FILED
MAR 30 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No 5-090 / 94-363

STATE OF IOWA,

Appellee,

vs.

MARY EARLINE HARRINGTON,

Appellant.

Appeal from the Iowa District Court for Scott County, David J Sohr and James E. Kelley, Judges.

Harrington appeals judgment and sentences, following jury trial, entered upon her convictions of three counts of first-degree robbery **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Michael J. Walton, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Mary E. Harrington appeals her conviction of three counts of robbery in the first degree in violation of Iowa Code sections 711.1 and 711.2 (1993). We affirm.

Harrington was convicted of robbing a Vickers gas station, a Kwik Shop convenience store, and a Clark gas station. The Vickers and Kwik Shop robberies occurred on March 31, 1993, within an hour of each other. The Clark station was robbed on July 13, 1992. All of these businesses are located in Davenport, Iowa.

Charles Ford, the night manager of the Vickers gas station, described the robber as a "black male about five foot six inches to five foot seven inches tall with a husky build." He identified Harrington during a live line up and at trial as the person who robbed him at knife-point on March 31, 1993.

David Mann, a night clerk at the Kwik Shop described the robber as a "black person approximately five-six, five-eight, stocky build." Mann also identified Harrington during a live line up and at trial as the person who displayed a knife and demanded money from him on March 31, 1993.

Anthony Depardo, the attendant working at the Clark station testified that he was also robbed at knife-point. He described the robber as a "black male in his twenties about five foot six to five foot eight, stocky, and wearing read sweatpants and a red poncho." He identified Harrington as the person who robbed the Clark station after she

was apprehended and taken back to the Clark station to see if he could identify her. He, like the others, identified Harrington at trial.

On the morning defendant was arrested, an officer, thinking defendant was a male, started searching defendant for weapons and, during the search, defendant informed the officer she was a woman, and a female officer completed the search.

All three counts were consolidated for trial. Harrington moved for judgment of acquittal at the close of the State's evidence arguing insufficiency of evidence identifying her as the robber. The district court denied this motion and Harrington's renewed motion at the close of all of the evidence.

On appeal Harrington contends the district court erred by denying her motions for judgment of acquittal. She also claims her attorney was ineffective because he failed to move to sever these offenses for separate trial.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence

at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Harrington contends the State's identification evidence was insufficient to connect her to any of the robberies. She cites Charles Ford's reference to a male suspect and his failure to identify her when he was shown mugshots and a photo array. She also cites similar discrepancies in David Mann's and Anthony Depardo's initial descriptions of the robber. Mann, like Ford, described the robber as a male. Depardo's description included references to facial hair and identified Harrington as the man who robbed the Clark station.

Harrington has steadfastly denied involvement in any of the robberies. There is no physical evidence such as foot or fingerprints connecting her to any of the robberies. The State also failed to produce any knife used in the robberies or stolen money recovered from Harrington. She therefore argues the State's evidence failed to create more than a mere suspicion or conjecture regarding her involvement in these offenses. We disagree.

The State's evidence included both in and out of court identifications of Harrington as the robber. The jury was informed of the contradictions and discrepancies in the identification witnesses' testimony and the absence of physical evidence. They, as the finders of fact, were at liberty to believe or disbelieve the testimony of any of the State's witnesses. State v. Blair, 347 N.W.2d 416, 421 (Iowa

1984) The jury was not required to accept Harrington's evidence and arguments contradicting the State's evidence. State v. Trammell, 458 N W.2d 862, 863 (Iowa App 1990) We conclude the State's evidence was sufficient to convince a rational trier of fact that Harrington was the person who committed these offenses The district court is affirmed on this issue.

We next consider Harrington's claim she was not competently represented by her attorney. Because this claim implicates her rights under the Sixth and Fourteenth Amendments, our review is de novo. We make an independent evaluation of the totality of the circumstances to determine whether any constitutional infringement occurred. Rhinehart v. State, 234 N.W 2d 649, 658 (Iowa 1975); State v Jefferies, 417 N.W.2d 237, 239 (Iowa App. 1987).

To prevail on her claim of ineffective assistance of counsel, Harrington must show (1) counsel failed to perform an essential duty and (2) the failure was prejudicial. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989).

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome

Strickland v. Washington, 466 U S 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984) The determination of prejudice need not await a finding that counsel's performance was deficient. State v McKettrick, 480 N.W 2d 52, 56 (Iowa 1992). We

may affirm upon an applicant's failure to establish prejudice without deciding if counsel failed to perform an essential duty. Taylor v. State, 352 N W 2d 683, 685 (Iowa 1984).

Harrington's allegations are based on her attorney's failure to move to sever these cases when it was discovered the videotape of the Clark station robbery failed to exclude Harrington as a suspect. The presumption of its exculpatory nature was the reason Harrington moved for consolidation. Harrington's attorney indicated during the sentencing hearing he should have moved to sever when he discovered the videotape was not as exculpatory as he originally assumed.

Even if we were to determine this failure was a breach of an essential duty, Harrington has failed to establish the required prejudice. The jury would have heard the eyewitness identification testimony regardless of whether these cases were consolidated or tried separately. We cannot say there is a reasonable probability the result would have been different.

The judgment of the district court is therefore affirmed in its entirety.

AFFIRMED.