IN THE COURT OF APPEALS OF IOWA

No. 7-746 / 06-1661
Filed October 24, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PHILIP RAYMOND ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge.

Philip Allen appeals his conviction for failure to appear. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Patrick Jennings, County Attorney, and James Loomis, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

Philip Allen appeals his conviction for failure to appear. He claims the district court erred in overruling his motions for judgment of acquittal and a new trial and in excluding relevant evidence. He also claims his trial counsel rendered ineffective assistance. We affirm.

I. Background and Facts

On July 17, 2006, Philip Allen was scheduled to appear at 9:30 a.m. for trial in district court in Sioux City, Iowa, on the charge of operating while intoxicated. The State's attorney, Allen's attorney, prospective jurors, and the court assembled on time, but Allen did not. When Allen failed to arrive by 9:30 a.m., court personnel called his name in the courthouse and the law enforcement center. The district court issued a bench warrant for Allen's arrest.

Allen lives in Flandreau, South Dakota, which is between two and two-and-a-half hours from Sioux City. At trial, Allen admitted he knew the trial started at 9:30 a.m. He testified that he fully intended to be at trial on time. Because he did not have a driver's license or vehicle, he made arrangements with his cousin, Howard Allen, to pick him up at "7:30, 7 o'clock," but his cousin did not arrive until later. His cousin believed the trial started at 10:30 a.m. Allen also testified that he was sick on the day of trial. He presented evidence that, after he learned the trial had been postponed, he sought medical treatment.

On July 19, 2006, having been informed of the warrant, Allen turned himself in. He appeared before District Associate Judge Timothy Jarman. Allen told Jarman he had not shown up for the trial because he had been sick. Two

days later, during his bond review hearing, Allen told Jarman that he had not appeared on time for trial because there was a problem with his ride.

On July 20, 2006, Allen was charged with failure to appear (felony) pursuant to Iowa Code section 811.2(8) (2005). On September 5 and 6, 2006, the matter was tried to a jury, who returned a guilty verdict. Allen was sentenced to an indeterminate term not to exceed five years, which was suspended. Allen was placed on probation and ordered to pay a $750 fine. His motions for judgment of acquittal and a new trial were denied. Allen appeals.

II. Merits

Allen contends the district court erred in overruling his motions for judgment of acquittal based upon insufficient evidence, and new trial based upon weight of the evidence. He also contends the court erred in excluding testimony regarding his past habit of arriving for legal proceedings on time. He further contends his trial counsel rendered ineffective assistance.

We review challenges to the sufficiency or weight of the evidence for correction of errors at law. Iowa R. App. P. 6.4; *State v. Bower*, 725 N.W.2d 435, 440-41 (Iowa 2006). We review the district court's evidentiary rulings for an abuse of discretion. *State v. Shortridge*, 589 N.W.2d 76, 81 (Iowa Ct. App. 1998). To the extent Allen's evidentiary claim raises constitutional issues, our review is de novo. *State v. Frazier*, 559 N.W.2d 34, 38 (Iowa Ct. App. 1996). Similarly, because a criminal defendant's right to reasonably effective assistance of trial counsel is derived from the Sixth Amendment of the United States Constitution, we review ineffective assistance claims de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

A. Sufficiency of the Evidence

Allen contends the district court erred in overruling his motion for judgment of acquittal based upon insufficient evidence. In reviewing challenges to the sufficiency of the evidence, we view all of the evidence, not just the evidence supporting the verdict, in the light most favorable to the State and determine whether the verdict is supported by substantial evidence. *Bower*, 725 N.W.2d at 444; *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). "Evidence is substantial if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Schmidt*, 588 N.W.2d at 418.

Under Iowa Code section 811.2(8), a person is guilty of failure to appear if, after having been released, he "willfully fails to appear before any court or magistrate as required." Allen argues that the evidence does not prove, beyond a reasonable doubt, that he missed his trial date *willfully*, which was defined in jury instruction number fourteen as "intentionally or by fixed design or purpose and not accidently." He contends the evidence shows he exercised due diligence to attend the trial as scheduled.

