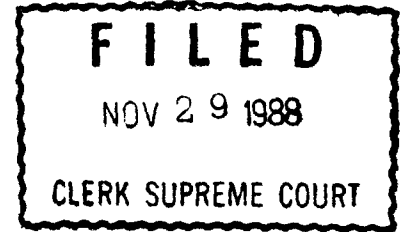


IN THE COURT OF APPEALS OF IOWA



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STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DENNIS ROSS SMITH,)
Defendant-Appellant.)

8-347
87-1013

Appeal from the Iowa District Court for Tama County
(No. 1944), Van Zimmer, Judge.

Defendant appeals from the judgment entered following
his conviction of theft in the second degree and from his
sentence as a habitual offender after a jury trial.
AFFIRMED.

Sally Weyer of Bergan & Weyer, Iowa City, for
defendant-appellant.

Thomas J. Miller, Attorney General; Julie Ann Halligan,
Assistant Attorney General; and Richard Vander Mey,
Assistant County Attorney, for plaintiff-appellee.

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

DONIELSON, P.J.

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Defendant appeals from the judgment entered following his conviction of theft in the second degree and from his sentence as a habitual offender after a jury trial. He claims: 1) the violation of an in limine order by a State's witness was so prejudicial that he is entitled to a new trial; 2) his two prior felony convictions are constitutionally infirm such that they could not be used to enhance his sentence pursuant to the habitual offender statute; 3) the State failed to prove beyond a reasonable doubt that he knew or believed that the property in question was stolen; and 4) he was denied his constitutional right to the effective assistance of counsel by his trial counsel's omissions and failure to preserve error.

Defendant Dennis Ross Smith was charged with theft in the second degree by exercising control over stolen property in violation of Iowa Code sections 714.1(4) and 714.2(2) and being a habitual offender, in violation of section 902.8. In early 1985, Smith lived with Brenda Lee Butler, also known as Brenda Smith, who was his ex-wife, his son, and some of Brenda's children. In March 1985, a number of household items were stolen from an uninhabited farmhouse. Brenda claims that defendant brought some furniture to the house at about that time. Smith testified that Brenda brought the property to the house and told him it came from an ex-boyfriend. Smith took some of the prop-

erty to the home of Dennis Stull, an acquaintance. Brenda called the sheriff's department and stated that Smith had stolen goods in the house. Brenda was later convicted of second-degree theft. Smith was also found guilty of second-degree theft. He appealed and the case was remanded for a new trial. Smith was again found guilty of theft in the second degree. He was also found to be a habitual offender and was sentenced to a term of imprisonment not to exceed fifteen years.

I. Prior to trial, defendant filed a motion in limine requesting the court to instruct the State not to mention or refer to the criminal record of the defendant. This request was sustained by the court. However, at trial, the prosecutor asked Brenda Butler the following questions:

Q. And as of this time had Dennis Smith been arrested and charged with a crime? A. Yes.

Q. But then you thought you should go back to him, that it would be safer for you after you had done that? A. Unless you know Dennis Smith and the way he is, it's hard to explain, but at that time he felt that if I went into court and lied and took the blame for it he knew I wouldn't go to prison. I have never been in trouble before this, and I had children. He knew that if he was convicted, he would go back to prison, and he wanted me to take the blame for it.

The defendant immediately asked to be heard outside the presence of the jury. The jury was removed, and the defendant moved for a mistrial based on the violation of the motion in limine and the prejudice resulting to the defendant from her statement. The court overruled the motion.

Trial courts have considerable discretion in ruling upon motions for mistrial, as they are present throughout the trial and are in a better position than the appellate court to gauge the effect on the jury. State v. Cage, 218 N.W.2d 582, 586 (Iowa 1974). We intervene only where the discretion is abused. Abuse of discretion is shown only when it is demonstrated that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Trudo, 253 N.W.2d 101, 106 (Iowa), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977).

The general rule is that evidence to show the commission of crimes other than that for which the defendant is presently on trial is irrelevant and inadmissible. State v. Finchum, 364 N.W.2d 222, 225 (Iowa 1985); Iowa R. Evid. 404(b). The exceptions to this rule are listed in Rule 404(b). The State has not sought to use any of the exceptions but instead argues that the testimony was not prejudicial. We agree.

In Finchum, the defendant was on trial for burglary of a certain domicile. The evidence that the prosecution sought to introduce was that defendant apologized to this person for a previous burglary to her home. "This evidence is highly prejudicial in that it appears to demonstrate previous similar conduct with regard to" this person. 364 N.W.2d at 225. This evidence against Finchum did not fit

within an exception and the State did not contend that it did. Therefore a new trial was necessary. Id.

The testimony heard by the jury in this case is not prejudicial as it was in Finchum. The fact that the defendant had been in prison does not demonstrate previous "similar" conduct. This testimony does not seek to prove the character of the defendant and that he acted in conformity therewith. See Rule 404(b). The trial court has discretion to admit evidence of other crimes for other purposes. Iowa R. Evid. 404(b). Evidence of other crimes will be excluded if relevant only to show an individual is a bad person capable of committing bad acts. State v. Roth, 403 N.W.2d 762, 765 (Iowa 1987).

