

IN THE COURT OF APPEALS OF IOWA

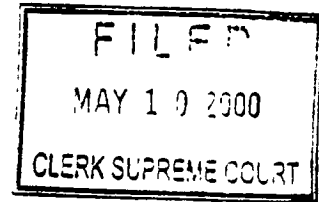
No. 0-140 / 98-1641

Filed May 10, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY POWELL,
Defendant-Appellant.



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

Defendant appeals from the judgment and sentence entered upon a jury
verdict finding him guilty of second-degree robbery. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, William E. Davis, County Attorney, and Kelly G. Raines, Assistant
County Attorney for appellee.

Heard by Streit, P.J., and Zimmer and Hecht, JJ.

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ZIMMER, J.

Anthony Powell, Sr., appeals from the judgment and sentence entered upon a jury verdict finding him guilty of second-degree robbery. We affirm.

On March 3, 1998, Powell's girlfriend, Leah Hanson, asked Robert Ware to return some merchandise for her at Lowe's, a home improvement store in Davenport, Iowa. She told Ware she could not do it herself because she did not have "proper identification." Ware agreed to return the items in exchange for fifty dollars. When Hanson picked him up, Powell was in the car with her but introduced himself as Mickey. Ware went into Lowe's but was unable to obtain a cash refund. The store did, however, take the merchandise back and informed Ware he would get a check in the mail in few weeks. Hanson and Powell sent him back into the store to get them a receipt but he was unable to do so. When Ware returned to the car for the second time, Powell grew angry and accused him of stealing their money. Powell threatened to take Ware to his friends and beat the money out of him. Powell then hit Ware several times in the face and head.

Hanson stopped the car and Powell told Ware to take his pants down. He 'frisked' Ware and also went through his billfold. Hanson then suggested Ware get the money from an ATM. Ware was unable to retrieve any funds from the ATM after having reached his withdrawal limit earlier that day. Hanson then told Ware to write them a check. When Ware said he did not have his checkbook, Hanson drove by his home. Powell yelled to Ware's daughter to bring the checkbook out, but Ware told her to call 911. A scuffle ensued, Ware got out of the car or was pulled out, and Hanson and Powell left in the car.

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On May 14, 1998, Powell was charged with second-degree robbery and false imprisonment. He was arraigned on May 14, 1998. On June 4, a new attorney was substituted for Powell's former defense counsel. Trial began August 10, 1998. Powell's motions for judgment of acquittal after the State's case in chief and at the close of the evidence were denied. The jury returned guilty verdicts on both counts. Powell moved for judgment notwithstanding the verdict and a new trial. Again, the district court denied both motions.

Powell appeals. He contends there was insufficient evidence to support a finding of his intent to commit a theft on the robbery charge. Also he urges his trial counsel was ineffective.

I. Scope of Review. We review sufficiency-of-the-evidence claims for errors at law. *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998). We review ineffective assistance of counsel claims de novo. *State v. Homess*, 600 N.W.2d 294, 297 (Iowa 1999).

II. Sufficiency of the Evidence. Powell maintains there was insufficient evidence of his intent to commit a theft. He claims there was no intent to *permanently* deprive Ware of money because Ware was going to get a refund check from Lowe's in a short time.

The standards applied in such a review are well-established:

The jury's findings of guilt are binding on appeal if supported by substantial evidence. . . . In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. . . . Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. . . .

State v. Query, 594 N.W.2d 438, 445 (Iowa App. 1999) (citations omitted). We do not make an independent determination of "whether the evidence established

guilt beyond a reasonable doubt"; rather, we determine the legal sufficiency of the evidence to support the verdict. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994).

Iowa Code section 711.1 (1997) defines robbery as:

... when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene thereof with or without the stolen property:

1. Commits an assault upon another.
2. Threatens another with or purposely puts another in fear of immediate serious injury.
3. Threatens to commit immediately any forcible felony. . . .

A person commits theft when the person "takes possession or control of the property in the possession of another, with the intent to deprive the other thereof." Iowa Code § 714.1(1). The intent to deprive requires more than temporary dispossession, although deprivation need not be permanent. See *State v. Berger*, 438 N.W.2d 29, 31 (Iowa App. 1989); but see *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999) (stating "an intent to permanently deprive the owner of his property is an essential element of theft under section 714.1(1)."). A defendant's intent to deprive the owner of property is seldom capable of being established with direct evidence. *Schminkey*, 597 N.W.2d at 789. Therefore, the facts and circumstances surrounding the act, as well as any reasonable inferences to be drawn from those facts and circumstances, may be relied upon to ascertain the defendant's intent. *Id.*

