IN THE COURT OF APPEALS OF IOWA

No. 2-1061 / 12-0057
Filed March 27, 2013

DIONE GRIGGS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Dione Griggs appeals from the district court order denying his application for postconviction relief. **AFFIRMED.**

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ. Tabor, J., takes no part.

BOWER, J.

Dione Griggs appeals from the district court order denying his application for postconviction relief (PCR). He contends his trial counsel was ineffective in several respects.

Upon our de novo review of the record, we find Griggs has failed to establish any of his claims of ineffective assistance of counsel. Accordingly, we affirm the district court's denial of his PCR application.

I. Background Facts and Proceedings.

Griggs was convicted of first-degree robbery, assault while participating in a felony, and conspiracy for his involvement in a botched robbery of Murphy USA employee Colleen France, which occurred on October 17, 2004. Griggs's girlfriend, Trina Watkins, had been fired from her job at a Murphy USA gas station in Davenport one month earlier. Griggs, who was present at the time of the firing, had accused France of having Watkins fired and had threatened to get even with France.

On the morning of October 17, 2004, Griggs enlisted the help of DeShon Collins to get even with the gas station by robbing France as she made a large deposit of the business's money at a bank near the Hy-Vee grocery store. Collins and his girlfriend, Jeanne Sindt, were staying at a residence with Griggs and Watkins. Griggs told Collins that France would be making the deposit between 10:00 a.m. and noon that day, and he knew the type of vehicle France would be driving. The men ingested drugs and followed France's vehicle to the Hy-Vee store with Griggs driving Collins's car. Once at Hy-Vee, Griggs told

Collins to "hurry up and rob" France, while handing Collins a gun. Collins exited the vehicle, leaving his cell phone behind.

The robbery was thwarted when citizens and Hy-Vee employees apprehended Collins and brought him to the ground. While restrained, Collins's vehicle sped toward the group and several witnesses identified the driver as a black male. Collins's vehicle was left at a Taco Bell across the river in Illinois. At approximately 1:00 p.m., Watkins called Sindt and asked for her help to retrieve the vehicle, which they drove to an apartment complex where Griggs was waiting.

Collins was arrested at the scene. He initially told the police that Corey Thomas was his accomplice but later named Griggs. He told the police that they committed the robbery because Griggs was upset that Watkins was fired and Griggs wanted to get even with the business.

Griggs, Collins, and Watkins were charged with robbery in the first degee, assault while participating in a felony, and conspiracy. Collins pleaded guilty to lesser charges. As part of a plea agreement, he testified at Griggs's trial. Watkins also pleaded guilty to lesser charges but did not testify.

This court affirmed Griggs's conviction on direct appeal. *State v. Griggs*, No. 05-1659, 2006 WL 3018234 (Iowa Ct. App. Oct. 25, 2006). We found sufficient corroboration of Collins's accomplice testimony warranting submission of the case to the jury. *Id.* at *4. Because the record was not developed with regard to Griggs's claim that his trial counsel was ineffective in failing to object to

the admission of Watkins's cell phone records, we preserved the claim for a possible PCR hearing. *Id.* at *4-5.

Griggs filed a PCR application on February 7, 2008. A hearing was held on July 28, 2011. On November 14, 2011, the district court entered its order denying Griggs's PCR application. Griggs filed an application to enlarge and amend, which was denied. On January 11, 2012, Griggs filed a timely notice of appeal.

II. Scope and Standard of Review.

Normally, we review PCR proceedings for errors at law. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011). However, PCR applications that allege ineffective assistance of counsel raise a constitutional claim. *Id.* Therefore, our review is de novo. *Id.*

III. Ineffective Assistance of Counsel.

All PCR applicants who seek relief as a consequence of ineffective assistance of counsel must establish counsel breached a duty and prejudice resulted. *Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012). We may affirm the district court's rejection of an ineffective-assistance-of-counsel claim if either element is lacking. *Id.*

With regard to the duty prong, a PCR applicant must prove counsel performed below the standard demanded of a "reasonably competent attorney." *Id.* An attorney's performance is measured against "prevailing professional norms." *Id.* It is presumed an attorney performed competently. *Id.* We are more likely to find ineffective assistance when the alleged action or inaction of counsel

is attributed to a lack of diligence rather than the exercise of judgment. *Id.* Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. *Id.* Where counsel makes a reasonable tactical decision, we will not engage in second-guessing. *Id.*

In order to satisfy the prejudice prong, a PCR applicant must show that counsel's errors were so serious that a fair trial was not had. *Id.* In other words, counsel's error must have an effect on the judgment. *Id.* It is not enough to show the error "conceivably could have influenced the outcome"; the effect must be affirmatively proved by a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* A reasonable probability is that which is sufficient to undermine confidence in the outcome. *Id.* The question we must answer is: "[W]hether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*

A. Cell phone records.

Griggs first contends that counsel was ineffective in failing to object to the admission of Watkins's cell phone records. He argues counsel had a duty to object to the phone records because they were inadmissible hearsay, not covered by any exception. Specifically, he argues the phone records were not admissible under the business records exception to the hearsay rule.

