IN THE COURT OF APPEALS OF IOWA

No. 3-392 / 10-1393
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEONARDO RUFIN-FONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

A defendant appeals from his judgment and sentence after conviction by jury trial of first degree robbery and assault while participating in a felony. **AFFIRMED IN PART AND REVERSED IN PART.**

Michael O. Carpenter of Gaumer, Emanuel, Carpenter & Goldsmith, P.C., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Allen L. Cook III, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield, J., and Goodhue, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

GOODHUE, S.J.

Leonardo Rufin-Fones appeals from his judgment and sentence after conviction by jury trial of first-degree robbery and assault while participating in a felony. He asserts that counsel was ineffective in failing to object to certain testimony and that error was committed when the trial court failed to merge the two offenses at the time of sentencing.

I. Background Facts and Proceedings

Juana Zavada closed the grocery store where she worked at 9:00 p.m. on the night of February 28, 2008. She later returned to retrieve a plate of food she had left. While she was in the store a masked man entered behind her, put a knife to her body, and told her not to move back and to keep walking forward or he would kill her. She was taken to a room in the back of the store and her hands were tied with tape. She saw no one else in the store, but the masked man, who left quickly after tying her up. She soon discovered that jewelry, cash, and bags in which money had been placed were missing. She estimated that about $3000 had been taken. Because the masked man left so quickly, Zavada was certain that a second party had actually taken the missing items.

Investigating officers who were called were able to observe two sets of tracks in the freshly fallen snow, which led from the store, down an alley, and to an apartment building. One of the footprint sets was from a “big lug” type of boot and the other from an athletic or tennis shoe. The spacing between the footsteps indicated that they were both made by individuals who had been running.

Andrea Barton, the apartment tenant, admitted the officers and advised them that her two roommates had entered the apartment together about ten

minutes earlier. One of the roommates was the defendant. Earlier in the day Barton and the defendant had argued over past due rent, and he had promised "he would get it and pay" her what he owed her. When the defendant and the other roommate, Palino Perez-Mondragon, had entered the apartment that evening, the defendant had gone directly to his bedroom and Perez to the bathroom. Neither came out until Barton summoned them after the police had arrived. The defendant emerged wearing unlaced boots. Initially he told the officers he had been wearing them outside, but later he pointed out a pair of tennis shoes he said he had been wearing. Both were observed to have dry soles. A pair of tennis shoes with wet soles was later found in the bedroom. The tread of those tennis shoes matched the tread marks in the snow. The defendant admitted they were his shoes.

A search warrant was obtained, and the proceeds of the theft were found in the defendant's bedroom. Stocking caps with eye-holes were found in the bathroom. When police asked the defendant what he had been doing that night he responded, "If I say it was me, what do I gain?" A motion to suppress the items retrieved from the apartment was filed and overruled. The ruling held that seizure of the second set of tennis shoes found in the bedroom was initially illegal, but because they would have been found anyway after the search warrant had been legally obtained and executed, they were deemed admissible. The search pursuant to the warrant was made approximately five hours after the officer first observed the tennis shoes. An officer testified without objection that the soles were wet when first observed.

The defendant was sentenced to a prison term not to exceed twenty-five years on the first-degree robbery conviction, with a minimum term of seventy percent before becoming eligible for parole. No fine was assessed for that charge. He was also sentenced to a concurrent term not to exceed five years and fined $750 on the charge of assault while participating in a felony.

II. Standard of Review

A. Ineffective-Assistance-of-Counsel Claim

The defendant has claimed ineffective assistance of counsel, which raises a constitutional issue and causes the scope of review to be de novo, requiring an independent evaluation of the totality of the circumstances. *Taylor v*. *State*, 352 N.W.2d 683, 684 (Iowa 1984). The trial record alone will rarely be adequate to resolve a claim of ineffective assistance of counsel on a direct appeal. *State v*. *Straw*, 709 N.W.2d 128, 133 (Iowa 2006). However, in this matter we find the record adequate to resolve the defendant's claim of ineffective assistance of counsel.

B. Merger

Mergers of sentences are reviewed for errors of law. *State v*. *Rodriquez*, 636 N.W.2d 234, 246 (Iowa 2001). Error preservation requirements do not apply to illegal sentences under Iowa Code section 701.9 (2007). *State v*. *Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999).

