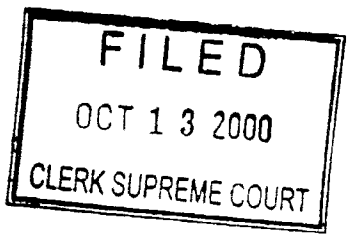
IN THE COURT OF APPEALS OF IOWA

No. 0-401 / 99-1053
Filed October 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ANDREW GREIMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

Defendant appeals following his conviction for first-degree robbery. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Paul R. Martin, County Attorney, and Douglas Hammerand, Assistant County Attorney, for appellee.

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

HECHT, J.

On appeal following his conviction for first-degree robbery, Mark Greiman contends the court erred in: (1) denying his motion to suppress based on the State's failure to record the defendant's interrogation, (2) sustaining the State's objection to the expected testimony of his brother, and (3) overruling his motion for judgment of acquittal based on the lack of evidence corroborating a "person solicited" pursuant to Iowa Rule of Criminal Procedure 20(3). He also maintains he was denied effective assistance of counsel in a number of respects. We affirm Greiman's conviction.

I. Factual Background and Proceedings. On September 14, 1998, the State filed a two count trial information charging Greiman with murder in the first degree and robbery in the first degree. The charges stemmed from the robbery and shooting death of Bruce Vrchota in his home in the early morning hours of July 27, 1998. Vrchota was known for the high quality marijuana growing and selling business he operated out of his attic. Greiman had been a friend of Vrchota's for several years and often purchased marijuana from him. Greiman then sold the marijuana to others, including Micheal Williams. He also traded marijuana for cocaine from Williams occasionally.

On the day before the murder, Williams called Greiman several times. Greiman was avoiding Williams's calls because he owed him money for past drug deals and did not have the money to pay him. After several phone calls, Greiman spoke to Williams and agreed to meet with him. While waiting for Williams to pick him up at his home, Greiman blackened his face, neck, and

hands with charcoal. Charles Stitts drove Williams to pick up Greiman and then drove the men to Vrchota's house. However, when Stitts learned of their plan to rob Vrchota and take some of his marijuana leaves, he refused to take part in it and drove the two passengers to Williams's house.

Later the same evening, Greiman and Williams picked up another man, Darnell Williams, and the three men returned to Vrchota's house. Greiman drove in Micheal Williams's car. He parked the car near Vrchota's house and walked into the backyard. Micheal Williams and Darnell Williams remained in the car. Greiman testified at trial that he only intended to go into Vrchota's backyard and take discarded marijuana leaves out of the garbage cans. He also testified there was no discussion of the other two men getting out of the car or coming up to the house with him. However, while Greiman was in the backyard, Micheal Williams and Darnell Williams entered Vrchota's house. They robbed him at gunpoint and Micheal Williams shot him twice in the head. Vrchota's eighteen year old son, Shelley, was in the house when his father was shot and recognized Micheal Williams. During Shelley's interview at the police station, he was asked whether he knew anyone else that could have been involved in the shooting. In response, he mentioned Greiman's name.

Greiman was arrested on unrelated charges on August 3, 1998. He was questioned by Special Agent William Basler of the Iowa Division of Criminal Investigations and Investigator Frank Stearns of the Mason City Police Department. Special Agent Basler was the lead officer during the interview and took handwritten notes. The interview was not videotaped or audiotaped. After

approximately two hours, Greiman was informed he could potentially be charged with first-degree murder. He then asked to speak to an attorney and the officers terminated the interview.

Trial in this matter commenced on May 11, 1999, and the jury returned verdicts of not guilty on the first-degree murder charge and guilty on the first-degree robbery charge against Greiman. The district court sentenced the defendant to an indeterminate term of imprisonment not to exceed twenty-five years. Greiman appeals.

