IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0575

STATE OF IOWA,
Plaintiff-Appellee,

vs.

K'VON JAMES HENDERSON,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE GEORGE STIGLER, JUDGE

APPELLEE'S BRIEF

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CERTIFICATE OF SERVICE

On the 27th day of April, 2017, the State served the within Appellee's Brief and Argument on all other parties to this appeal by e-mailing one copy thereof to the respective counsel for said parties and by mailing one copy to the *pro se* defendant:

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ROUTING STATEMENT

This case can be decided based on existing legal principles. Transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

K'Von Henderson appeals his conviction for first-degree robbery in Black Hawk County, Iowa. The Honorable George Stigler presided over the proceedings. The issues in the appeal are whether there is sufficient evidence to support a conviction for first-degree robbery, whether counsel was ineffective, and multiple pro se issues.

Course of Proceedings

On February 20, 2015, the Black Hawk County Attorney charged Henderson and co-defendants, Myles Anderson, Riley Mallett, and Cody Plummer, each with one count of first-degree robbery, a violation of Iowa Code sections 711.1 and 711.2, for their involvement in the robbery of Greenwood Pharmacy on February 10. 2015. Trial Information (FECR 204131); App. 5.

Trial in the case began on November 24, 2015, but ended in a mistrial on December 2, 2015. Order (12/2/15); App. 19. The retrial started on February 9, 2016, and ended on February 17, 2016, with a

verdict of guilty on first-degree robbery. Trial Memorandum (2/18/16); App. 112-13. On March 24, 2017, the district court sentenced Henderson to a twenty-five year sentence with a seventy percent mandatory minimum sentence. Judg. and Sent. (3/24/16); App. 142-44. This appeal follows. Not. Of Appeal (3/30/16); App. 146.

Facts

Shortly before nine p.m. on February 10, 2015, just before the Greenwood Pharmacy in Waterloo closed for the evening, two masked men entered the store to steal money and drugs. Both appeared to be wielding handguns.

The Plan

The robbers –Henderson, Riley Mallett, Cody Plummer, Myles Anderson, and Dayton Nelson assembled at Plummer's house on February 9th to plan the Greenwood Pharmacy robbery. Tr. Vol. 3, p. 305, line 8 through p. 311, line 3. Mallett came up with the idea to rob the pharmacy and all the men agreed to participate. Tr. Vol. 3, p. 311, line 4 through p. 312, line 6. The plan was for Anderson and Mallett to rob the pharmacy. Tr. Vol. 3, p. 312, line 7 through p. 313, line 7. About ninety minutes before the robbery, that plan changed

when Anderson backed out and Plummer replaced him. Tr. Vol. 3, p. 312, line 7 through p. 313, line 7.

Nelson and Henderson were the getaway drivers; Henderson drove a white Alero to a designated location while Nelson waited in Mallett's black BMW near the pharmacy so Plummer and Mallett could drop off the drugs and cash in the trunk and then meet Henderson at his designated spot. Tr. Vol. 3 p. 315, lines 5-15, p. 324, line 5 through p. 326, line 25.

Prior to the robbery, Nelson drove Mallett's black BMW to the pharmacy with Anderson in the passenger seat. Tr. Vol. 3, p. 320, lines 8-18. Mallett and Plummer were also in the car and when they got out of the vehicle, Anderson gave Mallett or Plummer his gun that he named "Billy" to use in the robbery. Trial Tr. Vol. 3, p. 321, line 15 through p. 322, line 20. Mallett was also wearing distinctive pants; they were black with white stars on them. Trial Tr. Vol. 3, p. 317, lines 14-20.

The Robbery

Marcie Mangin, a clerk at Greenwood Pharmacy, went outside to warm up her car before the pharmacy closed because it was cold outside. Tr. Vol. 2, p. 46, line 25 through p. 47, line 9. When she was

outside, she noticed two men standing outside the pharmacy shortly before the robbers burst through the door. Tr. Vol. 2, p. 46, line 25 through p. 47, line 13. One of the men was wearing "clown pants" with "stars on them." Tr. Vol. 2, p. 47, line 10 through p. 48, line 2. As she re-entered the pharmacy to finish her duties associated with closing the pharmacy, the two men ran in with "masks on and guns." Tr. Vol. 2, p. 50, line 2 through p. 51, line 12. One man ran to the back where the pharmacy was located and the other stayed in front where Mangin was standing next to a cash register. Tr. Vol. 2, p. 50, line 2 through p. 51, line 12.

Mangin asked the masked robber closest to her if he wanted the money in the register and he said, "yes." Tr. Vol. 2, p. 51, line 13 through p.53, ln.8. She gave him all the money that was in the cash register which she estimated to be around $70. Tr. Vol. 2, p. 51, line 13 through p. 52, line 23. The man marched her to the back of the pharmacy, where Mangin watched the other robber demanding drugs from the pharmacist, Wes Pilkington, at gunpoint. Tr. Vol. 2 p. 54, line 20 through p.61, line 14. That gunman was wearing "the flappy clown pants" that Mangin noticed moments earlier. Tr. Vol.2 p.53, line 9 through p.54, line 19; State's Ex. E. Mangin said that the man

who robbed her was using a gun that might not have been real; it had "a little orange around it." Tr. Vol. 2, p.76, ln.2 through p.78, ln.5.