We find there was sufficient evidence to support the jury finding Allen guilty based on his "voluntary and intentional violation of a known legal duty." *State v. Osborn*, 368 N.W.2d 68, 70 (Iowa 1985). Allen testified that his cousin was to pick him up between 7:00 and 7:30 a.m. for a trial, located between two and two-and-a-half hours away, scheduled for 9:30 a.m. He admitted he knew the time and date of the trial. At two different hearings, however, he volunteered two different reasons for his absence. *See State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984) ("[A] defendant's inconsistent statements are probative

circumstantial evidence from which the jury may infer guilt."). The district court did not err in overruling Allen's motion for acquittal.

Allen further contends the district court erred in overruling his motion for a new trial based upon weight of the evidence.

> Trial courts have wide discretion in deciding motions for new trial. Nevertheless, we caution trial courts to exercise this discretion carefully and sparingly when deciding motions for new trial based on the ground that the verdict of conviction is contrary to the weight of the evidence . . . . [A] failure to follow [this admonition] would lessen the role of the jury as the principal trier of the facts and would enable the trial court to disregard at will the jury's verdict.

State v. Ellis, 578 N.W.2d 655, 659 (Iowa 1998) (citations omitted).

Allen argues that the court used the wrong standard in ruling on the motion and "engaged in absolutely no weighing of the credibility of evidence." We disagree. In ruling on the motion for new trial, the court noted that much of the case involved credibility, and the jury apparently chose to believe the State's evidence and not to believe the defendant. The court specifically stated, "the weight of the evidence also supports the verdict." *See id.* at 658-59 (citations omitted) (holding the correct legal standard in ruling on a motion for new trial is whether the verdict is contrary to the "weight of the evidence," which means "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other").

This is not a case where the testimony of the witnesses which supports conviction "is so lacking in credibility that the testimony cannot support a guilty verdict." *State v. Adney*, 639 N.W.2d 246, 253 (Iowa Ct. App. 2001). Nor is it a case where "the evidence supporting a guilty verdict is so scanty, or the evidence

opposed to a guilty verdict so compelling, that the verdict can be seen as contrary to the evidence." *Id.* While the court noted at the sentencing hearing that it may not have reached the same conclusion as the jury, it correctly declined to usurp the jury's role as principal trier of fact. *See Ellis*, 578 N.W.2d at 659. The evidence "does not preponderate heavily against the verdict." *Adney*, 639 N.W.2d at 253. We therefore hold the court did not err in overruling Allen's motion for new trial.

B. Ineffective Assistance

Allen contends that his counsel had a duty to litigate and preserve error on the exclusion of testimony regarding his past habit of arriving for legal proceedings on time. He also contends that his trial counsel rendered ineffective assistance by failing to file a motion to suppress evidence of Allen's statements to Judge Jarman or, in the alternative, to object to the testimonies of Judge Hensley (the judge assigned to Allen's July 17, 2006 criminal trial, who testified that Allen was not present at 9:30 a.m.) and Judge Jarman as needlessly cumulative and prejudicial. He further contends his counsel failed to object to prosecutorial misconduct when he failed to object to the State's question, "Isn't it true that . . . you were charged with operating while intoxicated, fifth offense?" Allen contends the prosecutor committed misconduct because the reference to the fifth offense was not relevant to any fact at issue but was highly prejudicial.

When an ineffective assistance claim is raised on direct appeal, "the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination" under postconviction relief procedures. Iowa Code § 814.7(3). Because the trial record is often inadequate to allow us to

resolve the claims, we frequently preserve ineffective assistance claims for possible postconviction proceedings to enable a complete record to be developed. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." *Id.* Therefore, when the record is adequate, we should decide the claim on direct appeal. *Id.* Here, neither party seeks to preserve the claims under postconviction relief procedures. Further, we find the record is adequate to resolve all of Allen's ineffective assistance claims.

