

IN THE COURT OF APPEALS OF IOWA

No. 9-254 / 98-0716

Filed May 26, 1999

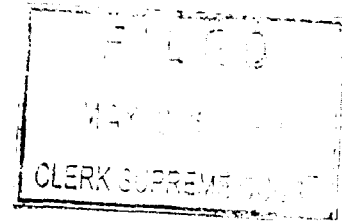
STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL ANTHONY McDUFFEN,

Defendant-Appellant.



Appeal from the Iowa District Court for Dallas County, William H. Joy, Judge.

Defendant appeals his conviction and sentence, following a bench trial, for first-degree robbery and attempted murder. **AFFIRMED.**

Maria Ruhtenberg of Paul Rosenberg & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Wayne M. Reisetter, County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

MAHAN, J.

Michael McDuffen appeals his conviction and sentence, following a bench trial, for first-degree robbery and attempted murder. He contends the State failed to prove he was guilty beyond a reasonable doubt on both charges and he received ineffective assistance of counsel. We affirm.

In February 1997, McDuffen moved to Perry, Iowa, to take a job at IBP. In March, McDuffen rented a room for fifty dollars per week from Carolyn Hollesen. McDuffen often stayed with a friend, Diana Yates, in Des Moines on the weekends.

On April 19, 1997, McDuffen was hit on the head, knocked unconscious, and robbed. McDuffen was placed on leave from his job at IBP, and while unable to work, he fell behind on his rent payments. McDuffen was later diagnosed as suffering from post-concussion syndrome which is characterized by headaches and dizziness.

Hollesen worked at the Woodward State Hospital and owned a trailer court. On May 3, she collected roughly \$1300 in rent payments, mostly in cash. As was her practice, she placed the money in her purse, along with her important papers; she carried this purse with her everywhere.

The testimony and evidence presented at trial established Hollesen arrived home from work at approximately 4:00 p.m. Her companion, Kenneth O'Bryan, was in the house; his son, David, was working on his truck in the driveway. Shortly after Hollesen arrived, McDuffen entered the house and went upstairs to his room.

Kenneth knew Hollesen had gone upstairs to talk to a renter or "Mike." From the living room, he heard loud banging, a short period of silence, and then loud thumping. He also heard a lot of yelling at some point. Kenneth went upstairs but McDuffen refused to open his door. McDuffen told Kenneth, "I have my girlfriend in here." Kenneth yelled to David that there was "something going on upstairs." David ran into the house and upstairs where he found McDuffen standing in front of his closed door. David specifically asked McDuffen what was going on in the bedroom. McDuffen told David, "Nothing's going on. My girlfriend had an accident."

Kenneth went to call the police after McDuffen again refused to open the door. Meanwhile, David observed blood on McDuffen's clothes and again asked McDuffen what was going on. McDuffen pushed the door open, allowing David to see Hollesen lying face down on the floor with blood around her head. McDuffen then told David Hollesen had assaulted him. The investigation later revealed Hollesen's head had been battered with the end of the canister portion of a vacuum cleaner found in McDuffen's room. The large blood stains on the floor and bedspread, Kenneth's description of the noises he heard, the damage to the vacuum cleaner canister, and an officer's testimony show Hollesen was struck with the canister and knocked to the bed, then was repeatedly battered with the end of the canister after she was on the floor. Hollesen's injuries were life-threatening and she has been reduced to a permanent unresponsive state. She is fed through a tube.

David and Kenneth got into Kenneth's truck to drive to the police station. As David was leaving, McDuffen left the house carrying a medium-sized object like a jacket or a bag. McDuffen went to a Kum & Go in Boone carrying a garment bag and told several people he had been beaten, robbed, and needed a ride to Des Moines. McDuffen showed three people what he said was a head wound he had suffered in the beating. One witness said it looked "dry;" another said it "didn't look new;" and the third did not see a cut or blood.

McDuffen later turned up at Yates' apartment. There is a dispute about the time of McDuffen's arrival. However, he did ask Yates to wash his bloody clothes and buy him new clothes. He gave her a \$100 bill and asked her to get her landlord to cash a money order for him. McDuffen repeatedly told the occupants of the apartment not to watch television. He said a "Mexican guy" had beaten his landlady with a vacuum cleaner.