Wes Pilkington, the pharmacist, testified that when the robbers entered, one of them "ran back to the pharmacy" where he was working. Tr. Vol. 2 p.95, line 24 through p.96, line 16. That robber handed Pilkington a note that said "Give All the pain pill All the xannex and all Promethazine codeien before I Shoot this bitch up." Tr. Vol. 2 p.96, line 22 through p. 98, line 10; State's Ex. A-15, AA; App. 117-19. That was accompanied by verbal statements, "continually saying that he was gonna shoot this bitch up." Tr. Vol. 2 p. 98, lines 11–19. The robber had a gun that "definitely looked metal" and "looked like a weapon that a police would have." Tr. Vol. 2, p. 98, line 20 through p.100, line 1. The robber "directed [Pilkington] around the store by pointing the gun at [his] head," and specifically directed him to the "Promethazine cough syrup" and Xanax. Tr. Vol. 2 p.101,line 8 through p.104, line 11 , p.107, line 4 through p.108, line 20. After that, the robber started grabbing an assortment of medications, including "generic Fioricet," which is packaged in bottles that look like bottles used for hydrocodone. Tr. Vol. 2 p.108, line 21 through p.109, line 11.

As Pilkington was being directed around the store, he was about a foot away from the robber. Tr. Vol. 2, p. 104, line 12 through p. 105, line 9. Though the robber was wearing a mask, Pilkington said he focused on "his eyes and the top of his nose," along with his skin tone, height, and build. Tr. Vol. 2, p. 104, line 12 through p.105, line 9. At trial, Pilkington identified Riley Mallett as the man who robbed him at gunpoint. Tr. Vol. 2, p.105, line 10 through p.106, line 14, p.149,line 5 through p.150,line 13. Pilkington also confirmed that the gunman was wearing the same unique pants that Mangin described. Tr. Vol. 2, p.100, line 16 line p.101, line 13, p.106, lines 15–20.

A camera at the pharmacy caught the robbery on video. *See* Tr. Vol. 2, p.114, line 18 through p.120, line 10; State's Ex. MM. Pharmacy techs Stephan Burk and Diana Petersen were in the back of the pharmacy when the robbery occurred. Tr. Vol. 4, p.673, line 12 through p.681, line 21; p.699, line 7 through p.708, line 12. Petersen managed to activate the silent alarm. Tr. Vol. 4, p.706, lines 8–23. After the robbers left the pharmacy, she "dialed 911 right away and told them [they'd] been robbed." Tr. Vol. 4, p. 709, lines 9–21. Police officers arrived at the pharmacy shortly thereafter, and the pharmacy

employees told them what happened. Trial Tr. Vol. 2, p.65, line 22 through p.66, line 13; Vol.4 p. 709, line 13 through p.710, line 6.

The Search/Investigation

Several police officers responded to the report of the robbery. Tr. Vol. 2, p. 161, line 10 through p. 162, line 20. Police officers in the area "were told that an officer had seen an individual running from the area of the Greenwood Pharmacy," so they began patrolling the area. Tr. Vol. 2, p.161, line19 through p. 162, line 11.

Officers saw Mallett fleeing, and tracked him through the snow. One officer saw the tracks end near a treehouse; Mallett was found hiding inside that treehouse. Tr. Vol. 4, p.497, line 19 through p. 498, line 21, p.632, ln.13 through p.636, line 16. Officers found Mallett's unique pants lying on the ground, about ten to fifteen feet away. Tr. Vol. 3 p.468, line 3 through p.471, line 23. Other clothing that he had worn during the robbery was also found nearby. Tr. Vol. 2, p.204, line 19 through p.206, line 9; Vol. 4, p.636, line 19 through p.639, line 22.

When Mallett was found, he was wearing shorts despite the fact it was cold out and there was snow on the ground. Tr. Vol. 2, p.235, lines 4–24. After his arrest, Investigator Zubak asked Mallett what he was doing.

> [I]nitially he told me that he was jogging and that he saw cops, so he started running from the cops and when I asked him why he was running from the cops, he said that he was running because he was black and that cops are out to get him.

Tr. Vol. 2, p.235, line 25 through p.237, line 5. Later, Mallett said he had been "a lookout for the robbery." Tr. Vol. 2, p.237, line 14 through p. 238, line 15.

Officers also found Plummer fleeing from the scene on foot. Tr. Vol. 3, p. 431, line 1 through p.436, line 22, p.480, line 8 through p.483, line 5. He was taken into custody. Tr. Vol. 3, p.493, line 2 through p. 497, line 5.

In his post-arrest interview, Cody Plummer accurately described what had occurred during the robbery, including the clothing that he had been wearing. Tr. Vol. 2, p.169, line 2 through p.175, line 11; p.184, line 25 through p.187, line 19. He admitted to robbing Marcie Mangin at the front of the pharmacy. Tr. Vol. 2, p.171, line 1 through p.172, line 18. He said that after he ran out the back door of the pharmacy with stolen money and drugs, he ran to "a car that was waiting" and threw the loot "into the back of the trunk of the car." Tr. Vol. 2, p.174, line 13 through p. 175, line 11.

Later, Nelson and Anderson met up with Henderson at Plummer's house, but they did not know where Mallett and Plummer were. Tr. Vol. 3, p. 327, line 13 through p. 329, line 18. Nelson and Anderson abandoned the BMW, and all three of them went back to Nelson's house in the white Alero with the proceeds from the robbery. Tr. Vol. 3, p.329, line 19 through p. 332, line 24, p.343, line 19 through p. 344, line 16.

