IN THE COURT OF APPEALS OF IOWA

No. 1-926 / 10-0118
Filed February 1, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JIMMY JEROME HARKEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer (motion to sever), and Bradley J. Harris (trial), Judges.

Defendant appeals from his conviction of robbery in the second degree. **AFFIRMED.**

Margaret E. King, King Law Office, Cantril, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Heard by Eisenhauer, P.J., Tabor, J., and Sackett, S.J.*

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

SACKETT, S.J.

Defendant, Jimmy Jerome Harkey, appeals his conviction and sentence for robbery in the second degree, in violation of Iowa Code sections 711.1 and 711.3 (2007). Harkey alleges the district court and his trial counsel committed a number of errors including: (1) the district court erred when it denied his motion to sever his case from his codefendants; (2) the district court erred when it denied his motion for substitute counsel; (3) the district court erred when it denied his motions for a mistrial, and trial counsel was ineffective for making an untimely motion for a mistrial based on the racial composition of the jury panel; (5) the district court erred in admitting into evidence the video of one of the victims' police interview, and trial counsel was ineffective for withdrawing his objection to the introduction of this video; (6) the district court erred when it denied Harkey's motion for judgment of acquittal; (7) trial counsel was ineffective for failing to review all the videos of the police interviews of the victims and witnesses; and (8) the district court judge erred in not recusing himself from trial. For the reasons stated below, we affirm.

I. BACKGROUND AND PROCEEDINGS.

In the early morning hours of October 19, 2008, twin brothers, Jarad and Nathan Schilling, along with four of their high school friends—Nick Ramsey, Nathan Pals, Wayde Rasmussen, and Alex Oliver, decided to rent a hotel room in downtown Waterloo in order to have a party. The group obtained liquor from the store, placed it in an East High School football duffle bag, and proceeded to a downtown parking ramp where they began to collect the money that would be

needed to rent the hotel room. As they were counting the money on the back of Nathan Pals's vehicle, the group was approached by three African-American men, Darterio Tarbor, Jimmy Harkey, and Darsjon Tarbor, and one African-American woman, Dareysha Tarbor.

Ramsey quickly grabbed the money off the back of the car and placed it in his pocket. One of the approaching men asked the boys if they wanted to buy marijuana or play dice.[1] When the boys responded in the negative, the three men approached Jarad and Darterio grabbed Jarad's wallet out of his back pocket. Darterio went through the wallet, but found no money, so he threw it on the ground. Darterio, Darsjon, and Harkey then approached Nathan Schilling trying to get his wallet. Nathan backed away from the group and tried pushing Darterio's hand away from his pocket. Harkey told Nathan to calm down, and Darterio shaped his fingers into a gun and pointed it at Nathan. Nathan stopped resisting and Darterio removed Nathan's wallet from his back pocket. Darterio removed twenty-one dollars from the wallet and started to walk away. When Jarad attempted to grab his brother's wallet back from Darterio, he was struck from behind by one of the other men. A fight broke out between the Schilling twins and Darterio, Harkey, and Darsjon. Jarad and Nathan also remember Dareysha pulling on the collar of their shirts during the fight.

The Schillings and their friends retreated to their van and attempted to drive away, but not before Darterio shattered the driver's side window. At some point during the melee, Dareysha reached inside the Schilling's van and took the

[1] Jarad Schilling testified he believed the questions were asked in order for the men to determine if the boys had any money.

football bag containing the alcohol. Nathan Pals stayed behind in his own vehicle, and as the Schilling van was pulling away, Darterio unsuccessfully attempted to kick out one of Pals's windows.

After driving out of the parking ramp, the Schillings and their friends returned a few minutes later where they observed Darterio, Darsjon, Harkey, and Dareysha walking out of the ramp toward the bridge. Dareysha was carrying the football bag. After dropping Wayde Rasmussen and Alex Oliver off at Wayde's car, which had been left behind in the parking ramp, the Schillings and Nick Ramsey proceeded to the top of the parking ramp where they called 911.

