IN THE COURT OF APPEALS OF IOWA

No. 6-812 / 05-1346
Filed November 30, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL DAVID DAWSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Michael D. Dawson appeals his convictions for burglary in the third degree and theft in the second degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Michael David Dawson (Dawson) appeals his convictions for burglary in the third degree and theft in the second degree. He contends the district court erred in overruling his objections to several jury instructions and in denying his motions for judgment of acquittal and new trial. He also claims his trial counsel was ineffective. We affirm his convictions and preserve his ineffective assistance of counsel claim for a possible postconviction proceeding.

I. BACKGROUND FACTS AND PROCEEDINGS.

On March 16, 2005, Theodore Wood, manager of Wilber Auto Salvage (Wilber Salvage), closed the business for the night at 5:00 p.m. He chained and locked the gate in the fence which surrounded the property. Based on a phone call Woods received the next day from a man he knew as Junior, Wood went to check on aluminum wheels (at times referred to as "rims") which had been stored near the Wilber Salvage office. He noticed "a bunch" of the wheels were missing, but he could not say how many exactly. Woods notified his boss, Anthony Wilber, and the police about the missing wheels. Apparently based on his conversation with Junior, Wood informed the police he suspected the "Dawson brothers" were the ones who had taken the wheels.

Waterloo Police Officer Willy Washington went to Wilber Salvage to investigate the stolen wheels. While there he spoke with Junior on the phone. Based on that conversation Washington investigated a license plate number which turned out to belong to a grey 1983 Buick LeSabre registered to Dawson and Louise Dawson. Wood later called Alter's Scrap Yard (Alter's) in an attempt

to locate the missing wheels and learned Alter's had recently purchased twenty-three aluminum rims from Dawson.

Larry Wrage, an employee of Alter's, testified at trial that on March 17, 2005, Dawson and an older man came to the scrap yard in a grey car loaded down with "rims." Another Alter's employee, Patrick Williams, described the vehicle as an Oldsmobile and wrote down the license plate number. He also issued a check to Dawson for the rims in the amount of $193.50. The Alter's employees provided this information to Officer Washington. Wrage identified Dawson from a photo line-up and Washington determined the license plate number recorded by Williams belonged to Dawson's grey Buick.

Wilber Salvage owner Anthony Wilber and his employee, Dennis Geiger, went with police to Alter's to attempt to identify the missing rims. Wilber and Geiger both identified all but four or five of the rims in the storage bin at Alter's as belonging to Wilber Salvage. The rims they identified included two that had the Wilber Salvage identification numbers on them.

Officer Washington testified he had interviewed Dawson, who stated that he had gone to Alter's with his brother and about twenty-five rims were provided to him by his brother Randy. He told Washington that Randy had obtained the rims from Litzkow Junk Yard, where Randy worked. Washington called Litzkow but was unable to reach him to confirm whether he had any lost or stolen rims.

Dawson was charged, by trial information, with burglary in the third degree, in violation of Iowa Code sections 713.1 and 713.6A(1) (2005), and theft in the second degree, in violation of sections 714.1(1), 714.1(4), and 714.2(2).

The matter proceeded to jury trial. Dawson filed a motion for judgment of acquittal at the close of the State's case and the trial court denied the motion. He also objected to the proposed jury instructions on aiding and abetting and on an inference of burglary. The court overruled the objections and submitted the challenged instructions to the jury. The jury found Dawson guilty as charged. Following the verdict Dawson filed a motion for new trial, arguing the verdict was contrary to the weight of the evidence. The district court heard arguments on the motion prior to sentencing. During the arguments Dawson renewed his challenge to the same jury instructions. The court denied the motion for new trial. Dawson was sentenced to five years on each count, the sentences were suspended, and he was placed on supervised probation for two to five years.

Dawson appeals his convictions, contending the trial court erred in overruling his objections to the instructions on aiding and abetting and on an inference of burglary, and in denying his motions for judgment of acquittal and new trial. He also claims his trial counsel was ineffective for failing to object to State's Exhibit 5.

