

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. KITT

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STATE OF NEBRASKA, APPELLEE,

V.

WESLEY E. KITT, APPELLANT.

Filed April 17, 2012. No. A-11-629.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge.
Affirmed.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

MOORE, Judge.

INTRODUCTION

Wesley E. Kitt appeals from his convictions and sentences in the district court for Douglas County for robbery, attempted robbery, and two counts of use of a weapon to commit a felony. On appeal, Kitt assigns error to the court's admission of a particular witness' deposition testimony, to the sufficiency of the evidence to support his convictions, and to the imposition of excessive sentences. He also assigns error and asserts that he received ineffective assistance of counsel. Finding no merit to Kitt's assignments of error, we affirm.

BACKGROUND

After a jury trial, Kitt was convicted of robbery, attempted robbery, two counts of use of a deadly weapon to commit a felony, and second degree assault. The district court sentenced him to imprisonment for a total period of 10 to 14 years. After postconviction relief was granted to Kitt, he was given a new direct appeal.

The evidence developed at trial showed that Jamie Hann, formerly known as Jamie Hansen, and her boyfriend, now husband, Jacob Hann, had returned to Jamie's apartment in Omaha, Nebraska, shortly after 1:30 a.m. on June 9, 2007, after going out to a bar. Jamie was driving. The parking lot for the apartment complex in which Jamie lived was full, and Jamie had to park the car in an area that was less well lit than the rest of the parking lot. After Jamie exited the car, a man ran out from a garage area across from where Jamie had parked, stuck a gun in Jamie's face, and told her he wanted money. Jamie was unable to describe her assailant, but she saw a handgun that looked silver to her. She gave him her wallet and identified an exhibit at trial as the wallet that had been taken from her.

After Jamie handed over her wallet, she saw another person run from the middle part of the garages and demand money from Jacob. She could tell this person was male and that he had a black handgun. Jacob appeared confused, and the man who demanded money from Jacob struck him in the head. Jacob fell to the ground, and a few moments later, Jamie observed another vehicle approach and stop very quickly. The driver got out of the vehicle and said, "[P]olice." Jamie observed that he was in uniform, had a "bag," and was carrying a firearm. This individual yelled, "[F]reeze," and the person who had held Jamie at gunpoint swung around and pointed his gun at the officer. The officer started firing, and the two assailants took off running with the officer in pursuit. Jamie ran after them as well and saw the assailants jump into a mid-sized white car. The officer ran back to his vehicle and pursued the assailants, but he returned a short time later. Other police officers arrived on the scene as well.

Jacob testified that as he was getting out of the car, he saw that someone had Jamie at gunpoint. A moment later, he found himself in the same situation. Jacob was able to see that the man assailing Jamie was black and had most of his face covered by a dark-colored bandanna. Jacob's assailant was slightly shorter than Jamie's assailant and perhaps shorter than Jacob himself. Jacob's assailant was wearing a mask and demanded money from Jacob, who refused. The assailant then hit Jacob in the mouth. Jacob pulled out his money clip to show the man that he had no money, which prompted the man to hit him with the pistol. Jacob described the gun carried by his assailant as a black handgun. As a result of the blow, Jacob needed to have eight stitches in his head.

After Jacob fell to the ground, he heard a vehicle stop and then the sound of gunshots. Jacob observed the two assailants run away, so he checked on Jamie to see if she was all right. Jacob said he was intoxicated that night but was not so drunk that he could not get himself out of the car. He did state that parts of the night were hazy because of the time of the assault, the fact that he had been drinking, and the fact that the situation itself felt like a bad dream.

