IN THE COURT OF APPEALS OF IOWA

No. 7-937 / 06-1721
Filed January 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUCKAS JOE SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Emmet County, Nancy Whittenburg, Judge.

Luckas Smith appeals from his convictions and sentences following a jury trial for possession of a firearm as a felon, second-degree theft, and second-degree burglary. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, and Douglas Hansen, County Attorney, for appellee.

Heard by Huitink, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Luckas Smith[1] appeals from his convictions and sentences following a jury trial for possession of a firearm as a felon in violation of Iowa Code section 724.26, second-degree theft in violation of sections 714.1 and 714.2, and second-degree burglary in violation of sections 713.1 and 713.5. He contends the court abused its discretion in admitting certain testimony regarding a theft charge that had been dropped prior to trial. He further contends he received ineffective assistance of counsel in many respects. We affirm.

I. Background Facts and Proceedings.

The jury could have found the following facts: In January 2006 Charles Smith was living in Estherville with his former girlfriend Tanya Helmick.[2] On the morning of January 21, Helmick told Charles to move out, and Charles packed his things and moved to his mother's house around noon that day. Before Charles left Helmick's residence, he began to drink. He continued to drink at his mother's house. By 10:00 p.m. he had consumed more than a twelve-pack of beer and half of a small bottle of Black Velvet. Around that time, Luckas called Charles to arrange a meeting, and the two men left their respective dwellings on foot and met on a nearby street.

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[1] Because the defendant, Luckas Smith, and the State's main witness, Charles Smith, have the same last name, we will refer to the individuals by their first names for clarity.

[2] Charles had two prior felony convictions and had been to prison five or six times. Charles was testifying against Luckas pursuant to a plea agreement that resulted in Charles serving two years on probation for the charge of carrying weapons. The charge had been reduced from the felony charge of intimidation with a dangerous weapon. During trial Charles explained that he insisted on his charges being dropped to a misdemeanor before he would agree to testify against Luckas.

At the meeting Luckas told Charles that he was going to commit a "smash-and-grab burglary" at Owens Jewelry, and he asked Charles to act as a lookout. Luckas told Charles he planned to trade the stolen jewelry for drugs. When Charles asked what he would get out of it, Luckas told him he would get some methamphetamine. Charles agreed to help, and he suggested they commit the burglary around 3:00 a.m.

The two men then walked to the residence of Jerred Pattison, with whom Luckas was staying. When they arrived at Pattison's garage, the two men looked at Luckas's Honda Odyssey ATV four-wheeler, which was stored in the garage. Luckas then retrieved a black .380 caliber semi-automatic pistol, which had been hidden in the rafters of the garage. Due to their criminal record, neither Luckas nor Charles could legally possess firearms.

After Luckas retrieved the pistol, the two men then walked toward the Good Times bar. In an alley near the bar, Luckas checked out an ATV that was parked on a trailer. He looked at the wires, tampered with the ignition, and tried to get it started. Charles left Luckas in the alley and went into the bar.

Later that evening, Charles left the bar and found Luckas still "playing with" the ATV. He told Luckas he had a screwdriver that Luckas could use. Around midnight, the two men walked to Charles's mother's house, and Charles gave Luckas the screwdriver. While the men were at Charles's mother's house, Charles made himself a Black Velvet and Coke. The two men then walked back to the Good Times bar; Charles went inside the bar but Luckas did not. Later, Charles exited the bar and saw Luckas near the ATV with the screwdriver. Charles then reentered the bar and saw his former girlfriend, Helmick, with a

man, Bruce Henningsen. Charles was upset seeing them together, and he told Helmick to watch her back and he had a "9mm bullet" with her name on it. Helmick testified Charles was "very, very drunk" when he made these statements.

Around 2:00 a.m. Helmick and Henningsen left the bar and drove to Henningsen's house. Charles also left the bar around this same time and found Luckas still "fiddling with" the ATV. The two men then walked past Henningsen's house to see whether he and Helmick were there. Charles was still upset, and said he wanted to do something to scare them. Luckas handed Charles the pistol he had retrieved from the garage earlier in the night and "basically told [Charles], here do it." Charles fired three bullets into Henningsen's house, aiming for the kitchen because he thought that was where Helmick and Henningsen would be. The two men then ran away, and Charles hid the pistol in his aunt's mailbox, which was two houses away from Henningsen's house. A short time later, Charles retrieved the pistol from the mailbox and gave it back to Luckas. The two men then walked to Pattison's residence and borrowed a pair of walkie-talkies. Luckas showed Charles how to use the walkie-talkies, which they planned to use during the burglary at the jewelry store.