The police arrived and took Darterio, Darsjon, Harkey, and Dareysha into custody.[2] All four were charged with robbery in the second degree. Prior to trial, Harkey requested and received substitute counsel on four occasions. Both Harkey and Darterio filed motions to sever their case from their codefendants. The motions were overruled by the district court; however, the court specifically provided that if problems developed as the case moved forward, defense counsel may renew their motions.

The case proceeded to trial with Darterio, Harkey, and Dareysha[3] on September 8, 2009. Harkey made a last minute request for new counsel the day of trial asserting his attorney had not adequately communicated with him. He claimed he did not even know trial was to begin that day. After counsel stated he was prepared to go to trial, the court denied Harkey's request. After six days of

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[2] These individuals were also charged with willful injury arising from an assault on another person near the bridge after they left the parking ramp. This charge was severed from the second degree robbery charge and is not part of this appeal.

[3] It appears Darsjon entered a guilty plea prior to trial.

testimony, the jury found Darterio and Harkey guilty of robbery in the second degree, and found Dareysha not guilty. Harkey filed a motion in arrest of judgment and motion for a new trial. He also filed another request for a new attorney. The court granted Harkey's request for different post-trial counsel so that he could raise ineffective assistance of counsel claims in his post-trial motions, but the court ultimately denied Harkey's post-trial motions.

Harkey was sentenced to a term of incarceration not to exceed ten years and must serve the seventy percent mandatory minimum under Iowa Code section 902.10. Harkey appeals alleging a number of errors of both the district court and his trial counsel. We will address each allegation in turn.

II. MOTION TO SEVER.

Harkey's first claim is that the district court erred in denying his motion to sever his trial from his codefendants, Darterio and Dareysha. Harkey claims that the joint trial prevented him from presenting convincing exculpatory evidence—the testimony from Darterio that Harkey had not participated in the crime. Harkey contends that Darterio's credibility was destroyed in the eyes of the jury because the jury saw the two sitting at defense table together throughout the trial. Harkey claims that if he were granted a separate trial, no connection between himself and Darterio would exist in the minds of the jury because Darterio would simply be called as a witness and not be present in the courtroom with Harkey throughout the trial.

In addition, Harkey claims on appeal that severance was necessary because of the complex nature of the case. He believes the jury was unable to

compartmentalize the evidence as it related to each defendant. The State asserts this argument was not presented to the district court and thus, is not preserved for appeal. Upon our review of the record, we agree Harkey did not preserve error on this argument as it was not raised either by written motion or at the hearing.[4] *See State v. Spates*, 779 N.W.2d 770, 776 (Iowa 2010) (holding the defendant failed to preserve error where he raised a different ground on appeal to support his objection to a jury instruction that was not raised before the trial court); *State v. Sanborn*, 564 N.W.2d 813, 815 (Iowa 1997) ("A defendant may not rest an objection on one ground at trial, and rely on another for reversal on appeal."). However, Harkey did preserve his claim that the motion to sever should have been granted to allow him to present exculpatory evidence, so we will proceed to address that issue.

We review a district court's decision on a motion to sever for an abuse of discretion. *State v. Leutfaimany*, 585 N.W.2d 200, 203 (Iowa 1998). Harkey must show he was prejudiced to the extent that he was denied a fair trial in order to establish an abuse of discretion. *Id*. A joint trial can prejudice a defendant in a number of ways including preventing a defendant from presenting the exculpatory testimony of a codefendant. *State v. Clark*, 464 N.W.2d 861, 863 (Iowa 1991).

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[4] Even if the argument was preserved, we fail to see how this case, which involved one count against three defendants, was so complex that the jury could not be expected to compartmentalize the evidence. The fact that the jury convicted two defendants and acquitted the third indicates to us that they were in fact able to effectively compartmentalize the evidence against each individual defendant.

