IN THE COURT OF APPEALS OF IOWA

No. 3-100 / 12-0426
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN RICHARD ARMSTRONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Jonathan Armstrong appeals his convictions and sentences for nine offenses, alleging ineffective assistance of trial counsel and insufficient evidence to sustain his convictions. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier and Tom Nelson, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Jonathan Armstrong appeals his convictions and sentences following a jury trial on multiple offenses related to a home invasion. After the merger of some charges, he was sentenced and convicted of nine offenses. He alleges ineffective assistance of trial counsel and insufficient evidence to sustain his convictions. We agree that counsel's failure to object to flawed jury instructions on kidnapping in the third degree constituted ineffective assistance of counsel. Accordingly, Armstrong's convictions for the five counts of kidnapping in the third degree are reversed, and the case is remanded to the district court for a new trial on those charges only. Because Armstrong fails to establish prejudice, and sufficient evidence supports his remaining convictions, we affirm in part.

I. Background Facts and Proceedings.

A jury convicted Armstrong of assault with intent to commit serious injury, five counts of kidnapping in the third degree, six counts of robbery in the first degree, burglary in the first degree, and carrying weapons. The district court merged the six counts of robbery, and accordingly, Armstrong was only convicted of one count of robbery in the first degree.

On July 21, 2011, seven individuals were present in Ann Benson's home: Ann Benson, Colton Benson, Taylor Benson, Douglas Conaway, Alicia Pigsley, Gerald McNeal, and Christopher Fox.[1] In the early morning hours, three black males entered Ann Benson's home without permission. Two of the men had their faces covered. They moved throughout the house screaming at the

[1] Testimony from Ann Benson, Taylor Benson, Alicia Pigsley, Colton Benson, Russell Root, and law enforcement officials established the following facts.

inhabitants and ordering them out of their bedrooms at gunpoint. Ann Benson, Conaway, Taylor Benson, and Pigsley were all removed from their bedrooms and forced to lie on their stomachs on the kitchen floor. Colton Benson managed to flee the house to seek help from his father, Russell Root, who lived across the street. Ten-year-old Fox was asleep on the couch.

The intruders threatened to shoot Fox and put the gun to the adults' heads to force them onto the kitchen floor. One of the intruders held McNeal down while another pistol-whipped him and demanded "weed" and money.

After some time Colton Benson returned with Root and chased the intruders away. Colton hit one of the men with a hammer. The three men escaped out the back door. One stopped and shot the gun toward Root. Root continued to pursue the intruders, and two more shots were fired at him.

Pigsley called 911. Police officers processed the crime scene, finding bullets and spent casings. About an hour after the attack, an officer encountered Alonzo Murray about five blocks from Ann Benson's home. The officer recovered a cell phone and a .380 caliber handgun from the ground near where Murray was walking. The gun matched three casings and two bullets recovered at the scene.

Taylor Benson found a do-rag[2] in her bedroom, where the intruders began their assault on McNeal. Testing revealed the do-rag had DNA from two contributors. The primary contributor was identified as Jonathan Armstrong. There was insufficient DNA in the sample to identify the minor contributor.

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[2] A "do-rag" is a kerchief, like a bandana, worn to cover the hair.

Law enforcement conducted a forensic analysis of cell phone records and determined that the Armstrong family cell phone[3] traveled from Omaha to Council Bluffs immediately before the invasion. Records established that fourteen calls were placed from the Armstrong phone to Murray's phone at the time the intruders were fleeing the scene.

Murray testified at trial as a witness for the State. His testimony was consistent with the testimony given by Ann, Colton, and Taylor Benson, as well as Pigsley and McNeal. Murray claimed that on the night of the invasion he, Armstrong, and Spencer Scott[4] rode in a car from Omaha to Council Bluffs. When the exited the vehicle, Scott announced that the three would rob the house they were approaching. He identified Armstrong as the man who held McNeal down while Scott beat him with the gun. Murray also testified that Armstrong placed calls to his phone immediately after the invasion and after the men had fled the scene.

Armstrong testified in his defense. He denied participating in the invasion and alleged he spent the night with his girlfriend. However, he admitted being acquainted with both Scott and Murray. Armstrong offered no explanation for how his family phone, which he admitted he used on occasion, would have been in the vicinity of the crime during the invasion or why fourteen calls would have been placed from the Armstrong family phone to Murray's phone within thirty

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[3] The phone at issue belonged to Armstrong's mother but was shared by other members of the family. Armstrong admitted to using the phone. His brother also testified that Armstrong used the phone.

