

IN THE COURT OF APPEALS OF IOWA

No. 2-569 / 11-1478
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JASON A. BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Jackson County, Marlita Greve,
Judge.

Jason Brown appeals his conviction and sentence for first-degree robbery.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, Chris Raker, County Attorney, and Andrew Prosser, Assistant County
Attorney, for appellee.

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

BOWER, J.

Jason Brown appeals his conviction and sentence for first-degree robbery, in violation of Iowa Code section 711.2 (2009). Brown contends his trial counsel was ineffective in failing to object to “inadmissible evidence,” including fingerprint testimony, evidence relating to phone records, and car repair receipts. Because this record is inadequate to evaluate Brown’s claims of ineffective assistance of counsel, we preserve his contentions for possible postconviction relief proceedings.

I. Background Facts and Proceedings.

In August 2010,¹ Jason Brown called his friend Charles Pledge. Brown told Pledge, “I got a lick for us.” A “lick” is slang for “a good hustle or a robbery.” Pledge declined Brown’s offer to join him.

On September 2, Tina Lanning was working alone as a teller at the Maquoketa State Bank in Andrew, Iowa. At approximately 3:15 p.m., two men entered the bank. The taller man had short hair and gold-capped teeth. The shorter man wore his hair in dreadlocks under a baseball hat and bandana. Lanning became suspicious of the men because “they kept looking around the bank a lot” and “looking at each other.” The men asked Lanning if she could cash a check or make a loan. When Lanning explained she could open an account but could not give them any cash, the taller man pulled a silver handgun from his pocket and pointed it at Lanning’s face.

¹ Unless noted otherwise, dates referenced took place in 2010.

The shorter man came behind the counter, held Lanning's hands above her head, and said, "I know you have kids and a husband." The taller man rummaged through the teller drawer and vault. The men took over \$45,000 in cash and left the bank, leaving behind a black garbage bag. Lanning immediately called 911 to report the robbery.

Lanning's twelve-year-old son, Zachary, was on his way to visit his mother at the bank on his way home from school. Zachary saw the two men enter the bank and leave a few minutes later. Zachary saw the men walk "behind the bank" toward the school bus barn. Carla Ehlers was working nearby at the Andrew Telephone Company and saw two men "running really fast" toward the bus barn. Sixth-grader Wesley Simons, who lives near the bus barn, noticed a "strange vehicle" parked near his house. Wesley thought the vehicle was a green SUV with an Illinois license plate.

Police officers responded to the bank. They seized the black garbage bag left behind by the men during the robbery. Fingerprints were visible on the glass door at the entrance of the bank, so officers removed the door and packaged it to transport to the crime lab. Surveillance videos from the bank depicted the two men and the robbery.

Surveillance videos from the J & K Gas Station in Otter Creek (approximately fifteen minutes north of Andrew) showed a dark SUV arrive at the gas station approximately forty minutes before the robbery, at 2:36 p.m. on September 2. A female passenger bought gas while two male passengers used the restroom. The two males matched the appearance of the bank robbers.

Meanwhile, Terry Kilburg was waiting behind the SUV to use the gas pump. Kilburg observed the dark SUV was a green Ford Explorer with Wisconsin license plates. The SUV headed south toward Andrew when it left the gas station at 2:44 p.m.

Police released descriptions of the bank robbers and the surveillance videos to the public. Tips led investigators to identify Jason Brown as a suspect. Investigators tracked Brown to a facility in Milwaukee, Wisconsin, where he had listed Carisha Turner as a contact. Turner was the registered owner of a green Ford Explorer in Milwaukee. On September 23, police executed a search warrant at Turner's home in Milwaukee. In Turner's bedroom, they found mail addressed to Brown. They also seized a purse that appeared similar to the purse carried by the female suspect in the gas station surveillance video. An investigator later identified the purse as matching the one in the video.

Police photographed Turner's green Ford Explorer. Wesley Simons identified the vehicle in the photo as the green SUV he saw parked near his house behind the bank. Terry Kilburg was "absolutely positive" the vehicle in the photo was the same green Ford Explorer with Wisconsin plates he saw at the gas station.

Police also executed a search warrant on Brown's Chevrolet Suburban. In the Suburban, police found a bill of sale showing Brown purchased the Suburban from Milwaukee-resident Cedric Dixon for \$2300 on September 7, five days after the robbery. After speaking with Dixon, police went to a Midas auto services

store. At Midas, police obtained a copy of an invoice showing Brown paid nearly \$1700 in cash to fix the Suburban's transmission on September 8.

Criminalist Dennis Kern from the Iowa Division of Criminal Investigation analyzed the black garbage bag and the bank door. Kern matched a fingerprint on the garbage bag and a fingerprint on the bank door to "known" fingerprints taken from Brown. The fingerprint Kern found on the door was Brown's left index finger and was pointed toward the lock. The bank surveillance video depicted the shorter man using his left hand to touch the door in the same area Kern found Brown's fingerprint. Bank Teller Angela Petersen stated the bank door got cleaned with Windex and a paper towel "three to four times a week," and she was "positive" the door would not "ever go one month without being cleaned."

Police interviewed Brown on September 15. Brown had his hair in "fairly long" dreadlocks. Initially, Brown denied he had ever been at the bank in Andrew. Brown denied recognizing anyone from still photos of the bank and gas station surveillance videos. When police told Brown that his fingerprints had been found at the bank, Brown said he had been to the bank "a few times" "about five months" earlier when his friend Shane McCreedy cashed a check. Later in the interview, Brown said he had also "cashed a check there" and that he "always used to" go behind the counter to "shoot the shit" with a female bank employee McCreedy knew, but Brown did not know her name. However, Shane McCreedy stated he had "never" been to the bank with Brown.

