IN THE COURT OF APPEALS OF IOWA

No. 0-592 / 99-1316
Filed November 20, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID JOSEPH VANCE, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

Defendant appeals from his convictions for three counts of first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher Wilson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

On appeal from his convictions for three counts of first-degree robbery, defendant contends the district court abused its discretion in admitting into evidence taped police interviews of two witnesses. He also maintains he was provided ineffective assistance of counsel in a number of respects. We affirm.

Background Facts and Proceedings. On December 11, 1998, robberies occurred at the EconoLodge and the Garden Inn in Council Bluffs. At approximately 5:30 p.m., a male wearing a flannel pullover and a mask entered the Garden Inn. He pointed a gun at an employee and told her to give him the money. He took between $150 and $250. The employee described the man as about six feet two inches and 180 pounds. The employee did not see a vehicle.

An EconoLodge employee noticed a late 1980s, Aries K-type car circling the building at approximately 9:00 p.m. The employee thought those in the car were going to steal something from a guest, so she ran back and forth between the front and back doors, trying to get the car's license plate number. She met the lone man as he came into the building. He was wearing a hunter camouflage ski mask and a long coat, and carrying a shotgun or rifle. She described him as a white male, approximately five feet ten inches and 160 pounds. He told her to give him the money and he did not want to hurt her. He took approximately $140.

On December 18, 1998, a robbery took place at the Kum & Go in Council Bluffs. At approximately 2:30 a.m., an employee heard the door buzzer from the cooler in the back, indicating someone had entered the store. When the

employee came out of the back, he saw a man behind the cash register. The man approached the employee, grabbed him, and directed him to the cash register. The employee opened the register. The employee called the police after the man left. The man was wearing a gray sweatshirt and a camouflage-type mask. He was carrying a sawed-off rifle. The employee did not observe any vehicles around the store.

Cynthia Cross testified Shawn Saul, David Vance, and Dan Long were at her house on the evening of December 17, 1998. The four of them left in a dark-colored Geo Metro to purchase methamphetamine at a nearby apartment. Vance and Long went into the apartment, and returned with the methamphetamine and a wad of clothing, which they placed in the trunk of the car. Sometime after midnight, Vance, Long, and Saul said "they were gonna go make some money," and left the apartment. Vance left wearing a gray hooded sweatshirt. Saul returned to the apartment at approximately 3 a.m., followed shortly thereafter by Vance. Long returned at approximately 5 a.m. Long and Vance were wearing different clothing when they returned. Saul had money when he returned. Cross purchased $20 worth of quarters and one dollar bills from Saul. Cross, Long, and Vance went to the casino. Cross's daughter testified similarly. She argued with Saul, her boyfriend at the time, about the money and where it had come from.

Later that day, Cross read a newspaper article about the Kum & Go robbery. She called the Crime Stoppers hotline and left an anonymous tip. She gave the names Shawn, David, and Dan and explained why she thought they

were involved in the robbery. Cross eventually contacted a detective with the Council Bluffs police department and discussed with him details of the evening in question.

Sherry Heath testified she knew Vance through her husband, Jason. Vance stayed at her house in December 1998. He drove her 1988 cream-colored Mercury Topaz on December 11, 1998. The following day, Vance admitted to Heath his involvement in robberies at EconoLodge and Garden Inn.

The detective investigating the robberies testified the police received two Crime Stoppers tips regarding the robberies. The detective spoke with one caller, Cynthia Cross. From the tips, police developed three names of individuals they thought might be involved in the robberies: Saul, Vance, and Long. After speaking with Saul, the detective went to William "BJ" Smith's residence and obtained permission to search the residence. The detective recovered a rifle with a pistol grip, a camouflage face mask, a red and black mask and a gray hooded sweatshirt.

As a part of their investigation, police interviewed William "BJ" Smith and Jeffrey Haines on December 19, 1998. During his taped interview, Smith stated Long came over and borrowed Smith's gun and a ski mask at approximately 1 a.m. on Friday morning, December 18, 1998. Long and Vance returned the gun, wrapped in a gray hooded sweatshirt, the ski mask, and another mask at approximately 10 a.m. that same day. The two men "threw out a whole bunch of change," approximately $10 worth of dimes, before leaving Smith's apartment. Smith identified Long and Vance in a photo line-up.

Haines, during his taped interview, stated Long and Vance came over and borrowed Smith's gun and a ski mask between midnight and 1 a.m. on December 18, 1998. Long, and possibly Vance, later returned the gun, wrapped in a gray hooded sweatshirt, the ski mask, and another mask. Haines identified Long and Vance in a photo line-up.

The State filed a trial information on December 31, 1998, charging Long, Vance, and Saul with first-degree robbery for acts alleged on December 18, 1998. On January 12, 1999, the State filed two trial informations, each charging Vance with first-degree robbery (count I) and felon with dominion and control of a firearm (count II) for acts alleged on December 11, 1998. On May 5, 1999, the court consolidated the cases for trial at the request of Long and Vance.

