IN THE COURT OF APPEALS OF IOWA

No. 1-814 / 11-0135
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NATHANIEL JAMES HAIR,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Patrick McCormick, Judge.

Defendant appeals his conviction for third-degree burglary. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant Appellate Defender, and Keith Duffy, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Patrick Jennings, County Attorney, and Athena Ladeas, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., Sackett, S.J.,* and Mahan, S.J.*

*Senior judges assigned by order pursuant to Iowa Code section 602.9206 (2011).

EISENHAUER, P.J.

Nathaniel Hair appeals his third-degree burglary conviction arguing: (1) insufficient evidence supports the jury's verdict; (2) the court improperly denied his motion to limit a police officer's testimony; and (3) his trial counsel was ineffective. We affirm.

I. Background Facts and Proceedings.

On April 4, 2010, Hair was arrested and his companion, juvenile A.F., was detained. At the start of Hair's December 2010 burglary trial, A.F. made a motion to quash his subpoena to testify. Neither party objected. The court granted the motion, ruling A.F. "will not be called as a witness."

The State's first witness was Richard Peterson. Early in the morning of April 4, Peterson was awakened by the aggressive barking of his three dogs. Peterson got up, looked out his front window toward the street, and saw Hair and A.F. standing next to each other while "trying the door of my wife's car." Peterson explained when the door handle is pulled, "the light comes on inside." Peterson observed Hair "was just kind of looking around while [A.F.] was looking in the car." Because the inside light of the car was on, Peterson "assum[ed] they were trying to get into it."

Peterson dressed, went outside, stood behind a camper parked in his driveway, and continued to observe Hair and A.F. By then Peterson saw A.F. sitting in the driver's-side seat of his neighbor, Richard Treinen's, car while Hair stood by the car "looking around to see if anybody was coming." A.F. "handed something out" of Treinen's car to Hair, who "almost instantly" tossed it back into

Treinen's car. Peterson later determined the item thrown was a "face plate cover for a stereo."

When Hair and A.F. left Treinen's car and walked around a corner, Peterson got in his truck and followed them with his lights off. Peterson observed Hair and A.F. "getting into another pickup down the street." Hair and A.F. then walked to the Kum & Go. Peterson called 911 and continued watching Hair and A.F. until police officers arrived.

After Peterson spoke with the officers and identified Hair and A.F., he returned to Treinen's house, woke him up, and told him of the break-in of his car. Peterson observed Treinen's car: "Glove box was open, center console was open, and the stereo face [plate] case was setting on the seat."

Treinen testified he was awakened by his neighbor around 4:00 a.m. and described the condition of his car:

> [T]he car door was wide open. And I remember seeing that and the dome light was on. And I walked around the car and I looked inside and . . . in the middle of the car there's where I keep my cash. Cash drawer thing was open. And there was a little black case like on the seat.

Treinen stated he does not lock his car because he does not leave valuables in it and nothing was removed from his car. Pictures of Treinen's car showing the open door, open console, and black case on the seat were entered into evidence.

Before Officer Fleckenstein testified, there was an extended bench conference discussing his testimony. Fleckenstein's police report stated:

> I then learned that Nathaniel Hair . . . is nineteen and [A.F.] is a juvenile. Upon hearing that I had an adult male present I . . . read [Hair] his Miranda Rights which he said he understood. [Hair] told

> me that he currently has just been placed on probation for four years for a Theft (Second Degree) conviction and when I asked him why he thought we were there he told me because evidently [A.F.] back talked or wasn't exactly respectful at the Kum & Go. I then informed him that we were there because we have a witness that observed him and his friend start getting into vehicles. Immediately upon speaking to [Hair] about this and strictly speaking about this, that's when [A.F.] stated that he would take full responsibility; that it was him who was getting into the vehicles and then eventually came forward and stated that he himself had gotten into two vehicles. [Hair] denied really any type of involvement; basically stated that when [A.F.] was doing this he just continued walking down the street with his hands in his pockets and he was saying that he was telling [A.F.] not to do what he was doing. [Hair] referred to car burglary as car shopping.

Hair's attorney sought to have Fleckenstein testify to A.F.'s statements admitting his responsibility while excluding testimony "about a felony conviction . . . it's too prejudicial to hav[e] the jury know he's on probation for a felony theft unless [Hair] testifies or we somehow bring that up. Mr. Hair is not going to testify today." Hair's attorney also argued Hair's credibility was not an issue and "if Officer Fleckenstein can testify that [Hair] told him he was on probation that in essence is forcing Mr. Hair to testify . . . ."

The court initially ruled *if* officer Fleckenstein testifies to A.F. stating he takes full responsibility, *then* "I'm going to let anything else come in about what [Hair] said relative to his theft 2nd probation or any of the matters that are contained here . . . ." After further discussion, however, the court determined Hair's statements in his conversation with officer Fleckenstein were an admission and changed its ruling: "All of this material—at least as it's presented in this report by Fleckenstein—can come in."

