

IN THE COURT OF APPEALS OF IOWA

No. 9-517 / 07-1936
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOE LOUIS BYRD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

Defendant appeals his conviction and sentence for first-degree robbery.

AFFIRMED.

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

Joe Louis Byrd, Newton, appellant pro se.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, John Sarcone, County Attorney, and Daniel C. Voogt, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., and Vogel, J., and Beeghly, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Special Agent Ron Hallock of the Iowa Division of Narcotics Enforcement, with the assistance of a cooperating individual, Joshua Moore, made arrangements to purchase crack cocaine and a handgun from Littoree Dock on May 16, 2007. Hallock was wearing an electronic transmitter for the transaction. Hallock and Moore met Dock in the area of 24th Street and Forest in Des Moines. They followed him into an apartment rented by Joe Byrd and his girlfriend, Jessica Malfara.

As soon as Hallock and Moore entered the apartment, Dock struck Hallock in the head with a gun. Hallock testified he could not see subsequent events because of blood in his eyes. There was evidence that Byrd's cousin, DeMarco Henderson, struck Hallock in the back of the head with a gun. Several items were taken from Hallock, including \$3000 in government money, a state-issued cell phone, and personal items. During this time Byrd was yelling at Moore that Moore had robbed Byrd during a previous drug transaction. Moore testified Byrd put a black gun in his face and asked him to empty his wallet.

Police officers who had been outside monitoring the electronic transmissions came into the apartment and apprehended Byrd. A black gun, identified by Moore as the weapon used by Byrd, was found in the apartment. Byrd was arrested and charged with robbery in the first degree, in violation of Iowa Code section 711.2 (2007).

On the State's motion, the prosecution against Byrd was consolidated with the cases against Henderson and Dock. On the day scheduled for trial, September 19, 2007, the district court determined Byrd's trial should be severed because different evidence would be admissible in his trial. The court stated that if a motion for a continuance was made it would be granted. Byrd agreed to go forward with the trial that day.

The State presented evidence as outlined above. Byrd testified Dock asked if he could make a drug sale at his apartment, and Byrd refused. He stated he did not participate in the robbery, and did not have a gun. Byrd stated he had screamed at Moore because Moore had previously robbed him. Malfara gave testimony that supported that of Byrd.

The jury returned a verdict finding Byrd guilty of first-degree robbery. The State asked for the sentencing order to include an amount of restitution. Byrd filed several pro se motions for new trial. The district court denied Byrd's post-trial motions. Byrd was sentenced to a term of imprisonment not to exceed twenty-five years. He now appeals.

II. Ineffective Assistance of Counsel

Byrd contends that he received ineffective assistance of counsel in several respects. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). 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 defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. During the trial, on cross-examination, Byrd was asked if he had sold drugs, and Byrd replied that he had. Also, Moore testified that "apparently I had drove off with some of his crack before." In addition, in rebuttal, Detective Mike McTaggart testified Byrd told him he had purchased some crack for Moore and gave it to him with the understanding that Moore would pay him, but Moore took off without paying for the drugs. Byrd contends he received ineffective assistance due to his counsel's failure to object to this evidence that he was involved in drug dealing. He asserts the evidence was unduly prejudicial, and should not have been admissible.

Generally, relevant evidence is admissible. Iowa R. Evid. 5.402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. Evidence of other crimes, wrongs, or acts may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 5.404(b).

The evidence that Byrd believed Moore had robbed him during a previous drug transaction was clearly relevant to show motive and intent. We determine the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was not dissimilar to Byrd's own testimony that he agreed to purchase drugs for Moore for twenty dollars. He

stated that Moore gave him money to purchase drugs, and in exchange wanted to hold some of Byrd's personal belongings, but when Byrd changed his mind about the drug purchase, Moore drove off with his personal belongings. Moore and Byrd agreed the previous incident between them involved an attempted purchase of drugs.

We conclude Byrd has not shown he received ineffective assistance due to counsel's failure to object to the evidence in question. Furthermore, Byrd has not shown he was prejudiced by his counsel's performance. Hallock, Moore, and Dock all testified Byrd was involved in the robbery. Dock testified it was Byrd's idea to rob Hallock and Moore instead of selling drugs to them. Moore and Dock both testified Byrd held a gun on Moore and demanded money from him. Byrd has not shown the result of the trial would have been different if trial counsel had objected to the evidence of a previous drug deal. *See Bettis v. State*, 547 N.W.2d 635, 637 (Iowa Ct. App. 1996) (noting a defendant must show "there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different").

B. Byrd filed a pro se motion for new trial on November 1, 2007, the same day as the sentencing hearing. Byrd alleged there was newly discovered evidence that Malfara had a bad relationship with one of the jurors. The district court stated the motion "must be supported by some type of evidentiary showing which I do not have here today. So I don't have the grounds to decide that issue today." Byrd claims trial counsel should have requested a continuance in order to present evidence to support his claim of newly discovered evidence.

