IN THE COURT OF APPEALS OF IOWA

No. 2-861 / 11-1750
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES BRANDON DIXON,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, John G. Linn, Judge.

Defendant appeals his convictions for robbery in the first degree, burglary in the first degree, and attempted burglary in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha A. Trout, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa Schaefer, Assistant County Attorney, for appellee.

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

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

MILLER, S.J.

I. Background Facts & Proceedings

At about 5:00 a.m. on July 25, 2010, Kimberly Peterson drove to the Crazy Coyote Bar and Grill in Burlington, Iowa, where she had a part-time job cleaning the establishment. As she pulled up she saw a tall, slender man wearing all black clothes, gloves, and a ski mask beside the back door. She put down her driver's side window and yelled, "hey, what are you doing," or "hey, what's going on." She saw the man coming towards her and attempted to put her car in gear to drive away, but before she could do so, she was hit in the head. The blow knocked her glasses from her face. She was thereafter not able to see much due to facial swelling and blood.

Peterson realized the man was jabbing her with a crowbar, and after a struggle the crowbar fell onto the passenger-side seat of her car. She and the man continued to struggle, hitting and scratching each other. At one point she was able to pull off the ski mask but was not able to see him clearly. The man put his upper body into the car and tried to choke Peterson. She bit his finger, and they continued to fight. The man got out a pry bar, and it fell between the middle console and front seat of Peterson's car. Eventually, Peterson was able to raise the window and drive away. She went to a nearby Kum & Go, where the clerk called 911. Peterson received medical treatment for her injuries.

Police officers collected blood samples from Peterson's vehicle. Testing of a sample matched the DNA of James Dixon. The probability of the DNA sample belonging to someone else is less than one in 100 billion.

Dixon was charged with robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (2009); burglary in the first degree, in violation of sections 713.1 and 713.3; and attempted burglary in the third degree, in violation of sections 713.1 and 713.6B. At the jury trial, after the State presented its evidence as outlined here, Dixon filed a motion for judgment of acquittal, which argued in part that the State had not adequately proven the charge of first-degree burglary because it had not shown Peterson's vehicle was an occupied structure, as defined by section 702.12. The district court denied the motion for judgment of acquittal.

Dixon presented only one witness in his defense, Laura Teesdale. Teesdale testified Dixon was staying at her home on July 25, 2010, and he was there at about 5:00 a.m. In cross-examination, the prosecutor asked Teesdale about prior convictions for fifth-degree theft in January 1997, October 1997, December 1999, and September 2008.

During the deliberations, the jury sent out a note stating they were unable to reach a unanimous verdict. Over some objections by defense counsel as to certain content of the instruction, the court gave the jurors a verdict-urging instruction. The jury found Dixon guilty of first-degree robbery, first-degree burglary, and third-degree attempted burglary. He was sentenced to be incarcerated for twenty-five years on the robbery charge, twenty-five years on the burglary charge, and two years on the attempted burglary charge, all to be served consecutively. Dixon appeals his convictions.

II. Sufficiency of the Evidence

For the charge of first-degree burglary, the State alleged Dixon entered Peterson's vehicle, the vehicle was an occupied structure, Peterson was present in the vehicle, Dixon did not have permission or authority to enter the vehicle, Dixon had the specific intent to commit an assault, and he was in possession of a dangerous weapon or he intentionally or recklessly inflicted bodily injury on her. Dixon claims the district court should have granted his motion for judgment of acquittal because there was insufficient evidence in the record to show Peterson's vehicle was an occupied structure.

We review claims challenging the sufficiency of evidence in a criminal case for the correction of errors at law. *State v. Dalton*, 674 N.W.2d 111, 116 (Iowa 2004). We will uphold the jury's verdict when it is supported by substantial evidence. *State v. Hagedorn*, 679 N.W.2d 666, 668 (Iowa 2004). "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). We consider all record evidence, not just that supporting guilt, but view the evidence in the light most favorable to the State, "including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005).