At the district court hearing, Harkey's attorney explained Darterio and Harkey intended to offer testimony on each other's behalf to establish a self-defense and a defense of others justification defense. Thus, it was the plan of both defendants to assert each was acting in self-defense or in defense of each other when the fight broke out. The district court correctly concluded that a joint trial would not prevent Harkey or Darterio from presenting this evidence. Harkey focuses on the fact that his codefendant's credibility was harmed by having to sit at defense table throughout the trial. While this may well be the case, it is not sufficient grounds for severing the trial. We find the district court did not abuse its discretion in refusing to sever Harkey's trial from Darterio's trial.

III. MOTION FOR SUBSTITUTE COUNSEL.

Next, Harkey claims the district court erred by refusing to grant his request for substitute counsel on the eve of the trial. Harkey asserts there was a total breakdown in communication with his attorney as evidenced by the fact that the day of trial Harkey came to court unaware that trial was to begin that day. He claims the district court incorrectly denied him new counsel based on the number of attorneys he previously had been assigned.

We review a district court's denial of a motion for substitute counsel for an abuse of discretion. *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001). While the Sixth Amendment does guarantee the right to counsel, it does not guarantee a "meaningful relationship between an accused and his counsel." *State v. Tejeda*, 677 N.W.2d 744, 749 (Iowa 2004). In order to justify replacing a court-appointed attorney, the defendant must show a conflict of interest, an

irreconcilable conflict, or a complete breakdown in communication. *Id*. at 750. The district 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." *Lopez*, 633 N.W.2d at 779 (internal citations omitted). The court has considerable discretion in ruling on a motion for substitute counsel made on the eve of trial as the court should not permit a defendant to manipulate or delay the trial with last minute requests. *Id*.

In this case on the morning the trial was set to begin, the district court addressed Harkey's two requests for new counsel, which were filed in the preceding two weeks. In the written motions, Harkey requested a new attorney because he believed his current attorney had shown no interest in working on his case. At trial Harkey stated the reason for the request for substitute counsel was, "I didn't even know I was starting trial today. I only spoke with [counsel] twice, and I don't feel that he will be representing me properly at all." The court asked Harkey's attorney whether he was prepared to proceed with trial that day. Counsel responded that he had met with Harkey three times and hired a private investigator to assist in trial preparation. While he had not yet had a chance to review all the police department videos, he would be able to do so in advance of his cross-examination of those witnesses, so he believed he was prepared to proceed with trial.

The district court then reviewed the court file and discovered that Harkey had requested new counsel on three earlier occasions, all of which were granted, making his current trial counsel his fourth attorney in the ten months since the

charges were filed. The court stated that at the time his fourth attorney was appointed, Harkey was told by the court that he would not be allowed another attorney. The court ultimately denied the request for substitute counsel saying,

> You had enough attorneys. You needed to listen to the people who had had some training rather than thinking that you were—you knew more than they did and told you that you would not be allowed to have an additional attorney in this matter.
>
> At this time you've made a request for yet another attorney. You're dissatisfied with another attorney's services and your request to have [counsel] taken off this case is denied. [Counsel] is prepared for this trial. He is ready to go to trial, and it will proceed as soon as we get into the other courtroom.

Based on our review of the record, we find the district court did not abuse its discretion in denying this final request for substitute counsel. Harkey's complaint that he was not aware of the trial date and his complaint that his counsel had met with him only on two occasions falls short of demonstrating that there was a complete breakdown in communication. Counsel informed the court that he was prepared to proceed with trial, and that he would have plenty of time to prepare for cross-examination of the State's witnesses as the trial proceeded. This request for new counsel can be interpreted as nothing but a last minute attempt to delay the trial. The district court did not abuse its discretion in preventing Harkey from manipulating the system.

