IN THE COURT OF APPEALS OF IOWA

No. 2-866 / 12-0046
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERRY ALLEN TOLBERT,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Jerry Tolbert appeals the judgment and sentence entered following his conviction for first-degree robbery. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David A. Adams, Assistant Appellate Defender, and Christina I. Thompson, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Philip Van Liew, Legal Intern, Michael J. Walton, County Attorney, and Jerald Feuerbach, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

Jerry Tolbert appeals the judgment and sentence entered following his conviction for first-degree robbery, contending his trial counsel was ineffective. We affirm.

***I. Background Facts and Proceedings*.**

From the evidence presented at trial, the jury could have found the following facts. On the evening of June 16, 2011, seventy-four-year-old Albert Stewart patronized a tavern in Davenport, Iowa. He consumed two rum and Cokes during the hour he was there. Shortly before midnight, he walked home, and, as he approached his front door, he was attacked from behind. Stewart fell to the ground and at some point his glasses were knocked off his face. The attacker struck Stewart in the back of his head between six and eight times with an object while demanding money from Stewart. The attacker took Stewart's billfold, which had a dollar in it, and a black cloth coin bag from Stewart's front pocket containing about two dollars worth of change. Stewart's lighter was also taken. After the attacker fled the scene, Stewart crawled into his house and called 911.

Officers Janet Martin and Byron Grothus were only a few blocks away from Stewart's home when the 911 call came in. Due to misinformation, they were informed Stewart was seen a couple of blocks away from his house, and the officers headed that way. Officer Grothus observed a black male walking between the 400 and 500 blocks of Wilkes Avenue, and the officers stopped him, believing he was the victim; however, the man was identified to be Jerry Tolbert. Officer Martin observed that Tolbert was sweating and seemed out of breath, like

he had been running. Officer Grothus also noticed Tolbert was sweating profusely and that Tolbert had a substance on his leg that appeared to be blood. Officer Grothus remained with Tolbert, and Officer Martin went to Stewart's home to collect evidence.

Officer Martin took photographs of Stewart's injury at the scene while Stewart was interviewed by other officers. Stewart told the officers he had been struck in the head with a claw hammer. Stewart was then taken to the hospital by ambulance, where it was discovered he had six lacerations on his head that required stitches. Stewart was released after he was cleaned and stitched up. All in all, he was at the hospital for about an hour.

While Officer Martin was at the scene, Officer Grothus patted Tolbert down and then placed him in the squad car. Tolbert told Officer Grothus he was coming from a friend's house in the area of Seventh and Wilkes Street, and he was going to a nearby convenience store. Officer Grothus found change in the pocket of Tolbert's shorts in the amount of $1.55. Additionally, he observed that Tolbert's shoes, legs, and shirt had what he believed to be blood on them.

Tolbert was taken to the police station and interviewed, and the interview was video-recorded. During the two-hour period Tolbert was kept in the interview room, Tolbert asked several times to call a family member. His requests were denied or ignored until the end of the interview, about two hours after he had been placed in the interview room and well over an hour after his first request for a phone call. Tolbert's clothes, shoes, keys, wallet, and the change in his pocket were collected as evidence.

Officers searched a two-block radius around Stewart's home. A single dollar bill was found one block north of where Officer Grothus first made contact with Tolbert, and Tolbert had been walking north to south when Officer Grothus saw him. Officers were unable to find the object with which Stewart was struck, as well as Stewart's black cloth coin bag and wallet. The officers did locate Stewart's glasses, keys, and lighter.

The spot on the front of Tolbert's shirt was tested and matched Stewart's DNA. A stain on Tolbert's right shoe was confirmed to be human blood, but no DNA profile was generated. Additionally, human blood was found on Tolbert's wallet and keys. No swabs were taken of the suspected blood on Tolbert's legs.

Tolbert was ultimately charged with robbery in the first degree under two alternate theories: (1) Tolbert "attempted to inflict a serious injury on Albert Stewart" or (2) Tolbert "was armed with a dangerous weapon." A jury trial was held in November 2011. Portions of Stewart's videotaped interview were played for the jury.

Additionally, Stewart testified he was struck in the head the night of the incident, he ended up on the ground, and his glasses were knocked off. He testified he could not initially tell what kind of object he was struck with, but it felt metal and had edges. He testified that when he was on the ground, he saw his attacker had a claw hammer, explaining: "I was laying more or less on my side and [the attacker] raised it up, and I [saw] the head and handle." He testified he was struck six to eight times in the head and had a gash on his head from where the attacker hit him. Stewart further testified he had cataracts, and he could

hardly see anything out of his left eye and his right eye was half-covered with cataracts.

