IN THE COURT OF APPEALS OF IOWA

No. 2-830 / 11-1616
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDY MITCHELL COPENHAVER,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Sean W. McPartland (motion for adjudication of law points) and Mitchell E. Turner (trial and sentencing), Judges.

A defendant appeals his conviction of two counts of robbery in the second degree and one count of theft in the second degree. **AFFIRMED.**

Randy Mitchell Copenhaver, Anamosa, appellant pro se.

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Jerry Vander Sanden, County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Defendant, Randy Copenhaver, appeals from the judgment and sentences on the jury's verdicts of guilty to robbery in the second degree (two counts), in violation of Iowa Code sections 711.1 and 711.3 (2009), and theft in the second degree, in violation of Iowa Code section 714.1(1) and 714.2(2). He argues that the two counts of robbery should have merged into a single offense and there was not sufficient evidence to prove the assault element of robbery. Copenhaver also makes multiple pro se arguments.

I. Background Facts and Proceedings

A reasonable juror could have found the following facts as true: around three o'clock in the afternoon on February 11, 2010, a man who identified himself as Copenhaver went to Vernon Heights Auto, a car dealership, and asked to test drive a reddish-colored Chevy Tahoe. The dealership employee made a copy of Copenhaver's driver's license and allowed Copenhaver to test drive the vehicle.

A Community Savings Bank branch office was approximately 1.1 miles from the auto dealership. Shortly after three o'clock a masked man entered the bank, walked up to a teller, handed her a note that informed her he was robbing the bank, and demanded large denomination bills. He repeated his demands orally. The teller, frightened but composed, complied and handed the man the money in her till drawer. The man told her to "keep it coming." A second teller approached and watched what was transpiring. When the first teller had emptied her till drawer, the man moved over to the second teller's window, swore at her, and demanded she give him the money in her drawer. She complied and the

man left, but only after a bank officer observed a reddish-colored SUV without a license plate in the parking lot.

After approximately fifteen minutes, Copenhaver returned with the vehicle to the Vernon Heights Auto lot. He told the salesperson that he liked the vehicle and wanted to show it to his wife. Copenhaver drove off again and returned approximately forty minutes later. Copenhaver returned the vehicle for the second time and told the salesperson that he would come back the next day to pay for the vehicle. He then left the dealership with another customer.

Shortly thereafter the police, who had been alerted to the details of the robbery, located a reddish Tahoe at Vernon Heights Auto. The bank officer was transported to the auto lot to view the vehicle, which he identified as the vehicle he had seen at the bank. From information supplied by the staff at the auto lot, the police learned the man who had test-driven the vehicle had identified himself as Copenhaver.

Copenhaver was arrested on February 12, 2010, taken to the police station, and interviewed about the incident at the bank. On February 25 the State filed a multi-count trial information charging Copenhaver with robbery in the second degree (two counts), in violation of Iowa Code sections 711.1 and 711.3, and theft in the second degree, in violation of Iowa Code section 714.1(1) and 714.2(2). On February 24, 2011, Copenhaver filed a motion for adjudication of law points arguing that two counts of robbery should merge into a single offense. The motion was denied. After a jury trial, Copenhaver was found guilty on all charges on July 28, 2011. He was sentenced to two consecutive terms of

imprisonment of ten years on each robbery conviction and a concurrent term of five years on the theft conviction. Copenhaver appeals.

II. Merger

Copenhaver argues both through counsel and pro se that the district court imposed an illegal sentence by violating the double jeopardy clause of the United States and Iowa constitutions when it failed to merge the two robbery offenses into one offense. Although we have discretion to consider a different standard under our state constitution, neither party suggests a different analysis or offers any reasons for a separate analysis. *See State v*. *Dewitt*, 811 N.W.2d 460, 467 (Iowa 2012). We accordingly decline to consider a different state standard under the circumstances and resolve Copenhaver's state and federal double jeopardy claims under the existing federal standards. Illegal sentences are reviewed for corrections of errors at law. *State v*. *Davis*. 544 N.W.2d 453, 455 (Iowa 1996). To the extent that Copenhaver is making a constitutional double jeopardy claim, our review is de novo. *State v*. *Finnel*, 515 N.W.2d 41, 43 (Iowa 1994).

The Double Jeopardy Clause of the United States Constitution's Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The clause is binding on the states through the 14th Amendment. *Benton v*. *Maryland*, 395 U.S. 784, 794 (1969). It prohibits, among other things, the imposition of multiple punishments on a defendant for the same offense. *North Carolina v*. *Pearce*, 395 U.S. 711, 717 (1969).