In order to admit a record containing hearsay into evidence under the business records exception outlined in Iowa Rule of Evidence 5.803(6), the proponent of the evidence must establish the following:

> 1) That it is a business record;
> 2) That it was made at or near the time of an act;
> 3) That it was made by, or from information transmitted by, a person with knowledge;
> 4) That it was kept in the course of a regularly conducted business activity;
> 5) That it was the regular practice of that business activity to make such a business record.

State v. Reynolds, 746 N.W.2d 837, 841 (Iowa 2008). However, where business records are created through a fully automated and reliable process involving no human declarant, the "statements" contained are arguably not hearsay at all. *Id.* at 843. As our supreme court has stated, "foundational testimony for non-hearsay evidence need only be provided by a person with 'special knowledge about the operation of the computer system.'" *Id.* (citation omitted).

Davenport police officer Mike Martin testified that he subpoenaed Watkins's phone records from Iowa Wireless. He testified that "there is a listing of every call you make and receive" and that when Iowa Wireless's records are subpoenaed, they "will send us back for the time frame that we requested every phone call that was made or received, including even when you go into your voice mail, and it lists my time—the time, the date and literally how many seconds." Martin stated that the records introduced at trial were the ones that were received in response to the subpoena. The district court found the records "are routinely used in trials to establish the whereabouts and contacts of individuals at pertinent times through the numbers called by individuals."

Assuming that Martin's testimony failed to establish that he is a person with special knowledge about the operation of the computer system, we cannot find Griggs was prejudiced by any failure on counsel's part to object to the lack of

foundation for the exhibit. A party objecting to the offer of evidence for lack of foundation must point out in what particular or particulars the foundation is deficient to allow the adversary an opportunity to remedy the alleged defect, if possible. *State v. Entsminger*, 160 N.W.2d 480, 483 (Iowa 1968). Had trial counsel objected as to the foundation, the State could have elicited additional testimony from Martin to establish foundation, or called an employee of Iowa Wireless to provide it.

B. Griggs's absence from the courtroom.

Iowa Rule of Criminal Procedure 2.27(1) provides that a defendant charged with a felony be personally present at every stage of trial. This includes when the jury is being instructed by the court. *See State v. Snyder*, 223 N.W.2d 217, 221 (Iowa 1974) ("When instructions are given by the court, . . . the presence of the accused is of the greatest importance, as he may be able to suggest to the court or his counsel some information that would throw additional light on his defense."). Griggs contends that he was absent from the courtroom during the jury instruction conference and the reading of the jury instructions. He argues trial counsel was ineffective in failing to ensure he was present or to object to his absence.

The PCR court rejected Griggs's claim, finding it could not "determine specifically that the applicant was or was not present when the jury instructions were prepared or read to the jury." However, the court concluded that:

> [W]hether this applicant was present or not during this portion of the trial, it does not significantly affect the fairness of the trial or the outcome of the trial. If Applicant was not present it was due to

> mistake or inadvertence and does not rise to the level of being a violation of the rights of the accused.

The trial transcript shows that the jury was directed to the jury room in order for the court to "take up some motions that were previously reserved." The transcript then notes: "Jury dismissed from the courtroom at this time, and the following proceedings were held out of the presence of the jury." The court then stated, "Let the record reflect that the jury is now out of the courtroom. The defendant and his attorney are present as well as the State." No record was made of the jury instruction conference. The next note in the record states, "Following proceedings were held in open Court with the Court, counsel, and jury present." The court then reviewed the jury instructions. The final note indicates the case was submitted to the jury. There is no transcript of closing arguments.[1]

Griggs testified at the PCR hearing that he was not present during the jury instruction conference or when the jury instructions were read. He did report being at the closing arguments.

