IN THE COURT OF APPEALS OF IOWA

No. 2-332 / 11-0847
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CORY JOHNATHON PACE,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Annette J. Scieszinski, Judge.

A defendant appeals from his convictions and sentences for two counts of theft. **AFFIRMED.**

Michael K. Lahammer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Rose Anne Mefford, County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Cory Johnathon Pace appeals from his convictions and sentences for two counts of theft. He contends he should be granted a new trial because a juror with familial ties to a defense witness was not dismissed, the photographs of stolen items that were admitted violated his due process rights, and bad acts evidence was allowed without a limiting instruction.

Because Pace's claims were not properly preserved in the district court, they cannot be considered on appeal. Addressing Pace's alternative argument, we find his trial counsel did not breach a duty in failing to make a meritless challenge for cause of a prospective juror. Accordingly, we affirm.

I. Background Facts and Proceedings.

In September 2009, the Mahaska County Sherriff's Office received multiple burglary reports. When a refrigerator taken during one of the burglaries was discovered in Jacklyn Auxter's shed, she identified Pace as the person she believed had left it there. Sherriff's deputies were dispatched to Pace's residence to look for stolen goods. Although Pace denied having any knowledge of stolen goods, he allowed the deputies to search his home.

While walking through the residence, the deputies spotted a number of items they believed were stolen in the burglaries. These items included stainless steel appliances, a washer and dryer, a large-screen television, and a brand new furnace. The deputies left the residence without informing Pace of what they believed to be stolen. Also present in the home, at the time of the search, was Pace's fiancé, Shayla Brittain, and his houseguest, Phillip Bruce.

Continuing their investigation into the burglaries, officers went to the home of Marvin Rust, Brittain's uncle. They saw no stolen items on his property and went to a junkyard owned by Rust nearby. On the way, the officers spotted Bruce driving a vehicle near the junkyard. After stopping him, they saw Rust was in the passenger seat.

The deputies received permission to search the junkyard and in an area overgrown with weeds, discovered a vehicle registered to Brittain and more items matching the description of those reported stolen, including: a four-wheeler frame, a furnace, a John Deere lawn tractor and mowing deck, a welder, an air conditioner, a kayak, a space heater, an air compressor, a stainless steel dishwasher, a go-cart, several boxes of tools and miscellaneous hand tools, several power tools, windows, a Stihl weed eater, a John Deere clock, a washing machine, a pressure washer, several jacks, a canister of Freon, a stainless steel microwave, a boat motor, and a two-seat baby stroller. When Brittain's vehicle was later impounded and searched, more items were discovered, including: hand and power tools, two flat-screen televisions, several Longaberger baskets, a bag of collectibles with a name tag of one of the burglary victims, a painting, and a blue knit bag.

A search warrant was then obtained for Pace's residence. The search yielded: an Echo chainsaw, a Stihl weed eater, boat paddles, two rocking chairs, a set of whicker patio chairs and a patio table, multiple solar-powered garden lights, and an instruction manual for a tool chest found at the junkyard. One of

the burglary victims came to the house and identified a stove and refrigerator as items that were stolen.

When Pace arrived at the premises and saw the officers executing the search of his home he stated, "I'm in trouble, aren't I?" After he was read his *Miranda* warning, he told the officers that some months earlier, a man told him property would begin to arrive in his driveway; if it was covered with a tarp, he was to leave it alone, but if it was not covered, Pace could keep it. He claimed the man had shown him photographs of Pace's family, including his five children, and Pace was frightened the man would harm them unless he complied. Although he initially did as told, Pace claimed he felt "uneasy" about the arrangement and moved some of the items to the junkyard.

A second warrant was executed on Pace's home, in which more stolen items were discovered. These include: windows, a chainsaw, a gas grill, a duck-shaped rock, a step-stool, several vases, a decorative washboard, polka-dotted rubber boots, a green bowl, and a set of ceramic chickens.

All the stolen items discovered at Pace's home, the junkyard, and inside Brittain's vehicle were photographed by law enforcement and later released to the purported owners.

On November 2, 2009, Pace was charged with first-degree theft and possession of stolen property. Pace filed pretrial motions, including a motion to exclude evidence. This motion sought to prohibit the introduction of evidence discovered in Pace's possession because the evidence was returned to the purported owners prior to Pace's inspection. Pace alleged the evidence violated

the best evidence rule and broke the chain of custody. The motions were denied.

