IN THE COURT OF APPEALS OF IOWA

No. 3-665 / 12-0082
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DERRICK STEVEN PENA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

A defendant appeals from the judgment and sentence entered on a jury verdict of burglary in the first degree, robbery in the first degree, and willful injury causing serious injury. **AFFIRMED.**

Matthew M. Boles of Parrish, Kruidenier, Dunn, Boles, Gribble, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Doyle, J., and Goodhue, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

GOODHUE, S.J.

Derrick Steven Pena appeals from the judgment and sentence entered on a jury verdict of burglary in the first degree, robbery in the first degree, and willful injury causing serious injury. The sentences were ordered to run concurrently. The jury had also returned a verdict of guilty on the charges of conspiracy to commit a forcible felony and assault while participating in a felony resulting in serious injury. At sentencing the last two convictions were determined to have merged with those sentences for which Pena was sentenced. Pena contends the trial court should have granted his motions for judgment for acquittal and for new trial as the conviction was not supported by sufficient evidence, and that trial counsel was ineffective in not seeking to sever Pena's trial from his co-defendant, Bobby Thompson.

I. Background Facts and Proceedings

On January 17, 2011, at 10:00 p.m., three men broke into a residence occupied by four residents, including Nikolas Bender. Bender had been selling powder cocaine from the residence since November 2010. He had sold to five different customers, but only two of those customers, one of which was Pena, were allowed to pick up drugs at the residence. Those two customers would knock at the back door and be taken by Bender to his basement bedroom where he kept the drugs in a safe. Strangers usually used the front door, and only friends and the drug buyers used the back door. Bender had retrieved drugs from the safe in Pena's presence a couple of weeks before the break-in.

At about 3:00 p.m. on the day of the break-in, Pena had contacted Bender about purchasing a large amount of powder cocaine, and they had agreed on a

sale of the amount specified for $700. Pena said he would get back to Bender later in the evening. Pena's prior purchases had been for smaller amounts in the forty-to-seventy dollar price range. About two weeks prior to the purchase Pena's girlfriend overheard a conversation between Pena and another male that mentioned the Bender residence. When she asked what was going on he said they "would be in a lot of money soon." Also, two-to-four weeks prior to the incident Pena told other occupants of the residence that they should be careful that "in this neck of the woods people get robbed every day."

Eventually all of the perpetrators donned face coverings of some sort. Initially one of them, Bobby Thompson, was not masked and was recognized by Bender. On the date of the break-in, Pena and Thompson spoke by telephone twelve times in the hours before the robbery, none during the time frame of the actual break-in, and eight times in the three hours after the robbery. They had communicated by telephone seven times on January 14 and January 16.

Thompson initiated the entry by approaching the back door of the residence and asking Bender if he could use his telephone. Thompson was accompanied by two others, one of when was subsequently identified as Albert Butler. Neither Thompson nor Butler had ever been to the residence previously. Bender noticed that one of the two men accompanying Thompson had a gun. He retreated into the residence, but the perpetrators were able to keep the door from closing and made entry into the premises. The residents handed over wallets and telephones at the demand of the perpetrators to empty their pockets. It was obvious the perpetrators were not interested in general property items.

Thompson stated "that's not what we came for" and demanded to know "where is it at?"

The one carrying a duffel bag led Thompson to the basement and on their return asked for the combination to the safe. The duffel-bag carrier identified Bender as the owner of the safe, and Thompson proceeded to escort him to the basement, but a scuffle ensued. Bender yelled to another occupant, who had remained on the second story, to call the police. During the struggle the third intruder shot Bender in the leg. All three of the intruders left immediately through the back door.

Neither Thompson nor the third perpetrator, Albert Butler, had ever been to Bender's residence before. Pena made no attempt to contact Bender to finalize the $700 purchase that had been negotiated or for any other reason after the incident. The other purchaser who had been to Bender's basement residence did try to contact Bender after the incident. To the extent anyone was able to describe the duffel-bag carrier, there was general agreement that he was of the same race as Pena, fairly good sized, wore dark clothes, and his face was covered. There was no positive identification of Pena as one of the intruders by the victims. Thompson and Pena were tried together.