Officer Robert Singley with the Omaha Police Department testified that he was on special assignment detail in the early morning hours of June 9, 2007, because of a rash of strong-armed robberies at some of the larger apartment complexes in northwest Omaha. Singley conducted a traffic stop at a particular intersection at about 1 a.m., where he observed a white Pontiac Grand Am sitting in the left turn lane with its blinker on, but not moving, despite the fact that there was no traffic. Upon contacting the occupants of the car, Singley learned that the driver was Joshua Harrington and the passenger was Kitt. The men told Singley they were looking for a particular apartment complex to visit a friend and were not sure how to get there. Singley ran a background check on the men, and after finding no warrants, he gave them a verbal warning for

impeding traffic, gave them directions, and let them go. We note that the apartment complex the men were seeking directions to was the same complex where Jamie lived and the robbery occurred. Singley identified an exhibit as a photograph of the car he had contacted that night.

Omaha police officer Kevin Vodicka was working off duty as security for the apartment complex in June 2007. Pursuant to police department policy, he was in full uniform, but was driving his own car. His usual schedule was from 10 or 11 p.m. to 12 or 2 a.m. The complex is laid out roughly in a circular pattern, and there is only one entry to the complex. Vodicka would patrol the apartment complex in his car in a counterclockwise direction, watching for signs of criminal activity.

Around 1:30 a.m. on June 9, 2007, Vodicka was patrolling the apartment complex when he observed an older white Grand Am being driven around the parking lot. Initially, he thought that the car might have been trying to get through the parking lot to another apartment complex. According to Vodicka, a lot of people try to do this, not realizing that the road does not go through. Vodicka watched the car for 20 to 25 minutes while continuing to patrol. He observed the car go to all of the dead ends, back up, drive around, park, and back up. Vodicka found the car's activity to be very suspicious.

Vodicka was able to see two individuals in the car and saw the passenger clearly. As Vodicka passed the car, the passenger had the car window rolled down about three-fourths of the way, and he stuck his head out, trying to get a look through Vodicka's car windows. Vodicka testified that he got a pretty good view of the passenger's face from a distance of about 5 to 7 feet and that the passenger gave Vodicka a look "kind of like the evil eye" as he passed the car. Vodicka identified the passenger as Kitt. Vodicka testified that he paid particular attention to Kitt's face when he stuck his head out of the car because of his observations of the car's suspicious activity.

Not long after Vodicka observed the passenger stick his head out of the car window, Vodicka saw the car parked and no one inside the car. On his next lap of the parking lot, Vodicka saw a black man dressed in black clothing hit a white man. Vodicka also observed a woman and third man. Vodicka accelerated to their location to try and stop the assault. He got out of his vehicle, yelled "Omaha Police," and observed one of the assailants holding a silver revolver and wearing a bandanna. The other assailant, the one who had struck the white man, was wearing a bandanna as well but held a black "semi hook" handgun. Vodicka drew his weapon as soon as he got out of his car and told the assailants to drop their weapons. Both assailants ran, and Vodicka pursued the suspect closest to him. Vodicka testified that this individual, the man with the silver revolver, pointed his gun at Vodicka and that Vodicka fired four or five times. Vodicka stopped pursuit, because the individual went around a corner, and returned to check on the male victim who was bleeding profusely from the head. Vodicka heard a car start its engine and ran back around the corner in time to observe the white Grand Am back out and drive off at a high rate of speed. According to Vodicka, he knew that this was the same vehicle he had observed earlier because he saw it leave the same parking spot where he had last observed it. He also recognized the hubcaps on the car, which he had previously observed.

Harrington was called to testify and stated that he resided at "OCC" for a crime he committed involving the robbery and assault of Jamie and Jacob, which he believed occurred on June 9, 2007. When asked if there was an individual with him on that occasion, Harrington stated

he was advised not to testify by his attorney. Harrington stated that he was refusing to answer any questions regarding allegations against Kitt. The district court then asked Harrington whether he would refuse to testify if the State asked him any questions relating to what happened on June 9 or any events that related to Kitt. Harrington responded affirmatively. The court dismissed Harrington and told the jury that when an incarcerated witness refused to testify, that witness' prior testimony which had been recorded could be read and that the court believed the State intended to proceed by reading into evidence Harrington's prior recorded testimony.

