IN THE COURT OF APPEALS OF IOWA

No. 0-325 / 99-1068
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT JEAN ROBINSON,
Defendant-Appellant.

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

Robert Robinson appeals from his conviction and sentence for first-degree murder in violation of Iowa Code sections 707.1, 707.2(1) and 707.2(2)(1997). He contends (1) there was insufficient evidence to support a conviction, and (2) his trial counsel was ineffective. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin R. Cmelik, Assistant Attorney General, and Michael L. Wolf, County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Defendant Robert Robinson appeals his conviction and sentence entered following jury trial for murder in the first degree, contending 1) the district court erred in overruling his motion for judgment of acquittal, and 2) he received ineffective assistance of counsel. We affirm.

I. JUDGMENT OF ACQUITTAL

A. Standard of Review

Our standard and scope of review in reviewing a denial of a motion for judgment of acquittal is well settled:

> We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. Our review of sufficiency-of-evidence challenges is for correction of errors at law. The jury's findings of guilt are binding on appeal if supported by substantial evidence. Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.
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> In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. Direct and circumstantial evidence are equally probative. A verdict can rest on circumstantial evidence alone. However, the evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient.

State v. Kirchner, 600 N.W.2d 330, 333-34 (Iowa App. 1999) (internal citations and quotations omitted).

We give consideration to all the evidence, not just the evidence supporting the verdict. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). The credibility of witnesses, in particular, is for the jury: "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

B. Background Facts

By application of the above standards, we are satisfied the record reveals the following facts. Prior to April 20, 1998, defendant Robinson was experiencing significant financial difficulties due to his unemployment. In the few weeks immediately prior to April 20, Robinson had asked his employer, his ex-wife, his daughter, and another acquaintance for loans varying in amounts between $300.00 and $350.00. Each of these people refused to lend him the money. However, two persons did loan Robinson money. Curtis Marzofka loaned him $150.00 sometime prior to April 20, the arrangement being Robinson would repay Marzofka $350.00 within two weeks. Douglas Leslie had loaned Robinson three hundred dollars approximately one month prior to April 20, with the arrangement being Robinson would pay Leslie six hundred dollars within two weeks.

In addition to experiencing financial difficulty, it appears Robinson was considering committing suicide. His son, Jerry, testified he loaned his father a .410 sawed-off shotgun and some three inch Winchester shotgun shells on April 18 because he believed his father wanted to commit suicide. Jerry also testified his father told him at that time that he needed $350.00 in order to pay a fine, and intended to get the money from a loan shark.

The victim, Thomas Tague, was the owner of the Clinton Car Company. Tague's business was run largely on cash receipts and Tague frequently deposited large sums of cash in the bank. Such a deposit was made on April 18.

On the morning of April 20 Tague arrived at his dealership between 7:00 and 7:10 a.m. Witnesses who drove by the business early that morning observed a blue Taurus with temporary plates parked at the business. One of the witnesses selected Robinson from a photographic lineup as the person whom the witness had observed standing inside the business, in front of its window. Another witness observed someone who matched the defendant's appearance drive a blue Taurus with temporary plates from the building just prior to 7:50 a.m. At all relevant times the defendant Robinson had a "bluish" or "grayish-blue" Ford Taurus with a temporary license sticker.

Tague's body was found by a potential customer at approximately 8:15 a.m. Police were dispatched to the scene at 8:22 a.m. Forensics established Tague was shot twice, once in the chest and once in the mouth with a .410 caliber shotgun firing a Winchester shell loaded with size seven and one-half shot, which most likely came from two and one-half inch shells, but could have come from three-inch shells. There was a lot of blood on the floor and numerous footprints in the blood.

Sometime after 7:30 the morning of April 20, Marilyn Jost was drinking coffee in her home, located about fifteen miles from Clinton. She observed a "grayish-blue or tan" four-door car, occupied by a single white male, being driven down the road with papers being thrown out the window. Her son later retrieved some of the papers and noticed one of them was a car title. After hearing of the murder they contacted the police, who retrieved several more of the discarded papers. All the documents recovered were business records of the Clinton Car Company.