At the close of the State's evidence, Pena moved for a judgment of acquittal on the grounds that there was a lack of sufficient evidence to establish that he was a the scene of the break-in or in any way connected with it. The motion was denied, and the jury convicted Pena of all charges. Thereafter, he filed a motion for new trial on the basis that the verdict was contrary to the weight of the evidence and not supported by substantial evidence. Again, Pena's

motion was denied, and he has appealed. On appeal Pena contends that the court erred in overruling his motions for judgment of acquittal and for a new trial as his conviction was not supported by sufficient evidence, and based on a claim of ineffective assistance of trial counsel for failing to seek to sever Pena's trial from his co-defendant Thompson. The State not only resists those claims, but contends Pena failed to preserve error.

II. Error Preservation and Standard of Review

The State's contention that error was not preserved is spurious. Pena's counsel made a motion for judgment of acquittal at the close of the State's case. It is true that to preserve error on a claim of insufficient evidence the motion for judgment of acquittal must state the specific ground raised in the appeal. *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011). It was clear from the motion Pena made that he was asserting there was insufficient evidence to place him at the scene of the crime or in any way connect him to it, which was a challenge to all the elements of every charge made. In a sense it might be considered a "general motion," but it was specific in asserting there was no evidence that Pena was connected with the offense charged. The record indicates that the State and the court were fully aware of the "lack of identification" issue Pena was raising by the motion. When it is obvious all are aware of the nature of the claimed defect in the State's case raised by the motion error is preserved. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

Sufficiency-of-the-evidence claims are reviewed for errors a law. *Id.* at 26. Ineffective-assistance-of-counsel claims are reviewed de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

III. Discussion

To deny a motion for judgment of acquittal, the guilty verdict must be supported by "substantial evidence," which requires evidence that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). The evidence "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). Evidence is to be viewed in the most favorable light to the State. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004). Direct and circumstantial evidence are of equal probative value. Iowa R. App. P. 6.904(3)(p).

The jury could have found the following, which established Pena's participation in the break-in. The perpetrators knew there were significant drugs at the site of the break-in, their interest was primarily in acquiring drugs, and the drugs at the site belonged to Bender who kept them in a safe in his basement bedroom. The intruders went to the back door and, of the three, only Pena had ever entered by the back door or even been on the premises. There were only two parties besides Bender who knew where the drugs were kept, and Pena was one of them. Pena had negotiated a purchase of $700 worth of powder cocaine from Bender earlier in the day and told Bender he would contact him that evening, presumably to consummate the sale, but did not do so. In fact, Pena did not make any known effort to contact Bender after the break-in. There were frequent calls between Thompson, who was identified as one of the intruders, both before and after the break-in, but not during it. Pena had advised other occupants of the residence to be careful because they were in "a dangerous area

where frequent break ins took place" and told his girlfriend they would be "coming into some money." The jury was in a position to view Pena and consider the victims' description of him. To the extent the credibility of the victims' testimony was impacted by their use of marijuana it was a matter for the jury to consider. There was substantial evidence to support a guilty verdict.

Pena moved for a new trial where the ground for relief is defined as where the verdict is "contrary to the weight of the evidence." *See State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Pena gets to benefit from the possibly less-stringent rule on the motion for new trial, but Pena does not direct the court to contrary evidence. His claim is a lack or deficiency of evidence connecting him to the crimes.

IV. Ineffective Assistance of Counsel

To support an ineffective-assistance-of-counsel claim a proponent must prove by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) this failure resulted in prejudice. *State v. Clark*, 814 N.W.2d 551, 567 (Iowa 2012). The trial record alone will rarely be adequate to resolve a claim of ineffective assistance on appeal. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). As to the issue raised in this appeal, we conclude the record is sufficient.