The police arrived at Yates' apartment on the evening of May 5 and found McDuffen hiding in a closet. Hollesen's purse was found in a paper bag under Yates' kitchen sink. Hollesen's checkbook and a \$400 money order made out to her was found in McDuffen's garment bag. Hollesen's business records showed \$2000 in cash, checks, and money orders was missing.

McDuffen testified at trial to a different version of the events. He said shortly before the assault he went to his room to watch television. While lying on the bed, he noticed Hollesen's purse was on top of his garment bag. When McDuffen lay

down on the bed, the contents of the purse spilled out. McDuffen was reaching out to replace the contents of the purse when he was struck by a sharp blow on the back of his head near the site of his earlier injury. He believed he had been hit with a hard object, not just a fist; he felt pain and fear and thought of defending himself. McDuffen then “totally blanked out.” The next thing he remembers is standing over Hollesen’s unconscious body. He believed he had hit Hollesen but denied having any intent to hit her or take anything away from her.

McDuffen did remember telling David he had been attacked by Hollesen. He stated he left because he was scared and did not remember seeing Hollesen’s purse at that time. McDuffen remembered being at the Kum & Go but did not remember telling people he had been robbed or showing them his head wound.

McDuffen denied putting the purse in his garment bag, telling the occupants of the apartment not to watch television, and telling Yates a “Mexican guy” had assaulted his landlady. He admits he tore up the checks which had been in the purse, gave Yates about \$40, but claimed he never saw the money order and could not explain why it was found in his bag.

The doctor who treated McDuffen for post-concussion syndrome testified at the bench trial that if McDuffen had been hit and suffered a second concussion, he could have been in a dazed state. In such a state, he would be unable to form clear thoughts or tell right from wrong. However, the doctor also testified it would not be consistent with a concussion for a person to remember being hit but failing to

remember what he did after that. A person in a dazed state from a concussion would not do anything purposeful. He stated a person who remembered being hit and lashed out at the attacker in a directed way probably did not have a concussion. Fighting back would be an intentional act.

The district court rejected McDuffen's claims of being struck in the head and that his further acts were not intentional. McDuffen was found guilty of first-degree robbery and attempted murder. McDuffen appeals.

I. SUFFICIENCY OF THE EVIDENCE. McDuffen maintains the State failed to prove beyond a reasonable doubt that he committed first-degree robbery or attempted murder. We disagree.

Our review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). The district court's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993); *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Allen*, 348 N.W.2d at 247.

In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. *Torres*, 495 N.W.2d at 681. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A verdict can rest on circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993). However, "[t]he 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. Casady*, 491 N.W.2d 782, 787 (Iowa 1992) (citations omitted). The same standards apply on review of trials to the court. *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

II. FIRST-DEGREE ROBBERY. McDuffen claims the State failed to prove him guilty of first-degree robbery beyond a reasonable doubt. Specifically, he contends the State failed to prove he intended to commit a theft or that any assault he may have committed was in furtherance of an intended theft.

The element of intent is seldom susceptible to proof by direct evidence. *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994). Rather, proof of intent usually depends on circumstantial evidence and inferences drawn from such evidence. *Id.* “The fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experiences and observation.” *State v. Howard*, 404 N.W.2d 196, 198 (Iowa App. 1987). “The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true.” *Finnel*, 515 N.W.2d at 42.

We have carefully reviewed the evidence and conclude the State did establish proof beyond a reasonable doubt that McDuffen committed the offense of first-degree robbery.

III. ATTEMPTED MURDER. McDuffen claims the evidence was insufficient to establish the offense of attempted murder beyond a reasonable doubt.

Specifically, he contends the evidence is lacking in that it fails to establish he intended to kill Hollesen.

Intent to kill may be inferred from the use of a deadly weapon with the opportunity to deliberate. *State v. Khouri*, 503 N.W.2d 393, 395 (Iowa 1993). A weapon is “deadly” if the manner of its use makes it likely to cause death. *State v. Phams*, 342 N.W.2d 792, 797 (Iowa 1983) (citing *State v. Mart*, 237 Iowa 181, 187, 20 N.W.2d 63, 66 (1946)). Intent to kill may also be inferred from the intentional use of a dangerous weapon. *Waterbury v. State*, 387 N.W.2d 309, 311-12 (Iowa 1986). “[A]ny instrument or device of any sort” is a dangerous weapon if it is “actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon another, and which, when so used, is capable of inflicting death upon a human being.” Iowa Code § 702.7.