We conclude there was substantial evidence from which the jury could have reasonably concluded Powell's intent to deprive Ware of his property was more than a temporary dispossession. There was evidence the merchandise Ware was asked to return was stolen. Therefore, neither Powell nor Hanson was

entitled to a refund. Powell did not use his real name when he met Ware, grew angry when a Lowe's employee appeared to be taking down the car's plate number after Ware exited the store, and fled the scene at Ware's house when he knew police had been called. Powell did not try to return the merchandise himself. Powell threatened to have his friends beat Ware. He and Hanson forced Ware to use his ATM card. Hanson then tried to use it herself, failed, and insisted Ware write them a check. Testimony also revealed the money was for Powell's drug dealer, indicating his motive. Ware had not received the alleged refund check as of the time of trial. From the circumstances, it is also permissible to infer it would have been highly unlikely Ware would recover the money from Lowe's or the defendant, if he had given Powell money that day. From these facts the jury could infer Powell and Hanson attempted to obtain money from Ware, and derivatively Lowe's, to which they knew they were not entitled and against Ware's will.

We disagree the possibility Ware was going to receive a refund check within two weeks of the attack renders the evidence insufficient on whether Powell intended to permanently deprive Ware of money. We also disagree with Powell's contention that the stolen nature of the Lowe's merchandise was irrelevant. Powell asserts in his brief that the State's case only showed Ware was asked to pay Powell and Hanson the amount he would receive from Lowe's. Powell's argument is essentially that he and Hanson had a claim of right to the asserted value of the merchandise Ware returned to Lowe's. He essentially suggests he was acting as a debt collector and the deprivation was only temporary.

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It is true a person may be found not guilty of robbery for forcibly taking property from another if he or she does so under a bona fide belief that he or she is the owner of such property or is entitled to its possession, since such belief contradicts the intent to steal. 67 Am.Jur.2d *Robbery* § 19 (citations omitted). Even if the property is taken to collect or secure a debt, a defendant must establish a claim of right or an ownership claim to defeat a robbery charge. *Id.* § 21. However, the claim-of-right defense has been held unavailable to a robbery defendant, where the claim of "right" was based in an illegal transaction.¹ See, e.g., *People v. Gates*, 743 P.2d 301, 310 (Cal. 1987) (finding trial court properly refused instruction on claim-of-right defense where robbery defendant's right based in illegal forgery scheme); *State v. Morant*, 701 A.2d 1, 5 (Conn. 1997) (reciting cases that hold a person may not use force to retake drugs or collect illegal debts from another). The emerging trend in other states is to reject such a defense to a robbery charge based on illegal transactions. See *State v. Mejia*, 662 A.2d 308, 319 (N.J. 1995), *superseded by constitutional amendment on other grounds as noted in State v. Cooper*, 700 A.2d 306 (N.J. 1997).

Hanson testified the property was stolen. This fact also seems clear from the surrounding circumstances, including Hanson's and Powell's reticence to return the items themselves, their claim they did not have proper i.d. to return the items (although why one would need an i.d. to return items is not explained), their willingness to pay someone to return the items, Powell's failure to use his real

¹Furthermore, the law frowns on the use of force to collect even the most legitimate debts. See, e.g., *People v. Tufunga*, 987 P.2d 168, 179 (Cal. 1999) (declining to extend claim-of-right defense to forcible taking perpetrated to satisfy or collect a debt); *People v. English*, 336 N.E.2d 199, 210 (Ill. 1975) ("a creditor may not employ violence, threats, or weapons to collect the debt but should pursue his remedies in the normal channels of peaceful and legal redress.").

names, the Lowe's employee taking the plate number, and the urgency surrounding the whole matter. Powell is not entitled to claim he had no intent to steal because he was simply collecting or securing a debt.

III. Ineffective Assistance of Counsel. Powell asserts his counsel was ineffective for failing to object to: (1) the prosecutor's allegedly leading questions or questions that called for hearsay; (2) Ware's testimony about Powell's "drug dealer"; (3) the prosecutor's questions about whether the Lowe's merchandise was stolen; (4) evidence about a subsequent theft of Ware's wallet; and (5) the prosecution's calling Hanson as a rebuttal witness and exceeding the scope of rebuttal testimony.

Powell must demonstrate two elements to succeed on his claims of ineffective assistance: (1) counsel failed to perform an essential duty; and (2) this failure resulted in prejudice. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (citation omitted). Prejudice is shown where there is a reasonable probability the result would have been different if counsel had performed competently. *Id.* at 211. Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, such claims may be resolved on direct appeal when the record adequately addresses the issues. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998). We deem this record adequate.