Police seized a Verizon Wireless cell phone from Brown's possessions at the jail. Police contacted Verizon Wireless to request records associated with the phone. Those records show that on September 2, at 2:17 p.m., Brown's phone used tower 235 in Dubuque, Iowa. At 2:31 p.m., Brown's phone used tower 225 in Zwingle, Iowa. And at 2:55 p.m., Brown's phone used tower 273 in Maquoketa, Iowa.

Several witnesses identified Brown as one of the men involved in the robbery. A few days after the robbery, police showed Tina Lanning a line-up that contained a photo of Brown with a beard. Lanning could not make a positive identification. But when police showed Lanning a photo of Brown without a beard, Lanning identified Brown as "the shorter [robber] with the hat on." Brown's friend Shane McCreedy watched the bank surveillance video. McCreedy said the shorter man "looked like" Brown, but he "couldn't be 100 percent sure." Brown's friend Charles Pledge watched the surveillance videos from the bank and gas station. Pledge knew "right away" without "any doubt about it" that the "person with the hat" was Brown. Pledge said that without even seeing the man's face, he "knew exactly" it was Brown due to his mannerisms and the way he walked.

The State filed a trial information charging Brown with robbery in the first degree. A jury trial commenced August 15, 2011. Brown testified at trial. Brown acknowledged he cut his dreadlocks and shaved his head a few days before trial, but denied it was an effort to look less like the robber in the surveillance videos. Brown testified he was in Milwaukee at the time of the robbery, and blamed the

robbery on his ex-girlfriend, LaKisha Jones, and two unidentified men. Brown stated he must have touched a garbage bag at LaKisha's house, and then LaKisha must have given the bag to the robbers. Brown later testified LaKisha was not involved in the robbery, but rather, Brenda Jones, LaKisha's sister, was the female suspect involved. Brown stated Brenda drove a green Ford Explorer with Illinois license plates, and had a purse similar to the female suspect on the gas station surveillance video.

Brown stated he had been to the bank one time in June 2010 with Shane McCreedy.² Contrary to his prior interview with police, Brown stated he had not gone behind the counter of the bank, but rather, he had urinated on the side of the bank and went inside briefly to get McCreedy's car keys. Brown said he was confused during the prior interview because he "did not sleep at all" the night before and was forced to sleep in his underwear in the freezing cold on a metal bed with no blanket.³

Brown stated he bought his Suburban from Cedric Dixon in June 2010 on a payment plan and made the final payment in September 2010 using money he got from Turner. Brown claimed the total purchase price was \$1900 rather than \$2300 listed on the bill of sale.⁴ Brown described the seller Dixon as "a good friend" he "went to grade school with" and whose mother "goes to church with" Brown's mother. However, Dixon testified he had "never met" Brown before he

² McCreedy stated he had never been to the bank with Brown.

³ When asked a few times during the interview how he was being treated at the jail, Brown told police "they treat me decent."

⁴ Brown also said that he paid about \$1700 to fix the Suburban at Midas.

sold Brown the Suburban. Dixon stated Brown bought the Suburban on September 7 for “\$2300 cash” from a listing on Craigslist and that Brown did not pay in installments.

In a phone call from jail, Brown told Turner a few things he needed her to do for him. Brown asked Turner to “get a statement” he was at a Milwaukee school when the robbery occurred.⁵ Brown also asked Turner to get rid of the “silver pipe.” A “pipe” is slang for “gun.” Brown also asked Turner “how much money she had left.” In a later call, Brown asked Turner to “get rid of some clothes.”

Following a one-week trial, the jury found Brown guilty as charged. The district court sentenced Brown to a twenty-five year term of imprisonment. Brown now appeals.⁶

II. Scope and Standard of Review.

Our review of ineffective-assistance-of-counsel claims is de novo. *State v. Maxwell*, 743 N.W.2d 185, 189 (Iowa 2008); see *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) (“Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules.”). To prevail on his claim of ineffective assistance of counsel, Brown must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Maxwell*, 743 N.W.2d at 189. The claim fails if either element is lacking. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008).

⁵ Brown testified he was in Milwaukee at a school basketball court talking to some friends when the robbery occurred.

⁶ A pro se “reply brief” or supplemental brief was filed on June 20, 2012. We have not considered the brief due to its untimeliness.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). These claims are typically better suited for postconviction relief proceedings that allow the development of a sufficient record and permit the accused attorney to respond to the defendant's claims. *Id.* If we determine the claim cannot be addressed on appeal, we must preserve it for a postconviction relief proceeding, regardless of our view of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

III. Discussion.

Brown contends his trial counsel was ineffective in failing to object to the testimony of criminalist Dennis Kern from the Department of Criminal Investigation about a comparison between latent fingerprints at the scene of the bank and "known" fingerprints on a card labeled with Brown's name. Brown argues the State failed to establish the fingerprints on the cards were indeed Brown's fingerprints, and therefore, trial counsel breached an essential duty by not objecting to evidence that the fingerprints found at the bank matched Brown's fingerprints. Brown further contends counsel was ineffective in failing to object to evidence relating to cell phone records from Verizon Wireless and car repair receipts from Midas. Brown alleges the evidence regarding Brown's cell phone was inadmissible hearsay because the records were kept by another business called New Star. Brown alleges the Midas car repair receipts were inadmissible hearsay and lacking a sufficient chain of custody.

Upon our review, we find the record is inadequate to decide these issues on direct appeal. Accordingly, we preserve the matter for possible postconviction relief proceedings. However, we affirm Brown's conviction and sentence.

AFFIRMED.