Griggs's trial counsel, Pat Kelly, was questioned as to whether Griggs was present at the jury instruction conference and during the reading of the jury instructions. He testified, "I actually have no memory of whether he was there or not, but I can't imagine him not being there. I cannot remember ever doing a jury trial when the defendant was not present for the instructions to the jury." Kelly also stated that for the defendant to not be present at that portion of the trial would be "extremely unusual" and "I've never seen it." He clarified that for Griggs

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[1] Iowa Rule of Criminal Procedure 2.19(4), which now requires closing arguments to be reported, was amended after Griggs's trial.

not to have been present "would have been so unusual I would think that it was something I would remember. I just can't imagine it happening that way. I'm not saying—I can't remember. It's the sort of thing I've never seen it happen, I've never heard of it happening."

After reviewing the record before us, we conclude Griggs has failed to show he was absent during the jury instruction conference or the reading of the instructions to the jury. The record shows Griggs was present during the conference on the pending motions. Although the subsequent jury instruction conference was not recorded, there is nothing to suggest that Griggs left the courtroom during that time or was not present when the jury was called to return to the courtroom. Although the trial transcript fails to note Griggs's presence when the jury returned, Kelly testified that he had never seen or heard of a defendant not being present at that stage of the trial and that Griggs's absence would have been so unusual that he would expect to remember it. In contrast, the only evidence of Griggs's absence is his own self-serving testimony. On this record, we find Griggs has failed to prove by a preponderance of the evidence that his trial counsel was ineffective in failing to object to his absence from the courtroom. *See Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998).

C. Testimony regarding a prior shooting.

Griggs contends counsel was ineffective in failing to object to testimony regarding an incident in which he allegedly shot a gun at Collins. He argues the testimony was inadmissible character evidence. He also argues the testimony

was beyond the scope of examination, its probative value was outweighed by the danger of unfair prejudice, and it was irrelevant.

At trial, Collins testified that Griggs handed him a gun and told him to "do it" or else he would "get at you, your baby mother and your son." Collins stated he took the threat seriously. He also explained that he gave the police a false name before identifying Griggs as his accomplice because Griggs had threatened his family. Griggs's counsel engaged in the following exchange during cross-examination of Collins:

> Q. Have you ever had an altercation with Mr. Griggs? A. Yes.
>
> Q. The altercation that you—was the reason for giving Corey Thomas' name—what was the altercation over? A. It was over one of my friends had got locked up and sent to prison. [Griggs] thought that I set it up for him to go, for him to go to jail. So that's what we was arguing about, fighting about.

Then on redirect examination, the following exchange occurred between Collins and the prosecutor:

> Q. Mr. Kelly had asked you if you had ever been involved in an altercation in the past with Mr. Griggs, and your answer to the jury was— A. Yes.
>
> Q. As a result of that altercation, did you believe that your life was seriously in danger by what Mr. Griggs did to you? A. Yes.
>
> . . . .
>
> Q. Had that happened well before this particular robbery? A. Yes.
>
> Q. Because of what happened in that altercation, did you think that he was the type of person that would carry through with the threat he made to you? A. Absolutely.

When Griggs testified, the prosecutor asked him about the altercation with Collins.

> Q. Mr. Collins had testified to this jury that he was frightened of you and took your threat seriously when you told him to go in and

> do that robbery. Do you recall that testimony, don't you? A. Why would he testify to something like that? I mean, he can say what he want [sic] to say, I mean, you know, he's trying to help himself out, you know.
>
> . . . .
>
> Q. The point being you recognized that there's been an altercation between you and DeShon in the past. A. It's been plenty of altercations between him and me.
>
> Q. In fact, the altercation that DeShon was talking to the jury about was an altercation where you actually took a gun and tried shooting DeShon and Irwin Bell. Isn't that right? A. No, ma'am.
>
> Q. Isn't it true that you were shooting at those individuals over money that they owed to you? A. That they owed to me?
>
> Q. Yes. A. No, ma'am.

Finally, the prosecutor called Collins as a rebuttal witness and questioned him one last time about the altercation.

> Q. Let me ask you this: We talked about a physical altercation that you had been involved with Mr. Griggs where you really felt frightened of him. A. Yes.
>
> Q. Okay. And going back to your earlier testimony, you had indicated because of that prior incident, you took his threats seriously there in the parking lot of Hy-Vee. Is that true? A. Yes, yes.
>
> . . . .
>
> Q. Describe what happened. A. What happened was, he got into it with my other friend, and I happened to be with him, and he started shooting at both of us.
>
> Q. What was the name of your other friend? A. Irwin Bell.
>
> Q. How long ago did this happen? A. It was like a couple weeks prior to the altercation.