Sometime before trial, the State learned Smith and Haines had changed their stories in an effort to support Long's alibi defense. The State filed notice of intent to introduce the taped interviews at trial. After a June 23, 1999, hearing on the matter, the district court ruled the tapes admissible under the residual hearsay exception, Iowa Rule of Evidence 803(24). Shortly thereafter, the court granted the State's motion to sever the trials. Vance proceeded to trial on June 29, 1999. The State amended the trial information to include allegations Vance committed first-degree robbery and/or aided and abetted in the commission of first-degree robbery. The State proceeded only on the first-degree robbery allegations.

At trial, Smith and Haines testified Smith loaned the gun and ski mask to Saul. Vance was at Smith's apartment with Saul when Smith loaned the items.

Vance and Saul returned the gun and ski mask, along with a gray hooded sweatshirt, another mask, and ten dollars in dimes.

Long testified at Vance's trial. He denied involvement in the December 11, 1998 robbery. He testified he was with Vance and Saul on December 17-18, 1998. The three men were at Smith's residence when Vance received a page from a friend, Ed. Vance and Saul left in Long's car. Saul took a rifle and a gray sweater with him. Long believed the two men were going to pawn the rifle to Ed. Long denied involvement in the December 18 Kum & Go robbery.

Vance testified in his own defense. He denied committing a robbery on December 11, 1998. Vance and Long went to Cross's residence on December 17 after receiving a page from Saul. Vance, Long, and Saul went to Smith's residence to drop Long off "because he needed to sleep." After receiving a page from Ed Beall, Vance left on foot for Ed's house. Saul left at the same time, with keys to Long's girlfriend's car and instructions from Vance to pick him up at Ed's in forty-five minutes to an hour, which he did. Vance denied involvement in the December 18 Kum & Go robbery.

The jury found Vance guilty of three charges of first-degree robbery. The court sentenced Vance to a term of incarceration not to exceed twenty-five years on each charge. The court ordered the terms for the December 11 robberies be served concurrently, but consecutively to the term for the December 18 robbery. Vance appeals.

Evidentiary Ruling. The admission of hearsay evidence is prejudicial to the nonoffering party unless the contrary is shown. *State v. Ross*, 573 N.W.2d

906, 910 (Iowa 1998). Therefore, our review of hearsay rulings is for errors at law. *State v. Tomquist*, 600 N.W.2d 301, 303 (Iowa 1999).

Vance contends the district court erred in admitting the taped police interviews of Smith and Haines pursuant to the residual hearsay exception, Iowa Rule of Evidence 803(24). The State argues Vance failed to preserve error on this issue. If this court determines Vance did properly preserve error, the State urges us to affirm the district court's ruling on the merits.

In general, the granting or rejecting of a motion in limine is not reversible error. *State v. Griffey*, 457 N.W.2d 13, 15 (Iowa App. 1990). The error occurs, if at all, when the matter is presented at trial and the evidence is then admitted or refused, as the case may be. *Id.* An exception to the general rule exists when the trial court's prior ruling on the subject follows an evidentiary-type hearing and constitutes an unequivocal holding on the disputed issue. *Id.* at 15-16. In such case, a defendant need not renew his objections at trial. *State v. Harlow*, 325 N.W.2d 90, 91 (Iowa 1982).

The trial court held an evidentiary-type hearing before ruling the evidence would be admissible at trial. However, the hearing took place and the ruling was filed before Long's and Vance's trials were severed. For this reason, the State argues Vance should have raised the issue of admissibility anew at trial to properly preserve error. We disagree. Error was properly preserved and Vance was not required to raise the issue of admissibility anew at trial.

Erroneous admission of hearsay is presumed to be prejudicial unless the contrary is established affirmatively. *State v. Hildreth*, 582 N.W.2d 167, 170

(Iowa 1998). However, we will not find prejudice if the admitted hearsay is merely cumulative. *Id.* The information Smith and Haines provided about Vance during their taped interviews essentially matches what they testified to at trial. The State, during the hearing on its notice of intent to introduce evidence, stated, "The only thing [Smith and Haines] changed, Judge, from the taped statements is they took Danny Long out of the equation. Other than that, the stories are identical for the most part." We agree. Therefore, we find the admission of the taped interviews into evidence merely cumulative and not prejudicial. Our disposition of this issue makes it unnecessary to determine whether the evidence was admissible under rule 803(24).

Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Vance claims trial counsel was ineffective in: (1) failing to preserve error regarding the admissibility of taped interviews; (2) failing to object to erroneous marshaling instructions for first-degree robbery; (3) failing to object to and introducing evidence of defendant's use and delivery of controlled substances; (4) failing to object to hearsay testimony; and (5) failing to object and move for a mistrial during the prosecutor's improper statements and questions.

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).

Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

Taped Interviews. Vance argues his counsel provided ineffective assistance when he failed to preserve error by objecting to the admission of taped interviews with Smith and Haines. We have concluded trial counsel preserved error on this issue. Therefore, trial counsel was not ineffective.

Other Ineffective Assistance of Counsel Claims. We conclude the record is inadequate to decide those claims of ineffective assistance of counsel concerning marshalling instructions, drug-related evidence, hearsay testimony, and the prosecutor's statements. Therefore, we preserve those claims of ineffective assistance of counsel for possible postconviction relief.

Summary. We affirm the trial court, and preserve all of Vance's ineffective assistance of counsel claims, except the claim pertaining to the preservation of error on the admission of the taped interviews.

AFFIRMED.