Section 702.12 defines an occupied structure:

> An "*occupied structure*" is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping

> of anything of value. Such a structure is an "*occupied structure*" whether or not a person is actually present.

This definition has two prongs. *State v. Pace*, 602 N.W.2d 764, 769 (Iowa 1999). The first prong describes the type of place that can be the subject of burglary—buildings, structures, appurtenances, vehicles, and similar places. Iowa Code § 702.12; *Pace*, 602 N.W.2d at 769. The second prong describes the purpose or use of these places—overnight accommodation, business or other activity, or the storage or safekeeping of anything of value. Iowa Code § 702.12; *Pace*, 602 N.W.2d at 769. In order to be considered an "occupied structure" for purposes of the burglary statute, a place must meet both prongs of the definition. *Pace*, 602 N.W.2d at 769.

A car is a land vehicle, and clearly meets the first prong of the definition. *State v. Sanford*, 814 N.W.2d 611, 616 (Iowa 2012). In order for a vehicle to be an "occupied structure" under section 702.12, however, there must be a showing that the vehicle meets the second prong. *Id*. This use or purpose does not need to be the primary use of the vehicle. *Id.* at 617. Not all land vehicles meet the definition of an "occupied structure." *Id*.

The State asserts that at the time of the offense Peterson was occupying the vehicle for the purpose of carrying on "other activity."[1] Seeking refuge from an assailant in a locked motor vehicle is an activity that would qualify a land vehicle as an occupied structure under the alternative of "other activity." *Id.* The

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[1] The State also claims the vehicle was an "occupied structure" because it was being used for the storage or safekeeping of things of value, such as a coffee mug and hat. Although we do not fully discuss this issue, we conclude the vehicle could be considered an "occupied structure" under the storage or safekeeping alternative as well. *See* Iowa Code § 702.12.

burglary statute is "designed primarily to protect against the creation of a situation dangerous to personal safety caused by unauthorized entry." *Id.* at 618 (quoting 13 Am. Jur. 2d *Burglary* § 3, at 219 (2009)). "[E]ntering a vehicle intending to commit an assault on one of the occupants can lead to a dangerous situation . . . ." *Id.*

At the time Dixon put his upper body into Peterson's vehicle, she was using the vehicle in an attempt to take refuge from his attack. It is clear Dixon intended to commit an assault because he had been fighting with Peterson prior to putting his upper body into the vehicle, and when he got his upper body in the vehicle, he proceeded to try to choke her by putting his hands around her neck. Dixon's unauthorized entry into Peterson's vehicle created a situation that was dangerous to both of them. We note that Peterson was only able to end the assault when she could raise the window of her vehicle and drive away.

We conclude the vehicle was an "occupied structure" because it was being used for "other activity." *See* Iowa Code § 702.12; *Sanford*, 814 N.W.2d at 617-18. We determine there was sufficient evidence in the record to support Dixon's conviction for first-degree burglary.

III. Ineffective Assistance

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, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). A party must

show both elements by a preponderance of the evidence. *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011). Absent evidence to the contrary, we assume an attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

In general, claims of ineffective assistance of counsel are "reserved for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). If we determine the record is adequate, we may resolve a claim of ineffective assistance of counsel on direct appeal. *State v. Adams*, 810 N.W.2d 365, 372 (Iowa 2012). In this case neither party alleges the record is inadequate for us to dispose of Dixon's claims on appeal.

A. Dixon claims he received ineffective assistance because his defense counsel did not object to the improper impeachment of Teesdale. Under Iowa Rule of Evidence 5.609(a)(2), a witness may be impeached by evidence of a prior conviction involving "dishonesty or false statement." A conviction for theft is a crime of dishonesty. *State v. Harrington*, 800 N.W.2d 46, 51 (Iowa 2011). However, there is a rebuttable presumption that convictions that are more than ten years old are not admissible. Iowa R. Evid. 5.609(b); *State v. Parker*, 747 N.W.2d 196, 208 (Iowa 2008).