IV. MOTIONS FOR A MISTRIAL.

Harkey asserts the district court erred in denying his many motions for a mistrial. He claims a mistrial should have been granted when a jury panel member made a comment during voir dire that he had seen the deputies following the defendants around, which gave him the impression that at least one

of the defendants was in custody. He also claims a mistrial should have been granted when it was brought to the court's attention that fifteen of the thirty-seven jury panel members were related to or close friends with someone in law enforcement. Next, he claims a mistrial should have been granted when, during a break in the trial, a juror overheard a joke between the prosecution and defense counsel. Harkey's final ground for a mistrial was the racial composition of the jury pool. Harkey claims he established a prima facie case of underrepresentation, and as a result, the court should have granted his motion for a mistrial.

Our review of a district court's ruling on a motion for a mistrial is generally for an abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006). We will reverse if the trial court was unreasonable in concluding that an impartial verdict could be reached. *Id*. To the extent Harkey claims his constitutional rights were violated, such as his Sixth Amendment right to a jury drawn from a representative cross-section of the community, our review is de novo. *State v. Choudry*, 569 N.W.2d 618, 620 (Iowa Ct. App. 1997).

A. Juror Misconduct—Comment About Custody. The first motion for a mistrial came after a juror made a comment during voir dire that he had seen the deputies following the defendants. Harkey claims this comment could have tainted the entire jury pool, and as a result, his motion for a mistrial should have been granted.

We begin by noting Harkey waived the reporting of voir dire, so the precise comment by the juror panel member is unknown. Whatever the precise

comment was, the impression was that the potential juror recognized at least one of the defendants was in police custody. The district court in ruling on the motion noted that the potential juror at no time indicated he thought the defendants were guilty because they were in custody, and the juror did not even know for sure if any of the defendants was in fact in custody. The court gave a curative instruction to the jury that would tell the jury to set aside any suspicion that may arise from the arrest, charge, or present situation of the defendant. In addition, we note this particular potential juror was struck from the jury by a codefendant. *See State v. Wilkins*, 693 N.W.2d 348, 351 (Iowa 2005) ("'[T]he partiality of a juror may not be made the basis for reversal in instances in which that juror has been removed through exercise of a peremptory challenge.'" (quoting *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993))). Finally, Harkey's own attorney referenced the fact that he was in jail during his opening statement.[5] We find the district court did not abuse its discretion in denying Harkey's motion for a mistrial on this ground.

B. Juror Impartiality—Jurors Related to or Friends with Law Enforcement. Next, Harkey asserts the district court should have granted a mistrial because fifteen of the potential thirty-seven jurors were either related to or close friends with people in law enforcement. Harkey complains the court

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[5] During his opening statement, counsel for Harkey stated,

> But he has to sit here for four days, and you know he is in jail. You've known that all along.
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> . . . .
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> . . . He's been sitting over there [in] that jail. He wants to get up there and tell you what happened. He is tired of this.
>
> . . . And the evidence will show that you have to let him leave this jail and go home where he belongs.

conducted no voir dire on this issue. However, the court in ruling on Harkey's motion for a mistrial stated, "if any of those persons show that they have formed an opinion or unable to be fair and impartial jurors, they can certainly be stricken for cause." To the extent that Harkey believed that any of these fifteen potential jurors could have been biased by their association with law enforcement, Harkey could have moved to strike these jurors for cause. From the record before us, we find that no challenges for cause were made, and it is unclear which of these fifteen potential jurors actually sat on the jury. We find no abuse of discretion in the district court's denial of Harkey's motion for a mistrial on this ground.

C. Juror Misconduct—Juror Overheard Joke Between Prosecutor and Defense Counsel. Harkey also asserts the district court erred when it denied his motion for a mistrial when one of the jurors overheard a joke made by the prosecutor to Harkey's defense counsel. Harkey asserts that despite the fact this juror was removed and admonitions given, the incident tainted the entire jury necessitating a mistrial.

The record indicates that after the incident was brought to the court's attention, the court called the juror into chambers. The juror told the court he had not overhead any comment in the hallway as he was concentrating on the schedule on the wall. The court denied the motion for a mistrial, but, out of an abundance of caution, excused the juror and replaced him with an alternate. There is no indication from the record that the juror shared any information he may have overheard with the rest of the jury, or that the rest of the jury was in

any way tainted by the incident. Again we find no abuse of discretion in the district court's denial of the motion for a mistrial on this ground.

