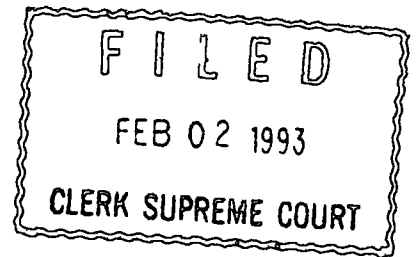


IN THE COURT OF APPEALS OF IOWA

No. 2-590 / 91-1457



STATE OF IOWA,

Appellee,

vs.

RICKY ERNEST PEEPLES,

Appellant.

Appeal from the Iowa District Court for Black Hawk
County, James C. Bauch, Judge.

The defendant appeals his convictions for first-degree
burglary and attempted murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia
Reynolds Lapointe, Assistant State Appellate Defender, for
appellant. .

Bonnie J. Campbell, Attorney General; Thomas S. Tauber,
Assistant Attorney General; Thomas J. Ferguson, County
Attorney; and D. Raymond Walton, Assistant County Attorney,
for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab,
JJ.

HABHAB, J.

The defendant, Ricky Ernest Peebles, appeals his convictions of first-degree burglary and attempted murder. We affirm.

The record establishes that on January 26, 1991, David Rutledge was the manager of Pistol Pete's convenience store in Waterloo, Iowa. On that evening, the defendant was involved in a disturbance at the convenience store. Rutledge called the police when he observed the defendant with a lighted object near a car. While at the police station, the defendant struck Rutledge in the face and told Rutledge he was going to get even.

The next evening while Rutledge was working the defendant entered the convenience store and started an altercation with Rutledge. Rutledge repeatedly told the defendant to leave. The defendant refused to leave, and the two men quarreled. During the quarrel, the defendant repeatedly reached under his coat toward the small of his back as if reaching for a gun and then threatened to shoot Rutledge. Rutledge saw something which looked like the butt of a gun beneath the defendant's coat. He explained what he saw resembled the butt of a handgun which he had seen in the defendant's possession a few weeks prior to the night in question.

When it appeared the defendant was grabbing for a gun, Rutledge grabbed a pipe to defend himself. The defendant grabbed cigarettes and ran outside. He then threw a glass

bottle toward Rutledge. Rutledge managed to avoid being hit. The defendant then approached the side windows next to the drive-up window where Rutledge was standing and began shouting, "I am going to kill him." Rutledge ran out the back door and the defendant then turned and went toward the gas pumps at which time he was approximately twenty to thirty feet from Rutledge. Rutledge saw the defendant raise his arms and level them at him as if the defendant was pointing a gun. As Rutledge turned to run back into the store, he fell and heard a gunshot. Rutledge ran back into the store and immediately summoned the police, who arrested the defendant shortly thereafter. During a search of the defendant's apartment later that evening, a police officer found a .22 caliber long rifle bullet in an attache case. This bullet was received into evidence at trial.

The State charged the defendant with attempted murder and first-degree burglary. The defendant waived his rights to a speedy trial and a trial by jury. He filed a notice of intent to rely upon an intoxication defense.

At trial, Rutledge testified on behalf of the State. His testimony is borne out by a videotape which was received into evidence. The convenience store has a video system which recorded the events that occurred the evening in question. The videotape corroborated Rutledge's testimony in virtually all respects. The tape clearly shows the defendant taking cigarettes as he leaves the store. It then shows a bottle flying past Rutledge while

the defendant can be heard saying numerous times, "I am going to kill him." The videotape of the defendant in the store is not at an angle sufficient to permit a gun to be seen under the defendant's coat but the threatening gestures by the defendant are clearly visible as he reached under his coat and toward the small of his back on approximately three different occasions.

On cross-examination, Rutledge admitted he could smell the odor of alcohol from the defendant on the night in question. However, he did not observe the defendant slurring his words or otherwise acting intoxicated. Rutledge acknowledged he was not positively sure he had seen a gun behind the defendant's back.

The defendant testified he does not recall what happened on the evening in question because he consumed three-fifths of liquor over a three-hour period. He acknowledged he had been at Pistol Pete's that evening. He testified he heard a gunshot while at the convenience store. However, he stated he did not have a handgun and denied shooting Rutledge.

Several witnesses, who were present at the time of the incident, testified on the defendant's behalf that they did not hear a gunshot. Mark Steven, a computer programmer, testified he was unable to spot a weapon during enhancements of the convenience store's videotape of the incident.

The defendant moved for a judgment of acquittal at the end of the case and asked the court to treat the motion as if it had been made at the end of the State's evidence. The district court denied the motion.

The district court found Rutledge's testimony to be credible and substantiated by the videotape. It found the defendant was not intoxicated and was aware of what was occurring and what he was doing. It found the defendant's actions on the videotape were not those of a person who was in such an intoxicated state that he did not know what was happening. The district court ultimately found the defendant guilty of first-degree burglary and attempted murder. It also found the defendant was armed with a firearm at the time of the attempted murder. The court then sentenced the defendant to concurrent twenty-five year prison terms and imposed the mandatory minimum sentence.

On appeal, the defendant contends the State's evidence was insufficient to overcome his intoxication defense. He argues the evidence was insufficient to prove that he acted with the specific intent to kill Rutledge and that he had the specific intent to commit a theft or assault inside the subject property after his right to be there had expired. The defendant also argues the district court abused its discretion in admitting evidence that the defendant possessed a gun prior to the crimes in question. Finally, the defendant argues he was denied effective assistance of counsel.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Viewing the evidence in the light most favorable to the State, we conclude there is substantial evidence the defendant committed the crimes of first-degree burglary and attempted murder. We affirm the district court on this issue.

The district court permitted Rutledge to testify he had seen the defendant in possession of a handgun a few weeks prior to the evening in question. The defendant claims the district court abused its discretion in admitting this evidence over his objection that it was irrelevant. He also argues the district court should have excluded the evidence pursuant to Iowa Rule of Evidence 403, on the ground that its probative value was substantially

outweighed by the danger of unfair prejudice. We disagree with these contentions.

Decisions concerning the relevancy of evidence are within the discretion of the district court. State v. Ludvigson, 482 N.W.2d 419, 424 (Iowa 1992). In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

We are unable to conclude the district court abused its discretion in admitting the testimony that the defendant had been in possession of a handgun prior to the incidents at Pistol Pete's. We affirm the district court on this issue.

Peeples claims his trial counsel was ineffective in several respects. He contends that we cannot resolve these claims on the present record. The State agrees with the defendant in this respect. We also agree.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We

therefore preserve defendant's ineffective assistance of counsel claim if the defendant desires later proceedings.

After considering all issues presented, we affirm the defendant's convictions and sentences.

Costs of this appeal are taxed to the appellant.

AFFIRMED.