IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-455 / 95-1198

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD DALE HOON, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Richard Hoon appeals his conviction and sentence for one count each of first-degree robbery, in violation of Iowa Code sections 711.1 and 711.2 (1995), first-degree burglary, in violation of sections 713.1 and 713.3, and second-degree theft, in violation of section 714.2(2). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney general, William E. Davis, County Attorney, and Donald E. Frank, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ.

STREIT, J.

Defendant appeals his conviction and sentence for first-degree robbery, first-degree burglary and second-degree theft. He contends he was denied his Sixth Amendment right to confront and cross-examine witnesses when a witness testified about a co-defendant's confession. He also claims ineffective assistance of counsel and abuse of discretion by the trial court in ordering consecutive sentences. We affirm.

Richard Hoon, Jr., was identified by Timothy Caskey as one of three individuals involved in breaking and entering into the home of an eighty-eight year old woman and robbing her at gunpoint. Caskey identified Hoon as a co-defendant while making a confession to police regarding his own involvement in the crimes. Hoon was charged as a co-defendant for first-degree robbery, first-degree burglary and second-degree theft based on that confession.

Before trial, Hoon filed a motion in limine requesting the State be estopped from calling Caskey as a witness or offering into evidence any statement made by Caskey to the police that would identify Hoon as a perpetrator of the crimes. Hoon also filed a motion to sever. Hoon withdrew his motions shortly before trial. The State agreed to not play Caskey's taped confession at trial or mention Hoon's name in testimony about Caskey's confession. Hoon agreed the State could indicate there were three people involved in the crime and Caskey named David Carney as one of them, but no other names would be mentioned.

At trial, the State had Officer Smith and Officer Thomas tell the jury about Caskey's confession, but did not mention Caskey's naming Hoon as taking part in the crimes. Hoon's defense counsel filed a motion for mistrial. The motion alleged the State had attempted to use Caskey's confession to identify Hoon indirectly through witness testimony that was hearsay. The court overruled the motion. Defense counsel also launched an objection to the jury instructions presented by the court. He requested an instruction that would require the jury to find corroboration through other sources in order to convict Hoon. The jury could not rely solely upon Caskey's confession. The trial court denied the request.

The jury found Hoon guilty of all charges. Hoon filed a motion for new trial based on the State's breach of agreement not to identify Hoon through Caskey's confession. The motion was overruled because the testimony of Caskey's confession did not mention Hoon. There was independent evidence based on the victim's testimony to implicate Hoon regarding his involvement with the crimes. Another witness also identified Hoon as one of the three persons with Caskey the evening before the robbery and burglary took place. Hoon was sentenced on all three charges, to be served consecutively.

Hoon appeals. He contends: (1) that even though the State did not play Caskey's taped confession in court he was denied his right to confront and cross-examine the witnesses against him; (2) if the court finds defense counsel failed to

preserve his Sixth Amendment right issue for appeal, then counsel was ineffective; and (3) the district court abused its discretion for failure to adequately state the reasons for consecutive sentences.

I. Hearsay Evidence. Hoon claims he was denied a fair trial because he was not given an opportunity to confront the witnesses against him, a right guaranteed by the Iowa Constitution, article I, section 10, and by the Sixth Amendment to the United States Constitution. He contends the State offered Caskey's confession to identify Hoon as one of the perpetrators of the robbery, burglary, and theft through the combined testimony of the police detectives' testimony who investigated the crimes and Caskey's girlfriends' testimony at trial. Specifically, Hoon objects to the police detectives' testimony that Caskey told them he and the two other people who were involved in the robbery were down on the levy along with Caskey's girlfriend the afternoon prior to the robbery. Caskey's girlfriend then testified that Hoon was down on the levy that evening with Caskey and Carney. Further, the prosecutor had indicated during opening statement that Hoon was with Caskey at the levy that evening.

