IN THE COURT OF APPEALS OF IOWA

No. 0-030 / 1999-413
Filed March 15, 2000

STATE OF IOWA,

Appellee,

vs.

DEMETRIUS LEVEL BIRTH,

Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Larry Eisenhauer, and Robert Blink, Judges.

Demetrius Birth appeals the judgment and sentence following his conviction on three counts of assault on a police officer and one count of interference with official acts. **AFFIRMED.**

Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

VAITHESWARAN, J.

Demetrius Birth was convicted of three counts of assault on a police officer and one count of interference with official acts. On appeal, he contends: (1) the evidence was insufficient to support a guilty verdict; (2) the district court erred in overruling his request for certain jury instructions; (3) the court abused its discretion in sentencing him to consecutive prison terms; and (4) his attorney provided ineffective assistance. We affirm.

I. Background Facts and Proceedings

On June 15, 1998, Gilbert Martinez, manager of a Des Moines apartment complex, saw Birth hit, grab, and push his girlfriend Aisha. Martinez had his assistant call 911. Two police officers arrived and asked Aisha if everything was okay. She shook her head. The police handcuffed Birth after noting his agitation, led him to a hill at the center of the complex, and asked him to sit down. Birth refused and the officers used a leg sweep to bring him to the ground. Birth responded by kicking one of the officers. Two additional officers arrived with a transport wagon. Birth continued to kick and also spat and swore. Officers brought him to the ground a second time, used pepper spray, and restrained his legs. Birth remained agitated as he was taken to the hospital and the police station.

II. Sufficiency of Evidence

Birth contends the district court erred in overruling his motion for directed verdict based on insufficiency of the evidence. He maintains the evidence was insufficient to prove: (1) he intended to assault the officers; (2) he intentionally spat on one of the officers; (3) he had an apparent ability to act; and (4) he interfered

with official acts. The State counters that Birth failed to preserve error on the first three contentions. We elect to pass on the error preservation issue and address the merits of each sufficiency of the evidence challenge. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

Birth first contends there is insufficient evidence to establish he was kicking at someone as opposed to "kicking in general." We disagree. The jury reasonably could have found from the officers' testimony that Birth deliberately kicked two officers in the shin. Birth testified the kicks were not accidental and one officer testified the kick was followed by invectives directed at him.

Birth next maintains there is insufficient evidence to establish he intentionally spat on an officer. He asserts he was merely discharging pepper spray that had accumulated in his mouth. The jury, however, reasonably could have surmised from the testimony of several eye witnesses that Birth's conduct was intentional. Those witnesses testified officers had not sprayed Birth at the time he spat, Birth turned toward the officer behind him before he spat, and spit landed on the officer's face.

Birth also suggests the fact he was handcuffed establishes he did not have the present ability to do anything to the officers. A jury could have found otherwise on the basis of the testimony described above. For the same reason, we reject Birth's final contention that he did not have the apparent ability to interfere with official acts.

III. Jury Instructions

Birth contends the district court erred in failing to submit two jury instructions offered by him. The State counters that Birth failed to preserve this claim because he did not file copies of his proposed instructions with the court file. We find defense counsel's statements to the court sufficient to apprise us of the content of Birth's proposed instructions. *See* Iowa R. Civ. P. 196; Iowa R. Crim. P. 18(5)(f) (applying civil jury instruction rule to criminal cases); *State v. Sallis*, 262 N.W.2d , 240, 248 (Iowa 1978). Therefore, we address the merits of Birth's jury instruction challenge.

A challenge to a jury instruction is reviewed for legal error. *State v. Chang*, 587 N.W.2d 459, 460 (Iowa 1998). Error in giving or refusing to give an instruction will not require reversal unless a defendant is prejudiced. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

A. Spoliation Instruction

Spoliation refers to intentional destruction by the State of exculpatory evidence. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997). The concept may implicate a defendant's constitutional right to due process. *State v. Dulaney*, 493 N.W.2d. 787, 790-91 (Iowa 1992). If the evidence is only potentially exculpatory, a defendant must establish that the destruction was in bad faith. *State v. Atwood*, 602 N.W.2d 775, 785 (Iowa 1999).