[4] In his testimony, Murray sometimes refers to him as Scott Spencer.

minutes of the invasion. He denied having the phone on the night in question. Armstrong offered no explanation as to how his DNA would have been on a do-rag found in one of the victim's bedrooms.

II. Standard of Review.

We review ineffective-assistance-of-counsel claims de novo. *State v*. *Maxwell*, 743 N.W.2d 185, 189 (Iowa 2008); *see also 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."). We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v*. *Utter*, 803 N.W.2d 647, 651 (Iowa 2011). However, when the record is adequate, we consider ineffective assistance claims on direct appeal. *State v*. *Cromer*, 765 N.W.2d 1, 7 (Iowa 2009) (citing Iowa Code § 814.7(3) (2011)).[5]

We review challenges to the sufficiency of evidence for errors at law. *State v*. *Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We review the evidence in the light most favorable to the State, including all reasonable inferences that may be deduced from the record, to determine whether the finding of guilt is supported by substantial evidence. *Id*. Evidence is substantial if it would convince a rational fact-finder of the defendant's guilt beyond a reasonable doubt. *Id*. "In assessing the sufficiency of the evidence, we find circumstantial evidence equally as probative as direct." *State v*. *Meyers*, 799 N.W.2d 132, 138 (Iowa 2011).

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[5] Iowa Code § 814.7(3) provides: "If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822."

III. Discussion.

A. Ineffective Assistance of Counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence (1) the attorney failed to perform an essential duty and (2) prejudice resulted from the failure. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Fountain*, 786 N.W.2d at 265–66. The claim fails if either element is lacking. *Strickland*, 466 U.S. at 700; *Fountain*, 786 N.W.2d at 266. The applicant must overcome a strong presumption of counsel's competence. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995); *see also Cullen v. Pinholster*, 131 S. Ct. 1388, 1404 (2011).

To establish prejudice, a defendant must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *accord Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Strickland*, 466 U.S. at 694; *accord Maxwell*, 743 N.W.2d at 196.

Armstrong alleges ineffective assistance as a result of his counsel's failure to request a jury instruction regarding the requisite corroboration of accomplice testimony; failing to object to the language of jury instruction number twenty-eight; and failure to make a motion for judgment of acquittal due to insufficient evidence in support of the kidnapping, robbery, burglary, and attempted murder convictions.

1. Instruction on corroboration of accomplice testimony.

Armstrong contends he received ineffective assistance because his trial counsel failed to request a jury instruction on corroboration of accomplice testimony.[6] He contends, and the State does not dispute, that Murray was an accomplice.[7] Thus, he urges the jury should have been instructed that Murray's testimony must be independently corroborated if used to support his conviction.

The State contends that counsel may have had sound tactical reasons for not requesting the instruction, for example, to avoid drawing attention to the corroborating evidence.[8] While the record does not adequately develop trial counsel's motivation, this does not preclude our resolution of this claim on direct appeal. Regardless of whether or not counsel breached an essential duty, Armstrong cannot establish prejudice because the accomplice testimony was corroborated with substantial evidence of Armstrong's guilt.[9]

Corroborative evidence need not be strong as long as it tends to connect the defendant with the commission of the crime. *State v*. *Barnes*, 791 N.W.2d 817, 824 (Iowa 2010).

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[6] Iowa Rule of Criminal Procedure 2.21(3) provides:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

[7] In fact, the State concedes that Armstrong would likely have been granted a corroboration instruction had one been requested.

[8] However, we note that counsel referenced the concept of corroboration in his motion for directed verdict and many times in his closing argument.

[9] We also note that instruction eleven directed the jury to consider the "witness's interest in the trial, their motive, candor, bias and prejudice" and whether testimony is "reasonable and consistent with other evidence you believe." Moreover, the concept of corroboration was repeatedly referenced throughout the trial.

Murray accurately described the gun used during the invasion. Forensics determined the three cartridges and two bullets found at the scene were fired from the gun recovered near Murray. Murray's description of the invasion was consistent with Ann Benson's testimony.

Murray testified he saw Armstrong with his phone during their drive from Omaha to Council Bluffs and that Armstrong called him right after the invasion. Cell phone forensics established that the phone, which Armstrong admitted using, traveled from Omaha to Council Bluffs shortly before the home invasion and was used in the immediate proximity of the Benson residence right after the invasion. Fourteen calls were placed between the Armstrong family phone and Murray's phone within minutes of the perpetrators leaving the scene. The Armstrong family phone also contained photos of Armstrong, exact duplicates of which were found on the phone of his accomplice, Scott.

