IN THE COURT OF APPEALS OF IOWA

No. 2-1111 / 11-0431
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEVIELL JORDAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Carlynn D. Grupp, District Associate Judge.

David Jordan appeals from his conviction of fourth-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams and Stephan J. Japuntich, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Carlyle D. Dalen, County Attorney, and Rachel A. Ginbey, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

EISENHAUER, C.J.

David Jordan appeals from his conviction, following a jury trial, for fourth-degree theft. He contends his trial attorney was ineffective in not calling an expert to testify about problems with eyewitness identification. We affirm.

Jordan was arrested and charged with fourth-degree theft following the theft of an Xbox videogame player from the apartment of Sarah Holder. Jordan was one of three individuals who stopped by the apartment one evening while several people were present. As Holder was preparing for bed she heard a commotion in the apartment, looked out the apartment window, and saw Jordan, whom she had met a day or two earlier, walking away with an Xbox. Two of the people in the apartment followed Jordan as he left with the Xbox. One of them had tried unsuccessfully to stop Jordan as he left the apartment with the Xbox. Holder quickly followed and caught up with Jordan, and the two who had followed him, in the parking lot of a convenience store across the street. By then, Jordan had put the Xbox in a red car, which drove away. When the police arrived, Holder identified Jordan as the thief. Police soon stopped a red car nearby and found the hard drive for an Xbox in the car. The Xbox was never recovered.

At trial, Holder identified Jordan as the person she saw leaving her apartment with the Xbox. She had met him a day or two before the theft and recognized him by his height and the braids in his hair. Jordan denied knowing Holder, being in her apartment, and taking the Xbox. The jury found Jordan guilty.

On appeal, Jordan contends his trial attorney was ineffective for not consulting with and calling an expert witness on eyewitness identification. He

argues Holder's identification of him as the thief is the only evidence tying him to the crime, there is no corroborative evidence to support the identification, and the jury "lacked the necessary framework to judge Holder's identification of Jordan as the man she saw." He asserts his attorney had a duty to know the applicable law and to protect him from a conviction based on an erroneous identification.

We review ineffective-assistance-of-counsel claims de novo. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008).

> To prove ineffective assistance of counsel, the appellant must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. There is a presumption the attorney acted competently, and prejudice will not be found unless there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Ennenga v. State, 812 N.W.2d 696, 701 (Iowa 2012) (citations and internal quotation marks omitted). 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).

Where, as here, an ineffective-assistance-of-counsel claim is raised on direct appeal, we must decide whether the record is adequate to decide the claim or whether it should be preserved for postconviction proceedings. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). Although such claims are generally preserved for postconviction relief proceedings, we will consider them on direct appeal where the record is adequate. *Id.* We conclude the record is adequate for us to address this claim.

Jordan suggests Holder's identification of him falls within the type of mistaken identifications that have been the subject of much research and

criticism. Yet he does not identify the presence of any of the factors research has identified as tending to affect eyewitness identifications, such as the presence of a weapon, presence of violence or stress, duration of the incident, confidence in the identification, cross-racial impairment, or various impermissibly-suggestive identification procedures. *See* Richard S. Smechel, Timothy P. O'Toole, Catharine Easterly & Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 195-204 (Winter 2006). He also has not identified what testimony an expert witness might give to impugn Holder's identification of Jordan.

Jordan's attorney cross-examined Holder on inconsistencies in her testimony. The court instructed the jury on how to evaluate eyewitness identification. *See generally State v. Cromedy*, 727 A.2d 457, 459 (N.J. 1999) (reversing a conviction for failure to give a jury instruction on cross-racial identification). Instruction 13 provided:

> The reliability of eyewitness identification has been raised as an issue. Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to see the person at the time of the crime and to make a reliable identification later.
>
> In evaluating the identification testimony of a witness, you should consider the following:
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> If the witness had an adequate opportunity to see the person at the time of the crime. You may consider such matters as the length of time the witness had to observe the person, the conditions at that time in terms of visibility and distance, and whether the witness had known or seen the person in the past.

The jury had "the necessary framework to assess Holder's identification of Jordan as the man she saw." Jordan has not shown "there is a reasonable probability that, but for counsel's [failure to call an eyewitness identification

expert], the result of the proceeding would have been different." *See State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) (citation omitted). Jordan has failed to demonstrate prejudice.

AFFIRMED.