II. MERITS.

A. Jury Instructions.

Our review of challenges jury instructions is for correction of errors at law. Iowa R. App. P. 6.4; *State v. Simpson*, 528 N.W.2d 627, 630 (Iowa 1995). The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 2.19(5)(*f*); *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court may phrase the instructions in its own words as

long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. *Liggins,* 557 N.W.2d at 267. The court must give an instruction if it "correctly states the law, has application to the case, and is not stated elsewhere in the instructions." *State v. Kellogg,* 542 N.W.2d 514, 516 (Iowa 1996).

The court instructed the jury on aiding and abetting as an alternative method of committing the theft and burglary. Dawson contends the court erred in overruling his objections to these instructions because there was no evidence someone else participated in the crime. It is true the aiding and abetting "instruction necessarily assumed that two or more individuals were involved in the crime. . . ." *State v. Mays,* 204 N.W.2d 862, 864 (Iowa 1973). Furthermore, "[a] person cannot aid and abet the commission of a crime unless another commits the offense; one cannot aid and abet himself in the commission of an offense." *Id.* (citations omitted). Here, however, there was evidence Dawson had acted in concert with another.

Wood testified, without objection, that based on his phone call with Junior he identified the "Dawson brothers" as suspects in the burglary. Wrage testified Dawson and another man arrived at Alter's in a grey car to sell the rims. Officer Washington testified that Dawson told him he received the rims from his brother, Randy, and then he and a brother went to Alter's to sell them. Thus, there was sufficient evidence in the record that Dawson did not act alone in committing the burglary. The court did not err in giving the aiding and abetting instructions

because they correctly stated the law and there was substantial evidence in the record to support their application to this case.

Dawson next challenges the court's instruction to the jurors regarding an inference of a burglary. The instruction given was based on *State v. Lewis,* 242 N.W.2d 711 (Iowa 1976). The instruction stated that if the jury were to find beyond a reasonable doubt the property in question was in fact stolen, Dawson thereafter had possession of said property, and that possession was recent, then the jurors "may, but are not required to, infer the defendant did in fact enter the fenced-in property." The instruction further provided:

> What is recent possession cannot be precisely defined. The nature of the property, its ease of transferability, and all of the circumstances shown are to be considered as bearing upon whether the interval between the time of alleged theft and Defendant's alleged possession was so short as to render it reasonably certain that there could have been no immediate change of possession.
>
> It is important that you keep in mind that it is your exclusive province as jurors to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits you to draw from possession of recently stolen property, *and you are not required to make this inference*. *If any possession the defendant may have had of recently stolen property is consistent with innocence, or if you entertain reasonable doubt, then you must find the defendant not guilty*.

(Emphasis added). "An inference of burglary may arise from the possession of recently stolen property when the surrounding circumstances are also considered." *State v. Martin,* 587 N.W.2d 606, 608 (Iowa Ct. App. 1998). Dawson contends the instruction was not warranted because there were no surrounding circumstances to support it and it unduly emphasizes the twenty-one unmarked rims.

We conclude the instruction was a correct statement of the law and equally allowed the jury to believe Dawson's innocent possession explanation or to infer he committed burglary. The surrounding circumstances supporting an inference of burglary instruction include, but are not limited to: the identification of the rims by Wilber and Geiger as belonging to Wilber Salvage; Dawson selling the wheels the day after they were stolen; and Dawson being in charge of the sale of the rims, including driving the car, approving the price received, and taking a check made out to him personally.

We conclude the inference of burglary instruction is supported by substantial evidence in the record, is a correct statement of the law, and does not unduly emphasize any particular evidence. The district court did not err in submitting this instruction to the jury.

B. Motions for Judgment of Acquittal and New Trial.

Dawson asserts the district court erred in denying his motion for judgment of acquittal, because there was insufficient evidence of burglary, theft, and the value of the items taken. Our scope of review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). We will uphold a trial court's denial of a motion for judgment of acquittal if there is substantial evidence to support the defendant's conviction. *State v. Kirchner*, 600 N.W.2d 330, 333 (Iowa Ct. App. 1999). Substantial evidence is such

evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* at 334.

Inherent in our standard of review of a jury verdict in a criminal case is the recognition that the jury was free to reject certain evidence, and credit other evidence. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *Liggins*, 557 N.W.2d at 269; *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence and place credibility where it belongs. *Thornton*, 498 N.W.2d at 673.