At about 9:00 on April 20, Robinson went to his son Jerry's house and asked for a bb gun, an old pair of shoes, a large plastic bag, and a receipt for six hundred dollars, though no money changed hands. The receipt stated "Loaned to Robert Robinson, $600.00 to be paid back 6-15-98." Jerry testified the date on the receipt was pulled "out of the air." Later that day, Robinson repaid Marzofka three hundred dollars in cash, and paid $285.00 in cash for rent.

Robinson returned home around noon. His wife, Arlene, noticed he was wearing shoes she had never seen before, and he explained to her his old boots had been bothering him because a dog had chewed up a toe. Robinson told his wife Jerry had loaned him six hundred dollars and showed her the receipt. Robinson went back to his son's house early that evening. He told his son he had taken care of a gas bill with money obtained from a loan shark.

The next day Robinson repaid Leslie three hundred dollars in cash, and purchased four money orders totaling $440.00. He then took his wife and daughter on a three day trip to Chicago. Robinson paid for the trip in cash, including hotel rooms and meals, explaining to his wife he had received two thousand dollars from a loan shark.

Robinson contacted Deputy Rieck of the Carroll County, Illinois, sheriff's office three times while Robinson was in the Chicago area. It appears Robinson had contacted Rieck several times in the past to pass on information about criminal activity he was aware of. On these three occasions Robinson paged

Rieck and Rieck then called him back. During one conversation on April 21, Robinson told Rieck he had received one thousand dollars from some subjects in Rockford, Illinois. On April 24 Robinson paged Rieck, and Rieck called Robinson back at the phone number provided. Although Robinson told Rieck he was in Bloomington, Illinois at the time, the phone number was actually to a phone in Gardner, Illinois. Robinson asked Rieck whether he was out catching bad guys, to which Rieck replied in the negative. Robinson said, "Well, you will probably be looking for me before too long." Rieck asked him what he meant by that, but Robinson did not reply.

Within a couple of days of April 20 the defendant called his son Jerry, who was busy, and left a message with a number for Jerry to call back. Jerry returned the call, apparently a long-distance call. The defendant told Jerry, "The thing that I got from you – I got nervous about having it. So I got rid of it." The defendant never returned the .410 shotgun he had borrowed, and Jerry has never seen it again.

C. Merits

Robinson contends the State did not present sufficient evidence to prove that he was the person who caused the death of Thomas Tague. We disagree.

To prove murder in the first degree the State had to present evidence to prove beyond a reasonable doubt that:

1. On or about the 20th day of April, 1998, the defendant shot Thomas Tague.

2. Thomas Tague died as a result of being shot.

3. The defendant acted with malice aforethought.

4. The defendant either:

> (a) acted willfully, deliberately, premeditatedly, and with a specific intent to kill Thomas Tague; or
> (b) was participating in the offense of first degree robbery [as defined in other instructions].

Jury Instruction No. 13; Iowa Code section 707.2 (1997). Robbery in the first degree requires proof that the defendant committed assault while armed with a dangerous weapon with intent to commit a theft. Jury Instruction No. 16; Iowa Code sections 711.1 and 711.2 (1997). Malice aforethought is a "fixed purpose or design to do some physical harm to another which exists prior to the act committed." *State v. Higginbotham*, 351 N.W.2d 513, 515 (Iowa 1984). Malice aforethought need not exist for any particular length of time and requires only such deliberation as would make a person appreciate and understand the nature of the act and its consequences. *Id.* Moreover, malice aforethought can be implied from the use of a deadly weapon. *State v. Artzer*, 609 N.W.2d 526, 530 (Iowa 2000).

As discussed above, inherent in the standard of review of jury verdicts in criminal cases is the principle that the jury is free to reject certain evidence and credit other evidence. *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998); *Anderson*, 517 N.W.2d at 211. The credibility of witnesses, in particular, is for the jury. *Thornton*, 498 N.w.2d at 673. We reiterate that a jury verdict is binding upon this court and we must uphold the verdict unless the record lacks substantial evidence to support the charge. *Id.* Furthermore, while evidence which raises only suspicion, speculation or conjecture is insufficient to establish proof beyond a reasonable doubt, *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa

1988), the law is clear that a jury verdict of guilty may rest on circumstantial evidence alone. *State v. Moses*, 320 N.W.2d 581, 586 (Iowa 1982); *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993). "Inferences and presumptions are a staple of the adversarial system of fact-finding." *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998) (quoting *State v. Simpson*, 528 N.W.2d 627, 632 (Iowa 1995).