At this point, Kitt's counsel objected to Harrington's being declared unavailable as a witness and to the State's being allowed to read Harrington's deposition into the record. He based his objections on Kitt's constitutional right to confront his accusers as well as the constitutional right to cross-examine witnesses testifying against him. The district court overruled Kitt's objection, stated that Harrington had been found unavailable based on his refusal to testify, and stated that Harrington's prior recorded testimony would be allowed because case law specifically permitted such testimony to be read into the record without running afoul of the hearsay rule.

The district court explained to the jury that Kitt's attorney had taken Harrington's deposition prior to trial and that this deposition would now be read to the jury. Harrington's deposition testimony was then read into the record.

At the time of his deposition, Harrington had already pled guilty to attempted robbery and assault of an officer. He stated that he had known Kitt for several years as an acquaintance and that they had played basketball together on youth teams. On the day before the incident, Kitt called Harrington sometime after 11 p.m. Kitt wanted to hang out. Harrington drove his white Pontiac Grand Am to pick up Kitt, which car he described as having tinted windows but that were "legal." Harrington and Kitt stopped at a convenience store to get cigars and/or alcohol and drove around until Kitt said he needed some money. Kitt made it clear that he was not interested in working for money and told Harrington he knew an easy way to get some money, which was to rob someone. According to Harrington, after they decided to do this, Kitt pulled out a ski mask, a bandanna, and a small silver handgun. Kitt gave either the ski mask or the bandanna to Harrington to wear and told Harrington he had stolen the handgun from his grandfather. Later in his deposition, Harrington denied that Kitt had given him either a mask or a bandanna to cover his face. Harrington and Kitt were sitting in the car at an apartment complex in west Omaha when Harrington saw a couple get out of another car. Kitt ran over to the couple, and Harrington followed, knowing that they were there to rob someone. Harrington stated that he and Kitt had been drinking and were not "in the right state of mind."

Harrington did not know whether he spoke to the couple after Kitt approached them and essentially refused to say that Kitt was in the process of robbing the couple. Harrington heard Kitt say something to the person he was robbing but he did not remember what Kitt said. Harrington insisted that both he and Kitt were yelling at the couple they were robbing and demanding money from them. Harrington did not get any money, but Kitt got a wallet. Harrington stated that Kitt hit the person he was robbing, but did not know if it was with his hand or his gun. When asked whether it could have been Harrington who hit the person, he replied that he was really drunk, that he probably did not hit the person, and that if he did so, it was only a chance. When it was suggested to Harrington that he was the primary person responsible for the

robbery, he adamantly denied that that was the case as he had a job and did not need the money. Harrington stated that the police arrived, and he and Kitt ran in different directions. After Harrington ran, a police officer started shooting, and Harrington was shot in the back of his leg. Harrington stated he was running with his “fake gun” in his hand but denied pointing this gun at the officer. Harrington stated that he returned to his car, drove off, and did not see Kitt after that.

Harrington called a friend and had her take him to the hospital. Harrington was questioned by police officers at the hospital, but he lied, telling them he had been shot at a different location. Later, after medical personnel finished attending to him, Harrington told the truth and was taken to the police station and arrested.

Harrington denied owning a real gun and stated that if a real gun was found in his car, he did not know how it got there, although he knows people who carry guns and that they have left them in his car before. Eventually, Harrington admitted that there was a real gun in his car but claimed that it was not his and that he did not use it during the robbery. Harrington insisted that during the robbery, he had a black fake gun and Kitt had his silver one. Harrington claimed that he threw the fake gun away and that later, when he had a friend remove a gun from his car, she removed the real gun that had been left in his car.

Toward the end of his deposition, when Harrington was clearly getting frustrated with the process, he asked whether he could “plead the Fifth” and Kitt’s counsel promptly and firmly told him, “No. There is no Fifth Amendment, sir. You have already been convicted of that crime.”

