IN THE COURT OF APPEALS OF IOWA

No. 6-899 / 05-1745
Filed December 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES LOSEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

James Douglas Losey appeals his conviction for second-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Fred H. McCaw, County Attorney, and Ralph R. Potter, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., Vogel, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HUITINK, P.J.

James Douglas Losey appeals his conviction for second-degree robbery. We affirm.

I. Background Facts and Proceedings.

Losey was charged with the foregoing offense after he was implicated in the robbery of the Dubuque Bank and Trust on July 12, 2004. Losey pleaded not guilty, and a public defender was appointed to represent him.

Losey's jury trial was set for September 18, 2005. At a September 15, 2005 final pretrial conference, Losey personally addressed the court concerning his dissatisfaction with the public defender and requested a new court-appointed attorney. The court denied Losey's request, and the matter proceeded to trial as scheduled.

At the close of the State's evidence, Losey's counsel moved for a directed verdict, citing the insufficiency of the State's evidence to prove the intent to commit a theft or assault element of robbery. Losey's motion was denied, and the court submitted the robbery charge to the jury. The jury returned a guilty verdict. Losey's posttrial motions were denied, and a judgment of conviction was entered in accordance with the jury's verdict. Losey was sentenced to serve a term not to exceed ten years.

On appeal, the appellate defender raises the following issues on Losey's behalf:

I. There is insufficient evidence to support defendant's conviction for second-degree robbery.
II. The district court erred and denied defendant the right to counsel by failing to thoroughly inquire into defendant's allegations of a conflict with his attorney.

III. Defendant's trial attorney rendered ineffective assistance of counsel.

Losey raises the following issues in his pro se brief:

I. Appellant was denied his fundamental right of due process under the Sixth and Fourteenth Amendments of the U.S. Constitution when only months prior to trial he had been diagnosed "chronically mentally ill with schizophrenia and bipolar one mood disorder . . . meets the criteria for dementia . . . symptoms of hallucinations and delusions . . . formal thought disturbance . . . his contact with reality tenuous . . ." [and where] "results indicate deficient range in memory functions in all domains assessed including immediate and delayed (intermediate) recall" and where appellant was coerced by jail officials to take psychotropic medications and where defense counsel obtained both psychiatric evaluation and list of medications yet failed to apprise the court prior to trial.

II. Appellant was denied his constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution when, after the trial had been pending a year, trial counsel had still failed to depose several witnesses and where the trial court consequently limited the number of depositions to be taken in the four remaining days prior to trial.

III. Appellant was denied his rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution when defense counsel had failed to file a timely motion to suppress illegally obtained evidence during a warrantless search and seizure.

II. Sufficiency of the Evidence.

We review a sufficiency of the evidence challenge for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We uphold a verdict if substantial evidence supports it. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). A jury's finding of guilt is binding upon us unless there is not substantial evidence in the record to support the finding. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001). Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *State v.*

Robinson, 288 N.W.2d 337, 339 (Iowa 1980). "'Evidence in not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding.'" *Chrysler Fin. Co. v. Bergstrom*, 703 N.W.2d 415, 418 (Iowa 2005) (quoting *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005)).

We view the evidence in the light most favorable to the State, but consider all the evidence, not just the evidence supporting the verdict. *Thomas*, 561 N.W.2d at 39. "Direct and circumstantial evidence is equally probative." *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). The evidence must raise a fair inference of guilt as to each essential element of the crime and must do more than raise suspicion, speculation, or conjecture. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2000). "[W]hen two reasonable inferences can be drawn from a piece of evidence, we believe such evidence only gives rise to a suspicion, and, without additional evidence, is insufficient to support guilt." *State v. Truesdell*, 679 N.W.2d 611, 618-19 (Iowa 2004).

Losey claims there is insufficient evidence in the record to support his robbery conviction. More specifically, he claims "the record does not establish that he did an act with the specific intent to place the victim in fear of immediate contact that would be painful, injurious, insulting, or offensive." Iowa Code section 711.1 defines robbery as follows:

> A person commits a robbery when, having the intent to commit theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
>
> 1. Commits an assault upon another.

> 2. Threatens another with or purposely puts another in fear of immediate serious injury.
> 3. Threatens to commit immediately any forcible felony.
>
> It is immaterial to the question of guilt or innocence of robbery that property was or was not actually stolen.

Iowa Code section 708.1 provides that a person commits an assault when, without justification, the person does any of the following:

> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
> 3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Assault requires an overt act. *State v. Smith*, 309 N.W.2d 454, 457 (Iowa 1981). An overt act can be defined as "an open manifest act from which criminality may be implied." *State v. Heard*, 636 N.W.2d 227, 231 (Iowa 2001). It is also "[a]n outward act done in pursuance and manifestation of an intent or design." *Id.* We consider the totality of the facts including both verbal and nonverbal actions. *See id*. at 232. Regardless of whether the assault is submitted as a specific or general intent crime, "the State must prove by evidence beyond a reasonable doubt that the defendant intended his act to cause pain or injury to the victim or to result in physical contact that would be insulting or offensive to the victim." *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004). The intent required by statute "may be inferred from the circumstances of the transaction and the actions of the defendant." *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006) (citing 21 Am. Jur. 2d *Criminal Law* § 128, at 214-15 (1998)). "[A]n actor will ordinarily be viewed as intending the natural and probable

consequences that usually follow from his or her voluntary act." *Taylor*, 689 N.W.2d at 132 (citing *State v. Bedard*, 668 N.W.2d 598, 601 (Iowa 2003)). A victim's perception and resulting fear are evidence properly considered in determining an accused's intent. *State v. Spears*, 312 N.W.2d 79, 81 (Iowa 1981).