The State contends the double jeopardy clause does not prohibit the State from filing multiple charges from the same episode where two or more acts occur

separately and constitute distinct offenses. *See State v. Schmitz*, 610 N.W.2d 514, 516 (Iowa 2000). Copenhaver argues that while the confrontations with two separate bank tellers could be charged as two separate assaults, there was only one victim of the robbery—the property owner—the bank. Copenhaver also argues that the two possible assaults were part of one continuous act to warrant only one charge and one conviction rather than separate acts supporting two charges and two convictions.

When multiple punishments are imposed in a single prosecution, the court's ability to impose multiple punishments is limited to what the legislature intended. *State v. Reed*, 618 N.W.2d 327, 336 (Iowa 2000). Multiple punishments may be imposed where the convictions and sentences are based on distinct acts. *State v. Jacobs*, 607 N.W.2d 679, 688 (Iowa 2000). In such cases the underlying charges merely allege the same kind of conduct, and no double jeopardy problem is presented. *Schmitz*, 610 N.W.2d at 517. However, when multiple charges are actually based upon the same conduct, only one punishment is authorized. *Id.*

The question of how many convictions are lawful under a statute rests with legislative intent, with any ambiguity as to intent resolved in favor of the accused. *State v. Wells*, 629 N.W.2d 346, 353 (Iowa 2001). In determining legislative intent for a unit of prosecution, we turn first to the plain words of the statute. *State v. Velez*, __ N.W.2d __, 213 WL 1497308, at *12-13 (Iowa 2013). Iowa Code section 711.1 defines robbery as follows:

> A person commits a robbery when having the intent to commit a theft, the person does any of the following acts to assist

> or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:
> 1. Commits an assault upon another;
> 2. Threatens another with or purposely puts another in fear of immediate serious injury;
> 3. Threatens to commit immediately any forcible felony.

The question before us is whether Iowa Code section 711.1, defining robbery, contains explicit language that would compel the conclusion that a crime like this was intended to be charged as one continuous crime rather than two separate acts. Copenhaver relies on *State v*. *Kidd*, for the proposition that the term "any" in Iowa Code section 711.1 signifies plural acts, as opposed to "an" being construed as singular. 562 N.W.2d 764, 765 (Iowa 1997). He argues that based on this finding in *Kidd*, any number of acts satisfying the three factors elevating an action done with the intent to commit theft to a robbery would still only amount to one robbery charge. "A person commits a robbery when having the intent to commit a theft, the person does *any* of the following acts. . . ." Iowa Code § 711.1 However, we agree with the district court that better language guidance comes from *State v*. *Constable*, 505 N.W.2d 473, 477-78 (Iowa 1993).

In *Constable*, the defendant argued he should not have been convicted of five counts of sexual abuse under Iowa Code section 709.1, because there were only two victims. Iowa Code section 702.17 defines a sex act as "any sexual contact between two or more persons" and then lists various types of contact. Iowa Code § 702.17. The court in *Constable* found:

> Constable engaged in five distinct acts of physical contact; each contact alone met the definition of "sex act" and each contact alone would be sufficient to charge Constable with one count of sexual abuse. It follows logically that by engaging in five distinct and separate sex acts, Constable committed five counts of sexual abuse.

Constable, 505 N.W.2d at 478. The *Constable* court found "any" act was meant to be singular and therefore, because he committed five of the "any sex act" variables, he was properly found guilty of five counts of sex abuse. *Id.*

As in *Constable*, the statute at issue proscribes "any" act in the list of variable elements of robbery—assault upon another, threats of immediate serious injury, or threats of a forcible felony. Here, Copenhaver may have initially had only one intent to commit a theft—the theft of the bank's money. However, based on *Constable*, there were two of the "any" variables—two assaults. Two bank tellers were confronted, at separate windows, with separate threats and assaultive behavior. Copenhaver demanded each hand over cash in their till drawer to him.

