IN THE COURT OF APPEALS OF IOWA

FILED
FEB 21 1984
CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 21, 1984

vs.) 4-12 404
83-369

GUY L. HAYES,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Scott County - David J. Sohr, Judge.

Defendant appeals from his conviction for theft in the second degree. AFFIRMED.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney General, for plaintiff-appellee.

LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Heard by Schlegel, P.J., Hayden and Sackett, JJ.

SACKETT, J.

Defendant, Guy L. Hayes, appeals from his conviction for theft in the second degree in violation of Iowa Code sections 714.1(1) and 714.2(2).

Hayes and a co-defendant, Ralph Gray, were tried together before a jury. Gray testified at trial but Hayes did not. Hayes was found guilty of theft in the second degree and was sentenced to a prison term not to exceed fifteen years.

On appeal defendant asserts that trial counsel was ineffective due to his failure to request that a lineup be conducted after his desire for a lineup had been made known to counsel, and his failure to seek a severance. Defendant alleges that prejudice resulted both from the fact that Gray testified while defendant did not, and from the inculpatory inferences that allegedly may be drawn from Gray's testimony. Nothing in Gray's testimony directly incriminated defendant and the only indentification of him was the arresting officer's testimony that he was the passenger in the car. Hayes also challenges the sufficiency of the evidence to support the verdict.

I. Sufficiency of the Evidence

In reviewing defendant Hayes' challenges based on sufficiency of the evidence, we must view the evidence in the light most favorable to the state. State v. Robinson, 288 N.W. 2d 337, 338 (Iowa 1980). All legitimate inferences which can be drawn from the evidence will be drawn in support of the conviction. Id. Evidence is sufficient to support a conviction if it allows a rational trier of fact to find defendant guilty beyond a reasonable doubt. Id. at 339. In reviewing the sufficiency of the evidence, direct and circumstantial evidence are deemed to be equally probative. Iowa R. App. P. 14 (f)(16). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt. State v. Schrier, 300 N.W. 2d 305, 308 (Iowa 1981).

A. Identification of defendant.

406

Hayes first argues that the state presented insufficient evidence that he was the perpetrator or accomplice in the crime charged. The record reflects that Glen Bently, the service station owner, left the station's receipts on his desk in his office while he waited on customers. At that time Monty Monger, a station employee, was in the attendant's shelter. Monger saw a person running by the car wash. He chased the man through the bushes but did not catch up with him and he could not see him well enough to provide a physical description. Monger later testified only that the man he chased wore dark clothing and some type of hooded jacket. After chasing the man through some bushes, Monger heard a car door shut and tires spinning and saw a large red and white car with Illinois license plates leaving the adjoining Kentucky Fried Chicken parking lot. Monger testified that he saw no other cars in the lot and that the individual he was chasing would have been visible to him unless he had gone into the Kentucky Fried Chicken store. Monger saw two black men in the car as it left the lot. The car was headed west on Kimberly Road. Officer Nielson, alerted by radio, intercepted a red and white car matching the description given by Monger with Illinois plates heading west on Kimberly Road. The defendant, who was a passenger in the car, crouched down in his seat when the officer pulled alongside the car. Nielson then stopped the car and ordered the occupants out of the vehicle. Nielson looked in the window and saw cash under the driver's seat. He then searched the car and found more money under the front seat. The money was crumpled and appeared to have been stuffed under the seat. The cash totalled approximately $3,000. There was testimony that the cash stolen from the service station totalled approximately $3,000, and that the total of cash and checks taken was approximately $3,600. The defendant and co-defendant were then taken to the station and booked. When stopped, the defendant was wearing a blue sweater and blue jeans. Neither the defendant nor the co-defendant were wearing a hooded sweatshirt or jacket when stopped.

While circumstantial in nature, the evidence presented in this case raises a fair inference of guilt. Viewing the evidence in the light most favorable to the state, we find that the evidence is sufficient to support the jury finding that defendant Hayes was a perpetrator or accomplice in the crime charged.

B. Value of property stolen.

Hayes next argues that the state failed to prove that over $500.00 was taken in the theft, the statutory minimum for theft in the second degree. At trial, the station owner testified that the cash and checks stolen totalled $3,579.65, approximately $3,000 of which was currency. Defendant Hayes and his co-defendant were apprehended shortly after the theft took place with approximately $3,000 in currency stuffed under the seat of the car. Viewing the evidence in the light most favorable to the state, there was sufficient evidence to support a finding that the money recovered was the money that was taken from Bentley's station, and that the value of the property taken exceeded $500.00.

II. Ineffective Assistance of Counsel

Hayes asserts that he was denied effective assistance of counsel by his counsel's failure to request that a line-up be conducted, and by his counsel's failure to move to have his trial severed from that of his co-defendant. He argues that he was denied a fair trial and denied effective assistance of counsel due to the prejudicial effect that the failure to move to sever the case had. Hayes requests that this court reserve the issue of ineffective assistance of counsel for a postconviction proceeding because facts supporting this claim are not present in the record. We agree and decline to consider this issue at this time. A determination of the adequacy of counsel's performance ordinarily requires an evidentiary adversary hearing. State v. Steltzer, 288 N.W. 2d 557, 560 (Iowa 1980).

AFFIRMED.

SCHLEGEL, J. (dissenting)

State v. O'Connell, 275 N.W. 2d 197, 204-05 (Iowa 1979) eliminated the distinctions formerly recognized between direct and circumstantial evidence in testing evidentiary sufficiency. Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Whether the evidence is direct or circumstantial, however, it must raise a fair inference of guilt; it must do more than create speculation, suspicion, or conjecture. State v. Schrier, 300 N.W. 2d 305, 308 (Iowa 1981); State v. Lewis, 242 N.W. 2d 711, 724 (Iowa 1976).

In this case, the circumstantial eivdence before the jury established that defendant was in an automobile which may have been seen near the scene of a theft, in which was found money in the amount of approximately $3,000. There is no identification of the money as that which was missing from the gasoline station, no identification of the defendant as the person seen running from the scene or of the driver of the car as that person, and no explanation of the fact that neither the defendant nor the driver was wearing the hooded garment that was decribed by Mr. Monger. In short there was no substantial evidence, either direct or circumstantial, that would raise a fair inference of defendant's guilt. We do not even have a permissible inference of the defendant's guilt arising from his possession of recently stolen property, since the money cannot be identified as that which was stolen, and it is not an established fact that the defendant was in possession of any stolen property. At best, the record in this trial does no more than create speculation, suspicion or conjecture as to the defendant being involved in the theft. State v. Schrier, 300 N.W. 2d at 308.

Considering the evidence and all permissible inferences in the light most favorable to the State, I do not believe there was sufficient evidence in the record to convict the defendant of theft, either as the perpetrator or as an aider or abettor. The court should have sustained defendant's motion for directed verdict of acquittal.

I would reverse.