McDuffen is six feet, four inches tall, and weighed 200 to 220 pounds. He was thirty-eight years old and had previously played several seasons of professional basketball. Hollesen was five feet, six inches tall, and sixty-two years old. McDuffen repeatedly and violently battered a smaller and older Hollesen with a vacuum cleaner canister and inflicted life-threatening injuries. Under these circumstances, the vacuum cleaner canister is a deadly or dangerous weapon. Furthermore, even if McDuffen did not initially intend to kill, the period of silence between blows shows McDuffen acted intentionally, not in the heat of passion. He had time to deliberate and form the intent to kill before he renewed the assault. During that break in the

assault, a reasonable person would have had time to reflect and bring his passion under control. Iowa Code § 707.4; *State v. Inger*, 292 N.W.2d 119, 122 (Iowa 1980).

We conclude the trial court's findings are supported by substantial evidence; the State did prove McDuffen guilty of attempted murder beyond a reasonable doubt.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL. McDuffen contends he received ineffective assistance of counsel. Specifically, he asserts trial counsel failed to adequately investigate and present evidence in support of his affirmative defense, failed to request a change of venue, and he was prejudiced as a result. The State concedes we cannot decide the change of venue issue on this record.

Ordinarily, we reserve 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). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). However, 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).

After reviewing these issues, we conclude the record is inadequate to decide them. We reserve McDuffen's ineffective-assistance-of-counsel claims based on failure to adequately investigate and present evidence in support of his affirmative

defenses and failure to request a change of venue for postconviction proceedings, if any are brought.

For these reasons, McDuffen's assertions of ineffective assistance of counsel are reserved for postconviction proceedings, if any are brought. We affirm McDuffen's conviction and sentence for first-degree robbery and attempted murder.

AFFIRMED.

No. 98-0716. [9-254] STATE v. McDUFFEN

Appeal from the Iowa District Court for Dallas County, William H. Joy, Judge.
AFFIRMED. Considered by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J.,
takes no part. Opinion by Mahan, J. (10 pages \$4.00)

Michael McDuffen appeals his conviction and sentence, following a bench trial, for first-degree robbery and attempted murder. McDuffen repeatedly and violently battered his landlady with a vacuum cleaner canister and inflicted life-threatening injuries. She has been reduced to a permanent unresponsive state and is fed through a tube. The landlady's companion and his son were home at the time of the incident. The companion was in the living room and reported hearing loud banging, a short period of silence, and then loud thumping. McDuffen first told the companion and the son that he had his girlfriend in his room. McDuffen finally opened the door to his room and told the son that the victim had assaulted him. McDuffen fled the scene and had the victim's purse with him when he was apprehended. McDuffen's theories of defense were that he acted out of self-defense or that he had been hit in the head, suffered a concussion, and thus could not form specific intent to commit first-degree robbery or attempted murder. He contends the State failed to prove he was guilty beyond a reasonable doubt on both charges and he received ineffective assistance of counsel. **OPINION HOLDS: I. First-Degree Robbery.** We have carefully reviewed the evidence and conclude the State did establish proof beyond a reasonable doubt that McDuffen committed the offense of first-degree robbery. **II. Attempted Murder.** McDuffen repeatedly and violently battered a much smaller and older victim with a vacuum cleaner canister and inflicted life-threatening injuries. Under these circumstances, the vacuum cleaner canister is a deadly or dangerous weapon. Furthermore, the period of silence between blows shows McDuffen had time to deliberate and form the intent to kill before he renewed the assault. We conclude the trial court's findings are supported by substantial evidence; the State did prove McDuffen guilty of attempted murder beyond a reasonable doubt. **III. Ineffective Assistance of Counsel.** After reviewing his claims, we conclude the record is inadequate to decide them. We reserve McDuffen's ineffective-assistance-of-counsel claims based on failure to adequately investigate and present evidence in support of his affirmative defenses and failure to request a change of venue for postconviction proceedings, if any are brought.