The United States Supreme Court held a defendant is deprived of his confrontation rights when the confession of a nontestifying co-defendant implicates the defendant, even if the jury is instructed not to use the confession against the defendant. *Bruton v. United States*, 391 U.S. 123, 167-68, 88 S. Ct. 1620, 1628, 20 L. Ed. 2d 476, 485 (1968). Defendant argues that Caskey's confession clearly implicated him and the

court gave no limiting instruction directing the jury to use the confession solely against Caskey. *See Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 1709, 95 L. Ed. 2d 176, 187 (1987). We do not reach this question whether Caskey's confession was used to implicate Hoon in the crimes because Hoon did not raise at trial the constitutional grounds he seeks to assert here. *See State v. Howard*, 509 N.W.2d 764, 769 (Iowa 1993); *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982).

Although, defendant's counsel raised a motion for mistrial based on hearsay, the objection is too broad to raise the issue of constitutional right of confrontation. *Id.* Furthermore, the objections to jury instructions by defendant's counsel that Hoon is entitled to some instruction regarding the use by the jury of Caskey's confession dealt more with the logistics of finding Hoon's guilt and not the use of the confession itself. Objections to evidence must be sufficiently specific to inform the trial court of the basis for objecting. *Farni*, 325 N.W.2d at 109. These objections failed to meet this standard. The trial court ruled on the objections as they were made. Nothing more was required of the court. *Id.*; *State v. Taylor*, 310 N.W.2d 174, 177 (Iowa 1981); *State v. Fowler*, 248 N.W.2d 511 (Iowa 1976).

II. Ineffective Assistance of Counsel. Failure to preserve error at the trial level entitles Hoon to assert a claim of ineffective assistance of counsel. *State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992). In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d

130, 131 (Iowa 1987). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick*, 480 N.W.2d at 56. Such claims may be decided on direct appeal, however, if the defendant fails to show one of the two prongs. *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995); *State v. O'Donnell*, 533 N.W.2d 576, 579 (Iowa App. 1995).

We find that Hoon's trial counsel failed to perform an essential duty in failing to make proper objection to the testimony of the police detectives along with Caskey's girlfriend's testimony based on right of confrontation. Although the remedies sought by counsel speak of the objection based on the Sixth Amendment, error was not preserved.

Next, the defendant must show that counsel's failure to perform an essential duty resulted in prejudice. *Taylor*, 352 N.W.2d at 685. The State conceded at oral argument there was a reasonable probability the verdict for theft would be found different from the crimes of burglary and robbery. Therefore, we reverse the defendant's conviction on theft charges in violation of Iowa Code section 711.2(2).

Despite the fact that error was not properly preserved with respect to the testimony given by the police detectives--as is normally required before we will reach the merits of an asserted error--we conclude that there was no prejudice entitling Hoon to a new trial on the robbery and burglary charges. There was enough other evidence in the record that would convict Hoon of these crimes.

III. Consecutive Sentences. Hoon was found guilty of two separate crimes--first-degree robbery under sections 711.1 and 711.2 of the Iowa Code and first-degree burglary under Iowa Code sections 713.1 and 713.3. Hoon contends the trial court did not adequately state reasons for ordering consecutive sentences. Scope of review is for errors at law. Iowa R. App. P. 4.

Iowa rule of criminal procedure 22(3)(d) requires the trial court to state on the record its reason for selecting the particular sentence. Iowa R. Crim. P. 22(3)(d). We believe the court's statements at sentencing more than adequately stated its reasons for the consecutive sentences.[1] Further, there is no indication that the legislature intended to prohibit multiple enhancement penalties for these crimes. *See* Iowa Code §§ 711.2, 713.3. Therefore, we conclude the court may impose sentences to be served consecutively on the robbery and burglary convictions.

AFFIRMED.

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[1] The court stated three reasons for consecutive sentences rather than concurrent. The reasons included: (1) the defendant's lengthy criminal history; (2) the circumstances of the offenses and what the victim went through; and (3) the need to protect the public from that type of activity.