Hair made a standing objection to the court's ruling and again argued the court was forcing Hair to testify. The court rejected this argument, stating:

> It's not forcing it. In other words, if he wants to testify, he can. But what he said out there can't be held up from a jury just because of the fact he decides he doesn't want to testify in court.

Subsequently, Officer Fleckenstein did not testify to either A.F.'s statements taking full responsibility or Hair's statements concerning probation/theft. Fleckenstein testified:

> [Hair] stated that he was walking down the street . . . with his hands in his pockets while his friend [A.F.] was the one that was actually getting into the cars. [Hair] said that he was telling his friend not to do it. However, he personally refers to car burglary as shopping.
>
> . . . .
>
> Q. Did you believe what [Hair] was telling you? A. No.
>
> Q. Why not? A. Because it's a common tactic when we catch burglars that one will do the acting and the other one [will] be the look-out for the police. So when we arrive on the scene to answer these types of calls, we always look for the person standing out looking and being in the obvious place where they would see squad cars coming into the area.

Hair did not testify at trial. The jury convicted Hair of third-degree burglary, and this appeal followed.

II. Scope of Review.

"We review challenges to the sufficiency of evidence presented at trial for correction of errors at law." *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). Our review of the constitutional claims is de novo. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008).

III. Substantial Evidence.

Hair argues the evidence is insufficient to support his conviction. The State contends Hair's motion for judgment of acquittal "was too general to preserve his claim." We conclude error was not preserved. Although Hair's counsel made a general motion for acquittal, counsel failed to identify the specific

elements of the charge insufficiently supported by the evidence. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

IV. Officer Fleckenstein's Testimony.

Hair's appellate argument is based on the court's *original* evidentiary ruling—*if* Officer Fleckenstein testifies to A.F. taking responsibility, *then* Fleckenstein can testify to Hair's statements concerning theft/probation. Hair asserts his own statements about his prior conviction and probation are inadmissible character/impeachment evidence and contends the court improperly limited his cross-examination of officer Fleckenstein by "the threat of admitting improper evidence." Hair seeks a remand with instructions "Hair be allowed to inquire into [A.F.]'s statement without opening the door to Hair's theft conviction and probation status."

Hair's argument does not acknowledge or challenge the court's final ruling—Hair's statements in his conversation with officer Fleckenstein are admissions and both Hair's statements and A.F.'s statements are admissible. Additionally, Hair's argument confuses the admissions he made during his conversation with officer Fleckenstein with evidence of prior bad acts used for impeachment. We find no merit to this claim. *See State v. Derby*, 800 N.W.2d 52, 54-59 (Iowa 2011).

V. Ineffective Assistance of Counsel.

Hair first asserts trial counsel was ineffective in failing to object to Fleckenstein's allegedly improper opinion testimony "that Hair was not merely at the scene but was, instead, acting as a lookout for [A.F.]." *See State v. Horton*, 231 N.W.2d 36, 38 (Iowa 1975). Additionally, Hair asserts trial counsel was

ineffective for failing to call officer Burns as a witness. Officer Burns's report states:

> I was able to assist [the arresting officer] by . . . escorting [A.F.], the juvenile male, to the Woodbury County Juvenile Detention Center . . . .
>
> [A.F.] was under the influence of alcohol. He indicated to me he had been drinking Keystone. He also indicated that Nate Hair shouldn't have been arrested as he was the one that was car shopping, getting into vehicles. He indicated Nate kept telling him not to do so. All of this information was given to me without ever having a conversation with [A.F.].

In order to prevail on his claims of ineffective assistance of counsel, Hair must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). His inability to prove either element is fatal. *See Greene*, 592 N.W.2d 24 at 29. We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392.

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Direct appeal is appropriate, however, when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of the ineffective-assistance claim. *Id*.

We can resolve Hair's ineffective-assistance-of-counsel claim on this direct appeal because we conclude, as a matter of law, Hair cannot prove "prejudice resulted." To meet the prejudice prong, Hair is required to show that, but for trial counsel's errors, there is a reasonable probability that the results of the trial would have been different. *See State v. Carey*, 709 N.W.2d 547, 559

(Iowa 2006). "The most important factor under the test for prejudice is the strength of the State's case." *Id*.

Because other evidence, properly admitted and described above, proved Hair was guilty of third-degree burglary, there is no reasonable probability the verdict would have been different if Hair's counsel had objected to a portion of Officer Fleckenstein's testimony and/or had sought to introduce the statements A.F. made to officer Burns. As the State points out, this was not a case where there was a single car burglary with Hair merely standing nearby. Rather, eyewitness Peterson testified to watching an attempt to break into his wife's car followed by A.F. successfully entering two other vehicles over a distance of several blocks. In each of the three incidents, Hair stood very near the car and appeared to be acting as a lookout. Peterson continued his observations of Hair and A.F. until the police arrived and he identified them to the officers. Officer Fleckenstein testified a common tactic for burglars is to have a lookout. Any alleged failure by counsel did not cause prejudice to Hair sufficient to establish ineffective assistance of counsel and we affirm his conviction.

AFFIRMED.