

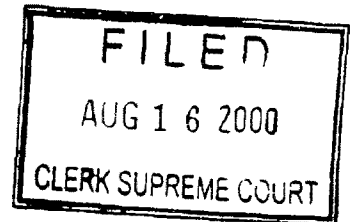
IN THE COURT OF APPEALS OF IOWA

No. 0-408 / 99-1307
Filed August 16, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES SYDNEY CURTIS, II,
Defendant-Appellant.



Appeal from the Iowa District Court for Clinton County, David H. Sivright,
Judge.

James Curtis appeals from his convictions following a jury trial, for robbery
in the second-degree in violation of Iowa Code sections 711.1 (1997) and 711.3
and burglary in the second-degree in violation of Iowa Code sections 713.1 and
713.5. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney
General, Mike E. Wolf, County Attorney, and Gary P. Strausser, Assistant County
Attorney, for appellee.

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

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VAITHESWARAN, J.

A jury convicted James Curtis II of second-degree robbery and burglary. Following entry of judgment and sentence, Curtis appealed, contending his trial attorney was ineffective in failing to object to hearsay evidence. We affirm.

I. Background Facts and Proceedings

Eighty-eight year-old Robert Crosthwaite awoke one morning to find two intruders in his home. The taller of the two men, later identified as Curtis, told Crosthwaite he had a gun and wanted his money. Crosthwaite pulled his wallet from his back pocket and gave it to Curtis. The wallet contained approximately \$80.00. Curtis took the money and left.

Crosthwaite called 911. Deputy Sheriff Kevin Cain came to his home and began interviewing him. Soon, Deputy Sheriff Rick Lincoln arrived and, together, he and Cain continued talking to Crosthwaite. Finally, a third officer and trained dog arrived at the scene. The dog traced a trail from Crosthwaite's home to the nearby home of Curtis.

Armed with the information gleaned from Crosthwaite and the dog, Lincoln applied for a warrant to search Curtis's home. The application was granted and Lincoln went to Curtis's home to execute the warrant. Present in the home were Curtis, his wife, and his wife's relative, Derrick Bailey, who later confessed to his involvement in the crime. The search yielded a wad of bills under the mattress of the bed in which Curtis and his wife slept. The wad consisted of one new and one old style twenty dollar bill, seven five dollar bills and seven one dollar bills, for a total of \$82.

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The State charged Curtis with second-degree robbery under Iowa Code sections 711.1 (1997) and 711.3 and second-degree burglary under Iowa Code sections 713.1, and 713.5. Curtis moved to suppress evidence seized pursuant to the search warrant. The district court denied the motion and the case proceeded to trial. The jury returned guilty verdicts on both counts and the court sentenced Curtis to a prison term not to exceed ten years on each count, with the sentences to run concurrently. This appeal followed.

II. Standard of Review

We review Curtis's ineffective assistance of counsel claim de novo. *State v. Smothers*, 590 N.W.2d 721, 722 (Iowa 1999). While we generally preserve these claims for postconviction relief proceedings, we may resolve them on direct appeal when the record is adequate. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998). We deem the record adequate to resolve Curtis's claim.

To establish a claim of ineffective assistance of counsel, Curtis must prove (1) his trial counsel breached an essential duty and (2) prejudice resulted. *Smothers*, 590 N.W.2d at 722. We may affirm if either element is lacking. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). As to the second element, Curtis must show a reasonable probability that, but for counsel's failure to object to the allegedly hearsay questions and answers, the trial result would have been different. *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996). A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *Id.*

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III. Ineffective Assistance of Counsel Claim

Curtis challenges his conviction on the ground his trial attorney rendered ineffective assistance. He maintains his attorney should have objected to hearsay testimony elicited from Lincoln and Cain concerning: (1) the bill denominations; (2) Crosthwaite's description of the intruders; and (3) Crosthwaite's description of the entire incident. "Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). This type of evidence is inadmissible unless it falls within an enumerated exception. Iowa R. Evid. 802. The State assumes without conceding that all of the challenged testimony is inadmissible hearsay, but counters Curtis suffered no prejudice by virtue of its admission. We will separately address each of the three challenged blocks of testimony, focusing only on the prejudice prong of the ineffective assistance of counsel test.