D. Racial Composition of Jury Panel. The final ground in support of Harkey's motions for a mistrial is the racial composition of the jury. Harkey's attorney objected to the panel, after the jury panel was sworn, but before the jury was selected,[6] based on the fact that he observed only one African-American on the panel, but the population of the city of Waterloo consisted of approximately 11.5% African-American. He claimed there was an unconstitutional underrepresentation of African-Americans on the jury.

The district court in addressing the challenge stated that based on the jury questionnaires it received there were three African-American prospective jurors, though it did not look to see if all those persons were present in the jury panel. The court overruled the challenge asserting there was ample representation of minorities on the jury panel after considering all the minorities.[7]

The Sixth Amendment "entitles a criminal defendant to a jury panel designed to represent a fair cross-section of the community." *State v. Jones*, 490

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[6] While such challenges should be made before any juror is sworn for examination, *see* Iowa Rule of Criminal Procedure 2.18(3), our courts have held that the failure to object within the time provided under this rule does not waive a defendant's right to raise a Sixth Amendment challenge to the jury panel. *State v. Watkins*, 463 N.W.2d 411, 413 (Iowa 1990). Thus, while Harkey raises an alternate claim of ineffective assistance of counsel based on counsel's failure to make an objection before the panel was sworn, the State concedes and we agree that such an objection was not mandatory to preserve this issue for our review.

[7] The court also considered Harkey's motion untimely under rule 2.18(3). As stated above, the failure to raise a challenge to the jury panel before the panel is sworn does not preclude Harkey's Sixth Amendment challenge. Because the court ruled on the merits of the motion, in addition to finding the motion untimely, we do not address Harkey's alternate claim of ineffective assistance of counsel. *State v. McCurry*, 544 N.W.2d 444, 448 (Iowa 1996).

N.W.2d 787, 792 (Iowa 1992). However, the right does not require the jury panel to have the same proportion of distinct groups as the general population. *Id*. at 792–93. In order to show a violation of the Sixth Amendment, Harkey must show:

> (1) [T]hat the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 792.

We agree Harkey is a member of a distinctive group as he is African-American. In evaluating the second prong of the test, we use the absolute disparity calculation to determine whether the minority representation was fair and reasonable. *State v. Fetters*, 562 N.W.2d 770, 776 (Iowa Ct. App. 1997). We compare only the distinctive group involved, not all minority groups, in determining whether a prima facie case has been established. *Jones*, 490 N.W.2d at 793. Absolute disparity percentage is calculated by taking "the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel." *Id*.

In this case Harkey asserts there was an absolute disparity of 8.8% as the black population in Waterloo was 11.5% but there was only one black juror in a panel of thirty-seven (2.7%). The State points out that it is not the minority population of Waterloo that should concern us, but the minority population of Black Hawk county as the panel members were drawn from the county at large not just the city. We agree. The State submits in its brief that the census data

for Black Hawk county indicates an African-American population of 7.9%, which would make the absolute disparity 5.2%, if we accept Harkey's assertion that there was only one African-American on the jury, or -.02% if we accept the court's assertion that the jury questionnaires indicated that there were three African-American prospective jurors.

Our cases have indicated that absolute disparities of as much as 7.2% and 10% were insufficient to establish a prima facie case of underrepresentation. *See id.* at 793 (citing *Swain v. Alabama,* 380 U.S. 202, 208-09, 85 S. Ct. 824, 829, 13 L. Ed. 2d 759, 766 (1965), and *United States v. Clifford,* 640 F.2d 150, 155 (8th Cir.1981)). In this case, whether the disparity is 5.2% or -.02%, we find Harkey has failed to prove substantial underrepresentation.