III. Discussion

A. Ineffective-Assistance-of-Counsel Claim

To establish an ineffective-assistance-of-counsel claim, the defendant must establish by a preponderance of the evidence that (1) counsel failed to

perform an essential duty and (2) prejudice resulted. *State v*. *Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

Officer Shaw was permitted to testify without objection that when a sheriff's deputy exited from the defendant's bedroom carrying a pair of tennis shoes with treads matching the imprints in the snow, the tennis shoes were wet. Even though the seizure of the shoes was held to be admissible under the inevitable discovery doctrine, the initial seizure had been illegal. The defendant contends that the shoes would have been dried between the initial search and the time when the warrant was issued. There was no evidence as to the wetness of the shoe soles when the warrant was issued or how long they might have required to dry. In closing, the prosecuting attorney emphasized that the two pairs of shoes the defendant initially said he had been wearing were dry, but made no mention that the subject tennis shoes were wet.

If there is a failure to prove prejudice, the existence of a breach of duty need not be concluded. *Ledezma v*. *State*, 626 N.W.2d 134, 142 (Iowa 2001). To establish prejudice the defendant must demonstrate that but for the error, there is a reasonable probability that the result of the proceeding would have been different. *State v*. *Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). The officer's comment that the subject tennis shoes were wet when first observed and before they had been legally seized was of little moment when considering the evidence as a whole.

The tracks with tread marks matching the tennis shoes found in the defendant's bedroom, which the defendant admitted were his, led directly from the place of the crime to the apartment where the defendant was living. The

fruits of the crime, although somewhat secreted, were found in the bedroom he was occupying. Knives were also found in the bedroom. The other two sets of shoes which he initially said he had been wearing outside, were dry. The two men had arrived at the apartment together only minutes before the police arrived. We find no reasonable probability that the result of the trial would have been different if the defendant's counsel had successfully lodged an objection to the challenged statement.

B. Merger

Iowa Code section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with the sentence, the court shall enter judgment of guilty of the greater offense only.

If a lesser offense contains an element that is not included in the greater offense, it is not a lesser included offense of the greater. *Mulvany*, 600 N.W.2d at 293. The lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without committing the lesser offense. *State v*. *Jeffries*, 430 N.W.2d 728, 740 (Iowa 1988).

The State's contention that inclusion of the language "when coupled with apparent ability to do an act," at the end of the assault definition set out in Iowa Code section 708.3 creates an element not necessary to the charge of first-degree robbery is without merit.

Robbery in the first degree contains the same elements as robbery in the second degree with the addition of "the person purposely inflicts or attempts to inflict serious injury or is armed with a dangerous weapon." Iowa Code § 711.2.

The first alternative constituting robbery requires an assault. *Id.* § 711.1. The State charged the defendant generally under Iowa Code sections 711.1 and 711.2 without specifying which of the three alternatives contained in section 711.1 was applicable. In examining whether a lesser offense is included in the greater it is logical in a jury case to begin with the marshaling instruction. *State v*. *Turecek*, 456 N.W.2d 219, 223 (Iowa 1990).

In this case the court instructed the jury on all three alternatives constituting robbery under Iowa Code section 711.1. The State contends that the jury could have found the defendant guilty based on the third alternative, in which event "an apparent ability to act" arguably may not have existed. The test is not whether the lesser offense is included within all of the instructed alternatives but is instead whether it is included in any of the alternatives on which the jury is instructed. *State v*. *Johnson*, 328 N.W.2d 918, 920 (Iowa 1983); *State v*. *Pettyjohn*, 436 N.W.2d 65, 68 (Iowa Ct. App. 1988). Assault while participating in a felony is a lesser included offense of first-degree robbery under the facts of the case; therefore, the charges do merge for purposes of sentencing.

IV. Conclusion

Where an illegal sentence is severable from the valid portion we may vacate the invalid portion without disturbing the remainder. *State v*. *Keutla*, 798 N.W.2d 731, 735 (Iowa 2011).

We therefore reverse the conviction and vacate the illegal sentence for the lesser included offense of assault while participating in a felony, and we affirm the conviction and sentence of first-degree robbery.

AFFIRMED IN PART AND REVERSED IN PART.