The test for determining whether the continuous offense doctrine applies has long been "whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately . . . . If the latter, there can be but one penalty." *Blockburger v*. *United States*, 284 U.S. 299, 302 (1932). Our supreme court has recently detailed three different tests for determining what constitutes multiple acts and thus can be considered multiple counts: the "separate-acts test," the "break-in-the-action test," and the "completed-acts" test. *Velez*, 2013 WL 1497308, at *14-19. In *Velez*, a defendant pleaded guilty to two counts of willful injury causing serious injury, for brutally beating one victim with a metal pole causing multiple serious injuries. *Id.* at *4. Our supreme court found under either the completed-acts test or the break-in-the-action test, Velez committed two acts meeting the statutory definition of willful injury. *Id.* at *20. The supreme court found Velez's action of

striking the victim "20 to 40 times," when either a single blow or a single series of blows caused each serious injury, were two completed acts. *Id.* at *10. Moreover, the supreme court found Velez's pause in the action to pat the victim down for money, and the subsequent resuming of the attack was "a break in the prior assault followed by another discrete assault." *Id.* at *19-20. This break was sufficient to constitute two acts of willful injury when serious injury results. *Id.*

We find Copenhaver's case factually analogous. While here there was only one pecuniary victim of the robbery, the bank, there were "completed-acts," "separate-acts," and there was a "break-in-the-action" warranting two robbery charges.[1] Copenhaver completed the crime of robbery when he assaulted the first bank teller and took the money from her drawer. Had he then left the bank, his actions would have been sufficient under the statute to have been a "completed-act" of robbery. However, Copenhaver did not leave. Rather, he shifted his attention and assaulted the second teller, intending to and indeed taking money from her drawer, completing a second robbery. This assault with the intent to commit a theft was a separate and distinct act from the first act. There was a "break-in-the-action" as each was an act discrete from the other. He assaulted two separate women, and did so both times, with a separate intent to commit a theft. Regardless of ownership, he intended to take money under the immediate control of the first teller, which he accomplished. Likewise he then intended to take money under the immediate control of the second teller and did so. Either of these actions by itself would meet the statutory definition of robbery.

[1] The parties disagree on whether the tellers had a sufficient possessory interest in the money to be the "victim" of a robbery. However, based on the holding in *Velez*, any distinction in this regards is irrelevant.

He completed two separate robberies and was charged and convicted accordingly. "It is well established in Iowa law that a single course of conduct can give rise to multiple charges and convictions." *Id.* at *21. We find under both the completed-acts test and the break-in-the-action test, Copenhaver committed two discrete acts of robbery. Because the legislative intent was to punish these two acts, double jeopardy was not violated. *See id.*

Related to this issue is one Copenhaver raises pro se. Copenhaver claims the theft conviction should have merged with the robbery convictions, alleging that theft is a lesser-included offense of robbery. He argues this "multiplicious behavior" in charging is prosecutorial misconduct in addition to alleging the district court erred in not merging the convictions. A lesser-included offense is necessarily included in the greater offense if the greater offense cannot be committed without also committing the lesser. *State v*. *Jeffries*, 430 N.W.2d 728, 736 (Iowa 1988). Conversely, if the lesser offense contains an element that is not part of the greater offense, the lesser cannot be included in the greater. *Id*. In comparing the two code sections, clearly theft is not a lesser-included offense of robbery; one does not need to *commit* a theft to under the robbery statute, but only need to have the *intent* to commit a theft. *State v*. *Rich*, 305 N.W.2d 739, 746 (Iowa 1981). Copenhaver's argument on this point is wholly without merit. *Compare* Iowa Code § 711.1 (defining robbery), *with* Iowa Code § 714.1 (defining theft).

III. Sufficiency of the Evidence: Assault Element

Copenhaver next claims, both through counsel and pro se, that the State did not satisfy its burden of proving the intent element of the assault component

of robbery under Iowa Code section 711.1. We must view all the evidence in the light most favorable to the nonmoving party, taking into consideration all reasonable inferences that could fairly be made by the jury. *State v*. *Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." *State v*. *Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006) (citation and internal quotation omitted).

Copenhaver is a large man who quickly entered the bank wearing a mask over his face. He passed a note to the first teller relating that he was committing a robbery. He then spoke to the teller in a forceful, demanding way. Next, the point of his glove twice touched the nose of the second teller as he was swearing and gesturing to her to hand him money. Copenhaver's argument that there was insufficient evidence that he had committed assault has already been addressed in our case law and we decline his suggestion that we depart from the reasoning to overrule these cases. *See, e.g*., *State v*. *Heard*, 636 N.W.2d 227, 231-32 (Iowa 2001) (holding the demand for money, made while in close proximity to the clerk and while masked, constitutes an overt act intended to place the clerk in fear of immediate physical contact which would be painful, injuries, insulting, or otherwise offensive, therefore constituting an assault).