II. Standard of Review. When assessing an alleged violation of a constitutional right, we review de novo the totality of the circumstances as shown by the entire record. *State v. Brown,* 612 N.W.2d 104, 108 (Iowa App. 2000). We review the district court's rulings on the admissibility of evidence for abuse of discretion. *See State v. Query,* 594 N.W.2d 438, 443 (Iowa App. 1999). Challenges to the sufficiency of evidence to corroborate an accomplice's testimony are reviewed for errors at law. *State v. Taylor,* 557 N.W.2d 523, 525 (Iowa 1996). We review claims of ineffective assistance of counsel de novo. *State v. Johnson,* 604 N.W.2d 669, 673 (Iowa App. 1999).

III. Failure to Record Interrogation. Greiman argues the failure of the police officers that interrogated him to record the interrogation by either audio or videotape violated his due process rights under both the Iowa and United States Constitutions. The Iowa Supreme Court has recently considered the issue and, noting there are both pros and cons to videotaping interrogations as a matter of public policy, the court determined the Iowa Constitution does not require law

enforcement personnel to record interrogations. *State v. Morgan*, 559 N.W.2d 603, 609 (Iowa 1997) ("We are confident . . . that such procedures are in no way mandated by any provision in the Iowa Constitution.") Therefore, Greiman's claim under the Iowa Constitution is without merit.

The United States Supreme Court has not yet specifically considered whether the due process protections of the Fifth and Fourteenth Amendments of the United States Constitution mandate an electronic recording of police interrogations requirement. However, the Supreme Court's decision in *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), is widely thought to be controlling on this issue. *See Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985); *see also Wilde v. State*, 706 P.2d 251, 255 (Wyo. 1985); *State v. Spurgeon*, 820 P.2d 960, 961 (Wash. Ct. App. 1991). *Trombetta* held the due process clause of the Fourteenth Amendment does not require police officers to preserve for trial breath samples obtained incident to drunk driving arrests. *Trombetta*, 467 U.S. at 491, 104 S. Ct. at 2535, 81 L. Ed. 2d at 423. Specifically, the police must preserve evidence if the evidence both possesses "an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 489, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. Other states have held because recording interrogations cannot satisfy the standard of constitutional materiality enunciated in *Trombetta*, the federal constitution imposes no duty to record custodial interrogations. *Stephens*, 711 P.2d at 1160; *Stoker v. State*, 692 N.E.2d 1386, 1389 (Ind. Ct.

App. 1998). We conclude the United States Constitution does not mandate electronic recording of interrogations. Having found neither a state nor federal constitutional basis for Greiman's due process claim, we affirm the district court on this issue.

IV. Testimony of Charles Greiman. Greiman next contends the district court erred by not allowing the testimony of his brother, Charles Greiman, whom he expected to testify regarding statements made by Charles Stitts. Stitts testified as to the events of the night before Vrchota's death, as well as to events occurring in the weeks before. Stitts stated it was Greiman's idea to break into Vrchota's house and take marijuana and cash. He further testified Greiman was aware Micheal Williams was carrying a gun the night of the murder. In summary, Stitts diminished the role of Michael Williams in planning and executing the robbery, and emphasized Greiman's culpability. During a break in Stitts's testimony, Charles Greiman allegedly overheard Stitts making negative comments regarding the defendant. Defense counsel sought to have Charles Greiman take the stand and testify as to Stitts's statements. The State objected asserting the proposed testimony would constitute hearsay. The district court sustained the objection.

The record does not reflect what the substance of Charles Greiman's testimony would have been. Although defense counsel took Charles's deposition, it was not offered as an exhibit at trial and was not made a part of the record on appeal. Defense counsel did not make an offer of proof during trial regarding the proposed testimony. An offer of proof is necessary to preserve

error on an alleged error by the district court in excluding testimony. *See State v. Schutz*, 579 N.W.2d 317, 318-19 (Iowa 1998). An offer of proof serves to give the trial court an adequate basis for its evidentiary ruling and to make a record for appellate review. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). Such a record is necessary so the reviewing court does not have to "base error on speculation as to the answers that would have been given to questions" had the questions been asked. *State v. Lange*, 531 N.W.2d 108, 114 (Iowa 1995). We determine Greiman has not preserved error on this claim and therefore, we do not consider it on appeal.