To establish the ineffective assistance of his counsel, Allen must overcome a strong presumption of his counsel's competence. *State v. Nucaro*, 614 N.W.2d 856, 858 (Iowa Ct. App. 2000). He "must demonstrate both ineffective assistance and prejudice." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). "The test is 'whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence.'" *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (citation omitted). "Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance." *Ledezma*, 626 N.W.2d at 143 (citation omitted). To prevail, Allen must also show prejudice – "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Artzer*, 609 N.W.2d at 531. It is not enough to show counsel's errors "had some conceivable effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 695 (1984).

i. Habit Evidence

Allen asserts the district court erred in excluding testimony regarding his past habit of arriving for legal proceedings on time. Because Allen failed to make an offer of proof, error is not preserved on this issue, and we need not consider it on appeal. *See State v. Schutz*, 579 N.W.2d 317, 318-19 (Iowa 1998) ("[A]n offer of proof is necessary to preserve error. Underlying this requirement is the premise that in ordinary circumstances in the absence of an offer of proof we lack an adequate record to review the ruling.").

Allen contends his counsel had a duty to litigate and preserve this issue, and he was prejudiced by his trial counsel's failure to do so. He argues that evidence of his "prior attendance at legal proceedings is relevant to prove that because he attended in the past, he meant to attend on July 17, 2006."

We fail to see how his counsel's failure to preserve or litigate this issue was ineffective or prejudiced Allen. Pursuant to Iowa Rule of Evidence 5.406, "[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit or routine practice." A condition on the admission of habit evidence is that it be "numerous enough to base an inference of systemic conduct." *Barrick v. Smith*, 248 Iowa 195, 200, 80 N.W.2d 326, 329 (1957) (citations omitted). His attendance at several prior legal proceedings hardly meets this condition. They are not so numerous, nor did they occur with sufficient regularity, to raise an inference of systemic conduct. *Contrast Gamerdinger v. Schaefer*, 603 N.W.2d 590, 593 (Iowa 1999) (noting forklift operator's erratic driving habits were discussed twice a month for five to six years). Similarly, the long-term consequences of

conviction by jury for fifth offense operating while intoxicated are clearly distinguishable from the functions served by pre-trial conferences. Under these circumstances, Allen's counsel may have reasonably determined it would be pointless to make an offer to prove Allen's habit of attending other judicial proceedings. Such a reasonable determination is not incompetence. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (noting counsel is not incompetent for failing to pursue meritless issues).

Further, even if the habit evidence had been admitted, it is unlikely the result would have been different. The jury could have concluded that, even though Allen attended other proceedings, he willfully failed to appear at trial. Under these circumstances, Allen is unable to show prejudice. *See Artzer*, 609 N.W.2d at 531.

ii. Judges' Testimony

Allen also contends his statements to Judge Jarman were the product of a custodial interrogation in violation of his Fifth and Sixth Amendment rights, and his trial counsel rendered ineffective assistance by failing to file a motion to suppress this evidence. We find that Allen's trial counsel did not render ineffective assistance on this issue.

Allen testified that on July 19, 2006, Judge Jarman asked him why he was not at court for his trial. He told the judge that he had been ill. Jarman testified that, while it is not impossible that he asked Allen why he did not appear, that is not his usual practice, and it is more likely that Allen volunteered the information. Based on this testimony, the district court could have concluded that Jarman's testimony was more credible, and that Allen had volunteered the inculpatory

statements. Because counsel is presumed to have acted competently, we find Allen's counsel may have reasonably determined it would be futile to move to suppress Jarman's testimony.

Allen also contends his counsel should have objected to the testimonies of Judges Hensley and Jarman as needlessly cumulative yet highly prejudicial. He argues that Hensley's testimony was cumulative of the testimony of other court employees who testified that Allen was not present and that "[p]rocuring two judges to testify against a defendant is inherently prejudicial."