Finally, Armstrong's DNA was found on a do-rag, which was recovered at the scene of the crime[10] in a bedroom where one of the victims was beaten, dragged, and pistol-whipped. This evidence not only tends to connect Armstrong to the crime, it is sufficient circumstantial evidence to support a jury finding, beyond a reasonable doubt, that Armstrong was one of the perpetrators.

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[10] The do-rag was not recovered by authorities the night of the invasion, as the bedroom from which it was recovered was messy, so it was not identified by the victim until the following day. Armstrong offered no explanation of how the do-rag with his DNA could have been discovered at the scene of the crime. The probability of finding the profile found on the do-rag in a population of unrelated individuals chosen at random would be less than one out of one hundred billion. The profile was consistent with the known profile of Armstrong. The do-rag also had DNA from another minor contributor.

Given the evidence outlined above, it is unlikely that the jury would not have found adequate corroboration had an instruction been requested and offered. Even if the jury would not have found adequate corroboration, they would likely have found Armstrong guilty, even without considering Murray's testimony, due to the persuasive nature of the other evidence presented. Therefore, Armstrong has failed to meet his burden of demonstrating there was a reasonable probability of a different result if counsel had requested, and the jury had been given, an accomplice instruction.[11]

2. Jury Instruction Twenty-eight.

Armstrong also alleges ineffective assistance due to his counsel's failure to object to the jury instruction on kidnapping in the third degree. He asserts the language allowed the jury to convict him of five counts of kidnapping in the third degree if he had specific intent to inflict serious injury upon any one of the listed victims, instead of requiring the specific intent as to each separate victim. We agree.

Jury instruction twenty-eight read as follows:

> *As a Lesser Included Charge under Counts II through VII*, the State must prove all of the following elements of Kidnapping in the Third Degree regarding defendant or another person who he aided and abetted:
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> 1. On or about the 21st day of July, 2011, the defendant confined or removed Gerald Eugene McNeal, Ann Marie Benson, Douglas Paul Conaway, Alicia K. Pigsley, *or* Taylor Benson; and
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> 2. The defendant did so with the specific intent to inflict serious injury upon one or more of those individuals; and

[11] We need not preserve this claim for postconviction, as the record of evidence introduced at trial was sufficient for our determination that no prejudice resulted from counsel's inaction.

> 3. The defendant knew he did not have the consent or authority of any of those individuals to do so.
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> If the State has proved all of the elements, the defendant is guilty of Kidnapping in the Third Degree. If the State has failed to prove any one of the elements, then the defendant is not guilty of Kidnapping in the Third Degree, and you will then consider the charge of False Imprisonment as explained in Instruction No. 31.

(Emphasis added.)

Counts II through VII as set forth in the trial information were separate counts of kidnapping in the second degree, each count providing the name of the individual victim.[12] Jury instruction twenty-eight states that it applies to counts II through VII. In essence, the district court combined five counts of the lesser offense of kidnapping in the third degree into one marshalling instruction. The marshalling instruction identified all of the alleged victims by name and framed the elements in the disjunctive by using the term "or."

"Jury instructions are not considered separately; they should be considered as a whole." *State v*. *Fintel*, 689 N.W.2d 95, 104 (Iowa 2004). Instructions twenty-three through twenty-seven list the victims individually with respect to the elements of the greater charge of kidnapping in the second degree. The trial information, which set forth the charges and victims separately for each count, was also read to the jury. Separate verdict forms naming individual victims were also completed for each count.

However, the instruction was flawed, as without separate instructions tailored to each alleged victim, the jury was permitted to convict Armstrong without finding all of the elements for each count charged. *See State v*. *Schuler*,

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[12] Apparently the jury instruction for Count IV, charging kidnapping of Colton Benson, was removed from consideration by the jury.

774 N.W.2d 294, 299 (Iowa 2009) (concluding defendant was entitled to a new trial where an instruction on willful injury required only that the victim sustained a serious injury rather than requiring the jury to find a specific defendant caused the victim's serious injury). Because instruction twenty-eight was written in the disjunctive, it permitted the jury to find Armstrong guilty of the same offense five times or guilty on all five counts if he only had the specific intent to inflict serious injury on one of the victims or if only one of the victims was confined or removed. The facts in this case required five separate marshalling instructions on the lesser offense of kidnapping in the third degree, specific to each alleged victim. As instructed, the jury was misled, and the instruction may have resulted in the misapplication of the law.