V. Corroboration of Witness's Statements. Greiman argues the district court erred in overruling his motion for judgment of acquittal based upon the lack of evidence to corroborate the testimony of Charles Stitts in violation of the requirement of Iowa Rule of Criminal Procedure 20(3). Rule 20(3) provides, in relevant part:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offenses; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Iowa R. Crim. P. 20(3). Greiman claims Stitts was a solicited person within the meaning of rule 20(3). However, Stitts cannot be considered a solicited person. The term "solicited person" in rule 20(3) applies only when the accused is charged with the offense of solicitation under Iowa Code section 705.1. *See State v. Williams*, 315 N.W.2d 45, 58 (Iowa 1982). Greiman was not charged with solicitation and therefore, Stitts's testimony required no corroboration. The

district court did not err by denying Greiman's motion for judgment of acquittal on this basis.

VI. Ineffective Assistance of Counsel. Greiman contends he received ineffective assistance of trial counsel. He argues trial counsel performed inadequately by (1) failing to file the motion to suppress in a timely manner, (2) failing to present sufficient foundation for Charles Greiman's testimony, (3) failing to make an offer of proof as to the expected testimony of Charles Greiman, and (4) failing to object to improper testimony, including Shelley Vrchota's testimony that he told police he thought defendant might be involved in the robbery and multiple statements made by Stitts during trial. Greiman also claims the aggregate of counsel's performance cumulatively deprived him of a fair trial.

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). To prevail, Greiman must prove by a preponderance of the evidence that his counsel failed in an essential duty and prejudice resulted. *State v. Westeen,* 591 N.W.2d 203, 207 (Iowa 1999); *State v. McPhillips,* 580 N.W.2d 748, 754 (Iowa 1998); *State v. Allen,* 565 N.W.2d 333, 336 (Iowa 1997). Prejudice is shown where there is a reasonable probability the result would have been different if counsel had performed competently. *Westeen,* 591 N.W.2d at 211. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Carrillo,* 597 N.W.2d 497, 500 (Iowa 1999).

Greiman's first claim of ineffective assistance is based upon a motion to suppress. It raised three issues: (1) certain arguably inculpatory statements made by the defendant during interrogation by law enforcement officers were induced by a conditional promise of leniency; (2) the defendant's rights to due process of law were violated by the failure or refusal of law enforcement officers to either videotape or audiotape the defendant's statement to them; and (3) the failure or refusal to record the statement violated the defendant's right to exculpatory information contained in the statement. The motion was not filed within the forty days after arraignment allowed by Iowa Rule of Criminal Procedure 10(4). However, the State did not object to the untimeliness of the motion, the trial court held an extended evidentiary hearing on the motion, and the trial court ruled on each of the three issues. Under such circumstances, the defendant can have suffered no prejudice whatsoever from the mere fact the motion was not timely filed, and any claim of ineffective assistance of trial counsel must fail under the second prong of an ineffective assistance claim.

We now consider the three remaining claims of ineffective assistance of counsel raised by Greiman. Generally, we preserve such claims for postconviction proceedings to allow trial counsel an opportunity to defend the charge. *State v. Pearson,* 547 N.W.2d 236, 241 (Iowa App.1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed and the allegedly ineffective attorney may have the opportunity to explain his or

her conduct. *State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa App. 1999). That is particularly true where the challenged actions of counsel implicate trial tactics or strategy that might be explained in a record fully developed to address those issues. *State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999). We find the record before us is insufficient to make a determination on the three remaining ineffective assistance claims, and therefore preserve them for postconviction proceedings.

VII. Conclusion. Having considered all issues properly before us on appeal, we affirm the conviction and sentence of Mark Greiman. Three claims of ineffective assistance of counsel are preserved for possible postconviction proceedings.

AFFIRMED.