IN THE COURT OF APPEALS OF IOWA

No. 2-821 / 10-0968
Filed October 31, 2012

FLOYD CROSS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Applicant appeals the decision denying his request for postconviction relief on his convictions for first-degree robbery and willful injury causing serious injury.

AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.

William A. Eddy of Eddy Law Firm, Indianola, for appellant.

Floyd Cross, Anamosa, pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant County Attorney, for appellee State.

Considered by Potterfield, P.J., Bower, J., and Huitink, S.J.*

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

HUITINK, S.J.

I. Background Facts & Proceedings.

On August 24, 2006, Jimmie Cameron and his friend, Maurice, were driving around Des Moines consuming crack cocaine and alcohol, and looking to purchase more drugs. They picked up Floyd Cross and another man (John Doe).[1] Cameron stopped the vehicle at a convenience store, and the three other men stole some soda pop. Cameron and a friend entered into an agreement to exchange vehicles for awhile, plus Cameron received about fifty dollars worth of cocaine. Cameron, Cross, Maurice, and Doe went to the Oakridge Apartments, where Maurice stated he knew someone who could turn their cocaine into crack cocaine.[2] This person refused to let them do it, but Maurice decided to spend the night there.

Cameron, Cross, and Doe began walking through the apartment complex. Cameron testified Cross asked him for the cocaine. When Cameron refused, Cross pulled a pipe out of a bag. Cameron stated, "He caught me off guard, and the next thing I know, boom, I was hit." Cameron also testified, "[W]hen I got up off the ground, I remember handing him the bag, and after I handed him the bag, I looked on up, . . . and he was—him and this other guy was walking off, he was putting the thing that he hit me with back in his bag." Cameron clarified although he did not see Cross hit him, he saw Cross with the pipe both before and after he was hit. Cameron's jaw was broken in two places. He had surgery, and screws were put in place to hold the jawbones together.

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[1] This man who was present that night was never identified. For clarity we will refer to him as John Doe.

[2] Cameron's preferred method of ingesting cocaine was to smoke it, which necessitated cooking the cocaine to turn it into a rock.

Cross was charged with first-degree robbery, in violation of Iowa Code sections 711.1 and 711.2 (2005), and willful injury causing serious injury, in violation of section 708.4(1). After a jury trial, he was convicted of these crimes.[3] The district court merged the two convictions for purposes of sentencing. Cross was sentenced on the first-degree robbery charge to a term of imprisonment not to exceed twenty-five years. Cross's convictions were affirmed on appeal. *See State v. Cross*, No. 07-0599, 2008 WL 3916703, at *3 (Iowa Ct. App. Aug. 27, 2008).

Cross filed an application for postconviction relief, claiming ineffective assistance of counsel. The district court, in a comprehensive decision, denied his request for postconviction relief. Cross now appeals.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

[3] Cross's first trial resulted in a mistrial. He was tried again in February 2007, and this resulted in his convictions.

III. Ineffective Assistance.

A. Cross first claims he received ineffective assistance because defense counsel did not subpoena Cameron's treating physician at the criminal trial. While Cameron's medical records were admitted during the trial, no expert testimony was presented on the issue of the extent of his injuries or his state of intoxication. At the postconviction hearing Cross presented answers to interrogatories from the treating physician.

The district court found, "[a] reasonable attorney could have determined that the doctor did not need to be contacted or subpoened because the medical records detailed the victim's injury." The court also found the physician's answers to interrogatories were in line with the medical records and Cameron's testimony. The court concluded Cross had not shown the result of the trial would have been different if the defense attorney had subpoened the treating physician. On our de novo review, we agree with the district court's conclusion that Cross has not shown prejudice. *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (noting that on a claim of ineffective assistance of counsel, the element of prejudice may be considered first).

B. Cross claims he received ineffective assistance because his defense counsel did not request a limiting instruction under Iowa Rule of Evidence 5.105 regarding testimony by Cameron that he and Cross had used illegal drugs together in the past. Cameron stated that due to his prior acquaintance with Cross he was able to identify him.

The district court pointed out the testimony in question implicated both Cameron and Cross, the case clearly involved illegal drugs, and other testimony

presented at trial showed Cameron, Maurice, Cross, and Doe were traveling around town together attempting to obtain illegal drugs. We note defense counsel's trial strategy was to attack Cameron's credibility and this evidence furthered that strategy. Generally, we will not find ineffective assistance of counsel where counsel's decisions are made pursuant to a reasonable trial strategy. *State v. Johnson*, 604 N.W.2d 699, 673 (Iowa Ct. App. 1999).

Additionally, the district court determined the testimony in question was not prejudicial to Cross. The whole case involved illegal drugs. We agree Cross has not shown the failure to request a limiting instruction prejudiced him. Therefore, he cannot show ineffective assistance on this ground. *See State v. Crawley*, 633 N.W.2d 802, 808 (Iowa 2001) (finding evidence of prior drug use was not prejudicial where drug use was not "wholly independent" of crime charged).

C. Cross claims he received ineffective assistance because defense counsel did not object to testimony by Cameron that Cross committed the theft of soda pop on the night of the incident. He claims this evidence of prior bad acts would not have been admissible under Iowa Rule of Evidence 5.404(b). Defense counsel testified he believed the theft was all part of what happened that night and was admissible for that reason.