We determine there is insufficient evidence in the record to address this issue. We conclude the issue should be preserved for a possible postconviction action. See *State v. Baker*, 560 N.W.2d 10, 15 (Iowa 1997) (noting claims of ineffective assistance of counsel are generally best preserved for postconviction proceedings in order for a more complete record to be developed).

C. Byrd was ordered to pay restitution of \$1844.14. His liability was joint and several with Dock and Henderson. On appeal, Byrd claims his trial counsel should have required the State to properly prove the amount of restitution. He states that his counsel should have requested a hearing on the issue of the amount of restitution.

We determine this issue should also be preserved for a possible postconviction action. There is insufficient information in the present record to permit us to address this issue. See *State v. Smith*, 573 N.W.2d 14, 22 (Iowa 1997) (noting that where the record is not adequate to evaluate a defendant's claims of ineffective assistance, we may preserve them for possible postconviction proceedings).

D. In a pro se brief, Byrd asserts he received ineffective assistance due to trial counsel's actions, as follows: (1) failure to argue that Byrd had a pending complaint of robbery against Moore; (2) failure to obtain an expert to ascertain the accuracy of the recording of the electronic transmission made by Hallock; and (3) failure to depose witnesses requested by Byrd.

"When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job."

Dunbar v. State, 515 N.W.2d 12, 15 (Iowa 1994). “The applicant must state the specific ways in which counsel’s performance was inadequate and identify how competent representation probably would have changed the outcome.” *Id.*

Byrd does not assert how counsel’s failure to act changed the outcome of the trial. He does not state what would have been different if counsel had argued that he had a pending complaint against Moore for robbery; it was clear Byrd believed he had been robbed by Moore. He does not state what an expert could have discovered by examining the recording of the electronic transmission. He does not assert what evidence could have been discovered if the witnesses had been deposed. We conclude Byrd has failed to present sufficiently specific complaints on these issues to show counsel’s performance was inadequate. See *id.*

Byrd has also claimed that he received ineffective assistance due to counsel’s failure to file a motion to suppress evidence discovered as a result of the officers’ entry into his apartment. We find there is insufficient evidence in the record to address this issue. We conclude it may be preserved for possible postconviction proceedings. See *Baker*, 560 N.W.2d at 15.

III. Sentencing

The sentencing order provided:

The Clerk of Court shall assess the DARE surcharge pursuant to Iowa Code section 911.2 and the Law Enforcement Initiative surcharge pursuant to Iowa Code section 911.3, to each applicable offense.

Byrd contends the district court improperly included this paragraph because the Drug Abuse Resistance Education (DARE) surcharge and the Law Enforcement

Initiative surcharge are not applicable to his conviction under section 711.2. The State agrees that the surcharges are not applicable in this case, but points out that the district court's order provides that the surcharges will be assessed "to each applicable offense." The State asserts that because the surcharges are not applicable here, the court's language is mere dicta.

We agree with the State's interpretation of the sentencing order. The DARE and Law Enforcement Initiative surcharges are to be assessed only to applicable offenses. Byrd was not convicted of an applicable offense, and so no surcharges should be assessed in this case. There is no need to remand the case for resentencing.

IV. Pro Se Claims

A. Byrd claims he was denied due process because the State did not give notice of two witnesses within ten days prior to trial. On the day of trial, the district court severed Byrd's trial, and the State gave notice that it intended to call Dock and Henderson as witnesses. Iowa Rule of Criminal Procedure 2.19(3) provides:

If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses (except rebuttal witnesses) at least ten days before trial, the court may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses.

The district court considered this rule and told Byrd it would permit him to conduct discovery of these two witnesses if he wished, and would grant a continuance if requested. Byrd declined this offer and instead stated he wished

to go forward with the trial that day. We conclude Byrd waived any claim of a violation of his due process rights or of rule 2.19(3).

B. Byrd asserts the district court erred by not requiring the State to introduce the entire recording of the electronic transmission made by Hallock. The State had filed a motion in limine seeking to introduce only a portion of the recording. Byrd objected based on Iowa Rule of Evidence 5.106(a), which provides that when a part of a recorded statement is introduced, any other part “is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation.” The district court found the first nine minutes of the recording covered when Hallock and Moore were driving to their assignment with Dock. The court ruled that portion of the recording was not necessary under rule 5.106(a).

On appeal, Byrd does not raise an issue based on rule 5.106(a), but he raises several other issues regarding the recording. We conclude these issues have not been preserved for our review because they were not raised before the district court. See *State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997).

C. Byrd claims the prosecution engaged in misconduct by calling Moore and Dock when it knew they were untruthful. Again, this issue was not raised before the district court, and we conclude it has not been preserved on appeal.

D. Byrd contends the district court used an improper standard of review in considering his motion for new trial. The district court clearly reviewed the motion using the correct standard under *State v. Ellis*, 578 N.W.2d 655, 658-

59 (Iowa 1998). We conclude Byrd has not shown the court used an improper standard.

E. In a pro se reply brief, Byrd raises an issue concerning the jury instructions. An issue raised for the first time in a reply brief is not properly presented to the court. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996).

We affirm Byrd's conviction for first-degree robbery.

AFFIRMED.