Police went to Nelson's residence and knocked on the door. Tr. Vol. 3, p. 517, line 5 through p. 518, line 14. Henderson and Dayton Nelson answered the door. Tr. Vol. 3, p. 518, lines 2-14. When the door opened, two dogs ran out and Henderson and Nelson followed the dogs outside. Tr. Vol. 3, p. 518, lines 12-24. Officers were unsure if the men were trying to run away or simply get the dogs. Tr. Vol. 3, p. 518, lines 12-24. As Henderson ran, he fell on the ice and his phone fell out of his pocket which officers seized. Tr. Vol. 3, p. 518, line 25 through p. 519, line 13. Officers detained Henderson, searched his pockets and found tinfoil wadded up in his pocket. Tr. Vol. 3, p. 519, line 12 through p. 520, line 12, Exh. O. The tinfoil contained green pills later identified as Alprazolam or Xanax. Tr. Vol. 3, p. 520, lines 11-15, p. 521, lines 6-9.

Investigators also searched Nelson's residence and found some of the medication that had been stolen from the pharmacy. Tr. Vol. 2 p.245, line 7 through p. 252, line 23, Tr.3 p.272, line 15 through p.274, line 13. Pilkington confirmed that bottles of Promethazine, Alprazolam (Xanax), Butalbital, Acetaminophen, Ranitidine, and Kayexalate that were found in Nelson's residence matched up with the medications that had been stolen from Greenwood Pharmacy, including wholesaler/distributor identifiers and the pharmacy-specific store number. Tr. Vol. 2, p.120, line 11 through p.131, line 12; State's Ex. BB, EE, GG, HH, II, JJ, KK, LL.

Officers questioned Henderson about his involvement in the robbery. Tr. Vol. 4, p. 540, line 10 through p. 541, line 25. Henderson initially claimed he did not leave Dayton Nelson's home the entire night. Tr. Vol. 4, p. 540, line 10 through p. 541, line 25. He then changed his story and said he was driving around. Tr. Vol. 4, p. 542, lines 9-16. He also acknowledged that he knew about the robbery before police arrived at Nelson's house. Tr. Vol. 4, p. 552, lines 10-13.

Cell phone records indicated there were several phone calls between Mallett, Plummer, and Henderson around the time when the robbery occurred. Tr. Vol. 2, p.222, line 8 through p.223, line 7, Vol.

3, p.277, line 6 through p.278, line 17, Vol. 4, p.646, line 25 through p.651, line 14, State's Exhs. TT, UU; App. 120-41.

Additional facts will be discussed below where relevant.

ARGUMENT

I. Sufficient Evidence Exists in the Record to Support the Defendant's First-Degree Robbery Conviction.

Preservation of Error

The State does not agree Henderson preserved error on his sufficiency challenge. At the close of the State's case, defense counsel argued:

> At this time Mr. Henderson motions for judgment of acquittal or directed verdict. We understand the standard is evidence viewed in the light most favorable to the State. However, given this record and the facts presented, the testimony presented in the light most favorable to the State, the only way Mr. Henderson is connected in all this through a theory of aiding and abetting and abetting or joint criminal conduct is through the testimony of Dayton Nelson. I think the Court can find that Dayton Nelson was an accomplice and therefore his testimony will need to be corroborated. We do acknowledge the corroboration does not have to be strong, but it has to be there. Mr. Nelson has his own issues with his credibility, but given viewed in the light most favorable to the State, I won't address those at this time. The argument is, Judge, that there is simply no corroboration of Mr. Nelson's testimony. Therefore, there is no jury question presented and we'd ask the Court to dismiss the charge of Robbery in the First Degree against Mr. Henderson as a matter of law.

Trial Tr. p. 722, line 15 through p. 723, line 9. At no point did Henderson allege then, as he does now, that he knew that a gun would be involved in the robbery. Def. Brief at 7-8. According to Henderson, "trial counsel's motion can be read as a blanket argument rejecting all elements of the offense." Def. Brief at 7. This claim lacks merit.

"The doctrine of error preservation has two components—a substantive component and a timeliness component." *State v. Krogmann,* 804 N.W.2d 518, 523 (Iowa 2011) (holding a one-page resistance that stated there was no legal basis for the State's actions did not properly preserve error with respect to the defendant's constitutional claims). To preserve error on appeal, the party must first state the objection in a timely manner, that is, at a time when corrective action can be taken, in addition to the basis for the objection. *Id.* at 524; *State v. Osterkamp*, 847 N.W.2d 612 (Iowa Ct. App. 2014). Because Henderson failed to timely or substantively allege that the evidence did not establish he knew a gun would be involved in the robbery, he did not preserve error on this claim.

Henderson alternatively argues that counsel was ineffective in failing to challenge the State's evidence in this regard. The State does

not contest error preservation on the ineffective assistance challenge. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (ineffective assistance of counsel is an exception to the general rule of error preservation).

Standard of Review

An appellate court reviews challenges to the sufficiency of the evidence for correction of errors at law. *State v. Edouard,* 854 N.W.2d 421, 431 (Iowa 2014). "In reviewing challenges to the sufficiency of evidence supporting a guilty verdict, courts consider all of the record evidence viewed in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." *State v. Showens,* 845 N.W.2d 436, 439–40 (Iowa 2014). The jury's verdict is binding on appeal unless there is an absence of substantial evidence in the record to sustain it. *State v. Hennings,* 791 N.W.2d 828, 832 (Iowa 2010). "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *State v. Jorgensen,* 758 N.W.2d 830, 834 (Iowa 2008).