A. Bill Denomination. At trial, Lincoln testified he included in his search warrant application a statement that he was looking for certain specific amounts of cash. When asked why, he summarized a conversation he had with Cain immediately after arriving at the scene. The testimony was as follows:

Q. Why were you looking for twenties, fives, and ones?

A. When I first arrived at Mr. Crosthwaite's residence, he had already been interviewed by Sergeant Cain. When Sergeant Cain told me what was taken from Mr. Crosthwaite, he indicated that Mr. Crosthwaite had a real good recall as to what he was missing – stated that he had two twenty-dollar bills and that he had five or six five-dollar bills, and the rest were one-dollar bills, and the total amount should have come close to \$80.00.

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Lincoln also summarized a conversation he had with Crosthwaite concerning the money that was found at Curtis's home:

Q. - I understand then you—after you found that money, you subsequently had a chance to talk to Mr. Crosthwaite again?

A. Yes I did.

Q. Could you describe, specifically, your conversation with him regarding the money you found?

A. Later in the morning I returned to Mr. Crosthwaite's residence, and I asked him to tell me the description of the money he was missing. He told me he was missing two twenties, five or six fives, and remainder in ones, totaling somewhere around \$80.00. I asked him to describe the twenties to me. He said, "What do you mean?" I said, "Are they new ones or are they old ones?" He said, I had one of each."

Curtis maintains his trial attorney should have objected to the testimony as containing hearsay. We conclude Lincoln's bill denomination testimony was cumulative and, therefore, there was not a reasonable probability an objection would have changed the outcome. See *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). Specifically, Crosthwaite testified he had an old and a new twenty dollar bill and also testified he had some fives and ones, totaling approximately \$80.00. Although Crosthwaite's testimony that he also had ten-dollar bills in his wallet was inconsistent with Lincoln's testimony and with the recovered bills, we find this inconsistency minor in light of the remaining similarities between Lincoln's and Crosthwaite's testimony. We also note Crosthwaite conceded his earlier recounting of events to the deputy would have been more accurate. Accordingly, we reject Curtis's first ineffective assistance of counsel argument.

B. Description of Intruders. At trial, Lincoln testified Crosthwaite had earlier described one of the intruders as "a white male in his twenties and somewhere around six foot tall." Cain similarly testified that Crosthwaite described the man standing over him as "a white male, medium build, about six foot tall. . ." We cannot conclude this testimony was cumulative of Crosthwaite's trial testimony. Although Crosthwaite conceded the man standing over him was taller than the other intruder, he could not specify the man's height or race.

We nevertheless conclude Curtis was not prejudiced by admission of this evidence because there was a reasonable probability the trial outcome would have remained the same, even if Curtis's attorney had objected to the testimony. See *Bayles*, 551 N.W.2d at 610. The wad of bills matching Crosthwaite's description was found under the bed in which Curtis slept. While Curtis's wife testified that accomplice Bailey was also sleeping in the room, the jury was free to discount this testimony and credit Deputy Lincoln's testimony that Bailey was asleep in a chair in the living room when he arrived to execute the search warrant. The jury could reasonably have inferred from this and other testimony that Curtis was involved in the crime. We accordingly reject this second ineffective assistance of counsel argument.

C. Description of Incident. Curtis finally challenges Cain's summary of the conversation he had with Crosthwaite concerning the incident. Specifically, Cain testified:

A. He said the person was yelling at him with his arms outstretched in front of him, and the person told me (verbatim) he had a gun and wanted his money.

Crosthwaite's testimony about the incident was similar but not identical to Cain's. He testified to the intruder's statements, but he did not characterize the tone of the intruder's voice as a yell or describe the position of Curtis's arms. We find these discrepancies immaterial for purposes of our analysis. The key description of what the intruder said is identical to Cain's. Therefore, Cain's testimony is merely cumulative and not prejudicial. *Bugley*, 562 N.W.2d at 176. Accordingly, we reject this third ineffective assistance of counsel argument.

In light of our conclusion that Curtis was not prejudiced by his attorney's failure to voice hearsay objections, we reject his ineffective assistance of counsel claim and affirm his conviction.

AFFIRMED.

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