IV. Pro Se Claims

Copenhaver makes several additional pro se claims, and these claims are either not preserved or without merit. First he claims there was insufficient evidence as to identification of the robber. This issue is not preserved as his motion of acquittal related only to the evidence establishing the commission of an

assault. However, we find even if this issue were properly before us it would fail as there is sufficient evidence in the record that Copenhaver was the man at the bank. The bank officer provided positive identification of the vehicle used in the robbery as the same one found on the auto lot. An employee of Vernon Heights Auto identified Copenhaver as the individual who was in control of the vehicle during the time of the robbery; this identification was supported by the copy of Copenhaver's driver's license he had given to Vernon Heights Auto. Moreover, the jury had the opportunity to observe the bank surveillance video as well as hear testimony regarding Copenhaver's suspicious behavior when returning the vehicle to the auto lot. We find there was sufficient evidence to support every element of the charges, including the identification of Copenhaver.[2]

He also claims his trial counsel was ineffective for alleged failures relating to the jury instructions. We review ineffective assistance of counsel claims de novo. *King v*. *State*, 797 N.W.2d 565, 570 (Iowa 2011). To establish a claim of ineffective assistance of counsel, applicant must satisfy both components of a two-pronged test. The defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense." *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). When the record is adequate, we may address an ineffective assistance of counsel claim on direct appeal; if not adequate, we must preserve the claim for postconviction relief proceedings regardless of our view of

[2] Furthermore, Copenhaver's pro se arguments are not entirely clear as to whether he is raising the issues as a direct attack or through an ineffective assistance claim. To the extent that he alleges the ineffectiveness of his counsel regarding the identification issue, as stated above, the record is adequate to determine the evidence is sufficient on all elements and his counsel therefore did not breach an essential duty.

the potential viability of the claim. *State v*. *Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Sufficiency of the evidence is discussed above, and since we find that there was sufficient evidence to support a finding of guilt as to all charges, there can be no showing of prejudice. *See State v*. *Begey*, 672 N.W.2d 747, 749-50 (Iowa 2003) (holding there was no ineffective assistance because there was no prejudice when there was sufficient evidence of all elements of the crime). The jury instruction issues are both vague in allegations and not preserved as random mention of issues without elaboration or supportive authority is not sufficient to raise the issue for our review. *See Soo Line R*.*R*. *Co*. *v*. *Iowa Dep't of Transp*., 521 N.W.2d 685, 691 (Iowa 1994). Nor does Copenhaver attempt to explain how such alleged errors prejudiced him. *See Strickland*, 466 U.S. at 689 (holding there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance). All of his ineffective assistance of counsel claims must fail.

Next, Copenhaver claims the district court erred in denying the motion for a mistrial after the jury was mistakenly shown a still picture of the defendant in handcuffs for a few seconds. We review the district court's ruling on these motions for an abuse of discretion. *Nitcher*, 720 N.W.2d at 559. This court will not find an abuse of discretion "unless the defendant shows that the trial court's discretion was exercised on grounds clearly untenable or clearly unreasonable." *State v*. *Henderson*, 537 N.W.2d 763, 766 (Iowa 1995). An "untenable" reason is one that lacks substantial evidentiary support or rests on an erroneous application of the law. *See State v*. *Rodriquez*, 636 N.W.2d 234, 239 (Iowa

2001). Mistrials are appropriate when an impartial verdict cannot be reached or the verdict would be reversed on appeal due to an obvious procedural error in the trial. *State v*. *Newell*, 710 N.W.2d 6, 32 (Iowa 2006)

We find the trial court did not abuse its discretion in denying the motion for a mistrial. A video played for the jury suffered from an unexpected "computer malfunction," which caused it to revert back to the beginning of the DVD. An image of Copenhaver in handcuffs was visible for a few seconds. However, as the district court found, during the portion of the DVD that had already been properly played for the jury, Copenhaver had been seen to be in handcuffs. *See State v*. *Hunt*, 801 N.W.2d 366, 373 (Iowa Ct. App. 2011) (finding no prejudice for a mistrial when the improper information came in through other proper means and the incident was isolated and brief). We agree with the district court Copenhaver was not prejudiced by the projected image and the motion for mistrial was properly denied.