An appellate court reviews claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

Merits

Sufficiency

The court instructed the jury that to convict Henderson of first-degree robbery, the State had to show:

> 1. On or about the 10th day of February, the defendant Kvon Henderson, or a person the defendant aided and abetted or engaged in joint criminal conduct, had the specific intent to commit a theft.
>
> 2. To carry out his intention or to assist in escaping from the scene, with or without the stolen property, the defendant, or a person the defendant aided and abetted or engaged in joint criminal conduct, committed an assault on Marcie Mangin or Diane Petersen or Stephen Burk or Wesley Pilkington.
>
> 3. The defendant, or a person the defendant aided and abetted, was armed with a dangerous weapon.
>
> If the State has proved all of the elements, the defendant is guilty of Robbery in the First Degree. If the Stat has proved elements numbers 1 and 2, but not element number 3, the defendant is guilty of Robbery in the Second Degree. If the State has proved only element no. 2, the defendant is guilty of Assault. If the State has proved only element no. 1 or not of the elements, the defendant is not guilty.

Jury Instruction 23; App. 115. In addition, to convict Henderson under a theory of aiding and abetting, "the record must contain

substantial evidence the accused assented to or lent countenance and approval to the criminal act by either actively participating or encouraging it prior to or at the time of its commission." *State v. Ramirez,* 616 N.W.2d 587, 591–92 (Iowa 2000), *overruled on other grounds by State v. Reeves,* 636 N.W.2d 22, 25–26 (Iowa 2001). "Knowledge is essential; however, neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting." *State v. Barnes,* 204 N.W.2d 827, 828 (Iowa 1972). An accused's participation in a crime may be inferred from "presence, companionship, and conduct before and after the offense is committed." *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984). A defendant's participation may, however, be proven by circumstantial evidence. *State v. Doss,* 355 N.W.2d 874, 878 (Iowa 1984).

The jury could reasonably find that on the evening of February 9, 2015, co-defendants and friends K'Von Henderson, Cody Plummer, Riley Mallett, Myles Anderson, and Dayton Nelson assembled at Plummer's house to discuss the Greenwood Pharmacy robbery. Tr. Vol. 3, p. 305, line 8 through p. 312, line 6. Under the original plan, Myles Anderson and Riley Mallett were going to commit the robbery, drop the drugs and money in one car driven by Nelson, and have

Anderson and Mallett run to another location where Henderson would be waiting for them. Tr. Vol. 3, p. 312, line 7 through p. 313, line 7, p. 315, lines 5-15, p. 326,lines 1-25, p. 329, lines 11-18.

The next day, the plan changed slightly when Myles Anderson dropped out of the scheme but Cody Plummer stepped in to replace him in the robbery. Tr. Vol. 3, p. 312, line 7 through p. 313, line 7. Mallett called Henderson and told him about the change in participants. Tr. Vol. 3, p. 313, lines 2-12. Henderson went to his designated spot – the intersection of Midlothian and Prospect – to wait for Plummer and Mallett. Tr. Vol. 3, p. 329, lines 6-18. When Mallett and Plummer did not appear, Henderson met Nelson at Plummer's house. Tr. Vol. 3 p. 327, line 13 through p. 329, line 18. Nelson and Anderson abandoned the BMW, and all three of them went back to Nelson's house in the white Alero with the proceeds from the robbery. Tr. Vol. 2 p.120, line 11 through p.131, line 12, p.245, line 7 through p. 252, line 23, Tr. Vol. 3 p.272, line 15 through p.274, line 13, p.329, line 19 through p. 332, line 24, p.343, line 19 through p. 344, line 16, p. 517, line 5 through p. 520, line 15, p. 521, lines 6-9. Police apprehended them there with the same type of drugs that had been stolen from Greenwood Pharmacy. Tr. Vol. 3 p. 327,

line 13 through p. 329, line 18. Without question, Henderson lent countenance to the robbery.

Henderson argues that the State failed to show that he knew a gun would be used in the robbery. Def. Brief at 9. He notes that the co-defendants decided during the February 9th meeting, "that a gun would not be involved." Def. Brief at 9. His claim is unavailing.

The "guilt of a person charged with aiding and abetting must be determined upon the facts which show [the person's] part in the crime and does not depend upon another's degree of guilt." *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (citing *State v. Fetters*, 202 N.W.2d 84, 90 (Iowa 1972). Contrary to Henderson's claim, the issue is not whether he knew a gun would be used in the robbery to establish his guilt but whether it was foreseeable that a gun would be used in the robbery. "Direct and circumstantial evidence are equally probative." Iowa R. App. P. 6.904(3)(p); *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). There is ample circumstantial evidence that he knew a gun would be used.

When the co-defendants planned the robbery, the young men agreed that Riley Mallett and Myles Anderson would enter the pharmacy. Tr. Vol. 3, p. 312, line 7 through p. 313, line 7. Everyone in

the group knew that Anderson had a gun he called "Billy" that he obtained in a previous burglary. Tr. Vol. 3, p. 319, lines 7-19, p. 358, lines 2-3, Vol. 4, p. 620, lines 8-23. It makes little sense that the young men would plan a robbery at a pharmacy with four employees present and not have a weapon with them when one was readily available. Additionally, the fact that Cody Plummer substituted for Myles Anderson on the actual day of the crime does not negate the fact that the men had a weapon available to them. Nelson testified that Anderson handed "Billy" over to Mallett and Plummer when the two were dropped off at the pharmacy. Tr. Vol. 3, p. 319, line 17 through p. 322, line 3. Even though Henderson had already driven to his designated spot, the jury could reasonably infer that if Anderson was involved with the robbery, a weapon would be used. Finally, even though Dayton Nelson testified that the co-defendants did not intend to use a weapon, the jury did not have to believe that portion of his testimony. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (the jury was free to believe any part or all of a witness's testimony and give weight to the evidence as it deems fit). This is especially true given that Nelson, a friend of the co-defendants, would try minimize his friends' actions. Tr. Vol. 3, p. 302, line 6 through p. 303, line 7.