Pena contends that his trial should have been severed from Thompson's. Pena's counsel made no motion for severance, but counsel has no duty to pursue a meritless issue. *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011). When defendants are indicted jointly, as Pena and Thompson were, the defendants are to be tried together unless separate trials are necessary to avoid

prejudice. *See State v. Sauls*, 356 N.W.2d 516, 517 (Iowa 1984). Severance is required when the issues are complex or evidence admitted against one defendant is so prejudicial against a co-defendant that the jury is likely to use it against the co-defendant. *State v. Williams*, 574 N.W.2d 293, 300 (Iowa 1998). This was not a complex trial.

Severance is required if either the evidence introduced by the State or the co-defendant is inadmissible and therefore prejudicial as to the defendant. *State v. Belieu*, 288 N.W.2d 895, 900 (Iowa 1980). Pena does not claim inadmissible evidence was admitted. He makes no claim the defense of his co-defendant was antagonistic to his defense, as in *Sauls*, 356 N.W.2d at 519.

The claim for severance is predicated on what Pena terms a "spill over effect" of the joint trial. He contends that because Thompson was identified at the scene of the break-in the evidence against him was stronger than the evidence against Pena, and the jury could have determined guilt by association. Pena has not directed the court to any Iowa case where severance was ordered because of the possibility of "guilt by association." Pena has directed the court to *State v. Bogan*, 774 N.W.2d 676, 684 (Iowa 2009), where on remand for other reasons the trial court was advised that it should consider the evidence admissible against the co-defendant and the lack of overwhelming evidence against the defendant on the issue of severance. Pena also cites *United States v. Flores*, 362 F.3d 1030, 1042 (8th Cir. 2004), as equating "guilt by association" and the "spill over effect," which requires separate trials. The *Flores* court was reciting the defendant's claim and did not require severance or introduce a

doctrine equating "guilt by association" and a "spill over effect" requiring separate trials. *Flores*, 362 F.3d at 1042.

Severance is not required simply because a defendant might have a better chance of acquittal in a separate trial. *Bogan*, 774 N.W.2d at 683 (citing *Zafiro v. United States*, 506 U.S. 534, 540 (1993)). Pena was charged with conspiracy, which requires proof of an association. There is no reason believe the evidence presented would have been different if Pena had been tried separately. Pena was not entitled to a separate trial from Thompson; therefore the claim of ineffective assistance of counsel is without merit.

AFFIRMED.

Vaitheswaran, P.J., concurs; Doyle, J., dissents.

DOYLE, J. (dissenting)

I respectfully dissent. There being no direct evidence, the State's case against Pena consists of layer upon layer of circumstantial evidence, spiced with supposition, infused with inference and innuendo, and topped off with a dollop of prosecutorial presumption.

To be sure, the proposition that circumstantial and direct evidence are equally probative is well established. Iowa R. App. P. 6.904(3)(p); *see also State v. Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011) ("Circumstantial evidence is equally probative as direct evidence for the State to use to prove a defendant guilty beyond a reasonable doubt."). "In a given case, circumstantial evidence may be more persuasive than direct evidence." *Brubaker*, 805 N.W.2d at 172. "There are, nevertheless, some dangers associated with the use of circumstantial evidence that are not associated with the use of direct evidence." *United States v. Gay*, 774 F.2d 368, 373 n.6 (10th Cir. 1985). As was once aptly written, "[c]ircumstantial evidence is a very tricky thing . . . ; it may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different." *United States v. Saborit*, 967 F. Supp. 1136, 1137 (N.D. Iowa 1997) (quoting Sir Arthur Conan Doyle, *The Boscombe Valley Mystery*, *The Adventures of Sherlock Holmes* 85 (Modern Library ed. 1920) (1892)). Unfortunately, there is "a danger legitimately associated with circumstantial evidence that the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree." *People v. Kennedy*, 391 N.E.2d 288, 291 (1979) (citation omitted).

From my point of view, the evidence here does nothing more than create speculation, suspicion, or conjecture. "Evidence that allows two or more inferences to be drawn, without more, is insufficient to support guilt." *Brubaker*, 805 N.W.2d at 172. Without more, I do not believe there was sufficient evidence here to support a guilty verdict. Consequently, I would reverse and remand for dismissal of his convictions.