Manuel Garcia, a crime laboratory technician with the Omaha Police Department, testified that he collected evidence from the scene of the robbery, including a revolver, a dark green bandanna, a blue knit ski mask which was found on the ground in the parking lot of the apartment complex, and a wallet with \$4.12 cash and a driver’s license belonging to Jamie.

Kitt rested without presenting any evidence. The district court denied Kitt’s motion to dismiss at the close of all the evidence. Kitt was then convicted and sentenced as set forth above.

ASSIGNMENTS OF ERROR

Kitt asserts that (1) the district court abused its discretion in finding Harrington unavailable as a witness and admitting his deposition testimony, (2) he received ineffective assistance of trial counsel, (3) the jury erred in finding Kitt guilty beyond a reasonable doubt, and (4) the district court abused its discretion in imposing excessive sentences.

STANDARD OF REVIEW

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Torres*, 283 Neb. 142, ___ N.W.2d ___ (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Vigil*, 283 Neb. 129, ___ N.W.2d ___ (2012). An abuse of discretion occurs when a trial court’s decision is based on reasons which are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. Nolan, supra*. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Kinser*, 283 Neb. 560, ___ N.W.2d ___ (2012).

ANALYSIS

Admission of Harrington's Deposition.

Kitt asserts that the district court abused its discretion in finding Harrington unavailable as a witness and admitting his deposition testimony. Kitt objected at trial to the court's determination that Harrington was unavailable and also objected that the court's decision to allow the State to read Harrington's deposition testimony into the record violated his constitutional rights to confront his accusers and to cross-examine witnesses testifying against him.

Neb. Rev. Stat. § 27-804(2)(a) (Reissue 2008) provides for the admission of the testimony of a declarant unavailable as a witness where the testimony is given

in a deposition taken in compliance with law in the course of the same or a different proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

The applicable definition of unavailability is found in § 27-804(1)(b), which states that a witness who “[p]ersists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so” is unavailable. It is within the discretion of the trial court to determine whether the unavailability of a witness has been shown. *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998).

The situation in this case is similar to that in *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996), in which a key witness to a murder refused to testify in a retrial. The trial court declared the witness unavailable, and his prior testimony was read into the record. On appeal, the defendant argued that § 27-804(1)(b) required the trial court to first “order” the witness to testify prior to finding him unavailable. The Nebraska Supreme Court concluded that the trial court did not abuse its discretion in finding the witness unavailable without first ordering him to testify. The record showed that the witness persisted in refusing to testify despite three requests from the trial court to do so. Normal contempt proceedings were useless to sanction the

witness since he was already serving a lengthy sentence. The Supreme Court determined that the trial court's failure to specifically "order" the witness to testify had little relevance because the witness' refusal to testify was evident on the face of the record.

In this case, Harrington was sworn in and gave the reason for his present incarceration. Upon questioning by both the prosecutor and the district court, Harrington stated his clear intent not to answer any question about Kitt or the incident in question. Although Harrington did not state the length of his sentences while on the stand at trial, a review of his deposition shows that he had been sentenced to incarceration for 8 to 12 years for his role in these crimes. Like the witness in *McHenry*, there was little the district court could have done to punish Harrington for his refusal to testify. It is clear from the record that Harrington was intent on refusing to testify. Accordingly, the district court did not abuse its discretion in finding him unavailable as a witness or in allowing the State to read his deposition testimony into the record at trial.

Likewise, we do not find a violation of Kitt's rights under the Confrontation Clause. Where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). Kitt had and took advantage of his opportunity to examine Harrington during the course of Harrington's deposition. Kitt's assignment of error is without merit.

Ineffective Assistance of Counsel.