A. Leading Questions. Powell argues questions posed by the prosecutor to the officer investigating Ware's complaint were improper and called for hearsay. He points out the same two trial counsel were involved in *State v.*

Martin, 587 N.W.2d at 610. In *Martin*, this court found certain questions about an officer's investigation elicited inadmissible hearsay evidence. *Martin*, 587 N.W.2d at 610.

The officer in question, Gano, was asked how Ware's complaint was placed. He responded he did not know. He was asked how he discovered Leah's last name. He explained his investigation took him to a bail bondsman who was familiar with her and told Gano her name. The prosecutor also asked him about Lowe's store policy regarding merchandise returned without a receipt. Gano did not know.

We fail to see how such evidence was prejudicial. Gano answered "I don't know" to two of the allegedly objectionable questions. In the third, he merely explained how he figured out who "Leah" was in Ware's complaint. We do not view the latter as damaging hearsay testimony. Hanson testified and did not deny she was the "Leah" involved. Trial counsel was not ineffective for failing to object to these questions.

B. Mention of Powell's "Drug Dealer." Powell claims his trial counsel should have objected to Ware's testimony concerning Powell's mention of his drug dealer during the incident. Powell asserts this mention was objectionable under *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994).

We disagree. In *Liggins*, the Iowa Supreme Court found it was an abuse of discretion to admit evidence a defendant charged with murder had been a cocaine supplier in the past. *Liggins*, 524 N.W.2d at 188. The court based its rationale on the fact the defendant's past supplying of cocaine was not an inseparable part of the murder. *Id.* Here, mention of Powell's drug dealer was

part of the crime. He mentioned the drug dealer himself when threatening to take Ware's money, who would beat the money out of Ware. *Liggins* does not apply here. We affirm on this issue.

C. Stolen Nature of Lowe's Merchandise. Powell claims his trial attorney should have objected to questions about whether the property Ware was asked to return was stolen because such evidence was irrelevant.

We disagree. This evidence was directly relevant to issues of intent to commit a theft, as discussed above. Trial counsel breached no duty in failing to object to it.

D. Theft of Ware's Wallet. Ware testified that someone named Lisha Rolands entered his home at 4:00 a.m. on the morning after the incident involving Powell and Hanson. He stated he talked to her a little while and then later that morning, after she had left, he noticed his wallet was missing. Powell claims this evidence was objectionable.

We disagree. Again, we fail to see how this evidence was prejudicial such that there was a reasonable probability the outcome would have been different. This testimony, while not strictly relevant, did not indicate any involvement on the part of Powell or show that he even knew Rolands. We affirm on this issue.

E. Failure to Object to Questioning of Hanson on Rebuttal. At the close of Powell's case, the State called Hanson as a rebuttal witness. Defense counsel objected but Hanson was permitted to take the stand. She was asked and answered questions regarding the incident, including meeting Ware, returning stolen items to Lowe's, why Ware was needed for that task, and picking up Ware. Powell claims her testimony was permitted to exceed the scope of

rebuttal. Furthermore, he asserts the State's calling Hanson was "a prejudicial ploy by the State to discredit, and attempt to bring in otherwise inadmissible evidence." Counsel was allegedly ineffective for failing to make objections on these grounds.

Proper rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by the accused or which is brought out on his or her cross-examination. *State v. Nicholson*, 402 N.W.2d 463, 466 (Iowa App. 1987). The questions asked of Hanson did not exceed the scope of Powell's testimony. We fail to see how the prosecution "bootstrapped" inadmissible evidence into the record by calling Hanson and then attempting to discredit her, as barred by *State v. Turecek*, 456 N.W.2d 219, 224-25 (Iowa 1990) (stating the State is not entitled to call witness who is expected to give unfavorable testimony and then, under the guise of impeachment, offer evidence which is otherwise inadmissible). Such impeachment evidence must be shown to have been used with the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible. *Id.* at 225 (citations omitted). There is no such showing here. Defendant does not make it entirely clear what inadmissible evidence the State was trying to bootstrap into Hanson's testimony via impeachment. Hanson's version of events differed from Powell's. She was called for the proper purpose of impeaching his testimony. We affirm on this issue.

In his pro se brief, Powell makes additional claims of ineffectiveness of trial counsel that are too indefinite because he does not state how competent representation would have likely changed the outcome. See *Dunbar v. State*,

515 N.W.2d 12, 15 (Iowa 1994). We conclude there was substantial evidence on which the jury could find Powell guilty of robbery. We also find Powell's trial counsel was not ineffective.

AFFIRMED.

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