"Prejudice exists where the claimant proves by 'a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different.'" *Maxwell*, 743 N.W.2d at 196 (citation omitted); *see Strickland*, 466 U.S. at 694. "'A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome.'" *Maxwell*, 743 N.W.2d at 196 (citation omitted). In the ineffective-assistance-of-counsel context, "the instruction complained of must be of such a nature that the resulting conviction violates due process." *Id.* Whether a defendant can show prejudice in cases challenging jury instructions as erroneous largely depends on the facts and circumstances of the case.

Because we accept Armstrong's contention that the instruction misstated the law, we must determine whether there is a reasonable probability that the jury

would have reached a different verdict if a proper instruction had been given. Here, the jury impliedly acquitted Armstrong of the greater offense, five counts of kidnapping in the second degree. Two other individuals were involved in the home invasion. There was also evidence that the invasion was centered around the recovery of marijuana and money from only one of the occupants. Proof of the element of specific intent to commit a serious injury was premised upon circumstantial evidence. We cannot conclude with confidence that the jury would have reached the same verdict if they had been required to determine that Armstrong had specific intent to commit a serious injury towards each victim.

We conclude that if separate marshalling instructions had been offered for each charge of kidnapping in the third degree specifying each individual victim, there is a sufficient probability of a different result undermining our confidence in the outcome. Accordingly, Armstrong has demonstrated prejudice resulted from counsel's failure, and thus, he did not receive effective assistance of counsel. He is entitled to a new trial on these charges.

3. Motion for Judgment of Acquittal—Kidnapping.

Armstrong further alleges ineffective assistance as a result of his counsel's deficient motion for judgment of acquittal on his kidnapping conviction.[13] If we would determine there was insufficient evidence, in lieu of a new trial for the faulty jury instructions, Armstrong would be entitled to dismissal of the five counts of kidnapping in the third degree.

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[13] Armstrong's trial counsel did in fact make a motion for judgment of acquittal at trial; however, the motion did not identify specific deficiencies in the evidence. Thus, we construe Armstrong's argument as an assertion that his counsel should have made a more specific motion as to each of the claims identified.

To preserve error for appellate review on a claim of insufficient evidence in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal. *State v*. *Crone*, 545 N.W.2d 267, 270 (Iowa 1996). An exception to this rule is recognized, however, "when the record indicates that the grounds for a motion were obvious and understood by the trial court and counsel." *State v*. *Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

Here, Armstrong contends trial counsel should have argued that the evidence was insufficient to prove the necessary confinement or removal required to establish kidnapping.[14]

As our supreme court has instructed, "[a] claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal." *State v*. *Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). If the record fails to reveal substantial evidence to support the convictions, then counsel was ineffective for failing to properly raise the issue and prejudice resulted. *Id*. However, if the record reveals substantial evidence, then counsel's failure to raise the claim of error could not be prejudicial. *Id*. Regardless, Armstrong's claim of ineffective assistance of counsel on this ground can and should be addressed on direct appeal.

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[14] We have had to wade through Armstrong's brief to discern the specific deficiency claimed and with some reluctance, have addressed the issue we believe is raised. *See Hubby v. State*, 331 N.W.2d 690, 694 (Iowa 1983) (concluding "issues are deemed waived or abandoned when they are not stated on appeal by brief; random discussion of difficulties, unless assigned as an issue, will not be considered").

A motion for judgment of acquittal is only granted "if the evidence is insufficient to sustain a conviction." Iowa R. Crim. P. 2.19(8)(a).

> Evidence is sufficient to withstand a motion for judgment of acquittal when, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, "there is substantial evidence in the record to support a finding of the challenged element." Substantial evidence means evidence that "could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." Moreover,
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> > [t]he function of the court, on a motion to direct a verdict of acquittal, is limited to determining whether there is sufficient evidence from which reasonable persons could have found the defendant guilty as charged. It is not the province of the court, in determining the motion, to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury. . . . *Any inconsistencies in the testimony of a . . . witness are for the jury's consideration*, *and do not justify a court's usurpation of the factfinding function of the jury*.

State v. *Williams*, 695 N.W.2d 23, 28 (Iowa 2005) (citations omitted).