Evidence that is inextricably intertwined with the crime charged is not covered by rule 5.404(b). *See State v. Nelson*, 791 N.W.2d 414, 419 (Iowa 2010). "Inextricably intertwined evidence is evidence of the surrounding circumstances of the crime in a causal, temporal, or spatial sense, incidentally revealing additional, but uncharged, criminal activity." *Id.* at 420 (citation

omitted). Cameron testified the plan was to sell the soda pop or exchange it for drugs. The evidence was part of the narrative that Cameron and the others in the vehicle were working together to obtain drugs, which they would then all use.

This evidence also contributed to defense counsel's trial strategy of attempting to discredit Cameron. We conclude Cross has not shown he received ineffective assistance due to defense counsel's failure to object to evidence he participated in stealing soda pop. *See State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) ("[W]e will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail.").

D. Cross contends he received ineffective assistance because defense counsel did not make a specific motion for judgment of acquittal. Defense counsel did make a motion for judgment of acquittal, but Cross asserts defense counsel failed to indicate the specific elements of the offense which he alleged were not supported by the evidence. Cross claims there is insufficient evidence to show he was the one who struck Cameron. A motion for judgment of acquittal will be denied if there is substantial evidence in the record to support the charges. *State v. Schooley*, 804 N.W.2d 105, 106 (Iowa Ct. App. 2011).

Even if defense counsel had made a more specific motion for judgment of acquittal and argued there was insufficient evidence to show Cross had struck Cameron, we believe the motion would have been unsuccessful because there was substantial evidence in the record on this issue. Cameron testified he saw Cross take a pipe out of his bag and Cross told him what he was going to do. Cameron did not actually see Cross hit him, but when he got up, he saw Cross

putting the pipe back in the bag. Cameron stated Doe was standing behind Cross and he could not have hit Cross without moving. Cameron stated he did not believe there was enough time for Doe to come forward, hit him, and then move back before Cameron got up again. Cameron stated he believed Cross hit him. Defense counsel does not have a duty to make a meritless motion. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996). Cross has not shown he received ineffective assistance on this ground.

Cross makes a further argument that he received ineffective assistance because appellate counsel did not raise an issue on appeal claiming defense counsel should have filed a more specific motion for judgment of acquittal. We have already determined if a more specific motion had been made, it would have been unsuccessful. We conclude Cross has not shown he received ineffective assistance from appellate counsel on this issue.

E. In a pro se brief, Cross claims he received ineffective assistance because defense counsel did not object to jury instructions on aiding and abetting, and joint criminal conduct. The Iowa Supreme Court has stated:

> When the submission of a superfluous jury instruction does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred, in the context of an ineffective-assistance-of-counsel claim, no prejudice results. Further, when there is no suggestion the instruction contradicts another instruction or misstates the law there cannot be a showing of prejudice for purposes of an ineffective-assistance-of-counsel claim.

State v. Maxwell, 743 N.W.2d 185, 197 (Iowa 2008) (citations omitted).

Here, the marshaling instruction directed the jury to consider Cross's conduct alone. Therefore, he would have been found guilty based on his own conduct. *See State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998) (finding there

was no error in giving an instruction on joint criminal conduct where there was no opportunity for the defendant to have been found guilty based on anything other than his own conduct). We conclude Cross has not shown he received ineffective assistance due to counsel's failure to object to these jury instructions.

F. Cross raises several other claims in his pro se brief asserting he received ineffective assistance of counsel. He claims defense counsel failed to: (1) investigate and question witnesses; (2) object to a statement by the prosecutor; (3) further assert the verdict was not supported by substantial evidence; (4) assert the prosecutor committed *Brady* violations;[4] (5) object to false testimony; and (6) subpoena the security guard at the apartment complex.

"When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). "The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome." *Id*. Cross's pro se brief merely asserts defense counsel could have done these various things differently but does not provide any argument to support his claims, or show how the result of the trial would have been different if counsel had done the things he now complains about. We conclude he has not shown he received ineffective assistance from defense counsel on these grounds.

IV. Merger of Convictions.

Finally, Cross contends his convictions are illegal because his conviction for willful injury causing serious injury should have merged into his conviction for

[4] This refers to the State's alleged failure to disclose exculpatory evidence, as required by *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

first-degree robbery. Cross asserts willful injury is a lesser-included offense of first-degree robbery, and under section 701.9 and Iowa Rule of Criminal Procedure 2.6(2), his convictions for the two offenses should be merged. An illegal sentence may be challenged at any time. Iowa R. Crim. P. 2.24(5); *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995).

The Iowa Supreme Court has determined "it is impossible to commit first-degree robbery under the purposely-inflicts-serious-injury alternative without first committing willful injury." *State v. Hickman*, 623 N.W.2d 847, 852 (Iowa 2001). Under the facts presented in this case, it is apparent the offenses of first-degree robbery and willful injury would merge pursuant to section 701.9. *See id.*

The sentencing order finds Cross guilty of first-degree robbery and willful injury causing serious injury, and provides, "These offenses are merged for purposes of sentencing." We conclude that under section 701.9 there should be only one legal conviction. *See State v. Hanna*, 179 N.W.2d 503, 508 (Iowa 1970) (noting the term "conviction" is generally used to mean the "establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty"). In this case, it is not clear whether the convictions were merged or just the sentences. We reverse the sentencing order and remand for a new order merging the convictions, as well as the sentences.

AFFIRMED IN PART, AND REVERSED AND REMANDED IN PART.