In the present case there was no physical evidence presented directly linking Robinson to the murder. There was, however, a significant amount of circumstantial evidence that did so. The evidence included the following: Robinson was seen at the scene of the crime shortly before the killing; the body of the victim was found shortly after Robinson was seen leaving the scene; the victim most likely had substantial cash with him when he was killed; immediately after the murder Robinson had money that he did not have before the murder; a person in a vehicle such as Robinson's was seen throwing documents which belonged to the victim out of the vehicle's window shortly after the murder; Robinson had borrowed a .410 shotgun shortly before the murder; the victim was shot twice by a .410 shotgun; and Robinson made statements to a friend who is a deputy sheriff suggesting that he had committed a crime. In addition, Robinson admitted to that deputy sheriff that he had been present at the victim's place of business on the morning of the murder, apparently when the victim was opening the business and shortly before he was killed. Finally, the defendant made a statement to his son that can be reasonably interpreted as meaning that he had disposed of the .410 shotgun. It was completely within the purview of the jury to reject certain evidence and accept other, as well as to determine the credibility of witnesses. *Arne*, 579 N.W.2d at 328. We conclude that when taken as a whole, there was sufficient evidence presented at trial for the jury to identify the defendant as the killer. Evidence of the use of a shotgun and the nature of the victim's wounds was sufficient to prove malice and intent to kill.

In addition, the jury was instructed that the State had the general burden to prove the defendant guilty beyond a reasonable doubt and told that Robinson was to be presumed innocent. The jury is generally presumed to follow the instructions of the court. *State v. Proctor*, 585 N.W.2d 841, 845 (Iowa 1998) (citing *State v. Simpson*, 438 N.W.2d 20, 21 (Iowa App. 1989)). Taken in the light most favorable to the State, we conclude a rational trier of fact could have found Robinson guilty beyond a reasonable doubt of the offense charged.

II. INEFFECTIVE ASSISTANCE CLAIMS

Robinson next contends his trial counsel was ineffective for 1) failing to investigate, call requested witnesses, subpoena phone records, and present an adequate defense; 2) failing to move for a change of venue; and 3) failing to move for a mistrial based upon prosecutorial misconduct. To establish an ineffective assistance of counsel claim, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The defendant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience does not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

While we often preserve ineffective assistance of counsel claims for a postconviction proceeding, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). However, this preference for preserving ineffective of assistance claims does not relieve Robinson of his duty on direct appeal to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa App. 1999); *see also Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We review claims of ineffective assistance of counsel de novo. *Casady*, 597 N.W.2d at 807. We find the record adequate to address some of the claims and preserve for a possible postconviction relief proceeding those which the record is inadequate to address.

A. Failure to Investigate

Robinson first contends counsel was ineffective for resting the defendant's case instead of waiting for a witness who was subpoenaed to appear at a later time and would have testified he saw Tague alive after the time other witnesses' testimony indicated the defendant had left Tague's place of business. The record made at trial concerning the decision to not wait for the witness shows that he would not have provided evidence substantially different in kind or degree than that provided by three other defense witnesses who did testify they had seen Tague alive after prosecution witnesses' testimony indicated the defendant had left Tague's place of business. Counsel had discussed the matter with Robinson, and they decided it would be better to not wait for the witness, at the risk of annoying the jury. The record clearly shows that witness's testimony would have been merely cumulative. We conclude counsel's decision, concurred in by the defendant after consultation with the defendant, was clearly a reasonable tactical decision. We therefore reject this claim of ineffective assistance of counsel.

Robinson claims defense counsel was ineffective in several other failures to investigate, call witnesses, subpoena phone records, and present an adequate defense. We find the record inadequate to address these other claims on direct appeal and preserve them for a possible postconviction relief proceeding.

