IN THE COURT OF APPEALS OF IOWA

No. 6-811 / 05-1345
Filed December 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYREE LEE YOUNG,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Tyree Young appeals his judgment and sentence for second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

Robert Steiner hit a vehicle in which Tyree Lee Young was a passenger. As Steiner attempted to retrieve his insurance card, Young picked Steiner's pocket and made off with his wallet, which contained several hundred dollars in cash.

A jury found Young guilty of second-degree robbery. Iowa Code §§ 711.1 and 711.3 (2003). On appeal, Young contends: (1) the evidence was insufficient to support the finding of guilt, (2) the district court erred in denying Young's request for a jury instruction on alternate theories, and (3) trial counsel provided ineffective assistance in several respects.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following elements of second-degree robbery:

> 1. On or about April 16, 2004 the defendant had the specific intent to commit a theft.
> 2. To carry out his intentions the defendant committed an assault upon Robert Steiner.

The district court defined the term "assault" as follows:

> Concerning element number 2 of Instruction No. 15, an Assault is committed when a person does an act which is meant to cause pain or injury, result in physical contact which will be insulting or offensive, place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive to another person, when coupled with the apparent ability to do the act.

The State concedes that this definition is inaccurate because it requires proof of all the assault alternatives rather than any one of them.[1] Because no objection to this instruction was lodged, it became the law of the case. *See State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) ("Failure to timely object to an instruction not only waives the right to assert error on appeal, but also 'the instruction, right or wrong, becomes the law of the case.'" (citations omitted)). Therefore, the jury had to find that Young did an act which was meant to (1) cause pain or injury *and* (2) result in physical contact which would be insulting or offensive *and* (3) place another person in fear of immediate physical contact which was painful, injurious, insulting or offensive to another person. In deciding whether there was sufficient evidence to support all these alternatives, we are obligated to view the evidence in the light most favorable to the State. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006).

Viewed in this light, the jury could have found the following facts. After the accident, seventy-nine-year-old Steiner felt a hand in a pocket containing his wallet. He reached around to grab the hand. Young pulled him backwards. As a result, Steiner "fell over backwards." When asked what caused him to fall, Steiner stated "[h]im pulling me backwards trying to get my billfold out and me hanging onto his hand."

The jury could have found from this evidence that, when Young put his hand in Steiner's pocket to take his wallet, he committed an act which satisfied all three of the assault alternatives. *See State v. Spears*, 312 N.W.2d 79, 81 (Iowa

[1] The State's brief says: "[T]he State agrees that under the instruction in this case, it was required to prove an assault was committed under all assault definitions cited in the instruction."

Ct. App. 1981) (finding sufficient evidence to support assault element of second-degree robbery where defendant "reached into the pocket of the apron being worn by the bartender, grabbed money out of his pocket . . . and fled.").

We recognize the jury could have found that the act of removing the wallet from Steiner's pocket was not, in and of itself, a violent act. However, precedent tells us that the focus is not on "the nature of the act itself" but on "the intended results." *Spears*, 312 N.W.2d at 81. Viewing all the circumstances surrounding the removal of the wallet, the jury reasonably could have found that Young intended to cause Steiner pain when he slipped his hand into Steiner's pocket and pulled him backwards. The jury also reasonably could have found that the act of taking the wallet would result in contact with Steiner that would be insulting or offensive to Steiner and would place him in fear of immediate physical contact which was painful, injurious, insulting, or offensive to another person. *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006) (quoting 21 Am. Jur. 2d *Criminal Law* § 128, at 214-15 (1998) (stating the intent required by statute "may be inferred from the circumstances of the transaction and the actions of the defendant")). We are convinced the jury's finding of guilt was supported by substantial evidence. *Shanahan*, 712 N.W.2d at 134.

II. Jury Instructions

At trial, defense counsel asked the district court to instruct the jury that they could find Young not guilty of robbery even if they subscribed to different theories of innocence, with some believing Young was not present at the scene and some believing he was present, but did not commit the assault. Defense counsel characterized such an instruction as an "alternative theory instruction."

The district court disagreed with defense counsel's characterization and denied Young's request for the instruction. The court explained that the "alternate theory" instruction focused on the State's theories of guilt rather than defense theories of innocence. Citing the uniform instruction, the court noted that the instruction does not require unanimity on alternate theories of guilt proffered by the State but only unanimity on an ultimate finding of guilt. *See* Iowa Criminal Jury Instruction 100.16. The court advised defense counsel:

> I don't think you are talking alternate theory. I think what you are saying is my client didn't do it. He wasn't there. If he was there, he didn't commit an assault. That is, really, not alternate theories, as I understand that instruction to go to.

The court said that defense counsel was free to make this argument to the jury.

The district court succinctly explained that Young's requested instruction was not a proper defense theory. *See State v. Johnson*, 534 N.W.2d 118, 124 (Iowa Ct. App. 1995). Therefore, we discern no prejudicial error in the court's refusal to give this instruction. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996) (setting forth standard of review).

III. Ineffective Assistance of Counsel

Young claims trial counsel was ineffective in: (1) failing to request an instruction on theft from a person, (2) purportedly telling the jury that he was guilty of theft, and (3) failing to impeach Steiner's in-court identification of him with a photo array containing his picture. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668,

690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984). Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

On the first claim regarding counsel's failure to request a jury instruction on theft from a person, Young specifically asserts that "[h]ad the jury received such an instruction, [he] would not have been found guilty of robbery." If Young is contending that theft is a lesser-included offense of robbery and failure to instruct on this offense was reversible error, our highest court has rejected this contention. *State v. Holmes*, 276 N.W.2d 823, 825 (Iowa 1979). On the other hand, if Young is contending that the prosecutor should have charged him with theft in addition to, or in lieu of, robbery, it is established that "the decision whether to prosecute, and if so on what charges, is a matter ordinarily within the discretion of the duly elected prosecutor." *State v. Iowa Dist. Ct.*, 568 N.W.2d 505, 508 (Iowa 1997). Because Young was not charged with theft, he was not entitled to a theft instruction and trial counsel was not ineffective in failing to request it. *Johnson*, 534 N.W.2d at 124.

On the second claim, Young contends defense counsel "conceded that there was an intention to commit a theft, and that a theft occurred." Young further asserts that "the jury likely heard the same concession." This discussion took place outside the presence of the jury. In addition, there is no indication that the district court took this issue away from the jury, as the jury was instructed on the "intent to commit theft" element of the robbery charge. Therefore, Young was not prejudiced by trial counsel's discussion of this element.

On the third claim, regarding defense counsel's failure to impeach Steiner's in-court identification of Young, Young contends "the evidence

concerning the real identity of the perpetrator was murky at trial." On our de novo review of the record, we disagree. Young's girlfriend at the time of the accident unequivocally testified that he was the person who took the wallet. Although other witness identifications of Young revealed some inconsistencies, the girlfriend's testimony renders it improbable that the outcome would have changed if the photo array with Young's picture had been introduced.

For these reasons, we reject Young's ineffective-assistance-of-counsel claims.

IV. Disposition

We affirm Young's judgment and sentence for second-degree robbery.

AFFIRMED.