indicated that he knew someone with the same name as one of the State's witnesses. Defense counsel did not use one of his six strikes to remove the juror.

Just prior to the close of evidence, the court was alerted to a potential problem with the juror—the court attendant stated that the juror "informed me that

one of the witnesses that he heard yesterday is a friend of his and that he did not feel comfortable and that he actually felt biased, and that he shouldn't be on this case. He really wants out." The juror was then questioned on the record, during which he stated that the witness was a friend of his and he "felt it would be better if I was off the trial." When asked if he could be fair, he responded "I do feel a bit uncomfortable just because he is a friend of mine." The following exchange occurred,

> PROSECUTOR: Well, I guess I'll just follow up. One of the things we talked about are jury instructions, and one of the things that you'll be asked to do is you're given an oath to follow the law and to evaluate each witness's testimony based on testimony you believe and the evidence that's presented to you. Are you able to set aside any friendship that you might have with [the witness] and evaluate the testimony that you saw from all of the witnesses the same.
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> JUROR: Yeah, I suppose I could.
>
> . . . .
>
> THE COURT: Now, [the Prosecutor] just asked you some questions that sort of suggested—with your answer is sort of suggesting that you could put aside that friendship and evaluate the case not on the friendship.
>
> JUROR: Yeah.
>
> THE COURT: But on the basis of the law and the evidence.
>
> JUROR: Yeah. My whole thing is I just feel a bit uncomfortable, you know, actually being involved with the case or whatnot. Just knowing people involved with the whole thing. That's the whole reason that I didn't want to—
>
> THE COURT: Well, but the level of discomfort, does it rise to the level of where you can't be fair, where you can't follow the law and the evidence?
>
> JUROR: No, I guess not.
>
> . . . .
>
> [The juror left the courtroom.]
>
> PROSECUTOR: Well, again, I mean I think that he stated he could follow the oath and evaluate and follow the jury instructions and evaluate the witness's testimony and the evidence equally and fairly, and so I would say that nothing he said would rise to the level of being replaced by an alternate, especially since this was no surprise and this was something that came up in jury selection.

> . . . .
> DEFENSE COUNSEL: Given his statements that he could follow the law and the jury instructions, I don't believe that it rises to the level of bias that needs to be assessed.
> THE COURT: Before you commit to that, your client, I think, would like to talk to you.
> DEFENSE COUNSEL: I'm sure he would.
> [A discussion was held between Defense Counsel and Zazueta.]
> DEFENSE COUNSEL: Yeah, we don't believe it rises to the level of bias.

While the juror indicated that he knew the witness and had some discomfort, at no point did he indicate he could not fairly decide the case. *See State v. Rhodes*, 288 N.W. 98, 103 (1939) ("A person is qualified to act as a juror when it is apparent from his entire examination that, notwithstanding his present knowledge of the facts or any opinion which he may have formed therefrom, he can try the case fairly and impartially on the evidence alone."). When asked whether he could follow the law and evaluate the witness's testimony based on the evidence presented, he stated he could do so. Upon further questioning, he explained he was only uncomfortable, but it did not rise to the level where he could not follow the law and make a decision based upon the evidence presented. His statements during questioning demonstrated he retreated from his initial self-assessment of being biased as related through the court attendant. *See State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993) (evaluating whether the challenged juror made statements indicating the juror could overcome their prejudice). Consequently, because the juror agreed he could be fair and follow the law and the evidence, defense counsel had no duty to argue that the juror was biased and Zazueta cannot establish a breach of duty. *See State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (explaining trial counsel has no duty to raise a

meritless issue). Zazueta's ineffective-assistance-of-counsel claim fails and we affirm.

AFFIRMED.