If an applicant cannot show the prejudice prong of a claim of ineffective assistance of counsel, we may decide the claim on that issue alone. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). In order to show prejudice, an applicant must show there was "a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* at 143. A reasonable probability is one sufficient to undermine confidence in the case. *Id.*

Here, while three of the prior convictions used to impeach Teesdale were more than ten years old, one of the convictions was from 2008 and therefore, could properly be used to impeach Teesdale under rule 5.609. Teesdale could have been impeached in any event by this one prior conviction for theft. Furthermore, the DNA evidence firmly established Dixon as the person involved in the offenses. We conclude Dixon has not shown a reasonable probability the result of the proceedings would have been different if counsel had objected to the other convictions. We conclude Dixon has not shown he was prejudiced by his counsel's performance on this issue.

B. Dixon also claims he received ineffective assistance because defense counsel did not object to an improperly coercive verdict-urging instruction, also known as an *Allen* instruction.[2] He asserts the instruction given by the court improperly included the language, "This case must be decided by some jury selected in the same manner this jury was selected, and there is no reason to think a jury better qualified would ever be chosen."

After the jurors deliberated a day and a half, defense counsel requested the court to give the jurors a verdict-urging instruction. The State objected, and the court refused the request at that time. Later that morning the jurors sent out a question asking what happened if they could not reach a unanimous decision.

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[2] The United States Supreme Court first approved of this type of instruction in *Allen v. United States*, 164 U.S. 492, 501 (1896).

The State proposed that the court "instruct them that if they are not able to reach a unanimous decision, it would have to be retried." Defense counsel stated, "Of course, at some point down the line, if this jury is unable to reach a verdict, the parties may be able to reach some plea agreement; the State might make the decision to dismiss their case. So it's really not true that a retrial is inevitable." The court stated it would inform the jury, "A mistrial is declared and this jury is discharged. A new jury is then selected to try this case." Defense counsel objected, stating it was inaccurate to state the case would be retried because of the possibility of settlement prior to a new trial. The court overruled the objection and responded to the jury's question.

A few minutes later, the jurors sent out a note stating they could not reach a unanimous verdict. The court indicated it intended to give the verdict-urging instruction from *State v. Campbell*, 294 N.W.2d 803, 808 (Iowa 1980), with language about expenses excluded. Defense counsel objected to the instruction, "for the same reasons I believe are already in the record as to why we objected to the Court's response to the first message from the jury on what happens if we can't come to a unanimous verdict." The court overruled defense counsel's objection and submitted the verdict-urging instruction to the jury.

In *Campbell*, 294 N.W.2d at 810, the Iowa Supreme Court concluded the language, "must be decided by some jury," was erroneous because the case could be dismissed.[3] Dixon claims the verdict-urging instruction in this case was

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[3] The court stated further, "But the fact that such a statement is inaccurate does not mean that it is necessarily or even likely prejudicial." *Campbell*, 294 N.W.2d at 810.

improper under *Campbell*, and he received ineffective assistance because defense counsel did not object to the instruction on this ground.

Our review of the record, however, shows defense counsel specifically discussed *Campbell* when objecting to the court's response to the jury's question and noted that the court's language was very close to the language that had not been approved in *Campbell*. Then, when the court indicated its intent to give the verdict-urging instruction from *Campbell*, defense counsel objected "for the same reasons I believe are already in the record." We conclude the record shows defense counsel adequately objected to the verdict-urging instruction on the grounds now raised by Dixon on appeal. Dixon has failed to show defense counsel breached an essential duty. We conclude Dixon has not shown he received ineffective assistance of counsel.

We affirm Dixon's convictions for first-degree robbery, first-degree burglary, and attempted burglary in the third degree.

AFFIRMED.

Whether a verdict-urging instruction that includes this language is prejudicial must be determined based on the circumstances of the case. *Id*. at 811.