In addition, Harkey failed to provide any evidence to support the third prong of the test that the underrepresentation is due to a systematic exclusion of the group in the jury-selection process. *Jones*, 490 N.W.2d at 792. In fact, Harkey's counsel conceded at trial that the clerk's office would testify that all the statutory procedures for compiling the jury panel were followed. Harkey has failed to prove a prima facie case of underrepresentation, and as a result, we find the district court did not err in denying Harkey's motion for a mistrial on this ground.

V. ADMISSION OF VIDEO OF VICTIM'S POLICE INTERVIEW—INEFFECTIVE ASSISTANCE OF COUNSEL.

Harkey's fourth claim of error is that the court violated his Sixth Amendment right to confrontation when it allowed the admission of the police

interview video of Nathan Schilling into evidence. Harkey asserts that neither he nor his attorney was present to cross-examine Nathan when the video was made, and therefore, the video cannot be admitted into evidence. The fact that Nathan was deposed by Harkey's attorney and testified at trial where he was subject to cross-examination does not, in Harkey's words, "count" to correct the Confrontation Clause violation.

We must first address here the error preservation issue. At trial, Harkey's attorney initially objected to the admission of Nathan's police interview video. However, he withdrew the objection when the State agreed to allow Nathan's deposition to be admitted into evidence in addition to the police interview video. Because counsel withdrew his objection, we find error was not preserved. A defendant "cannot both object and consent to evidence if he expects to preserve error for appeal." *State v. Terry*, 569 N.W.2d 364, 369 (quoting *State v. Schmidt*, 312 N.W.2d 517, 518 (Iowa 1981)). In anticipation of the error preservation problem, Harkey also raises his Confrontation Clause claim under the guise of ineffective assistance of counsel. Because ineffective-assistance-of-counsel claims are the exception to the normal error preservation rules, we will proceed to address this claim. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010).

To prevail on a claim of ineffective assistance of counsel, Harkey must show (1) his counsel failed to perform an essential duty, and (2) prejudice resulted. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Harkey must prove both elements, or the claim will fail. *Ledezma v.*

State, 626 N.W.2d 134, 142 (Iowa 2001). We presume counsel is competent, and miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Trial counsel has no duty to raise an issue that has no merit. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). To prove prejudice, Harkey must show there is a reasonable probability that, but for counsel's errors, the result of the case would have been different. *Ledezma*, 626 N.W.2d at 143. While ineffective assistance of counsel claims are generally preserved for postconviction relief proceedings, we will address this claim as we find the record adequate to do so. *Graves*, 668 N.W.2d at 869.

Harkey maintains that his Sixth Amendment right to confront his accuser was violated when the court admitted Nathan Schilling's police interview video. Harkey claims the video is inadmissible because Schilling was not cross-examined at the time the video was made, and because Schilling was not present in court when the video was played to the jury. We find Harkey misinterprets his Sixth Amendment right to confrontation.

The Confrontation Clauses of the United States and Iowa Constitutions prevent the admission of testimonial out-of-court statements made by a declarant who is unavailable to testify at trial if the defendant has not had a prior opportunity to cross-examine the declarant. U.S. Const. amend. VI.; Iowa Const. art. I, §10. In this case the Confrontation Clauses do not prevent the admission of the video because the declarant did testify at trial, and Harkey did have prior opportunities to cross-examine Schilling both at his deposition and at trial.

First, Nathan testified at trial. "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford v. Washington*, 541 U.S. 36, 59 n.9, 124 S. Ct. 1354, 1369 n.9, 158 L. Ed. 2d 177, 198 n.9 (2004). The Confrontation Clause only bars statements from those who are absent from trial. *Id*. at 50, 124 S. Ct. at 1363, 158 L. Ed. 2d at 192 (noting the principle evil the Confrontation Clause was directed at was the use of *ex parte* examinations as evidence against the accused).

