

FILED

APR 30 1985

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 30, 1985

vs.

)

BURTON W. LOVELESS III,

)

5-62

84-1036

Defendant-Appellant.

)

Appeal from the Iowa District Court for Pottawattamie County - Glen McGee, Judge.

Defendant appeals from his conviction of first-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(1) and a finding of habitual offender under Iowa Code section 902.8. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

DONIELSON, P.J.

Defendant appeals from his conviction of first-degree theft in violation of Iowa Code sections 714.1(4) and 714.2(1), and a finding of habitual offender under Iowa Code section 902.8. On appeal, he asserts that trial counsel was ineffective in 1) failing to specifically assert in the motion for directed verdict that there was no corroboration of an accomplice's testimony and 2) failing to support the allegation that the prosecution withheld exculpatory, material evidence from the defense. We affirm.

Burton Loveless was charged by amended trial information with first-degree theft and with being a habitual offender. At trial, State witness David Foote testified that Loveless had hauled truck cabs onto his property. Foote said that he had helped the defendant and two others store the cabs, and later helped them load pieces of the dismantled cabs onto a truck for transfer to a scrapyard.

Foote admitted his involvement to police only after he failed a polygraph exam and was offered a lighter sentence. He also acknowledged that he had been allowed to plead guilty to one theft charge and expected to receive probation in exchange for his testimony.

The owner of the scrapyard testified that the defendant and two others delivered truck parts to the yard. An employee at the scrapyard could not identify the defendant as one of the three persons unloading the truck. Two witnesses stated that they identified the truck parts as coming from the stolen cabs.

Defense counsel moved for a judgment of acquittal at the close of the State's evidence on the ground of insufficiency of the evidence. The motion was overruled.

The jury ultimately returned a verdict of guilty and found that the value of the items exceeded \$5,000. The defendant appealed from this determination.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Strickland v. Washington, ____ U.S. ____, ____, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), the United States Supreme Court enunciated this test for 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Applying these principles in the present case, we find that, as a whole, Loveless had effective representation.

Loveless first argues that there was no corroboration of David Foote's testimony and that his counsel should have moved for a directed verdict on this ground. We disagree.

The sufficiency of corroboration of testimony is generally a question of fact for the jury. State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981). Such testimony need not confirm every material fact testified to by the accomplice. Id. Rather, it is only necessary "that the accomplice's testimony be supported in some material fact that tends to connect the defendant with the crime charged and, therefore, supports the credibility of the accomplice's testimony." Id.

In reviewing the record, it is apparent that David Foote's testimony was supported by the testimony of Donald Ortiz, owner of the scrapyard:

Q. Mr. Ortiz, can you tell us at approximately 8:30 what happened at your business? A. Well, truck drove into the scale. It was covered. I believe that Butch¹ was driving, and Steve came in and told me he had some aluminum; and I weighed it.

On cross-examination, Ortiz affirmed that defendant drove the truck:

¹The defendant's nickname is Butch.

Q. Okay. Now, you said that when this truck first pulled on, you said I believe Butch was driving; is that right? A. Right.

Q. Okay. But you made the scale ticket out to Steve Loveless? A. Because Steve was off the truck, and came in and talked to me.

While defendant attacks the sufficiency of the evidence, we believe there was enough evidence to submit the question to the jury. Thus, it can hardly be said that if defense counsel had moved for a directed verdict on this ground the result of the proceeding would have been different. We need not consider whether defense counsel may have had a duty to move for a directed verdict based on lack of corroboration. It is apparent that the defendant simply has not demonstrated the prejudice necessary to support his claim.

Loveless also claims that his trial counsel was ineffective in failing to support his allegation that exculpatory evidence was withheld from the defense.

In his motion for new trial, defense counsel asserted inter alia that the State withheld evidence concerning a listed State witness's inability to identify the defendant as one of the individuals who delivered parts to the scrap yard. Defendant argues that during the hearing on the motion, his counsel did not put on any evidence to support the allegation and that this constitutes ineffective assistance. We are unpersuaded by this argument.

During the hearing on the motion for new trial, defense counsel explained that "despite some attempts to do so" he had been unable to verify the allegation or produce a witness on the point. There is nothing in the record to indicate that counsel unreasonably failed to investigate the possibility of suppressed exculpatory evidence. To the contrary, it is apparent that he did investigate the allegation and simply found no supporting evidence. We simply cannot characterize this as ineffective assistance. If the allegation was in fact unfounded or unverifiable, trial counsel cannot be faulted for failing to make a

record on the motion. Nor can it be said that the defendant was prejudiced in any respect by the failure to support a meritless claim.

Finding no error, we affirm.

AFFIRMED.