Another officer at the scene, Officer Ryan Bowers, testified he observed a large amount of blood in Stewart's front yard. He also observed Stewart's face was covered in blood that was still fresh and dripping off of his face. He testified the injuries Stewart sustained to his head were what looked like it could have come from a claw-end of a hammer, based on the depth and width of the injuries and lacerations.

Prior to submission of the case, the jury was instructed on the crime of robbery in the first degree, as well as the lesser-included crimes of second-degree robbery, assault with intent to commit serious injury, and assault. The verdict form submitted to the jury did not require it to specify—if it found Tolbert to be guilty of first-degree robbery—which theory of first-degree robbery it found: an attempt to inflict a serious injury or armed with a dangerous weapon. Tolbert's trial counsel did not object to the non-specific verdict form. The jury ultimately found Tolbert guilty of first-degree robbery.

Tolbert now appeals. He contends his trial counsel was ineffective for failing to make specific arguments in support of his judgment of acquittal and for failing to file motions to suppress and for a new trial concerning a portion of his videotaped police interview played for the jury.

II. Discussion.

We review Tolbert's claims of ineffective assistance of counsel de novo. *See State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). To succeed on his ineffective-assistance-of-counsel claim, Tolbert must show his (1) counsel failed

to perform an essential duty, and (2) prejudice resulted. To prove the first prong, Tolbert must rebut the presumption that his attorney performed as a reasonably competent practitioner. *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Prejudice is established if Tolbert shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id.* at 143. The claim fails if either element is lacking. *See Clark*, 814 N.W.2d at 567.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *See 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.* In this case, we deem the record adequate to address Tolbert's claims, and neither party suggests this issue should be preserved for postconviction proceedings. We therefore turn to the merits of the claims. *See State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010) ("If the defendant requests that the court decide the claim on direct appeal, it is for the court to determine whether the record is adequate and, if so, to resolve the claim.").

A. Judgment of Acquittal.

A motion for judgment of acquittal is a means of contesting the sufficiency of the evidence. *See State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). To determine whether evidence is sufficient, "the question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 470 (internal quotation marks and citations omitted).

Relevant here, a robbery is committed when a person,

> having the intent to commit a theft, . . . 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. . . .

Iowa Code § 711.1 (2011). The crime becomes robbery in the first degree "when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, *or* is armed with a dangerous weapon." *Id.* § 711.2 (emphasis added). "If substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required." *State v*. *Corsi*, 686 N.W.2d 215, 222 (Iowa 2004) (internal quotation marks, alterations, and citations omitted).

Here, the State offered the jury both theories, "attempt to inflict serious injury" and "armed with a dangerous weapon," to prove Tolbert committed robbery in the first degree. In the motion for judgment of acquittal, Tolbert's trial counsel stated:

> Your honor, the State having rested, Mr. Tolbert and I move the Court for directed verdict of acquittal in this case and an order dismissing trial information on the grounds taken in the light most favorable to the State, there is insufficient substantial evidence from which a rational finder of fact can find guilt beyond a reasonable doubt.

Counsel made no further argument or explanation, and the district court denied the motion.

Tolbert argues that his trial counsel was ineffective because he failed to argue explicit grounds for the motion, specifically that the State failed to prove he attempted to inflict serious injury upon Stewart or that he was armed with a dangerous weapon. He is correct in his assumption that "a motion for judgment of acquittal does not preserve error if trial counsel makes no reference to specific grounds." *State v*. *Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). Tolbert further argues he was prejudiced by his counsel's ineffectiveness because a motion for acquittal based upon those arguments "had a probability of success and the most serious crime [Tolbert] could have been convicted of was robbery in the second degree."

Viewing the evidence in the light most favorable to the State, we find there was substantial evidence from which the jury could find Tolbert both attempted to inflict serious injury upon Stewart and was armed with a dangerous weapon, a claw hammer in this case. Although Tolbert challenges Stewart's observation abilities because of his age, cataracts, and the two drinks he had that evening, it is "inherent in our standard of review of jury verdicts in criminal cases . . . that the jury was free to reject certain evidence, and credit other evidence." *State v*. *Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006) (citation omitted). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v*. *Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). The "very function of the jury is to sort out the evidence and place credibility where it belongs." *State v*. *Thornton*, 498 N.W.2d

670, 673 (Iowa 1993) (internal quotation marks and citation omitted). The "credibility of witnesses is for the factfinder to decide except those rare circumstances where the testimony is absurd, impossible, or self-contradictory." *State v*. *Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011).

Clearly Stewart was struck in the head numerous times with something. Stewart testified he was struck with something metal with edges. He testified he saw his attacker had a claw hammer. Stewart testified his head was struck six to eight times, and he was covered with blood when the police arrived. Pictures taken of Stewart that night and entered into evidence show he was, in fact, covered in blood. He had lacerations on his head that required six stitches. The fact that a hammer was not found in the area of Stewart's home or upon Tolbert's person does not disprove Stewart was struck with a hammer as he testified. Stewart's wallet and coin bag were also not found. Additionally, Stewart's testimony is not diminished by the fact that he was lucky and his injuries were ultimately not life threatening. Here, it is evident the jury believed Stewart's testimony that he was struck with a claw hammer, and the record does not evidence that his testimony was absurd, impossible, or self-contradictory.