The record indicates Losey entered the bank at approximately 3 p.m. on July 12, 2004. One or more of the bank's employees noticed Losey was overdressed for the hot weather because he was wearing a tweed or wool sport coat and a black fedora hat. Losey was also carrying a large envelope. Upon entering the bank, Losey approached a bank teller and handed her a note. The note read, "Put the money in the envelope and no ink bombs." Losey did not speak to the clerk, but simply stood by the teller's window holding the envelope open to receive the money he demanded.

The clerk testified she was frightened by Losey's demands and thought the note referred to a bomb. She was also concerned that Losey may have carried a weapon inside of his sport coat. Instead of complying with Losey's demands, the teller knelt down behind the counter, pressed an alarm button, and alerted her supervisor to Losey's demands. After a few minutes, Losey left the bank without taking any money from the teller.

Although the record contains no evidence indicating Losey was armed, made an express threat or threatening gesture, we nevertheless find the evidence sufficient to establish the assault element of Losey's robbery conviction. Losey's demeanor, proximity to the bank teller, his note demanding money, as well as the teller's resulting fear, when considered in total, support an inference

of the requisite statutory intent. While we find no Iowa case directly on point, cases from other jurisdictions have reached the same conclusion under strikingly similar circumstances. *See, e.g., United States v. Henson*, 945 F.2d 430, 439-40 (1st Cir. 1991) (although no weapon was displayed and no threat of bodily harm expressed, emphatic written demand for immediate surrender of money sufficient to establish intimidation (conduct reasonably calculated to cause fear) element of federal bank robbery statute.); *United States v. Robinson*, 527 F.2d 1170, 1172 (6th Cir. 1975) (Defendant wore clothing in which a weapon could be concealed and stated "Give me all your money."); *State v. Collingsworth*, 966 P.2d 905, 908 (Wash. App. 1997) ("no matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force"). We therefore affirm on this issue.

III. Motion for Substituted Counsel.

We review the trial court's denial of Losey's request for substitute counsel for an abuse of discretion. *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001). "The Sixth Amendment right to counsel does not guarantee a 'meaningful relationship between an accused and his counsel.'" *Id.* (quoting *Morris v. Slappy*, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d 610, 621 (1983)). To justify the appointment of substitute counsel, a defendant must show sufficient cause. *State v. Martin*, 608 N.W.2d 445, 449 (Iowa 2000). "Sufficient cause includes 'a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.'" *Id*. (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)).

In *Lopez*, the court said:

> In determining whether to grant a request for substitute counsel, the court must balance the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice. The court should not permit a defendant to manipulate the right to counsel to delay or disrupt the trial. Additionally, the court should not allow last-minute requests to substitute counsel … to become a tactic for delay. For these reasons, the court has considerable discretion in ruling on a motion for substitute counsel made on the eve of trial.

Lopez, 633 N.W.2d at 779 (citations omitted). "[A] defendant must show prejudice when the court denies a motion for substitute counsel." *Id*. The court has "a duty of inquiry once a defendant requests substitute counsel on account of an alleged breakdown in communication." *State v. Tejeda*, 677 N.W.2d 744, 750 (Iowa 2004). The court must inquire into the allegation of the breakdown of the defendant's communication with his lawyer. *Id*.

> A defendant who cannot communicate with his attorney cannot assist his attorney with preparation of his case, including suggesting potential witnesses to call and trial strategies to pursue, discussing whether the defendant himself should testify, and helping formulate other bread-and-butter decisions that can constitute the core of a successful defense.

Id. Therefore, the trial court must appoint substitute counsel when a total breakdown in communication occurs. *Id*.

At the earlier mentioned pretrial hearing, Losey told the court:

> But see, I feel like I've gone from a position of my attorney being my advocate to now having two adversaries. As a matter of fact, I feel like I have three adversaries now, but none of this is due – none of this is due to something I've done that's against the rules.
>
> I want the court to make sure – I just have one, two, three, four, five – what they done was sandbagged me. They told me they were going to do this and do this and do this, and they showed up Tuesday and told me it's too late, we're not, and then said we're going to come in here and get it on the record so he doesn't have

> an ineffective counsel claim, and I can preserve my right on it, but you know what? That's intended for me to challenge the legality of something already presumed illegal. It's already presumed illegal.

With a brief interruption by the trial court, Losey continued with the following:

> In light of what I said and in light of what I want filed, I would say that I would think it's a conflict of interest to proceed to trial for the representation that I have at this time . . . .
>
> . . . .
>
> All I know is I'm proceeding to trial with 20 depositions not taken and I'm proceeding to trial without being able to have a motion for suppression on an issue that's constitutionally presumed illegal, not one time, but two times.

The trial court denied Losey's request for substitute counsel stating:

> THE COURT: I will not appoint new counsel at this point. As I said before, we're one business day away from trial for a matter that's been pending a year. That's just the way it stands. We are set for trial on Monday and we're going. I will not substitute my judgment or your judgment for counsel's as to the need for depositions.
>
> THE DEFENDANT: Your Honor, you substituted counsel's judgment concerning the suppression motion.
>
> THE COURT: The record needs to show that the Court was about to explain its reasoning but the defendant's interruption makes it apparent that there is really no point to doing that.

Based on our review of the record, we find the trial court was fully informed concerning Losey's reasons for requesting substitute counsel. No further inquiry was necessary for the court to rule on Losey's request. The trial judge did not abuse his discretion by denying Losey's eve-of-trial request for substituted counsel. We accordingly affirm on this issue.

IV. Ineffective Assistance of Counsel.

Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa

1997). "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006) (citing *Atley*, 564 N.W.2d at 833). We preserve claims for postconviction proceedings "where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002); *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We find the record on direct appeal is insufficient to address Losey's ineffective assistance of counsel claims and preserve them for postconviction relief.

AFFIRMED.