At approximately 3:00 a.m., the two men walked toward Owens Jewelry. Luckas still had the pistol he had retrieved earlier in the night with him. He asked Charles for the Coke bottle from which Charles had been drinking Black Velvet and Coke to use as a silencer for the pistol. The two men separated, but they continued to communicate via the walkie-talkies. Charles watched for cars coming in their direction. Shortly after he notified Luckas that a car had been

driving in their direction but then turned away, Charles heard a loud pop. After hearing the noise, Charles began walking to the local gas station where he was to meet Luckas; however, Luckas then told Charles to "meet him at the Odyssey" via the walkie-talkie. The two men met at Pattison's garage, and Luckas told Charles that he shot the Owens Jewelry window, it did not break, he beat out the window with the pistol, grabbed the jewelry, and stashed it. The two men then walked to the residence of Luckas's girlfriend, Cindy Koons, where Luckas went inside. Charles returned to his mother's house.

Meanwhile, at 3:25 a.m., police were dispatched to Owens Jewelry. The police discovered that jewelry having a wholesale value of about $3420, and a retail value of about $8552, was missing. They observed the safety glass in the display window had broken into distinctive long, narrow shards. The police found a shell casing and a twenty-ounce plastic Coke bottle with a hole in the bottom beneath the window. They also found a bullet jacket and the lead core of a bullet inside the store. Additionally, the police traced a trail of broken glass, which consisted of distinctive long, narrow shards of the same thickness and color as the shards found around the broken window, to an ATV that had been on a trailer behind a nearby building. Police found the last shard near a van behind which the ATV had been parked. They discovered the ATV had been removed from the trailer, the cover of the ignition had been pulled off, and the wires had been "messed with," indicating that someone had tried to hot-wire the ATV. On the rear tire of the van, next to the place where the ATV had been, the police found a

paper towel stained with blood containing DNA which was later determined to match Luckas's DNA.[3]

Police recovered three bullets from Henningsen's house. Victor Murillo, a criminalist with the Iowa Division of Criminal Investigations State Laboratory, testified that the three bullets found in Henningsen's house, and the bullet jacket found at Owens Jewelry, had all been fired from the same firearm and they were all "consistent" with .380 caliber bullets. Detective Greg Van Langen testified that the firearm in question had been made by one of five manufacturers, several of which were Russian. Detective Van Langen further testified that after Charles was arrested, Charles told police where Luckas hid his guns in the past. Based on this information, police obtained a search warrant for the residence occupied by Luckas and his girlfriend, where they found a hand-grip for a pistol, marked with a star and the words "Made in Russia," in the basement. Detective Van Langen later determined that the hand-grip would fit a .380 caliber pistol.

On May 15, 2006, the State filed a trial information charging Luckas with intimidation with a dangerous weapon, possession of a firearm as a felon, first-degree theft, second-degree burglary, and first-degree theft regarding an ATV. Additionally, the trial information accused Luckas of being a habitual offender and being subject to a minimum sentence due to committing forcible felonies while in possession of a dangerous weapon. A supplemental trial information was filed on September 26, 2006, amending the first-degree theft to second-degree theft,

[3] The DNA report from the criminalistic laboratory showed the odds of a chance match were less than one in 390 million, and that Charles was eliminated as the source of the DNA found on the paper towel.

dropping the theft charge regarding the ATV, and not listing the two sentencing enhancements. That same day, trial commenced.

On September 29, 2006, the jury found Luckas guilty of possession of a firearm as a felon, second-degree theft, and second-degree burglary. The jury acquitted him of the charge of intimidation with a dangerous weapon. Luckas stipulated that he had two prior felony convictions, which subjected him to sentencing as a habitual offender. The court sentenced him to three fifteen-year terms of imprisonment, which were to run consecutively to each other.

Luckas now appeals.

II. Discussion.

A. Testimony of Charles.

On appeal, Luckas claims the court abused its discretion in admitting Charles's testimony concerning Luckas's attempt to steal the ATV, arguing that it constituted improper and unduly prejudicial evidence of Luckas's bad character. During direct examination Charles testified, without objection, that he saw Luckas near the ATV "trying to get it started," he lent Luckas a screwdriver to use on the ATV, he saw Luckas near the ATV with the screwdriver, Luckas was "still fiddling with the ATV" when the Good Times bar closed, Luckas then "gave up on the ATV, couldn't get it started," and, with respect to Luckas's reason for tinkering with the ATV, "he said something about parts for his Honda Odyssey." Because there was no objection to this testimony, we find Luckas failed to preserve this issue for appeal, and thus, we will not review his claim on appeal.[4] *See State v.*

[4] Prior to this testimony, the State asked Charles if Luckas planned on committing "any other crime" that night. Luckas's counsel objected on several grounds. The court

Musser, 721 N.W.2d 734, 740 n.1 (Iowa 2006) (stating issues not raised before the district court cannot be raised for the first time on appeal).

