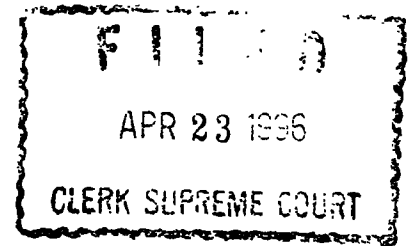


IN THE COURT OF APPEALS OF IOWA

No. 6-200 / 95-1141



STATE OF IOWA,

Appellee,

vs.

DOMINIC BACHEMIN,

Appellant.

000325

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

Defendant appeals his convictions and sentences for two counts of second-
degree robbery and one count of simple assault. **AFFIRMED.**

Robert A. Wright, Sr. of Wright & Wright, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant
County Attorney, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Dominic Bachemin appeals his convictions and sentences for two counts of second-degree robbery and one count of simple assault. We affirm.

In the early morning hours of May 19, 1994, Matt Garbers, Jason Povlick, and Brian Lohrer were at the "Old Roller Dam" on the southwest side of Cedar Rapids when they were approached by three cars pulling into the dam site. Garbers and Povlick recognized one of the vehicles, and the three decided to follow it in Garbers' car. After driving around the area for a short time, the three other vehicles boxed in Garbers' car and forced him to stop. Two individuals then exited one of the vehicles and walked to the side windows of Garbers' vehicle. One of the individuals then asked Garbers what he was doing and demanded the men exit the vehicle. When they refused, Garbers and Povlick were forcibly removed from the car, and Povlick was punched in the stomach and struck in the head. Garbers and Lohrer were each forced to the ground and made to lie face down while several passengers from the other cars searched them for valuables. Before leaving the scene, the perpetrators stole \$10 from Lohrer and \$200 from Garbers along with Garbers' car stereo, air conditioner, and radar detector. They also drove Garbers' car into a ravine and threw the keys into the river. After the robbery, Garbers flagged down a passing motorist who took the three men home where they immediately called the police.

Three months later, police showed Garbers a photo array from which he identified the defendant, Dominic Bachemin, as one of the participants in the robbery. Povlick and Lohrer also selected a photo of Bachemin who was then arrested and charged by trial information with two counts of second-degree robbery and one count of assault.

At trial, Garbers, Povlick, and Lohrer all identified Bachemin as one of the participants in the robbery. Bachemin relied on an alibi defense, claiming he was on the telephone at the time of the robbery. The district court denied Bachemin's motion for a directed verdict at the close of the State's evidence, and the jury found Bachemin guilty as charged. Following the district court's denial of Bachemin's motion for a new trial, he appeals.

Bachemin first challenges the sufficiency of the evidence supporting his conviction. Our review of this issue is for correction of errors of law. Iowa R. App. P. 4. Where a defendant challenges the sufficiency of the evidence supporting a jury verdict, we will uphold the verdict if there is substantial evidence to support it. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Evidence is substantial or sufficient if it could convince a rational fact finder the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Constable*, 505 N.W.2d 473, 479 (Iowa 1993). When considering challenges to the sufficiency of the evidence, we examine the evidence in the light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337,

340 (Iowa 1980). We consider all of the evidence presented at trial, not just the evidence supporting the verdict. *Id.*

The crime of robbery is committed when a person assaults another in furtherance of an intended theft. Iowa Code § 711.1 (1993). Theft is committed when a person takes control of another's property with the intent to deprive the other thereof. Iowa Code § 714.1 (1993). Assault, a lesser-included offense of robbery, is defined as "[a]ny act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act." Iowa Code § 708.1 (1993). Inherent in these offenses is the element of identity; the State must establish the defendant was present and performed the alleged acts. *State v. Sallis*, 238 N.W.2d 799, 801 (Iowa 1976).

We find substantial evidence supports Bachemin's convictions for robbery and simple assault. The record shows an individual identified as Bachemin was one of several people who assaulted Garbers, Povlick, and Lohrer in an effort to deprive them of money and valuables. Povlick was forcibly removed from Garbers' car, punched in the stomach, and struck in the back of the head. Similarly, Garbers and Lohrer were forced into separate ravines and required to lie with their faces to the ground while several different individuals searched them for valuables. Two-hundred dollars was taken from Garbers, and ten dollars was taken from Lohrer. In addition, the individuals also stole Garbers' car stereo, air-conditioner, and radar detector. To establish

Bachemin's identity as one of the assailants, the State presented evidence showing Garbers, Povlick, and Lohrer each identified Bachemin from a photo array and stated he was the individual who had talked to them through the car window before they were forced to exit the automobile. At trial, all three men again identified Bachemin as the individual at the passenger window, and Povlick and Lohrer both declared they had no doubt Bachemin was involved in the robbery. We find this evidence sufficient to support the jury's guilty verdict. We affirm on this issue.

