

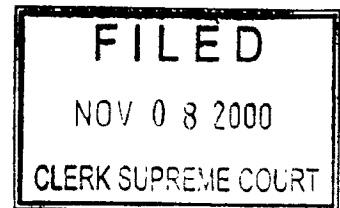
IN THE COURT OF APPEALS OF IOWA

No. 0-459 / 99-0726
Filed November 8, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS WILLIAM BENNETT,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Larry J. Eisenhower,
Judge.

Defendant appeals from the judgment and sentence entered after a jury found him guilty of first-degree murder in violation of Iowa Code section 707.1 and 707.2 (1997). Defendant contends (1) the evidence was not sufficient to support his conviction; and (2) he was denied effective assistance of trial counsel. **AFFIRMED.**

Christopher A. Kragnes, Des Moines, and Bryan J. Tingle, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Defendant-Appellant, Thomas William Bennett, appeals from the judgment and sentence entered after a jury found him guilty of first-degree murder in violation of Iowa Code section 707.1 and 707.2 (1997). Defendant contends (1) the evidence was not sufficient to support his conviction; and (2) he was denied effective assistance of trial counsel. We affirm.

The State contends defendant together with John Molloy and Tony Vang went to the home of the victim Terry Spradau, robbed and murdered him. Defendant and his mother, Lorraine Bennett, were neighbors and friends of the victim who received assistance from defendant with daily errands. Defendant knew both when the victim got his social security check and that he smoked marijuana. Defendant's mother found the victim dead in a sitting position on his couch. He had been shot in the back of his head, the rear of his neck and near his left shoulder.

Vang, as part of a plea agreement with the State, testified at trial. His testimony was that on August 3, 1999, he, defendant and Molloy were drinking and smoking marijuana at the home of Molloy's parents. Defendant shared a room with Molloy in a house located about three-tenths of a mile from the victim's home. Vang said that during the party at Molloy's house defendant and Molloy approached him asking if he wanted to rob the victim. Defendant knew the victim had just cashed his social security check. Vang and Molloy donned black trench coats and covered their faces with bandanas. Molloy took a .22 caliber pump action rifle in a pool cue case. On the way to the victim's home defendant said he would go in the house and the other two men should come in after five

minutes to rob the victim. Vang remained on the porch but heard and saw Molloy shoot the victim while he sat on the couch. Vang said he heard defendant tell Molloy to shoot the victim again and again. Vang said the three of them left the scene discarding the rifle and the trench coats in the alley before returning to Molloy's house.

Defendant contends the evidence is not sufficient to support the verdict. He argues (1) Vang was an accomplice and his testimony was not corroborated, and (2) the testimony of other witnesses was so lacking in credibility that it should not be believed.

Our standard of review for claims of insufficient evidence is well established. We review such claims for errors at law. Iowa R. App. P. 4.; *State v. Nichols*, 572 N.W.2d 163, 163 (Iowa App. 1997). A verdict of guilty is binding on appeal unless no substantial evidence in the record exists to support it, or it is clearly against the weight of the evidence. *State v. Forsyth*, 547 N.W.2d 833, 834 (Iowa App. 1996). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997).

In determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Milner*, 571 N.W.2d 7, 10 (Iowa 1997). All evidence is considered, not merely the evidence supporting the verdict. *State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crimes. *State v. Casady*, 491 N.W.2d 782, 787

(Iowa 1992). Additionally, discrepancies in testimony do not, in and of themselves, preclude proof beyond a reasonable doubt. See *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (holding a jury could adopt evidence it found credible); *Forsyth*, 547 N.W.2d at 836 (holding a jury's function to determine credibility and resolve conflicts in evidence).

Vang was an accomplice. Consequently, for his testimony to be sufficient evidence to support the verdict it must be corroborated. Iowa Rule of Criminal Procedure 20(3) provides:

A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The standard for corroboration of accomplice testimony is well established. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa App. 1999). Corroborative evidence may be direct or circumstantial. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). In *State v. Ware*, 338 N.W.2d 707, 710 (Iowa 1983), the court stated:

Corroborative evidence need not be strong and need not be entirely inconsistent with innocence. The existence of corroborative evidence is a legal issue, but its sufficiency is ordinarily a question of fact for the jury. The requirement of corroborative evidence is met if it can fairly be said the accomplice is corroborated in some material fact tending to connect the defendant with the commission of the crime. Corroboration is required not only to provide a firm connection between the accused and the crime but also to enhance the credibility of an accomplice whose involvement in the crime and self-interest in blaming the defendant severely erode his believability.

Id. (citations omitted.)