Griggs contends the foregoing testimony is inadmissible character evidence. Iowa Rule of Evidence 5.404 governs the admissibility of character evidence. Evidence of a person's character is not admissible for the purpose of proving that a person acted in conformity therewith on a particular occasion, except in certain instances. Iowa R. Evid. 5.404(a). Evidence of a pertinent character trait of the accused is admissible if offered by the accused or by the

prosecution to rebut the same. Iowa R. Evid. 5.404(a)(1). While evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that person acted in conformity therewith, it may be admissible for other purposes. Iowa R. Evid. 5.404(b). These other purposes include, but are not limited to, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

Griggs admits the testimony "appears to have been elicited to establish why DeShon Collins participated in the robbery." He argues that Collins's motive was irrelevant, however, because Collins's purpose for committing the crime is immaterial to his guilt. He claims then that "[t]he only use for this evidence was to show that Griggs was a bad person and therefore likely to commit another bad act."

We find the evidence of the altercation between Griggs and Collins was not introduced to show Griggs acted in conformity with his prior bad act, but "for other purposes." The examples listed in rule 5.404(b) are not exclusive. *State v. Nelson*, 791 N.W.2d 414, 425 (Iowa 2010). Rather, "the important question is whether the disputed evidence is 'relevant and material to some legitimate issue other than a general propensity to commit wrongful acts.'" *Id.* (citation omitted). Here, the evidence was relevant to explain why Collins participated in the robbery; it was not introduced to show conformity with Griggs's prior bad act. We likewise find the probative value of the evidence outweighs the danger of unfair prejudice.

Griggs also asserts the State's cross-examination of him exceeded the scope of direct examination because no testimony regarding the altercation was elicited on direct examination. Rule 5.611 states: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." In his direct examination, Griggs testified that he and Collins "had maybe like two altercations," which occurred "a couple months prior to this case or maybe a month."

We find counsel had no duty to object to the testimony regarding Griggs's altercation with Collins. Accordingly, Griggs has failed to establish his trial counsel was ineffective.

D. Evidence of accomplices' guilty pleas.

Griggs contends his trial counsel was ineffective in failing to object to evidence of Watkins's and Collins's guilty pleas. On direct examination, the prosecutor asked Collins what criminal offenses he had pleaded guilty to for his involvement in the crimes committed. Collins testified he was sentenced to twenty-five years in prison and that he agreed to testify truthfully for the State as part of the plea agreement. Collins also testified that Watkins pleaded guilty.

Generally, evidence of another's conviction or acquittal is inadmissible. *State v. Scott*, 619 N.W.2d 371, 374 (Iowa 2000). "Evidence of acquittal of one jointly indicted with accused is not admissible on behalf of accused as tending to establish that he also is innocent." *Id.*

Griggs's trial counsel testified at the PCR hearing that he wanted the jury to hear Collins's testimony regarding the plea agreement. The tactical decision

to allow or introduce this type of evidence so that the jury may infer Collins had a motive for testifying to Griggs's guilt does not amount to ineffective assistance of counsel. We also find Griggs is unable to demonstrate he was prejudiced by this testimony given the evidence of his guilt.

E. Prosecutorial misconduct.

Griggs also contends his trial counsel was ineffective in failing to object to what he claims are instances of prosecutorial misconduct during the trial. In the first instance he argues counsel had a duty to object to comments made during the opening statement where he alleges the prosecutor "brought before the jurors a myriad of other facts not previously presented." He also argues the prosecutor engaged in misconduct by asking him on cross-examination if he believed certain witnesses for the State were lying.

In order to prevail on a claim of prosecutorial misconduct, a defendant must show both the misconduct and the resulting prejudice. *State v. Kroamann*, 804 N.W.2d 518, 526 (Iowa 2011). In determining whether prosecutorial misconduct occurred, we consider: "(1) the severity and pervasiveness of misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; (5) the extent to which the defense invited the misconduct." *Id.* The most significant factor is the strength of the State's evidence. *Id.* While prejudice can result from isolated prosecutorial misconduct, it usually does not. *Id.* Ordinarily, there needs to be persistent

efforts to inject prejudicial matters before the jury before we will find prejudice has been established. *Id.*

With regard to the opening statement, we find Griggs has failed to show the prosecutor engaged in misconduct at trial warranting an objection. The prosecutor stated that two witnesses were concerned that Griggs would hit them with the car while speeding away from the crime scene. These witnesses testified in conformity with this statement.