Because the young men brought a weapon to the pharmacy, brandished the weapon, and put it to the head of the pharmacist, it would be reasonable for Henderson to anticipate that a weapon would be used. The evidence supports the jury's verdict.

Ineffective Assistance of Counsel

If this claim was not properly preserved, Henderson alternatively argues counsel was ineffective in failing to preserve the issue. The problem for Henderson is that aside from setting forth the law with regard to ineffective assistance of counsel, he makes no argument as to the breach of duty or prejudice. Def. Brief at 8-9. This failure should be deemed a waiver of the claim on appeal. *State v. Cooley*, 608 N.W.2d 9, 13 (Iowa 2000) (failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed a waiver of that issue); Iowa R. App. P. 6. 903(2)(g) (3).

Should the court choose to address the claim, Henderson cannot demonstrate counsel's ineffectiveness. To prove counsel was ineffective, Henderson must show: (1) trial counsel failed to perform an essential duty; and (2) prejudice resulted from the error. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. McPhillips*,

580 N.W.2d 748, 754 (Iowa 1998). The Court can affirm on appeal if either element is absent. *McPhillips,* 580 N.W.2d at 754.

Counsel did not breach an essential duty in failing to challenge the sufficiency of the evidence. To prove the first prong of an ineffective assistance of counsel claim, Henderson must prove counsel's performance was not within the normal range of competence. *Id.* The court presumes counsel is competent. *State v. Spurgeon*, 533 N.W.2d 218, 219 (Iowa 1995). Henderson "must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency." *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). On this record he cannot do so.

"When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Henderson must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* Because Henderson did not argue this claim, he has not established a breach.

Additionally, even if he had alleged counsel breached a duty, the record demonstrates that trial counsel determined that the best way to challenge the State's evidence was to argue that Dayton Nelson was an accomplice and argue that the State failed to corroborate Nelson's testimony. Tr. Vol. 4, p. 722, line 15 through p. 723, line 9. This was a reasonable, albeit unsuccessful, trial strategy. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) (citing *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 2006) (improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel). Counsel breached no duty.

Henderson must also demonstrate prejudice. To do so, he must show that had counsel challenged the sufficiency of the evidence as to his lack of knowledge that a weapon would be used during the robbery, the court would have granted the motion, and he would not have been convicted of first-degree robbery. On this record, he cannot do so.

The State had a strong case against Henderson and his co-defendants. Dayton Henderson, one of the co-defendants, testified about how the men planned the robbery, who would actually rob the pharmacy, who would act as the getaway drivers, how the proceeds

would be distributed, the cars that were used, and how Anderson provided the gun to Mallett and Plummer. Tr. Vol. 3, p. 305, line 8 through p. 329, line 18. In addition, the pharmacist Wes Pilkington identified Mallett as the robber who wore the distinctive "clown pants" and threatened him with a gun. Tr. Vol. 2, p. 95, line 24 through p. 106, line 4. Officers recovered cash and the same type of drugs stolen from the robbery in the home of Nelson hours after the robbery along with Henderson who went there after the robbery. Tr. Vol. 3, p. 330, line 2 through p. 332, line 24. Officers also found the same type of drugs (Xanax) that were stolen from the pharmacy in Henderson's pocket hours after the robbery occurred. Tr. Vol. 2, p. 120, line 11 through p. 131, line 12, Vol. 3, p. 519, line 12 through p. 520, line 12. In light of this evidence, there is no reasonable probability of a different outcome at trial.

II. The Defendant's Pro Se Challenges to the Sufficiency of the Evidence Lack Merit.

Preservation of Error:

In his pro se brief, Henderson raises two issues. One was not properly preserved and should not be considered. That is, Henderson contends his due process and equal protection rights were violated because there was insufficient evidence to convict him of robbery.

That is, he argues that "there was no evidence in light most favorable to the state of a dangerous weapon to constitute the charge." Pro Se Brief at 7. As set forth above, and incorporated herein, this challenge has not been preserved. Tr. Vol. 4, p. 722, line 15 through p. 723, line 9. At no point did defense counsel challenge the State's evidence with regard to a weapon when he moved for judgment of acquittal. *Krogmann*, 804 N.W.2d 518, 523-24 (Iowa 2011). This claim is unpreserved.

As to his claim that there was insufficient evidence to corroborate the testimony of the accomplice, Dayton Nelson, the State agrees that error was preserved. Tr. Vol. 4, p. 722, line 15 through p. 723, line 9.

Standard of Review

An appellate court reviews challenges to the sufficiency of the evidence for correction of errors at law. *Edouard,* 854 N.W.2d at 431.

