

IN THE COURT OF APPEALS OF IOWA

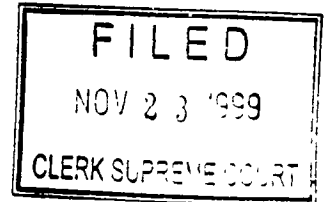
No. 1999-260 (9-490) / 98-1445

Filed November 23, 1999

STATE OF IOWA,
Appellee,

vs.

JASON SOTO,
Appellant.



Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden,
Judge.

Jason Soto appeals his conviction, following a jury trial, of robbery in the first
degree. **AFFIRMED.**

Bruce H. Stoltze of Brick, Centry, Bowers, Swartz, Stoltze, Schuling & Levis,
P.C., Des Moines, and Ward A. Rouse, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, Richard R. Phillips, County Attorney, and Alan R. Ostergren, Assistant
County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink, Vogel, Mahan, and Zimmer, JJ., and
Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999)..

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VOGEL, JR.

Jason Soto appeals his conviction, following a jury trial, of robbery in the first degree. We affirm.

Background facts. On March 11, 1998, Teresa Maylone was delivering pizzas for Pizza Hut in Muscatine, Iowa, when she was robbed at gunpoint. Although the perpetrator had worn a ski mask, Maylone told police that his build and manner of walking reminded her of Jason Soto, a friend of one of her co-workers. Police eventually tracked down and arrested Soto. Soto consented to a police interview after being read his *Miranda* rights.¹ During the interview, Soto confessed to robbing the pizza delivery driver. He described the events surrounding the robbery in detail, admitted to displaying a gun, and correctly identified the driver's vehicle as having been a Ford Bronco. Soto was subsequently charged with robbery in the first degree.

The court appointed attorney Jeff Johnson to represent Soto and set a trial date for June 1, 1998. On May 21, 1998, the day before the scheduled pretrial conference, attorney Patricia Zamora entered an appearance on behalf of Soto and moved to continue the trial. Zamora stated that she had just been retained by Soto, had a conflict with the current trial date, and needed additional time to prepare for trial. The State resisted. The pretrial conference was held as scheduled on May 22nd, with attorney Johnson appearing for Soto. The motion to continue the trial was set for a telephonic hearing on May 29th. There is no ruling on the motion in the record. Trial

¹Soto was age seventeen at the time of his arrest. We note that Soto's parents also consented to his interview by police and were present during the interview.

~~commenced as scheduled~~ on June 1st with attorney Johnson representing Soto. The jury subsequently convicted Soto of first degree robbery and he now appeals.

I. Motion to continue. Soto first claims the court erred in failing to continue the trial date. He acknowledges that there is no ruling in the record, but argues that we should assume his motion was denied. While it is obvious that the case went forward as scheduled, without a ruling we cannot speculate as to the reason why. Soto could have demanded a ruling in order to preserve error, but the record does not reveal any such demand. It was Soto's burden to make a record for appeal. We have nothing before us to review and therefore conclude that Soto has failed to preserved error on this issue. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995); *State v. Schiernbeck*, 203 N.W.2d 546, 547 (Iowa 1973).

II. Prosecutorial misconduct. Soto next contends the State violated his rights by engaging in prosecutorial misconduct during closing arguments. The State contends that Soto has waived error because (1) he cited to the entire closing argument in his brief and did not specify which particular comments he found objectionable, and (2) he did not lodge a specific objection at trial. We agree that Soto's citation to the record was too general to alert us to whatever specific comments he believes were prejudicial. *Cf. State v. Akers*, 435 N.W.2d 332, 336-37 (Iowa 1989) (court declined to consider claim where appellant made no references to the record to support his assertions). Moreover, Soto's counsel made only a single objection during the prosecution's closing without specifying the nature of the objection, and

did not request a mistrial. For these reasons, we conclude that Soto has failed to preserve error. *See State v. Romeo*, 542 N.W.2d 543, 552-53 (Iowa 1996); *State v. Radeke*, 444 N.W.2d 476, 479 (Iowa 1989).

III. Ineffective assistance. Finally, Soto claims his defense counsel rendered ineffective assistance in several aspects.

To prevail on a claim of ineffective assistance of counsel, the burden rests with the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997). It is not necessary for us to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996); *see also Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.*

Soto claims that his trial counsel should have: 1) filed a motion to suppress his confession and evidence of the gun; 2) interviewed witnesses and had witnesses testify; 3) conducted discovery; and 4) made an opening statement. However, the

record does not support that his counsel breached an essential duty nor that Soto was prejudiced as a result. Soto was properly *Mirandized* and interviewed by police with the consent and in the presence of his parents. Furthermore, the gun was discovered in the home of an acquaintance and consent to search was given by the owner. Soto had no legitimate expectation of privacy in the home of another to be protected by the 4th amendment and therefore no standing to challenge the search. *See generally Rakas v. Illinois*, 439 U.S. 128, 143, 150, 99 S. Ct. 421, 434, 58 L. Ed. 2d 387, 405 (1978) (passengers did not prove they had a legitimate expectation of privacy in another's car and therefore could not challenge search of the car); *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995) (defendant failed to show he had a reasonable expectation of privacy to challenge search of mother's property).

In addition, Soto does not specify what further discovery would have led to a different outcome. He fails to state what specific witnesses, testimony, or evidence would have potentially created reasonable doubt in the minds of the jurors. He also fails to specify which jury instructions were objectionable, what legal arguments should have been lodged, or how an opening statement would have changed the outcome of the trial. Soto's claims of ineffective assistance are simply too vague and unsupported. We therefore decline to preserve any of them for postconviction proceedings. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We do not find counsel breached an essential duty and, in light of the evidence presented by the state, do not find prejudice resulted.

Having considered all issues properly before us on appeal, we hereby affirm the conviction and sentence of Jason Soto.

AFFIRMED.