Iowa's appellate courts have discouraged the "routine designation of judges as witnesses" in habitual offender cases, in part because it may cause "laypersons to question the fairness of a process that allows a judge to switch roles from one proceeding to the next." *State v. Gardner*, 661 N.W.2d 116, 119 (Iowa 2003). We believe the reasoning behind discouraging judges from testifying is similarly applicable to this case. It is not, however, necessarily a constitutional or rule violation. *Id.* "'A judge is not disqualified and is a competent witness to testify at a new trial or collateral proceeding to observed facts that occurred before him or her at a former trial or proceeding.'" *Id.* (quoting with approval *Gold v. Warden*, 610 A.2d 1153, 1157 (Conn. 1992)). Further, relevant "evidence *may be* excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or needless presentation of cumulative evidence," and district courts are given wide discretion in ruling on evidentiary matters. Iowa R. Evid 5.403 (emphasis added); *accord Gamerdinger*, 603 N.W.2d at 594. Although the testimony of Judge Hensley may have been cumulative and ill-advised, the testimony of Judge Jarman was highly relevant

and not cumulative. Judge Jarman testified that Allen provided contradictory statements when he first told Judge Jarman one reason for his absence and two days later gave another reason.

Trial counsel will not be found incompetent for failure to pursue meritless issues. *Greene*, 592 N.W.2d at 29. Allen's trial counsel did not render ineffective assistance because "under the entire record and totality of the circumstances" the failure to file a motion to suppress or to object to the judges' testimony "was within the normal range of competence." *Artzer*, 609 N.W.2d at 531.

Under these circumstances, Allen is unable to show his counsel's actions resulted in prejudice. *Id.* Based on the record, we hold that Allen's counsel did not render ineffective assistance by failing to file a motion to suppress or to object to the judges' testimony.

iii. Fifth Offense

Allen contends that his trial counsel rendered ineffective assistance by failing to object to the State's question which included a reference to his fifth charge of operating while intoxicated. He claims that evidence of his four prior convictions was not relevant, but highly prejudicial, and is propensity evidence. We find that Allen did not show his counsel made errors so serious his performance may be deemed deficient, nor did prejudice result from his failure to object to the State's question. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Pursuant to Iowa Rule of Evidence 5.404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Such evidence may be

admissible, however, if it is "relevant and material to some legitimate issue other than a general propensity to commit wrongful acts." *State v. Barrett*, 401 N.W.2d 184, 187 (Iowa 1987).

The fact that this was Allen's fifth offense was arguably relevant to show the seriousness of the matter and the importance of Allen's timely appearance at his trial. Further, the failure to appear for a specific trial is an element of the offense. Therefore, we believe that, if Allen's counsel had objected, the district court likely would have overruled the objection. *See State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004) (noting relevancy is determined by "whether a reasonable person might believe the probability of the truth of the consequential fact to be different if such person knew of the proffered evidence"); *State v. Fetters*, 202 N.W.2d 84, 92 (Iowa 1972) ("In order to be relevant, . . . [t]here must be such connection between the offense charged and the other offenses that the latter can reasonably be said to tend to establish the first, or some essential fact in issue."); *Shortridge*, 589 N.W.2d at 83 (noting evidence of the circumstances of the case "is admissible in order to show the complete story of a crime, even when it shows commission of another crime"). Under these circumstances, Allen's counsel may have reasonably determined there would be no point in objecting to the State's question. Further, because this information was relevant to the circumstances of the case and any objection would likely have been overruled, Allen is unable to prove prejudice, i.e. "a reasonable probability that, but for counsel's [failure to object], the result would have been different." *Artzer*, 609 N.W.2d at 531.

III. Conclusion

Because there is sufficient evidence to support Allen's conviction, the district court did not err in overruling his motion for acquittal. Because the verdict is not against the weight of the evidence, the district court did not err in overruling Allen's motion for new trial. Based on the record, we hold that Allen's counsel did not render ineffective assistance by failing to make an offer to prove Allen's habit of attending other judicial proceedings, or to file a motion to suppress or to object to the judges' testimony, or to object to the State's question which referenced his fifth charge of operating while intoxicated.

AFFIRMED.