In addition, Harkey cross-examined Schilling on two occasions: at his deposition and at trial. "When a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id*. at 59 n.9, 124 S. Ct. at 1369 n.9, 158 L. Ed. 2d at 198 n.9. Harkey has failed to show his counsel failed to perform an essential duty by withdrawing his objection to the admission of the video. *Graves*, 668 N.W.2d at 881 ("Trial counsel has no duty to raise an issue that has no merit."). Therefore, Harkey's ineffective assistance claim fails.

VI. MOTION FOR JUDGMENT OF ACQUITTAL.

Next, Harkey claims the district court erred by denying his motion for judgment of acquittal made at the close of the State's evidence. He asserts there was insufficient evidence to sustain his conviction for robbery in the second degree. He claims all of the witnesses for the prosecution testified that he was standing in the background when Darterio robbed Jarad and Nathan Schilling. Because he believes the evidence shows he did not in any way participate in the

robbery, Harkey claims the district court should have granted his motion for judgment of acquittal.

Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. *State v. Hearn*, 797 N.W.2d 577, 579 (Iowa 2011). The jury verdict is binding on appeal if it is supported by substantial evidence. *State v. Isaac*, 756 N.W.2d 817, 819 (Iowa 2008). Evidence is considered substantial if it would convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). We must view the evidence in the light most favorable to the State, and we considered all the evidence, not just the inculpatory evidence. *Hearn*, 797 N.W.2d at 580. The State must prove every fact necessary to constitute the crime charged. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). Because Harkey does not assert the jury instructions contained incorrect statements of the law, we will examine his claim based on the law the district court gave to the jury. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

The jury was instructed that to find Harkey guilty of robbery in the second degree they would have to find beyond a reasonable doubt that,

> 1. On or about the 19th day of October, 2008, the defendant had the specific intent to commit a theft or aided and abetted another who had the specific intent to commit a theft.
> 2. In carrying out the intention or to assist in escaping from the scene, with or without the stolen property, the defendant:
> a. Committed an assault on Nathan Schilling, Jarad Schilling, Nick Ramsey, Nathan Pals, Wayde Rasmussen and/or Alex Oliver; or
> b. Threatened Nathan Schilling, Jarad Schilling, Nick Ramsey, Nathan Pals, Wayde Rasmussen and/or Alex Oliver with or purposely put them in fear of immediate serious injury.

The jury was also instructed the definition of aiding and abetting included "to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed." The definition also clarified the specific intent requirement as, "the state must prove the defendant either had such specific intent or 'aided and abetted' with the knowledge the others who directly committed the crime had such specific intent."

Harkey challenges that all the witnesses testified he stood in the background while Darterio committed the robberies. From our review of the evidence in this case, we find there was sufficient evidence from which the jury could conclude Harkey did not merely stand in the background, but actively participated both in the robberies and the fight that followed.

Jarad Schilling testified that the men walked together as a group as they approached the teenagers and that no one hung back. Nathan Schilling testified he felt threatened when all three men, Darterio, Darsjon, and Harkey, encircled him and his brother, Jarad, as Darterio took their wallets. Nathan Pals testified that when Nathan Schilling was trying to prevent Darterio from taking his wallet, Harkey told Nathan to calm down. While Harkey contends this statement shows he was trying to keep the peace, the statement can also be viewed as an attempt to further the robbery by instructing the victim to stop resisting. In addition, each of the teenagers testified that Harkey participated in the fight that broke out after Jarad attempted to retrieve his brother's wallet from Darterio. When considering the evidence in the light most favorable to the State, we find the jury could

reasonably conclude Harkey aided and abetted Darterio in taking the wallets from the Schillings and assaulted the Schillings as the group attempted to leave the scene. We find the district court did not err in denying Harkey's motion for a judgment of acquittal.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL—FAILURE TO VIEW ALL VIDEOS OF VICTIMS AND WITNESSES.

Harkey also claims his counsel rendered ineffective assistance when he failed to view all the police interview videos of the victims and witnesses, and failed to admit into evidence the video of Jarad Schilling. Harkey asserts there was exculpatory evidence in Jarad's video showing that he did not take part in the robbery, but was simply standing in the background.

