IN THE COURT OF APPEALS OF IOWA

No. 0-382 / 99-0561
Filed October 13, 2000

STATE OF IOWA,
Appellee,

vs.

AUBREON SAVIL HUBERT,
Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Mark J. Smith, Judge.

Aubreon Hubert appeals the court's judgment and sentence for perjury in violation of Iowa Code section 720.2 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen B. Doland, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

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

VOGEL, P.J.

Aubreon Hubert appeals his conviction and sentence for perjury in violation of Iowa Code section 720.2 (1997). Because we find the record contains substantial evidence to support the conviction, Hubert's trial counsel was not ineffective, and the district court correctly overruled Hubert's relevancy objections, we affirm.

Background facts. The perjured testimony arose from an incident in April 1996, during which Hubert and two other men robbed a man for twenty dollars. The victim died as a result of the attack and the three men faced various criminal charges. During a videotaped interview in April 1996, Hubert told police that Isom Rogers[1] was with them on the night of the robbery and he implicated Rogers as a participant in the attack. During a November 1998 deposition for the pending criminal charges against Rogers, Hubert testified that Rogers was not present on the day in question and that Rogers had not participated in the robbery or the assault. Based on these conflicting stories and the testimony of several other witnesses, Hubert was charged with perjury. He was tried to the court and found guilty. He then moved for a judgment of acquittal, which was overruled. Hubert appeals.

Scope of review. The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983); *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a

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[1] Hubert alternately referred to Rogers as Isom and Isaac throughout the police interview.

rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994). Substantial evidence does not, however, denote some elevated quantity of proof. *Id.* Rather, the relevant question in our review of the case "is whether, after reviewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Insufficient evidence. Hubert asserts the State failed to provide sufficient evidence to allow a rational trier of fact to determine that he was guilty of perjury beyond a reasonable doubt. He contends the conflicting witness testimony fails to provide sufficient evidence to convict him. The accounts given by Frank Morning and Devin Fabre, although conflicting on some details of the incident, both verified that Rogers and Hubert were present on the night of the attack. Contrary to Hubert's deposition testimony that he had not seen Rogers participate in the robbery or assault, Rogers later pled guilty to charges regarding the robbery.

In addition, the 1996 videotaped interview was admitted into evidence as well as Hubert's 1998 deposition testimony, revealing his contradicting testimony. During the 1996 police interview, police asked Hubert to name who was on the porch that night when they saw the victim walking down the street. He said Rogers was present. After further questioning, he gave the following account of the incident:

Q. While you guys are standing on the porch, what is said about him? You said, you said that you yourself said, "Hey look, there's a drunk guy." A. Yup.

Q. Okay, then what . . . who else said something? A. Isaac said, "Let's go steal him, let's go take his money."

Q. Okay, who else says something? A. Devin says, "Let's go take his money. See if he's got anything in his pockets."

Q. Okay. Then what happens. A. We stepped off the porch.

Q. Okay. A. Then we run through the alley.

Q. Okay. Who's "we?" A. Me, Devin and Isom.

* * *

Q. Then what happened to the guy? A. He fell. And then Isaac came up, and Isaac, uh, searched him for his money.

* * *

Q. They come back with the change. Who gets what? A. I got 5, Isom got 5 and he had 10.

* * *

Q. Was there a lot of blood around? A. When he hit the dude?

Q. Yeah. A. There was blood on his jaw, on, where they hit him at. There was blood on his shirt.

Q. How do you know that? A. 'Cause I was there watching.

Q. And you saw the blood on his shirt? A. Yup.

Q. Was there blood on any one of the guys that hit him, Devin or Isom? A. There was blood on Isom's hand when they had went back, they had went back to see if he had some more money. When they came back, Isom said, "Oh man, I got some blood on my hand. I got to wash it off." I guess Devin had some blood on his hand too because they had, they said they had went back, checked his pockets again, he woke up and said, "What are you doing?" and I guess they kicked him. I guess Isom, Isom kicked, I mean, punched him and then Devin kicked him in the head before he even got back up. Then they came back to the house and Isom had some blood on his hands and he washed it off.

This account, given within a few days of the incident, was in direct contrast to many of Hubert's deposition statements, including the following questions:

> Q. Okay. Were you ever involved in a robbery with Mr. Rogers and Mr. Fabre? A. No.
>
> * * *
>
> Q. Have you ever at any time seen Mr. Rogers participate in a robbery or any other type of assault? A. No.
>
> Q. Have you ever seen Mr. Fabre participate in a robbery or any other type of assault? A. No.
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> * * *
>
> Q. And you're certain that Mr. Rogers never ran down that alley after the guy? A. No.
>
> Q. You are certain? A. Yeah.