Luckas alternatively claims his trial counsel was ineffective in failing to preserve Luckas's objections to Charles's testimony, and in many other respects. We review claims of ineffective assistance of counsel de novo. *State v. Oetken,* 613 N.W.2d 679, 683 (Iowa 2000). To establish ineffective assistance of counsel, Luckas must prove: (1) his attorney's performance fell below "an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish breach of duty, Luckas must overcome the presumption that counsel was competent and prove counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Luckas may establish prejudice by showing a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Luckas's ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Luckas contends his trial counsel was ineffective for failing to object to Charles's testimony that he tried to steal the ATV as improper and unduly prejudicial evidence of Luckas's other bad acts under Iowa Rules of Evidence

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sustained the objection on the theory that the prosecutor had laid no foundation for Charles to testify about Luckas's state of mind and struck both the question and the answer. A short time later, Charles stated that Luckas had been interested in an ATV parked outside the bar. Luckas's counsel again objected, arguing that evidence about Luckas's attempt to steal the ATV was not relevant because the count based on that charge had been dismissed, and Charles was not competent to testify about Luckas's state of mind. The court sustained the objection, but counsel did not ask the court to strike the testimony and it did not do so.

5.404(*b*) and 5.403. Charles testified that Luckas tried to start the ATV, he lent Luckas a screwdriver to use on the ATV, Luckas was near the ATV with the screwdriver, Luckas finally gave up on the ATV because he could not get it started, and to explain why he was tinkering with the ATV, Luckas said something about parts for his own Honda Odyssey. Luckas does not claim it would have been improper for the State to present evidence that established Luckas was in the vicinity of the ATV, a trail of glass led from the jewelry store to the ATV, and a paper towel was found near the ATV that contained the defendant's blood. Rather, Luckas argues the State could have presented this evidence without adding the fact that Luckas was in the vicinity of the ATV because he was trying to steal the ATV. The State asserts the jurors could have drawn the obvious inference that Luckas was up to no good, even if Charles had not testified to that effect. We agree.

Even if Charles had not testified that Luckas was attempting to steal the ATV, the jurors would have learned Luckas spent hours loitering in an alley, in the vicinity of an ATV that did not belong to him, in the middle of the night in January, with no apparent reason for being there. Considering the other evidence in this case, there is no reasonable probability the verdicts would have been different if defense counsel had successfully objected to Charles's testimony that Luckas tried to steal the ATV. Therefore, Luckas is unable to show that prejudice resulted.

Luckas also contends his counsel was ineffective in failing to ask the court to strike certain testimony. Charles testified that Luckas "was trying to hot-wire the ATV." Luckas's counsel objected to this testimony, and the court sustained

the objection; however, the court was not asked to strike the testimony, and it did not do so. Considering the other overwhelming evidence supporting Luckas's guilt and the negligible effect the testimony that Luckas was trying to hot-wire the ATV could have had on the verdict, we conclude there is no reasonable probability the verdicts would have been different if Luckas's counsel would have asked the court to strike that portion of Charles's testimony from the record. Accordingly, Luckas is unable to show prejudice resulted from his counsel's omission.

B. Intimidation Charge.

Luckas contends his trial counsel did not properly move to sever the intimidation charge from the charges of burglary, theft, and possession of a firearm by a felon. In the supplemental trial information, Luckas was charged with intimidation with a dangerous weapon, as an accomplice of Charles. The jurors acquitted Luckas of the intimidation charge, but Luckas argues, "the taint of the accusations likely remained." The State argues that the testimony concerning the shots fired into Henningsen's house, and the fact Luckas provided the pistol that Charles used, in addition to the evidence that the same pistol fired the bullets recovered from Henningsen's house and the bullet jacket recovered from Owens Jewelry would have been relevant and admissible to support the conclusion that Luckas was the perpetrator of the burglary and theft. Therefore, even if a motion to sever could have been granted, the facts underlying the intimidation charge would have been admissible at trial. We agree. Because these facts would have been admitted into evidence, we conclude there was no reasonable probability that, but for Luckas's counsel's

failure to ask for severance, the result of the proceeding would have been different. Accordingly, we find Luckas failed to establish the prejudice prong of the *Strickland* test.

C. Jury Instruction.

Luckas further contends his trial counsel failed to perform an essential duty and prejudice resulted when counsel failed to ask the court to give Iowa Criminal Jury Instruction 200.4, which states that testimony of an accomplice must be corroborated. Luckas and the State agree Charles was an accomplice in the burglary and theft. However, because the record reveals there is ample corroboration of Charles's testimony, we conclude Luckas is unable to show prejudice resulted from his counsel's failure to request the instruction on corroboration of accomplice testimony.