Moreover, using his or her common sense, a reasonable juror could legitimately infer that, in striking Stewart in the head with the claw-end of a hammer multiple times, Tolbert purposefully attempted to cause Stewart a serious injury as defined by Iowa Code section 702.18(1)(b). Under that section, a "serious injury" means, among other things, a bodily injury which creates a substantial risk of death. *See* Iowa Code § 702.18(1)(b)(1). "[A] substantial risk of death means more than just any risk of death but does not mean that death

was likely. If there is a 'real hazard or danger of death,' serious injury is established." *State v*. *Hilpipre*, 395 N.W.2d 899, 904 (Iowa Ct. App. 1986) (citation omitted). Striking someone repeatedly in the head with hammer undoubtedly presents a real hazard or danger of death.

Likewise, a reasonable juror could legitimately infer a hammer used to strike a person multiple times in the head constitutes a dangerous weapon. Section 702.7 defines "dangerous weapon" as including any "instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being." Under this language, "the test is whether the device is used in such a way as to show an intent to kill or injure a person." *State v*. *Greene*, 709 N.W.2d 535, 537-38 (Iowa 2006). We consider whether the defendant "objectively manifests to the victim" his intent "to inflict serious harm upon the victim." *State v*. *Ortiz*, 789 N.W.2d 761, 766-67 (Iowa 2010) (discussing "dangerous weapon in manner used"). Accordingly, "[d]angerous weapons, in fact, can encompass almost any instrumentality under certain circumstances." *Greene*, 709 N.W.2d at 537 (recognizing a stick, stone, or hoe could meet the definition "according to the manner in which it is used"). Under the facts detailed above, a reasonable juror could find Tolbert used the hammer in a manner which objectively indicates he intended to inflict serious injury on Stewart and, when used to strike Stewart in the head, the hammer was capable of killing Stewart.

For the above stated reasons, we conclude a more elaborate motion to acquit was not probable to succeed because the evidence was sufficient to

support both theories. Consequently, Tolbert was not prejudiced by counsel's failure to more specifically challenge both theories of first-degree robbery. Accordingly, this claim of ineffective assistance of counsel must fail.

B. Motion to Suppress and Motion for New Trial.

Tolbert's next argument concerns his videotaped police interview. During his interview, Tolbert made several requests to call a family member. Before he was allowed to make a call, the interviewing officer made comments to him, recorded on the video, about his belief of Tolbert's guilt, such as: "[Y]ou're only kidding yourself at this point, 'cause I'm going to believe the evidence that's put in front of me, and the jury's going to do the same thing." This portion of the interview was played for the jury.

Tolbert contends his trial counsel was ineffective for not moving to suppress the video and for not moving for a new trial thereafter based upon the playing of the interview. He argues his statutory rights were violated by the officer's refusal of his request to make a phone call, and his trial counsel therefore had a duty to seek suppression of the video or later a motion for new trial. He asserts he was prejudiced by the video, specifically the comments made by the officer to Tolbert concerning his veracity, because "[i]t would have been very easy for the jury to adopt [the officer's] evaluation of [Tolbert's] veracity and evaluation of the strength of evidence instead of making an independent evaluation of the evidence."

Even assuming without deciding Tolbert's trial counsel had a duty to assert these motions, we agree with the State that Tolbert cannot demonstrate the requisite prejudice. Based upon the evidence produced at trial, there is not a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Here, Tolbert was found leaving the area of the scene on foot just minutes after the crime. He was sweating profusely like he had been running. Most damningly, testing performed on the stain from the front of Tolbert's shirt was a positive match for Stewart's DNA, and human blood was also found on his wallet and keys.

Furthermore, "jurors are presumed to follow instructions." *State v. Sanford*, 814 N.W.2d 611, 620 (Iowa 2012). Here, the jury was instructed it had to decide the facts from evidence. It was instructed statements and questions by law enforcement officers during interviews with Tolbert were not evidence to be considered for their truth, and it was also instructed that it had to find the defendant guilty beyond a reasonable doubt. Based upon the evidence admitted at trial, we conclude that even if the video had been suppressed and not played for the jury, there is not a reasonable probability that the result of the trial would have been different. Because Tolbert cannot establish he suffered prejudice, this ineffective-assistance-of-counsel claim must fail.

IIII. Conclusion.

Because we conclude Tolbert's ineffective-assistance-of-counsel claims fail, we affirm his judgment and sentence for robbery in the first degree.

AFFIRMED.