Merits

A. Sufficiency

One of Henderson's pro se sufficiency challenges focuses on whether the gun used in the robbery was a "dangerous" weapon. Def. Brief at 7. The jury was instructed on what constitutes a dangerous weapon in instruction 27 as:

> any device or instrument designed primarily for use in inflicting death or injury, and when used in its designed manner is capable of inflicting death. It is also any sort of instrument or device which is actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is capable of inflicting death.

Jury Instr. 27; App. 116. The testimony of Wes Pilkington established that a dangerous weapon was used during the commission of the robbery. Pilkington testified that during the robbery, one of the robbers ran to the rear of the pharmacy where the drugs were located and handed him a note that said he wanted pain pills, Xanax, and Promethazine codeine "before I shoot this bitch up." Tr. Vol. 2, p. 96, line 22- p. 98, line 10, Exhs. A-15, AA. Pilkington believed it was real. Tr. Vol. 2, p. 98, line 20 through p. 100, line 1. He described it as looking like a "police weapon." Tr. Vol. 2, p. 98, line 20 through p. 100, line 1. The robber pointed the gun at Pilkington's head and directed the pharmacist to the drugs he wanted. Tr. Vol. 2, p. 101, line 8 through p. 104, line 11, p. 107, line 7 through p. 108, line 20. When one points a weapon that appears to be real at the head of a person during the course of a robbery and threatens to "shoot this bitch up," the evidence establishes a dangerous weapon was used.

B. Corroboration of Accomplice Testimony.

Next, Henderson alleges that the court erred in submitting this case to the jury because there was insufficient evidence to corroborate the testimony of the accomplice, Dayton Nelson. Pro Se Brief at 9. Again, Henderson's claim lacks merit.

Iowa Rule of Criminal Procedure 2.21(3) provides that a person may not be convicted "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 offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Corroborative evidence need not be strong nor confirm every material fact. *State v. Berney*, 378 N.W.2d 915, 918 (Iowa 1985). And it need not confirm all the elements of the crime charged. *State v. Cuevas*, 282 N.W.2d 74, 78 (Iowa 1979). Such evidence may be direct or circumstantial. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). Any corroborative evidence tending to connect the defendant to the commission of the crime supports the credibility of the accomplice and is sufficient. *State v. Vesey*, 241 N.W.2d 888, 890 (Iowa 1976). The only requirement is that the accomplice's testimony be supported

in some material fact tending to connect the defendant to the crime charged. *State v. Aldape*, 307 N.W.2d 32, 41 (Iowa 1981). It must be inculpatory but need not be entirely inconsistent with innocence. *State v. Larson*, 512 N.W.2d 803, 806 (Iowa Ct. App. 1993).

The corroboration requirement serves two purposes: "First, it independently tends to connect defendant to the crime. Second, it supports the credibility of an accomplice whose motives are clearly suspect because of the accomplice's self-interest in focusing blame on the defendant." *State v. Brown*, 397 N.W.2d 689, 694 (Iowa 1986). The existence of corroborative evidence is a question of law for the court, but its sufficiency is a question of fact for the fact finder. *Bugely*, 562 N.W.2d at 176. Each case must be governed by its own circumstances, and evidence that merely raises a suspicion the accused is the guilty party is not sufficiently corroborative of the testimony of an accomplice to warrant a conviction. *State v. Gillespie*, 503 N.W.2d 612, 617 (Iowa Ct. App. 1993). There was ample evidence to corroborate the testimony of Dayton Nelson.

For example, Nelson testified that he, Henderson, Myles Anderson, Cody Plummer, and Riley Mallett assembled at Plummer's house on February 9, 2015 to plan the robbery. Tr. Vol. 3, p. 305, line

8 through p. 311, line 3. Delila Salman, Plummer's girlfriend, testified that the five men were at Plummer's residence on February 9, 2015, and they were all together on February 10, 2015, after five p.m. Tr. Vol. 4, p. 614, line 17 through p. 616, line 2. These dates and times correspond with the planning and preparation of the robbery.

Dayton Nelson testified that Riley Mallett called Henderson before the robbery to tell him that Myles Anderson was out and that Cody Plummer was going to replace him in the robbery. Tr. Vol. 3, p. 313, lines 2-12. The Waterloo police obtained phone records for Henderson, Mallett, Plummer, Nelson, and Anderson. Exh. TT; App. 120-29. These phone records confirm a series of calls between Mallett and Henderson between 8:15 and 8:45 p.m. the evening of the robbery. Exh. TT; App. 120-29.

Finally, Nelson testified that after the robbery, the plan was for the robbers to drop the money and drugs in the back of the car he was driving and that Mallett and Plummer would go to where Henderson was waiting for them. Tr. Vol. 3, p. 312, line 7 through p. 313, line 7, p. 315, lines 5-15, p. 326,lines 1-25, p. 329, lines 11-18.

Nelson eventually went to his house, removed the drugs, cough syrup, and hid them in his basement. Tr. Vol. 3, p. 331, line 9 through

p. 333, line 2. Because Waterloo police apprehended Mallett and Plummer, Nelson split the drugs stolen in the robbery with Anderson and Henderson. Tr. Vol. 3, p. 344, lines 4-20.

When officers arrived at Nelson's house with a search warrant, Henderson and Nelson were both present. Tr. Vol. 2, p. 245, lines 7-10, Vol. 3, p. 517, line 5 through p. 518, line 14. The officers searched Henderson and found tinfoil in his pocket with eleven green pills determined to be Alprazolam or Xanax, the same drug stolen in the robbery. Tr. Vol. 3, p. 519, line 12 through p. 520, line 15, p. 521, lines 6-9, Exh. O.