Contrary to defendant's argument we find there is sufficient evidence corroborating Vang's testimony. Gretchen Kellogg, who was at the party, testified she saw defendant leave with Molloy and Vang. She noted Vang and Molloy were wearing trench coats. Kellogg further testified after the men left she went into the bedroom shared by Molloy and Vang and saw a box of bullets on the bed and in looking behind the dresser noted the rifle ordinarily kept there was gone. Kellogg also testified she was still at Molloy's house when the three men returned. She said Vang sat in a chair by the door and then ran outside like he was going to get sick. She noticed that the men were not wearing the trench coats they had on when they left the house earlier. Officers found a rifle, cue case and six live .22 cartridges in the alley where Vang said they were discarded.

Three spent shell casings, a blue bandana and a box of .22 caliber ammunition were found in the victim's house. A fourth shell casing was found in the bedroom defendant and Molloy share. The four shell casings had the same overall general shape and individual characteristics of test fired shell casings from the rifle found in the alley.

This evidence is sufficient to corroborate material facts of Vang's testimony that connected defendant with the commission of the crime. Defendant's claim that Vang's accomplice testimony was not corroborated is without merit. In arriving at this conclusion we have dismissed defendant's argument that the testimony of certain witnesses including Kellogg was so lacking in credibility that the jury should not have been allowed to rely on their testimony.

It is for the jury to judge the credibility of the witnesses and weigh the evidence. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999); *State v. McPhillips*, 580 N.W.2d 748, 753 (Iowa 1998). A jury is free to believe or disbelieve any testimony it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). A jury's assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory that it may be deemed a nullity. *State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993). Such was not the case here.

Although the testimony of the challenged witnesses was inconsistent in part with previous statements and depositions, this fact is not necessarily fatal to the admissibility of their testimony. See *State v. Romeo*, 542 N.W.2d 543, 549-50 (Iowa 1996) (rejecting insufficiency-of-the-evidence claim despite inconsistencies in the testimony of the two primary witnesses against the defendant and holding it was for the jury to decide if the witnesses were credible); *State v. Tonn*, 441 N.W.2d 403, 404 (Iowa App. 1989) (finding evidence sufficient to sustain the defendant's convictions of third-degree sexual abuse despite inconsistencies and mistakes in the victim's testimony). The testimony of the challenged witnesses was not so absurd or unbelievable as to render it null. There is substantial evidence in the record to support defendant's conviction. The district court correctly denied defendant's motion for judgment of acquittal.

Defendant also advances several ineffective assistance of trial counsel claims. We review claims of ineffective assistance of counsel de novo. *State v.*

Brooks, 555 N.W.2d 446, 448 (Iowa 1996). To succeed on a claim of ineffective assistance of counsel, defendant must prove that (1) his trial counsel failed in an essential duty, and (2) prejudice resulted from counsel's error. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. See *Hinkle v. State*, 290 N.W.2d 28, 34 (Iowa 1980). In evaluating counsel's performance, we presume counsel acted competently. See *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

Normally, "we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Query*, 594 N.W.2d 438, 444 (Iowa App. 1999). Claims of ineffective assistance of counsel may be resolved on direct appeal "when the record is adequate to decide the issue." *Id.* If the record is not adequate, we preserve the claim for postconviction proceedings so the facts may be developed and the allegedly ineffective attorney may have the opportunity to explain his or her conduct. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996).

Specifically in his ineffective assistance claims the defendant alleges trial counsel (1) should have moved to suppress statements he made; (2) failed to assert proper objections at trial; and (3) failed to call witnesses whose testimony would be beneficial to his cause.

Defendant claims he received ineffective assistance when trial counsel did not object in a timely manner to hearsay testimony given by Lt. Dawson and Tony Vang. Lt. Dawson testified Molloy told him Vang and defendant were involved in killing Spradau. Defendant's trial counsel objected after Lt. Dawson answered.

Defendant has failed to establish he was prejudiced by Lt. Dawson's answer. There was other testimony establishing defendant was involved in the crime. Lt. Dawson's testimony was cumulative and any error in failing to object was harmless.

Vang testified Molloy asked him, "Do you want to rob Terry?" Assuming without deciding this testimony was hearsay, defendant has failed to establish prejudice from its admission.

Defendant next claims counsel was ineffective for failing to object when a police officer testified that when they moved the body of the victim there was a pungent odor of blood and the victim's pet iguana suddenly crashed through the top of the aquarium and raced toward the victim's body. While we agree with the defendant the evidence was not relevant, defendant has failed to show prejudice resulted to a level that influenced the verdict. This ineffective assistance claim is without merit.

The record is not adequate to address defendant's ineffective assistance claims that (1) his attorney failed to move to suppress a statement allegedly obtained in violation of his constitutional rights to remain silent and have counsel present at questioning; (2) failed to object under Iowa Rule of Evidence 602 to testimony of Mr. Christy; and (3) failed to call witnesses on the defendant's

behalf. These claims are preserved for postconviction proceedings, if any are brought, so the facts may be developed and defendant's trial attorney may have the opportunity to explain his or her conduct.

AFFIRMED.