Here the jury clearly determined, as was in its discretion to do, the testimony from Geiger and Wilber identifying the rims that Dawson sold at Alter's as belonging to Wilber Salvage was more credible than Dawson's story that the rims came from Litzkow's where his brother worked. In addition, the jury could view the acceptance of payment in Dawson's name without any reference to Litzkow or his brother as evidence supporting a finding Dawson stole the rims rather than having legitimately acquired them from Litzkow through his brother to sell them. The short amount of time between when the rims were stolen from Wilber Salvage and when they were sold at Alter's also tends to support the jury's verdict. Thus, we find there is sufficient evidence from which a rational jury could find beyond a reasonable doubt that Dawson was guilty of the burglary and the theft of the rims.

Dawson also alleges the jury lacked sufficient evidence to determine the actual value of the stolen items was more than $1,000.[1] The value of property is defined in Iowa Code section 714.3 as: "The value of property is its highest value by any reasonable standard at the time that it is stolen. Reasonable standard includes but is not limited to market value within the community, actual value, or replacement value." "Value testimony is liberally received, with its weight to be determined by the jury, and rules as to the competency of witnesses on questions of value are 'always liberally construed.'" *State v. Savage,* 288 N.W.2d 502, 504 (Iowa 1980) (citations omitted).

Anthony Wilber, owner of Wilber Salvage, testified that the stolen rims were worth $1,150. "As in a civil suit, an owner is competent to testify concerning the value of his property." *State v. Boyken,* 217 N.W2d 218, 220 (Iowa 1974). Wilber's testimony alone is sufficient for the jury to find that the value of the stolen rims exceeded $1,000.

Dawson also challenges the court's denial of his motion for new trial. Our scope of review for rulings on motions for new trial is for errors at law. Iowa R. App. P. 6.4. When a defendant argues the trial court erred in denying a motion for new trial based on the claim that the verdict is contrary to the weight of the evidence our standard of review is for abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

"The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or

[1] Dawson was found guilty of second-degree theft, which requires that the value of the property stolen exceed $1,000. Iowa Code § 714.2(2).

cause than the other.'" *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998) (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-38, 1025 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). The power of the trial court to grant a new trial on the ground the verdict was contrary to the weight of the evidence should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id*. at 659.

Based on the evidence in the record set forth above, we conclude this is not a case in which the testimony of a witness or witnesses which otherwise supports conviction is so lacking in credibility that the testimony cannot support a guilty verdict. Neither is it a case in which the evidence supporting a guilty verdict is so scanty, or the evidence opposed to a guilty verdict so compelling, that the verdict must be seen as contrary to the evidence. The evidence in this case simply does not preponderate heavily against the verdict. The trial court did not abuse its broad discretion by denying Dawson's motion for new trial.

C. Ineffective Assistance of Counsel.

Finally, Dawson claims his trial counsel was ineffective for not objecting to State's Exhibit 5. Exhibit 5 contained a list of missing rims generated by Anthony Wilber. Below the listing of wheels and the total dollar amount claimed as the value of those wheels was a list of other items missing as a result of thefts from Wilber Salvage in the prior year (2004) and the values of those items. The exhibit was offered and received without objection. Dawson claims the information in Exhibit 5 regarding the other items missing from other thefts was irrelevant, highly prejudicial and misleading to the jury because the jury may have

attributed those thefts to Dawson and improperly used the additional amounts "to aggregate the amount at greater than $1000."

When there is an alleged denial of constitutional rights, such as an allegation of ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). To prove trial counsel was ineffective the defendant must show that counsel failed to perform an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle,* 652 N.W.2d at 203.

As set forth above, Dawson can succeed on his ineffectiveness claim only by establishing both that his counsel failed to perform an essential duty and that prejudice resulted. *Wemark*, 602 N.W.2d at 814. No record has yet been made before the trial court on this issue, counsel has not been given an opportunity to explain her actions, and the trial court has not ruled on this claim. Accordingly,

we conclude the record on direct appeal is insufficient to review Dawson's claim. Under these circumstances, we pass this claim in this direct appeal and preserve Dawson's specified claim of ineffective assistance for a possible postconviction proceeding. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

III. CONCLUSION.

For the reasons set forth above, we affirm Dawson's convictions and preserve his specified claim of ineffective assistance for a possible postconviction proceeding.

AFFIRMED.