Bachemin next contends he was denied effective assistance of counsel. He bases his claim on the following alleged errors: (1) failure to assert defendant's right to counsel during the photo array display; (2) failure to fully investigate; (3) failure to seek suppression of the out-of-court eyewitness identifications; (4) failure to object to the State's delay in arresting and filing charges against the defendant; and (5) failure to subpoena an alibi witness. Because Bachemin's claim implicates his constitutional right to effective assistance of counsel, our review is de novo. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980).

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an

essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. In evaluating counsel's performance, we presume counsel acted competently. *See id.* at 131.

Bachemin's ineffective assistance of counsel claim comes to us on direct appeal. Generally, we will not decide ineffective assistance claims on direct appeal as we prefer to reserve them for postconviction proceedings where counsel has an opportunity to respond. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference if the record is adequate to evaluate appellant's claims. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982). Here, we find the record sufficient to evaluate Bachemin's ineffective assistance claims and will, accordingly, consider them on appeal.

On our de novo review, we find counsel had no duty to assert Bachemin's right to counsel during the photo array displays. The right to counsel does not attach until the initiation of adversarial proceedings. *United States v. Gouveia*, 467 N.W.2d 180, 187, 104 S. Ct. 2292, 2297, 81 L. Ed. 2d 146, 153 (1984). Even after indictment, however, the defendant does not have the right to have counsel present during a photographic identification proceeding. *United States v. Ash*, 413 U.S. 300, 321, 93 S. Ct. 2568, 2579, 37 L. Ed. 2d 619, 633 (1973). Here, the trial information and arrest warrant were issued nearly a month after the first photo array display. As such, adversarial proceedings had not yet been initiated against Bachemin at the time of the

photo array and the right to counsel did not attach. Counsel breached no essential duty by failing to assert Bachemin's right to counsel during the photo array.

We further reject Bachemin's contention the photo array was "unduly suggestive." Bachemin is unable to cite anything in the record indicating improperly suggestive or inappropriate comments were made during the photo array. Instead, he claims the fact the array happened three months after the crime calls into question the reliability of the identification. We, however, find this lapse inconsequential. *See State v. Whetstine*, 315 N.W.2d 758, 766 (Iowa 1982) (four-month lapse between a crime and an out-of-court identification did not defeat the reliability of the identification). Accordingly, we cannot say counsel breached an essential duty by failing to object to the photo array as unduly suggestive.

We also find no merit in Bachemin's assertion counsel was ineffective in failing to investigate placement of Bachemin's photo in the photo array. Defense counsel was aware an eyewitness who had been questioned by police stated she saw someone resembling Bachemin at the scene of the crime. Because this witness's statement reasonably explains the presence of Bachemin's photo in the photo array, counsel had no duty to investigate further. *See Origer v. State*, 495 N.W.2d 132, 136 (Iowa App. 1992) (defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary).

Counsel also breached no essential duty in failing to object to the State's alleged delay in arresting and filing charges against Bachemin. Although more than three months transpired between the robbery and issuance of Bachemin's arrest warrant, such a delay was reasonable under the circumstances of the case. It was not until Bachemin had been positively identified in the photo array that probable cause existed to support an arrest. The arrest warrant was issued less than one month after such identification had been made. Such a brief investigative delay does not deprive a defendant of due process and accordingly does not serve as a basis for an ineffective assistance of counsel claim. See *United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

Finally, we find no merit in Bachemin's contention counsel breached an essential duty in failing to subpoena an alibi corroborating witness. Bachemin does not provide the identity of this witness nor does he specify the substance of this alleged alibi corroborating witness's testimony. For a claim of ineffective assistance of counsel to be entitled to review, a defendant must state the specific ways in which counsel's performance was inadequate. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Here, we find Bachemin's claim insufficiently specific to allow us to review it on appeal or preserve it for postconviction proceedings. Even if we had sufficient information to consider Bachemin's claim, we find it unlikely counsel's failure to subpoena the alleged witness would have constituted ineffective assistance of counsel. At trial, Bachemin

presented an alibi defense in which he claimed he was talking on the telephone at the time of the robbery. Three witnesses testified on his behalf in an attempt to establish Bachemin's whereabouts several hours before, during and after the robbery. We find any further alibi-corroborating testimony would have been cumulative and unnecessary. As such, we are unable to find trial counsel had a duty to subpoena an additional alibi witness, nor are we able to find any resulting prejudice. Accordingly, we conclude Bachemin was not denied effective assistance of counsel.

In summary, we find sufficient evidence to support Bachemin's convictions for second-degree robbery and simple assault. We further find Bachemin was not denied effective assistance of counsel. We affirm.

AFFIRMED.