Hubert's prior admissions and statements to police officers, combined with witness accounts and Rogers' own guilty plea provide substantial evidence to support the perjury conviction.

Hubert also argues the contradictions in his testimony, if sufficiently proven, were not material to the prosecution, as is required for a perjury conviction.

> A false statement of fact knowingly made under oath or affirmation is material and will support a charge of perjury if it directly or circumstantially (1) supports or attacks the credibility of a witness, or (2) has a legitimate tendency to prove or disprove some relevant fact irrespective of the main fact at issue, or (3) is capable of influencing the court, officer, tribunal or other body created by law on any proper matter of inquiry.

State v. Fisher, 282 N.W.2d 684, 687 (Iowa 1979) (citations omitted). Eye-witness testimony regarding Rogers' presence during the robbery "has a legitimate tendency to prove" an essential fact in the prosecution of Rogers for his participation in the robbery. *State v. Walker,* 574 N.W.2d 280, 283 (Iowa

1998) (holding the element of materiality should be submitted for the jury's determination). Hubert waived a jury trial and was tried to the court. The judge determined that the identification and implication of Rogers was material to the prosecution. We agree and find the record contains substantial evidence of the material nature of the perjured statements.

Hubert further claims the State failed to adequately prove he was under oath during the 1998 deposition. He asserts the State's failure to call the court reporter as a witness to verify this fact left the issue without sufficient evidentiary support. However, the deposition in question clearly contains a statement prior to questioning Hubert that he had been duly sworn. Hubert later admits, within his deposition, he was aware he was under oath to tell the truth and that consequences for perjury could apply if he was not truthful. The attorney who took his deposition also testified that the transcript appeared to be a true and accurate record of the deposition. Therefore, we find there was sufficient evidence that Hubert was under oath while being deposed.

Ineffective assistance of counsel. Hubert next alleges his trial attorney was ineffective because she initially objected to the introduction of the deposition transcript for lack of a proper foundation and then withdrew the objection. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes,* 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell,* 557 N.W.2d 908, 913 (Iowa App. 1996). In alleging ineffective assistance, a defendant must

overcome the strong presumption counsel was competent. *State v. Ray,* 516 N.W.2d 863, 865 (Iowa 1994). Generally, such claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder,* 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger,* 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of the claim. *Id.* We find the record sufficient to decide the issue on direct appeal.

The trial transcript reflects Hubert's attorney's initial objection to the admission of the deposition was based on a lack of a foundation. However, when the court informed her she would not be allowed to cross-examine witnesses based on the contents of the deposition unless it was allowed into evidence, she withdrew her objection. We find this was a tactical decision that would allow her access to the deposition in her cross-examination. "Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel." *State v. Johnson,* 604 N.W.2d 669, 673 (Iowa App. 1999) (citations omitted). Because Hubert's counsel withdrew her objection pursuant to a reasonable trial strategy, we find she did not fail to perform a necessary duty.

Hubert also claims his attorney was ineffective in failing to object to the admission of the deposition based on his Sixth Amendment right to confront a witness. U.S. Const. Amend. VI. He argues this right was violated because he

was not allowed to confront the court reporter to verify the accuracy of his statements in the deposition transcript. However, our supreme court has previously found the Confrontation Clause can be satisfied when the hearsay declarant is available to testify in court and be cross-examined. *State v. Rojas*, 524 N.W.2d 659, 664 (Iowa 1994). In this case, the hearsay declarant, Hubert, was available to testify to the accuracy, or lack thereof, of the deposition transcript. Therefore, we find the Confrontation Clause has not been violated. Accordingly, we find Hubert's attorney was not ineffective in the manner alleged.

Relevancy objections. Finally, Hubert claims the trial court erred in overruling the relevancy objections made pertaining to the evidence presented about the robbery and the videotape of Hubert's interrogation. Several objections to testimony were made which were simply, "Objection, irrelevant" or "Irrelevant and immaterial to the charge of perjury." We find the general relevancy objections made at trial did not preserve the issue Hubert now raises on appeal, that the evidence should be excluded under Iowa Rules of Evidence 401, 402, 403 and 404. *See State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa App. 1999). Nonetheless, had the issue been preserved, we would agree with the trial court, that excluding all evidence of the robbery "would unduly restrict the proof by the State" as that evidence was essential to prove the statements made by Hubert were false. Further, Hubert was tried to the court, creating less danger of unfair prejudice. The prejudicial effect of evidence regarding prior bad acts is reduced in the context of a bench trial. *State v. Williams*, 445 N.W.2d 408, 410 (Iowa App. 1989). Therefore, even if the evidence should have been excluded,

Hubert has not demonstrated that he was prejudiced by the admission of the evidence.

Having considered all other issues raised on appeal and finding them to be without merit, we affirm.

AFFIRMED.