Kitt asserts that he received ineffective assistance of trial counsel. In order to establish a right to relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011). To establish a right to relief because of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Wabashaw*, 274 Neb. 394, 740 N.W.2d 583 (2007). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* In an ineffective assistance of counsel claim, to prove prejudice, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Kitt's arguments in connection with this assignment of error are somewhat unclear but appear to relate to objections made by his trial counsel at the time that Harrington was found to be unavailable. Kitt faults his attorney for not making an effort to voir dire Harrington to identify his status on the record. Presumably, Kitt means his attorney should have determined whether Harrington was convicted and sentenced for his role in the crimes at issue. Kitt's argument appears to be based on his inaccurate assumption that the basis for Harrington's unavailability was an assertion of his Fifth Amendment rights as provided for in § 27-804(1)(a). We have already determined that the district court properly found Harrington to be unavailable as a witness and that the basis for Harrington's unavailability was § 27-804(1)(b), his persistent

refusal to testify. Kitt also argues that his attorney should have made a continuing objection to each question and answer as the deposition was read. Again, Kitt fails to make clear what this would have accomplished. Kitt makes vague allegations that his trial counsel's performance was deficient, but he does not argue that this supposed deficient performance was prejudicial. Because Kitt has not shown how he was prejudiced, his assignment of error is without merit.

Sufficiency of Evidence.

Kitt asserts that the jury erred in finding him guilty beyond a reasonable doubt. Kitt was convicted of robbery, a Class II felony; attempted robbery, a Class III felony; two counts of use of a deadly weapon to commit a felony, a Class II felony; and second degree assault, a Class IIIA felony. See Neb. Rev. Stat. § 28-324 (Reissue 2008); Neb. Rev. Stat. § 28-201 (Reissue 2008); Neb. Rev. Stat. § 28-1205 (Reissue 2008); and Neb. Rev. Stat. § 28-309 (Reissue 2008). We have set forth the evidence in some detail in the background section above and, in the interests of brevity, will not repeat the evidence meeting the elements of the crimes for which Kitt was convicted. This was a lengthy trial, and the record is replete with evidence sufficient to support Kitt's convictions even without considering Harrington's deposition testimony. The evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support Kitt's convictions. His assignment of error is without merit.

Kitt's Sentences.

Finally, Kitt asserts that the district court abused its discretion by imposing excessive sentences. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). When imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education and experience, social and cultural background, past criminal record, and motivation for the offense, as well as the nature of the offense and the violence involved in the commission of the crime. *Id.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id.* The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

Kitt's brief contains no substantive argument in support of this assignment of error; rather, he merely recites various applicable propositions of law without specifying how they relate to him and the sentences he received. He complains that Harrington received a lesser sentence, but given that Kitt was convicted of more charges, at least based on the information we have from Harrington's deposition, it is not unreasonable to expect that he would have received harsher sentences. Kitt was sentenced to imprisonment for a total of 10 to 14 years for five felony convictions, including two counts of use of a weapon in the commission of those crimes, which by law require that the sentence imposed for that crime be consecutive to the underlying charges. See § 28-1205(3). Three of the five offenses for which Kitt was convicted are Class II felonies, punishable by a maximum of 50 years in prison for each offense. See Neb. Rev. Stat. § 28-105 (Reissue 2008). Kitt has a limited criminal history; the presentence investigation report shows only a traffic infraction for initiating an improper turn and convictions for possession of marijuana less than 1 ounce and theft by unlawful taking. Kitt refused to be interviewed by the probation officer, so the officer was unable to complete a full presentence investigation. The

crimes at issue in this appeal, however, are quite serious, and Kitt's sentences totaling 10 to 14 years' imprisonment are hardly excessive. The district court did not abuse its discretion in sentencing Kitt. Kitt's assignment of error is without merit.

CONCLUSION

The district court did not abuse its discretion in finding Harrington unavailable as a witness and in allowing the State to read Harrington's deposition testimony into the record at trial. Kitt's rights under the Confrontation Clause were not violated. Kitt has not shown how he was prejudiced by his trial counsel's performance. The evidence is sufficient to support Kitt's convictions. The district court did not abuse its discretion in sentencing Kitt.

AFFIRMED.