Testimony established that Ann Benson, Conaway, Pigsley, and Taylor Benson were removed from their respective bedrooms and forced into the kitchen at gunpoint. Thus, there was evidence that the occupants of the house were contained and prevented from escaping or otherwise interfering with the robbery. The perpetrators used a deadly weapon, threatened to shoot ten-year-old Fox, demanded "weed and money," and physically assaulted McNeal. The invasion was disrupted only by the arrival of others who chased the intruders from the home.

Armstrong argues the evidence was insufficient because the time period of removal or confinement was brief. However, "[n]o minimum period of

confinement is required to convict a defendant of kidnapping." *State v*. *McGrew*, 515 N.W.2d 36, 39 (Iowa 1994). The confinement or removal must only go beyond what is incidental to the underlying crime by increasing the risk of harm, lessening the risk of detection, or facilitating the perpetrator's escape. *Id*.

Viewing the evidence in a light most favorable to the State, sufficient evidence existed to require the jury to determine Armstrong's guilt or innocence on the kidnapping charges. The risk to the victims may have been increased as a result of their removal from their respective bedrooms, as they were forced into the kitchen where they were confined at gunpoint and forced to lay on their stomachs, defenseless on the floor. They were confined in the kitchen, which was located in the back of the house, where passersby would be less likely to detect that something was amiss or to hear screams for help. Finally, the victims' confinement in the kitchen facilitated the perpetrators' eventual escape out of the back door, which was near the kitchen. Whether Armstrong had the specific intent to inflict serious injury to each of the named victims was a matter of circumstantial evidence. Sufficient evidence of intent, at least to require the jury's determination, may be inferred by Armstrong's participation in the home invasion with a co-conspirator who possessed a gun and by his action of forcing all the victims to the floor.

Armstrong's counsel had no duty to pursue a meritless motion for judgment of acquittal based on insufficient evidence to support a conviction of kidnapping in the third degree. Because the result of the proceedings would not

have been different had counsel made such a motion, Armstrong cannot establish prejudice, and his claim of ineffective assistance fails.

4. Sufficiency of Evidence—Robbery.

Armstrong also claims ineffective assistance for failure to move for judgment of acquittal on his robbery convictions, claiming insufficient evidence to establish intent to commit a theft as to Ann Benson, Colton Benson, Douglas Conaway, Alicia Pigsley and Taylor Benson. However, all of Armstrong's robbery convictions merged into a single count at sentencing. Thus, in order to prove prejudice, he must only establish that his counsel was ineffective in not moving for judgment of acquittal as to Count VIII, robbery of Gerald McNeal, the only count of robbery for which a conviction and sentence were entered. With respect to Count VIII, Armstrong contends there was insufficient evidence to establish that he aided and abetted Scott. For reasons previously explained, we find the record on direct appeal adequate to address this issue. *Truesdell*, 679 N.W.2d at 616.

To convict on robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2, the jury found that on the day of the home invasion Armstrong (1) had the specific intent to commit a theft; (2) committed an assault on McNeal; and (3) was armed with a dangerous weapon.[15] The intent element is satisfied if the principal had the requisite intent and Armstrong had knowledge

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[15] Armstrong challenges only the intent element on appeal. We also note a handgun like that used in the home invasion is a dangerous weapon per se. Iowa Code § 702.7. The third element is met if Armstrong or any of his cohorts was armed. "An allegation that the joint perpetrators of the offense were armed with a dangerous weapon is satisfied by proof that one of them was so armed at the time their confederacy was carried out." *State v*. *Johnson*, 162 N.W.2d 453, 455 (Iowa 1968).

of that intent. *State v*. *Tangie*, 616 N.W.2d 564, 574 (Iowa 2000); Iowa Code § 703.1.

Iowa Code section 703.1 sets forth Iowa's law on aiding and abetting, and provides:

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

Aiding and abetting requires proof the accused "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." *State v*. *Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). The words "aid and abet" are broadly construed. *State v*. *Davis*, 183 N.W. 314, 316-17 (Iowa 1921).

> [N]either knowledge nor proximity to the scene is-*standing alone*-enough to prove aiding and abetting. But . . . such factors in combination with circumstantial evidence such as "presence, companionship, and conduct before and after the offense is committed" may be enough from which to infer a defendant's participation in the crime.

Lewis, 514 N.W.2d at 66 (emphasis added) (citations omitted).