Finally, Copenhaver makes several pro se evidentiary claims. First, he claims the district court erred by not allowing the defense to introduce the criminal history of a witness. Copenhaver fails to identify where in the record such a ruling was made or provide any explanation as to why this decision would entitle him to reversal. He also claims the search warrants were invalid; however, this was never raised at the trial level. Merely stating that an error occurred is not sufficient to raise the issue for consideration on appeal. *State v*. *Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003), *rev'd on other grounds by State v*. *Hanes*, 790 N.W.2d 545 (Iowa 2010). These claims are not preserved because they were not properly raised at the district court.

V. Conclusion

The district court did not impose an unconstitutional punishment when it sentenced Copenhaver on two counts of robbery because he committed two separate and distinct offenses by assaulting two separate women with the intent to commit a theft. There was sufficient evidence to sustain the convictions and his pro se claims are either not preserved or without merit.

AFFIRMED.

Danilson, J., concurs specially; Mullins, J., concurs in part and dissents in part.

DANILSON, J. (specially concurring)

I specially concur to bring light to what may be described as an example of overcriminalization–the practice of charging multiple crimes covering the same conduct, thus tipping the scales in favor of the prosecution and encouraging a defendant to accept a plea bargain rather than face the risk of getting convicted of multiple crimes. Overcriminalization is a matter of bi-partisan concern, a proper subject for legislative reform of criminal codes, and may, in part, explain the increasing numbers in our prisons. Zach Dillonns, *Symposium on Overcriminalization* Forward, 102 J. Crim. L. & Criminology 525, 525-526 (Summer 2012). The premise of counting victims to determine the number of robbery counts has also been the subject of one article investigating the history of the crime of robbery and noting the jurisdictional split on the issue. *See generally*, H. Mitchell Caldwell & Jennifer Allison, *Counting Victims and Multiplying Counts: Business Robbery, Faux Victims, and Draconian Punishment*, 46 Idaho L. Rev. 647 (2010). However, I concur in the result because we are bound by the principles espoused in *Velez*, and I agree the majority has properly applied those principles to the facts at hand.

MULLINS, J. (concurring in part, and dissenting in part)

I respectfully concur in part and dissent in part. In this case of first impression, we should apply the statute as written to the facts as they are, and not artificially dissect the facts in order to stretch the meaning of the statute. Under section 711.1, "[A] person commits a robbery when, having the intent to commit a theft, the person does any of the following acts . . . ." We should not ignore the first element of robbery, intent to commit theft. Intent to commit one theft can only lead to one robbery conviction.[3]

Here, Copenhaver intended to commit one theft from the bank. He did so by demanding money from two separate tellers. He assaulted each of the two tellers, but he intended to commit one theft as a continuous act. The fact that in order to steal as much money as he could he was required to move from one teller to another is not a break in the action or completed acts as contemplated by *Velez*, 2013 WL 1497308, at *8-10 (Iowa Apr. 12, 2013). Nor was the act of taking money from the first teller a separate act of robbery followed by another distinct robbery.

[3] Although courts across the county are sharply divided on this issue, I find the reasoning in the following cases persuasive: *Williams v. State*, 395 N.E.2d 239, 248–49 (Ind. 1979) ("[A]n individual who robs a business establishment, taking that business's money from four employees, can be convicted of only one count of armed robbery . . . ."); *State v. Potter*, 204 S.E.2d 649, 659 (N.C. 1974) ("[W]hen the lives of all employees in a store are threatened and endangered by the use or threatened use of a firearm incident to the theft of their employer's money or property, a single robbery with firearms is committed."); *Keeling v. State*, 810 P.2d 1298, 1301 (Okla. Crim. App. 1991) (finding defendants' robbery of a grocery store, during which defendant took cash from two separate employees, was a single offense for double jeopardy purposes); *State v. Franklin*, 130 S.W.3d 789, 795–97 (Tenn. Crim. App. 2003) (holding double jeopardy principles required second robbery conviction be overturned where defendants committed a single theft from a market, albeit in the presence of two persons);.

The legislature intended to provide multiple options for satisfying the last element of the offense of robbery through the use of the word "any." There is no indication that, in providing alternative methods to commit robbery, the legislature intended that multiple assaults arising out of an intent to commit one act of theft would generate multiple robbery charges. The legislature could have easily worded the statute to provide that each assault committed with intent to commit a theft and in the furtherance of the intended theft constituted robbery.[4] It did not do so.

I respectfully submit that under the majority opinion, the floodgates of multiplicious prosecutions are open. I would reverse one of the robbery convictions. I concur with the majority opinion in all other respects.

[4] *See* Or. Rev. Stat. Ann. § 161.067(1) (West 2013) ("When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims.")