Birth sought an instruction that witness Gilbert Martinez destroyed a videotape depicting a portion of the incident. He asked for language that would have advised the jury "they may infer, but are not required to infer, that the

evidence, if it's been presented, would be favorable to the Defendant and unfavorable to the State." The district court declined to give a spoliation instruction. We find no error in this ruling.

To implicate the due process concept of spoliation, a defendant must show the evidence was destroyed as a result of state action. *See Skubal v. Meeker*, 279 N.W.2d 23, 26 (Iowa 1979). The tape in question was not destroyed by or at the behest of a state employee, but by a private citizen. *Cf. Principal Casualty Ins. Co. v. Blair*, 500 N.W.2d 67, 69-70 (Iowa 1993) (noting private entity did not become state actor for purpose of due process clause merely because it was subject to state regulation). Therefore, the spoliation doctrine does not apply. Additionally, even if Birth had established intentional wrongdoing by the State, there is no record evidence demonstrating the tape was destroyed in bad faith. *See Atley*, 564 N.W.2d at 821-22. Accordingly, the district court did not err in refusing to instruct the jury on spoliation.

B. Eyewitness Instruction

Birth also sought a jury instruction on eyewitness identification. Specifically, his attorney stated, "we do think it's important for the jury to be mindful the only witness--the only lay eyewitness to at least the incident concerning Count I and II did not have an opportunity to see everything." Birth contends the district court erred in overruling his request. We conclude the district court adequately covered eyewitness testimony and witness credibility in other instructions. See *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996) (jury instructions are to be read and

considered in context with other instructions, rather than in isolation). Accordingly, we find no error in the court's failure to give this requested instruction.

IV. Consecutive Sentences

Birth contends the district court abused its discretion in imposing consecutive sentences. He maintains the sentencing judge was at a disadvantage because he did not preside at the trial, the court did not consider all pertinent circumstances in imposing the sentence, and the sentence imposed does not accomplish justice for himself and for society.

We review for abuse of discretion a district court's decision to impose consecutive sentences. *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). A district court should weigh all pertinent matters, including "the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform." *Id.* (quoting *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)).

The district court did so here. The sentencing judge stated he had read Birth's presentence investigation report. That report notes Birth's age, prior criminal history, and social history, including physical and mental health, substance use or abuse, and occupation. The court explained Birth had been involved in a "significant amount of criminal activity. . . . in a relatively short period of time". The court went on to list that activity, then noted Birth's criminal history demonstrated "a violent disposition." In explaining its decision to impose four consecutive one year sentences, the court stated:

> Probation does not appear to impress upon you the need to curb your violence. This is particularly of concern because you have

> demonstrated a willingness to visit violence not only on person involved in domestic relations, but you are willing to exert violence and force on police officers.

The court told Birth, "the Court believes that these sentences should be consecutive to impress upon you that each time that you strike out with violence there is a consequence."

We conclude the court furnished sufficient reasons to support imposition of consecutive sentences and did not abuse its discretion in imposing those sentences. We find no need to address Birth's remaining challenges to the sentences.

V. Ineffective Assistance

Birth contends his attorney was ineffective in failing to conduct the trial according to his wishes. He contends the record is inadequate to allow him to address this issue and urges us to preserve this grounds for postconviction relief.

A defendant who wishes to prevail on an ineffective assistance of counsel claim must show: (1) the attorney failed to perform an essential duty; and (2) the failure resulted in prejudice. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). When ineffective assistance of counsel claims are raised on direct appeal, we generally preserve them for postconviction proceedings "to allow full development of the facts surrounding counsel's conduct." *State v. Query*, 594 N.W.2d 438, 444 (Iowa App. 1999). However, such claims may be resolved on direct appeal, if the defendant fails to show one of the two elements. *State v. Pierson*, 554 N.W.2d 555, 562 (Iowa App. 1996). Failure to meet this burden will result in denial of the claim. *Id.*

Birth has not articulated any specific errors that he contends his attorney committed. Accordingly, we deny the claim on direct appeal.

We affirm Birth's convictions and sentences.

AFFIRMED.