Armstrong contends that he did not aid and abet because even if the jurors accepted Murray's testimony, he remained silent after Scott announced the planned robbery. However, evidence established that after hearing Scott's plan, Armstrong followed him into the house and participated in the kidnapping and robbery.

Phone forensics placed a phone used by Armstrong at the scene at the time of the invasion. A do-rag with Armstrong's DNA was also found at the scene. Armstrong admitted association with Murray and Scott. Finally, Murray testified that Armstrong held McNeal down while Scott pistol-whipped him.

Sufficient evidence existed from which the jury could have reasonably found, beyond a reasonable doubt, that Armstrong either intended to participate as a principal in the robbery or that he aided and abetted Scott, knowing that Scott intended to rob the victims in the house.

Armstrong alleges inconsistent witness testimony undermines his conviction. Some victims testified to seeing only one or two of the intruders. However, it is the jury's duty to assess the credibility of witnesses and to assign the evidence presented whatever weight it deems proper. *State v*. *Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). They did so here.

Murray testified that he saw Armstrong hold McNeal down on the ground while Scott pistol-whipped him. He further testified that after the escape, Armstrong was calling Murray's phone and talking to Scott.

Viewing the evidence in a light most favorable to the State, sufficient evidence supported the jury's guilty verdict on the robbery charges. Armstrong's counsel had no duty to pursue a meritless motion for judgment of acquittal. Because the result of the proceedings would not have been different had counsel made such a motion, Armstrong cannot establish prejudice and his claim of ineffective assistance fails.

***5. Sufficiency of Evidence—Burglary*.**

Armstrong also alleges ineffective assistance due to trial counsel's failure to make a motion for directed verdict on his burglary convictions. Armstrong claims there is insufficient evidence that he had the specific intent to commit a theft in connection with entering the home or that he aided and abetted Scott with the knowledge that Scott had the requisite intent.

Even if Armstrong was not present when Scott fired the gun at Root, Armstrong is not excused from culpability. He participated in the same felonious scheme as Scott. Scott announced to Armstrong and Murray that he intended to rob the house. Armstrong then entered the house with his armed companions, who threatened the inhabitants and demanded "weed and money."

Viewing the evidence in a light most favorable to the State, sufficient evidence supported the jury's guilty verdict on the burglary charges. Armstrong's counsel had no duty to pursue a meritless motion for judgment of acquittal. Because the result of the proceedings would not have been different had counsel made such a motion, Armstrong cannot establish prejudice and his claim of ineffective assistance fails.

***6. Sufficiency of Evidence—Attempted Murder*.**[16]

Finally, Armstrong contends the record lacks sufficient evidence to prove he aided and abetted Scott in the assault on Root. Armstrong notes that testimony established he did not shoot the gun and was not present when the shots were fired. However, even if Scott fired the gun and Armstrong was not

[16] The jury convicted Armstrong of the lesser included charge of assault with intent to inflict serious injury.

present at that precise moment, Armstrong participated in the same general felonious scheme with Scott; thus, he is liable as the principal. *Lewis*, 514 N.W.2d at 66 ("[C]ircumstantial evidence such as presence, companionship, and conduct before and after the offense is committed may be enough from which to infer a defendant's participation in the crime.") (internal quotation marks and citation omitted).

The evidence outlined above also supports Armstrong's conviction of assault with intent to inflict serious injury. Viewing the record in a light most favorable to the State, the evidence is sufficient to support the jury's verdict of guilt. Armstrong's counsel had no duty to pursue a meritless motion for judgment of acquittal. Because the result of the proceedings would not have been different had counsel made such a motion, Armstrong cannot establish prejudice and his claim of ineffective assistance fails.

***B*. *Sufficiency of Evidence to uphold all convictions*.**

Independently from his ineffective-assistance-of-counsel claims, Armstrong contends there was insufficient evidence to uphold all of the convictions because the evidence did not prove beyond a reasonable doubt that he was present during the invasion. For the reasons set forth above, we find there is sufficient evidence to support the conclusion that he was present and did participate in the home invasion.

IV. Conclusion.

Counsel's failure to object to the flawed jury instructions on kidnapping in the third degree constituted ineffective assistance of counsel. Accordingly,

Armstrong's convictions for the five counts of kidnapping in the third degree are reversed, and the case is remanded to the district court for a new trial on those charges only. Armstrong fails to establish that he was prejudiced by his counsel's representation on the balance of his claims; thus, we affirm his remaining convictions.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.