We next address Griggs's claim that counsel was ineffective in failing to object when the prosecutor asked him if the State's witnesses were lying. It is improper under any circumstance to ask a defendant whether another witness is lying. *State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003). However, Griggs fails to show how he was prejudiced by this questioning. In light of the evidence of his guilt, we cannot find he was prejudiced. Accordingly, ineffective assistance of counsel has not been demonstrated.

F. Hearsay evidence.

Griggs contends his trial counsel was ineffective in failing to object to hearsay and opinion testimony elicited from Officer Martin. Martin testified that Watkins told him she had made certain phone calls to Griggs on Collins's cell phone around the time of the robbery. Griggs complains he was denied a fair trial because he was unable to cross-examine Watkins regarding the alleged statements.

Trial counsel opened the door to this line of questioning during Martin's cross-examination when he asked about phone calls made minutes after the

robbery between the cell phones registered to Watkins and Collins. Counsel challenged Martin's knowledge of who was on either end of the phone, stating, "You believe you know, but you don't really know, do you? You weren't there. You don't know who had that phone in their hand. You don't know who was using DeShon Collins' phone. You don't know who was using Trina Watkins' phone." Martin responded that Watkins specifically told him that she had possession of the phone and made the calls. He acknowledged he did not review State's Exhibit 5 with Watkins to determine that she made each of the calls listed. On redirect examination, Martin was asked: "She did admit that she was the person who had the cellphone, correct?" Martin replied, "Yes."

We find Griggs has failed to establish ineffective assistance of trial counsel. The State introduced cell phone records showing a series of phone calls between Watkins's cell phone and one registered to Collins. Trial counsel opened the door to the hearsay testimony by attempting to highlight Martin's lack of personal knowledge regarding the phone calls. As such, it was a tactical decision. "[C]laims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment." *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001). Trial counsel's decision did not fall outside the scope of a reasonable competent attorney.

G. Failure to call witness.

Griggs also faults trial counsel for failing to call Iowa Wireless personal to testify at trial. He claims this testimony was necessary to demonstrate when and where the cell phone calls originated from and the location of the cell tower. He speculates that such testimony could have disputed Collins's testimony that the calls were made while they were waiting for France to arrive at Hy-Vee, because personnel could have determined the location the phone calls were being made from.

Griggs cannot show a reasonable probability that but for counsel's failure to call personnel from Iowa Wireless, the outcome would have been different. He failed to present any evidence as to how these potential witnesses would have testified, instead speculating as to what their testimony might have been. Accordingly, this ineffective-assistance-of-counsel claim fails.

H. Drug evidence.

Griggs contends his trial counsel was ineffective in failing to file a motion in limine to preclude evidence of selling drugs. He does not specifically outline the testimony in question that he objects to. As a result error has not been preserved for our review. *See Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996) (stating the appellate court will not comb the record for facts to support an appellant's argument).

I. Reasonable doubt instruction.

Next, Griggs contends his trial counsel was ineffective in failing to object to the jury instruction on reasonable doubt. The instruction he complains of states:

> The burden is on the State to prove the defendant Dione Lamar Griggs guilty beyond a reasonable doubt.
> A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State.
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
> But if, after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.
> If there is a reasonable doubt as to the degree of the crime, the defendant shall only be convicted of the degree for which there is no reasonable doubt.

Our supreme court has found the language of this instruction is adequate. *See State v. Frei*, ___ N.W.2d ___, ___ 2013 WL 86952, at *5 (Iowa Mar. 8, 2013); *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980). Accordingly, we find counsel had no duty to object to it. Griggs has failed to show counsel was ineffective.

J. Availability of a deposition to the jury.

Finally, Griggs complains that his trial counsel was ineffective in failing to offer a solution to a question asked by the jury during their deliberations.

The jury sent a note to the court stating: "Regarding Jeanne Sindt's depositions, did she indicate Dione Griggs was at the Blue Diamond Apartment in the deposition?" Trial counsel had cross-examined Sindt with her deposition,

but it was not entered into evidence. The district court proposed the following answer to the jury:

> Regarding your question about Ms. Sindt's deposition, her deposition was not admitted into evidence, and therefore it is not available for your review. Your question involves an issue of fact, the answer to which you must determine using your individual recollections of the testimony.

Trial counsel did not object to the answer.

In order to have the deposition provided to the jury, it would have to be in evidence. Griggs cannot show that even if counsel had moved to reopen the record and admit the deposition into evidence, the trial court would have agreed to do so, or that the outcome of the proceedings would have changed. Accordingly, we find trial counsel was not ineffective.

AFFIRMED.