As stated above, to prevail on a claim of ineffective assistance of counsel, Harkey must show (1) his counsel failed to perform an essential duty, and (2) prejudice resulted. *Anfinson*, 758 N.W.2d at 499. We presume counsel is competent, and miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance. *Millam*, 745 N.W.2d at 721. We determine we are able to address this claim on direct appeal, rather than preserve it for postconviction relief proceedings. This is because the claim was raised and addressed by the district court in Harkey's post-trial motion where Harkey was afforded an evidentiary hearing to develop a more complete record, and trial counsel was permitted his day in court to explain his conduct. *Graves*, 668 N.W.2d at 869; *State v. Slayton*, 417 N.W.2d 432, 436 (Iowa 1987).

At the post-trial hearing, after a new attorney had been appointed to represent Harkey, Harkey's trial counsel admitted he had never viewed the police interview video of Jarad Schilling. Counsel explained that he did not feel a need to view the video as he already had Jarad's deposition and the written police statement. He felt the video was cumulative evidence, and to admit it into evidence would have wasted the court's time, the county attorney's time, and the jury's time. Because counsel believed Jarad testified at trial consistent with his police statement, he saw no need to present the video.

We do not find that counsel failed to perform an essential duty when he decided to forego viewing the video. Counsel made an informed and reasoned decision after a thorough review of the evidence, and decided to spend his time reviewing Jarad's deposition and written statement. *Ledezma*, 626 N.W.2d at 143 ("[T]he duty to investigate is not unlimited, and trial counsel is not required to interview every potential witness. . . . Similarly, investigation of a defense may be curtailed or eliminated if the facts are already known to counsel through another source.")

In addition, in this case Harkey cannot prove he was prejudiced by counsel's decision not to view or offer into evidence Jarad's video. *Anfinson*, 758 N.W.2d at 499. While Harkey maintains the video contained exculpatory evidence, he fails to point out any particular statement in the video that was exculpatory. From our review of the video, we find only one statement that could potentially be exculpatory. Jarad states in speaking of Harkey and Darsjon, "The other two, I think just sort of were there so that like, I don't know, sort of got

wrong place sort of thing maybe just cuz he took a swing, I took a swing, sort of." Jarad's trial testimony was consistent with this statement making the video cumulative evidence. Jarad testified at trial that he could not remember where Harkey was or what Harkey was doing when the wallets were taken. Therefore, we find Harkey has failed to show there is a reasonable probability that, but for counsel's errors, the result of the case would have been different. *Ledezma*, 626 N.W.2d at 143.

VIII. RECUSAL OF JUDGE.

Finally, Harkey asserts the trial judge should have recused himself after the judge made the decision not to allow Harkey to have a new attorney at the start of the trial. Harkey asserts that he was not allowed to have a new attorney because of the judge's pre-trial warning Harkey was done getting new attorneys. Because Harkey asserts the decision violated his right to counsel, he believes the judge should have recused himself.

The State asserts, and we agree, that Harkey has failed to preserve error on this issue. Upon our review of the record, nowhere do we find a motion for recusal or even an objection to the trial judge presiding over the case. *State v. Rodriquez*, 636 N.W.2d 234, 246 (Iowa 2001). We therefore consider this issue waived.

IX. CONCLUSION.

We find the district court did not abuse its discretion when it denied Harkey's motion to sever his case from his codefendants or when it denied his motion for substitute counsel. The district court also correctly denied Harkey's

many motions for a mistrial. We find Harkey's counsel did not render ineffective assistance when he withdrew his Confrontation Clause objection to Nathan Schilling's police interview video and was not ineffective for failing to offer into evidence Jarad Schilling's police interview video. Finally, we find sufficient evidence supports Harkey's conviction and Harkey failed to preserve error on his claim that the trial judge erred in not recusing himself from trial.

AFFIRMED.