Trial was held from November 18 to November 19, 2010. During voir dire, a prospective juror informed the court that his brother-in-law was Brittain's former father-in-law, and that he knew Brittain's ex-husband. The prospective juror told the court that his family did not hold Brittain in high regard, but stated his knowledge of Brittain would not cause him to be unfair to Pace. Pace's attorney did not challenge the juror for cause and did not use a peremptory challenge to strike him from the panel.

Brittain testified as a key witness for Pace. She claimed much of the allegedly stolen property had been purchased by and belonged to Pace and herself.

Pace was found guilty of first-degree theft and second-degree theft. He was sentenced to a term of imprisonment not to exceed ten years on the first-degree conviction and a term of imprisonment not to exceed five years on the second-degree conviction. The terms were ordered to run concurrently. Pace appeals.

II. Failure to Remove a Juror With Familial Ties to a Defense Witness.

Pace first contends the court erred in failing to remove a juror who had familial ties to Brittain. His attorney did not challenge the juror for cause and did not use a peremptory challenge to strike the juror. Pace claims the court had a duty to sua sponte remove the juror. In the alternative, he contends his trial counsel was ineffective in failing to challenge the juror.

We conclude Pace failed to preserve error regarding any challenge of the juror. Objections must be raised at the earliest opportunity after the grounds for the objection become apparent. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). Pace failed to raise the issue until his motion for new trial. However, we elect to address this issue as a claim of ineffective assistance of counsel arising from counsel's failure to challenge the juror.

We review ineffective-assistance-of-counsel claims de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). To prove ineffective assistance of counsel, Pace must show by a preponderance of the evidence that his counsel failed to perform an essential duty and prejudice resulted. *See id.* at 784. His claim fails if he is unable to prove either element of this test. *See id.*

Pace is unable to show counsel had a duty to challenge the juror for cause. Pace cites to Iowa Rule of Criminal Procedure 2.18(5)(d), which allows a defendant to challenge a juror for cause when there is "[a]ffinity or consanguinity, within the fourth degree, to the person alleged to be injured by the offense charged, or on whose complaint, or at whose instance, the prosecution was instituted, or to the defendant, to be computed according to the rule of the civil law." This rule does not apply where a juror is related in some way to a witness. *See State v. Albery*, 197 N.W. 650, 652 (Iowa 1924) (holding the relationship between a juror and prospective witness was not grounds for a challenge for cause because it was not included in the rule in place at that time regarding challenges for cause).

The only other possible ground for challenge for cause is found in rule 2.18(5)(k): "Having formed or expressed such an opinion as to the guilt or innocence of the defendant as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial." The juror in question stated he "didn't really know" Brittain and had not made any presumptions regarding the case. Given the juror's express statement that nothing about the fact that Brittain was Pace's fiancé would cause him to be unfair, there were no grounds for challenging the juror for cause. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) (noting counsel has no duty to make a meritless motion).

III. Admission of the Photographs of Allegedly Stolen Property.

Pace next contends the court erred in allowing the State to enter the photographs of the items recovered in his home, Brittain's vehicle, and the junkyard into evidence. He asserts the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), when it returned the items to their rightful owners without allowing him to inspect the evidence. In *Brady*, the Supreme Court stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

In his motions to suppress and exclude evidence, Pace presented arguments regarding the best evidence rule and chain of custody. He made no arguments regarding his due process rights under *Brady.* Because he failed to raise this issue before the trial court, we find Pace has failed to preserve this

claim for our review. *See State v. Philo*, 697 N.W.2d 481 (Iowa 2005) ("Ordinarily, we do not consider issues raised for the first time on appeal.").

IV. Admission of Bad Acts Evidence.

Finally, Pace contends the court erred in allowing evidence regarding his alleged other bad acts. Specifically, he complains that the State presented the jury, through testimony and photographs, with over one hundred allegedly stolen items Pace possessed, and the court failed to give the jury a limiting instruction.

Pace states he preserved error on this issue in his motion for new trial. Again, a motion for new trial is too late to raise error; the error must be raised at the earliest opportunity. *See State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991) ("As a general rule, objections to evidence must be raised at the earliest opportunity after the grounds for objection become apparent."). Because Pace failed to challenge the admission of the evidence at the time it was being received, we will not consider his claim on appeal.

Having found no error, we affirm Pace's convictions and sentences for first-degree theft and second-degree theft.

AFFIRMED.