Finally, Nelson testified that Henderson drove an Alero to his designated spot to wait for Mallett and Plummer. Tr. Vol. 3, p.315, lines 5-7, Vol. 4, p. 553, lines 3-9. Officers found the Alero at Nelson's house and searched it. Tr. Vol. 2, p. 193, line 12 through p. 196, line 3. Inside the Alero, officers found a black bag that was similar to what was used in the robbery. Tr. Vol. 2, p. 193, line 12 through p. 196, line 3. All of these facts corroborate Nelson's testimony that Henderson was involved in the robbery. Henderson's claim must be rejected.

III. The Defendant Cannot Demonstrate a Constitutional Violation Based Upon His Claim That Jury Voir Dire Was "Waived."

Preservation of Error

The State does not agree error was preserved. Henderson alleges his:

> Right to an impartial Jury has [sic] violated because the trial courts filed to conduct a proper Voir Dire into matters of prejudice, that are non waiverable due to the nature of the crime. Based on two grounds. The first ground because there was interracial violence and the second ground, the level of television exposure to media coverage due to a mistrial on December 2[,] 2015.

Pro Se Brief at 14. This claim is erroneous.

Henderson is incorrect in his belief that voir dire did not occur in this case. Henderson, through counsel, waived the reporting of voir dire. Order (11/24/15); App. 15. Because he waived reporting of voir dire, he cannot now claim that no voir dire occurred or that there was a problem during the jury selection process. Iowa R. App. P. 6.803(1) (the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion). By waiving the reporting of voir dire, he has not provided the court with a record of the alleged error. Additionally, in the trial transcript, the court noted "we have just selected the jury." Trial Tr. p. 2, lines 5-12. If the

parties selected a jury, voir dire occurred. Thus, there is nothing for this court to review.

IV. The Defendant Has Failed to Articulate How His Right of Confrontation Was Violated.

In his pro se brief, Henderson asserts he was denied his right to confront witnesses. Pro Se Brief at 16-17. The State is unable to respond to this issue because it is unclear exactly what Henderson is arguing. Iowa R. App. P. 6. 903(2)(3) (appellant's brief must include an argument containing the appellant's contentions and reasons for them with citations to the authorities relied on and references to the pertinent parts of the record in accordance with rule 6.904(4)). This claim cannot be considered.

V. Trial Counsel Effectively Represented the Defendant.

Preservation of Error

The State does not contest error preservation. *Ondayog*, 722 N.W.2d at 784.

Standard of Review

An appellate court reviews claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012).

Merits

Henderson contends that trial counsel was ineffective in various respects. For example, he argues that (A) counsel should have deposed an accomplice witness, Deon Nelson; (B) counsel was ineffective in filing a motion in limine to prevent the prosecutor from referring to another co-defendant's testimony; (C) counsel was ineffective in failing to object to the criminal history of a non-testifying co-defendant; (D) counsel failed to "make proper voir dire of the issues"; and (E) counsel failed to argue that a weapon was involved in the commission of the robbery and that the weapon was a dangerous weapon.

As set forth above, to establish that counsel was ineffective, Henderson must prove (1) trial counsel failed to perform an essential duty; and (2) prejudice resulted from the error. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Henderson cannot show counsel was ineffective on any of his claims.

A. Deposing Deon Nelson

Henderson initially claims that counsel should have deposed Deon Nelson. He alleges "there was no prior testimony available to

reflect any inconsistencies in the testimony. . . " Pro Se Brief at 19. Henderson's allegation does not demonstrate either a breach of duty or prejudice.

"When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Henderson must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* Henderson has not established what Deon Nelson would have said during the deposition that would have allowed him to be impeached at trial and how that testimony would have affected the outcome of the trial. This perfunctory claim with no analysis does not establish counsel breached a duty. *Id.* Moreover, counsel could have reasonably determined not to depose Deon Nelson because he had nothing to add to the case or his testimony would not have helped Henderson's case. *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel).

Henderson must also demonstrate prejudice. To do so, he must show that had counsel deposed Deon Nelson, counsel would have impeached him, and he would not have been convicted of first-degree robbery. On this record he cannot do so. As set forth above and incorporated by reference herein, the State had a strong case against Henderson given the testimony of the accomplice and all of the evidence that corroborated the accomplice's testimony. This claim must fail.

B. Filing a motion in limine

Henderson also argues that counsel was ineffective in filing a motion in limine that prevented the prosecutor from making references to other co-defendants' testimony. Again, this claim lacks any merit.

Henderson must first show that counsel breached a duty in moving in limine to prevent the prosecutor from referring to statements made by his co-defendants. Tr. Vol. p. 8, lines 8-14. Prior to trial counsel stated:

> . . . Mr. Henderson did file a motion in limine prior to the first trial. I'm renewing that motion. It talks about statements of nontestifying co-defendants alleging Mr. Henderson's knowledge and participation in this robbery. I'm renewing that at this time.

Tr. Vol. 1, p. 8, lines 8-14, Mot. in Limine (11/23/15); App. 13. Counsel's decision in preventing the prosecutor from using the co-defendants' statement was a reasonable trial strategy. *Ledezma*, 626 N.W.2d at 143. Counsel did not want Henderson to be convicted by the statements of his non-testifying co-defendants who could implicate him in the crime. Counsel acted reasonably and in Henderson's best interest. No breach of duty occurred.