B. Failure to Move for a Change of Venue

Robinson contends trial counsel should have moved for a change of venue because "the publicity attending this matter was pervasive and inflammatory." Because no change of venue was requested it appears the only evidence in the record concerning pretrial publicity is the newspaper article discussed in the next section of this opinion. We therefore find the record inadequate to address this claim of ineffective assistance of counsel on direct appeal and preserve it for a possible postconviction relief proceeding.

C. Failure to Move for Mistrial Based on Prosecutorial Misconduct

Prior to the commencement of testimony, the trial court placed into the record a newspaper article appearing that day, which quoted the county attorney saying, "Our case is a lot of circumstantial evidence. . . . We think everything we're presenting is valid." The trial court "admonish[ed] the State to follow D.R. 7-107 of the Iowa Code of Professional Responsibility for Attorneys," expressing the view that the county attorney's statement was "close to an opinion on the merits of the case, which is prohibited by the rule." The trial court went on to admonish all counsel to "re-read the Canons and follow them religiously . . . ." The Code of Professional Respnsibility states in relevant part, "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not . . . make. . . an extrajudical statement that relates to: Any opinion as to guilt or innocence of the accused, the evidence, or the merits of the case." DR 7-107(B)(6). Robinson contends the prosecutor's comment constitutes prosecutorial misconduct, and that defense counsel was ineffective for not moving for a mistrial on the basis of that misconduct.

Assuming, but not deciding, that in fact the prosecutor committed misconduct, it is not the prosecutorial misconduct which entitles defendant to a new trial; it is the prejudice which results from the misconduct and which prevents the trial from being a fair one. *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976); *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa App. 1997). Ordinarily, a finding of prejudice results from persistent efforts to inject prejudicial matter before the jury. *Webb*, 244 N.W.2d at 333. A prosecutor's misconduct will not require a new trial unless the conduct was "so prejudicial as to deprive the defendant a fair trial." *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989) (citing *State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973)).

"It is also important to consider the strength of the evidence of guilt. If the evidence is strong, an inappropriate comment by a prosecutor is unlikely to contribute to a conviction." *Escobedo*, 573 N.W.2d at 277 (citing *State v. Webb*, 244 N.W.2d 332, 333 (Iowa 1976)). Robinson must show that the misconduct prevented the trial from being a fair one. *Anderson*, 448 N.W.2d at 33; *Webb*, 244 N.W.2d at 333.

Several facts lead us to conclude that the prosecutor's comment, assuming it was misconduct, was not a substantial factor in the defendant's conviction and was not so prejudicial so as to deny him a fair trial. First, the defendant makes no claim that any juror saw or heard about the newspaper article that contained the prosecutor's comment, or was otherwise aware of the comment. Second, the defendant's case was pending in Clinton County and trial was held there, while the article appeared in the Quad-City Times, apparently published in Scott County. Third, the comment appears to acknowledge that the case against the defendant is based solely on circumstantial evidence, therefore appears to acknowledge a lack of any direct evidence, and may thus have led anyone who might have become aware of the comment to doubt the strength of the evidence against the defendant. Finally, by the conclusion of the trial it was apparent that the State's case was based solely on circumstantial evidence, as the comment had indicated, and the State had no doubt argued the validity of the evidence and case it had presented, as the comment had suggested. Stated differently, the comment neither suggested nor provided anything that would not be presented at trial. We conclude there is no reasonable possibility the comment could have deprived the defendant of a fair trial. We reject the defendant's claim that defense counsel was ineffective for not moving for a mistrial on the basis of prosecutorial misconduct.

III. CONCLUSION

We find the evidence was sufficient to support a conviction for first degree murder and the trial court did not err in overruling the defendant's motion for judgment of acquittal. We find the record adequate to address the defendant's claims that defense counsel was ineffective for resting the defendant's case instead of waiting for a witness who was subpoenaed to appear at a later time and for not moving for a mistrial based on prosecutorial misconduct, and reject those claims on the merits. We find the record inadequate to address the other claims of ineffective assistance of counsel that the defendant raises, and preserve those claims for a possible postconviction relief proceeding.

AFFIRMED.