Charles testified that Luckas was in possession of a .380 caliber pistol. Jerred Pattison, a friend of Luckas, testified that during the week preceding the crimes he saw Luckas with "a pistol grip" that was "sticking out," presumably from Luckas's pocket or belt. Charles also testified Luckas recruited him to help with the projected burglary and Luckas obtained walkie-talkies so Charles would be able to act as a lookout while the burglary was under way. Kevin Clabaugh, a friend of Luckas's who was staying at Pattison's house, testified that Luckas and Charles came to Pattison's house together on the night of the burglary and that Luckas wanted to borrow Pattison's walkie-talkies. Additionally, Charles testified that Luckas took the Coke bottle from which Charles had been drinking Black Velvet and Coke, saying he was going to use it for a silencer. Officer Matt Reineke testified that police found a plastic Coke bottle with a hole in the bottom

beneath the broken window at Owens Jewelry. Officer Reineke also testified that police found a trail of distinctive shards of glass from the broken window back to the ATV where Charles had testified Luckas had been. The record also reveals that police found a paper towel stained with blood containing DNA that was later determined to match Luckas's DNA near the ATV.[5]

Charles further testified that he used Luckas's .380 caliber pistol to shoot at Henningsen's house, that Luckas had the pistol in his possession immediately before the burglary, and that Luckas said he shot the display window. Expert testimony established the bullets found at Henningsen's house and the bullet jacket found at Owens Jewelry were all fired from the same firearm, and they were all "consistent" with .380 caliber bullets. Additionally, expert testimony also revealed the firearm that fired those bullets had been made by one of five manufacturers, several of which were Russian. Officer Paul Budach testified that the police found a black pistol grip with a star and the words "Made in Russia" hidden in the house Luckas shared with Koons. Detective Van Langen testified that the pistol grip would fit a .380 caliber pistol.

"Corroboration need not be strong nor need it go to the whole case so long as it confirms some material fact connecting the defendant with the crime." *State v. Polly*, 657 N.W.2d 462, 467 (Iowa 2003). Based on the evidence supporting Luckas's guilt, including that which corroborates Charles's testimony, there is no reasonable probability the jurors would have found, but for Luckas's

[5] On appeal, Luckas points out the possibility that he could have cut himself while tampering with the ATV. However, as the State points out, the jurors could consider it more probable that Luckas cut himself when he reached through the broken window and took the jewelry from amid the broken glass which littered the display counter.

counsel's failure to ask the court to give an instruction on corroboration of accomplice testimony, the result of the proceedings would have been different. Accordingly, we find Luckas is unable to establish prejudice.

D. Other Bad Acts.

Finally, Luckas contends his trial counsel was ineffective in not objecting, under Iowa Rules of Evidence 5.402, 5.404(*b*), and 5.403, to allegedly irrelevant and unduly prejudicial testimony stating or suggesting that Luckas committed bad acts other than those with which he was charged. As with his other ineffective-assistance-of-counsel claims, we find Luckas is unable to establish prejudice.

During trial, Charles testified, in response to being asked why Luckas was staying at Pattison's house, "Because I think there was a restraining order with [his girlfriend] Cindy or something like that. I'm not sure." Charles also testified, in response to being asked why he agreed to help Luckas with the projected burglary, "Because he's my friend and because we've done stuff like this before." Officer Budach testified that, in connection with the fact he executed a search warrant at the residence which Luckas shared with his girlfriend, he had been there before. Officer Shane Brevik testified that the ATV, originally located on a trailer near the bar, had been pushed off the trailer and a little way down the alley, the cover of the ignition had been pulled off, and the wires had been "messed with." Detective Van Langen testified that Luckas's Odyssey ATV "was involved in another situation that we were investigating." Additionally, Detective Van Langen testified that Luckas said he "ended up trading [the Odyssey ATV] to Pattison for some meth."

Evidence of other wrongs is generally inadmissible. Iowa R. Evid. 5.404(*b*); State *v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979). However, as previously stated, for an ineffective-assistance-of-counsel claim, the defendant must demonstrate the "reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Because other evidence, properly admitted, overwhelming proved Luckas was guilty of possession of a firearm as a felon, theft, and burglary, there is no reasonable probability the verdicts would have been different if the defendant's counsel had objected to the testimony at issue. Accordingly, Luckas failed to establish the prejudice prong of the *Strickland* test. Therefore, he failed to prove his ineffective-assistance-of-counsel claim.

III. Conclusion.

We will not review Luckas's claim that the court abused its discretion in admitting Charles's testimony concerning Luckas's attempt to steal the ATV, because we find Luckas did not preserve error on this claim. With respect to the ineffective-assistance-of-counsel claim, we find Luckas was unable to prove prejudice resulted from his counsel's omissions during trial. Therefore, we affirm Luckas's convictions.

AFFIRMED.