Henderson must also demonstrate prejudice. To do so, Henderson must establish that had counsel not sought to prevent the prosecutor from discussing the statements of his co-defendants he would not have been convicted of first-degree robbery. This he cannot do because the State had a strong case against him and additional statements that the jury did not hear would only have cemented the conviction.

C. Criminal History of Myles Anderson

Next, Henderson complains that counsel should have objected to the testimony that Myles Anderson had been involved in a 2014 burglary in Waterloo where multiple guns were stolen and not all were recovered. Tr. Vol. 4, p. 536, lines 1-16. Counsel breached no duty.

Defense counsel raised the matter of the introduction of Anderson's involvement in the 2014 burglary at the pretrial conference before the first trial. 11/13/15 PTC Tr. p. 8, line 13 through p. 12, line 6. Counsel tried to prevent the State from introducing the testimony about Anderson's involvement in the burglary and the weapons. 11/13/15 PTC Tr. p. 8, line 13 through p. 12, line 6. The court limited the State from going into the particulars of the burglary but did allow the State to bring up the fact that Myles Anderson was implicated in the burglary and had access to a weapon. Tr. Vol. 4, p. 536, lines 1-16.

Counsel did what he could to limit the State's use of this testimony incriminating Anderson in the burglary and his access to a weapon. 11/13/15 PTC Tr. p. 8, line 13 through p. 12, line 6; Trial Tr. p. 536, lines 1-16. He acted reasonably in doing what he could to prevent the jury from hearing that Anderson – as one of the co-defendants—had access to a gun. His failure to object at the time the testimony came in was not a breach of duty. Rather, counsel acted proactively in limiting the testimony. Counsel acted within the range of competence given the circumstances.

Henderson must also demonstrate prejudice. To do so, he must show that had counsel objected, the testimony would not have come in and he would not have been convicted of the robbery. This he cannot do because similar evidence was admitted at trial. Dayton Nelson testified that Myles Anderson had a weapon – "Billy" – and Anderson gave the weapon to either Riley Mallett or Cody Plummer for use in the robbery. Trial Tr. Vol. 3, p. 321, line 15 through p. 322, line 20; *State v. Elliott*, 806 N.W.2d 660, 669 (Iowa 2011) (one way to show evidence did not have an impact on the jury's verdict is to show the evidence was merely cumulative). Because sufficiently similar evidence was introduced, Henderson cannot demonstrate prejudice. This claim must fail.

D. Voir Dire

Henderson also contends counsel was ineffective in failing to "make proper voir dire of the issues." Pro Se Brief at 24. Henderson cannot demonstrate either a breach of duty or prejudice. As argued above, it is not enough to simply claim that counsel should have done a better job. *Dunbar,* 515 N.W.2d at 15. Henderson must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed

the outcome. *Id*. Henderson has not established what a "proper voir dire" would be nor has he stated how that would have affected the outcome of his case. His bald assertions that interracial violence and media exposure is not enough to sustain his burden. No breach of duty occurred.

Similarly, Henderson has not even mentioned, let alone argued, how he was prejudiced by this alleged defect. His failure to argue prejudice must be deemed a waiver of the issue. Iowa R. App. P. 6. 903(2)(g)(3). His claim must be rejected.

E. Proof of that a dangerous weapon was used

Finally, Henderson argues that counsel was ineffective in failing to assert that a weapon was used in the offense and that it constituted a dangerous weapon. As with the other claims, this lacks merit.

Henderson cannot demonstrate counsel breached a duty in failing to argue that a weapon was used in this case and that that weapon was a dangerous weapon. Henderson contends, in essence, that because the weapon was never recovered and what was seized was not used in the offense, the State failed to prove its case. Once again, Henderson is incorrect in his assertions.

Even though the weapon Riley Mallett wielded during the robbery was not recovered, there was ample evidence that a dangerous weapon was used in the robbery. Wes Pilkington testified a gun that looked like "a police weapon" was pointed at his head during the robbery as Mallett directed him around the store. Tr. Vol. 2, p.96, line 22 through p.100, line 1. In both a note given to Pilkington and during the course of the robbery, Mallett threatened to "shoot this bitch up." Tr. Vol. 2, p.96, line 22 through p.100, line 1; Exh. AA; App. 119. Dayton Henderson also testified that he dropped off Mallett and Plummer near the pharmacy and after the men got out of the car, Myles Anderson handed them his gun "Billy." Trial Tr. Vol. 3, p. 321, line 15 through p. 322, line 20. Given this testimony which established a dangerous weapon was given to Mallett and Plummer and it was used during the robbery, counsel had no duty to argue that the State's evidence was lacking. *Ledezma*, 626 N.W.2d at 143. If there is no breach of duty, there is no prejudice. All of Henderson's ineffective assistance claims must be rejected.

CONCLUSION

Henderson's conviction for first-degree robbery must be affirmed.

REQUEST FOR NONORAL SUBMISSION

This case involves routine challenges to the sufficiency of the evidence and trial counsel's effectiveness. Oral argument is not necessary to dispose of these claims. In the event argument is scheduled, the State requests to be heard.

Respectfully submitted,

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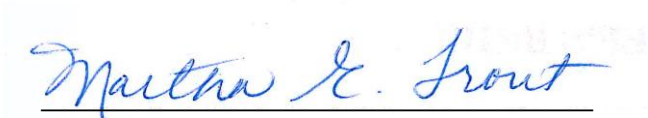
Attorney General of Iowa



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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **8,148** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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