In ruling on the motion for a mistrial, the district court stated in part:

[I]t does appear to me that in the absence of a stipulation or agreement by the State with respect to paragraph 1(a) of the Motion in Limine, that this particular comment attributed to the defendant by the witness might well have been admissible in the absence of the agreement as an admission against interest by the Defendant or perhaps under Rule 404(b) depending on how the evidence developed.

It cannot be said that the trial court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. The court considered other purposes for the admission of this evidence before ruling. The court heard the testimony in the context of the trial and did not abuse its discretion in denying the motion for mistrial.

Furthermore, the court did offer to admonish the jury. The defendant declined the offer, taking the position that any admonishment would not remedy the damage already done. Generally we consider an admonishment and a motion to strike testimony as sufficient to prevent prejudice when a witness testifies inadvertently about an inadmissible subject. See State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986). Having declined the admonishment, defendant cannot now claim that prejudice remained. We find no abuse of discretion in overruling defendant's motion for mistrial.

II. Defendant contends that his two prior felony convictions were constitutionally infirm such that they could not be used to enhance his sentence pursuant to the habitual offender statute. The State claims the defendant was not denied effective assistance of counsel in 1960 and 1964 and consequently the convictions were properly used for purposes of the habitual offender statute.

The State filed an Amended and Substituted Trial Information alleging the defendant was a habitual offender based on two previous felony offenses: breaking and entering in 1960 and escape in 1964. Prior to trial on the theft charge, defendant filed an Objection to Use of Prior Convictions. Defendant claimed his prior convictions were obtained in violation of his constitutional rights and that he was not represented by counsel and did not waive counsel for these proceedings. After a hearing, the court found

that defendant was represented by counsel and that his convictions were competent for purposes of the habitual offender statute.

Defendant claims his appointed counsel rendered ineffective assistance with respect to his 1960 conviction. To be successful on this claim, defendant must overcome the presumption that counsel is competent. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). Defendant must shoulder the burden of proof to establish by a preponderance of the evidence, including an affirmative factual basis, that counsel provided ineffective assistance. Id. Defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the results would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984).

Defendant claims his counsel was appointed on January 23, 1960, as he was being brought to court. He told his attorney that he wanted to plead not guilty, but the attorney advised him to plead guilty. There was no further counseling before his attorney told the court that defendant wanted to plead guilty. Defendant asserts that the attorney failed to investigate his case, did not adequately advise on alternatives, and did not assist in developing a defense.

Defendant Smith has not presented an affirmative factual basis for his claim. He has not shown how additional investigation and counseling would have provided more effective assistance or would have affected the outcome of the trial. The only evidence presented was Smith's testimony. This does not overcome the presumption that counsel is competent. Therefore, we find the 1960 conviction was properly used pursuant to the habitual offender statute.

Regarding the 1964 escape charge, defendant again wanted to plead not guilty. He contends the conviction was infirm because he did not have effective assistance of counsel and that his plea was not entered voluntarily. Defendant argues there is nothing to indicate that the appointed attorney fulfilled any of the duties of effective representation. No evidence was presented besides defendant's testimony. Again, defendant has not met his burden of an affirmative factual basis to overcome the presumption that counsel was competent.

The trial court found that Smith's plea was voluntary. Judge Eads of the Sixth Judicial District testified that Smith appeared before him and voluntarily pled guilty. The calendar sheet indicated this to be true. Defendant says he never appeared before the judge. The trial court, after hearing the witnesses testify, decided that Smith had been represented by counsel and that the 1964 conviction was competent for the habitual offender statute.

Under the totality of the circumstances, we find that the 1960 and 1964 convictions were obtained without foregoing defendant's sixth amendment right to effective assistance of counsel. Defendant was not denied his constitutional rights. Therefore, the court properly considered the 1960 and 1964 convictions pursuant to the habitual offender statute.

III. Defendant next contends that the State failed to prove beyond a reasonable doubt that the defendant knew or believed that the property in question was stolen. The State asserts there was sufficient evidence.

The State is required to prove all elements of a crime beyond a reasonable doubt. State v. Wilkens, 346 N.W.2d 16, 20 (Iowa 1984). Defendant was charged with theft pursuant to Iowa Code section 714.1(4). Of the elements required, defendant contends the State failed to prove the defendant knew or believed that the property in question was stolen.

When considering the sufficiency of the evidence, the appellate court will consider all of the evidence presented and view it in the light most favorable to the State. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). All fair and reasonable inferences that may be deduced from this evidence will be accepted. Id. The jury is not required to accept defendant's version of the facts. State v. Pletka, 310 N.W.2d 525, 527 (Iowa 1981).

Furthermore, the jury verdict is binding upon the reviewing court and will be upheld when substantial evidence supports it. Evidence is substantial when it would convince a rational trier of fact beyond a reasonable doubt that the defendant is guilty as charged. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16).

Substantial evidence supports the jury verdict. First, the defendant came into possession of the property shortly after it was stolen. From this it can be inferred the property was received with guilty knowledge. State v. Post, 286 N.W.2d 195, 203 (Iowa 1979). Second, the defendant's explanation for having stolen items in his home was not so inherently credible as to preclude the jury from finding that he knew them to be stolen. Defendant testifying that Butler bought the items at a garage sale near the time the goods were reported stolen presented a credibility question peculiarly within the province of the jury. State v. Sheffey, 234 N.W.2d 92, 96 (Iowa 1975). Third, there was conflicting testimony by defendant and Dennis Stull regarding how Stull came to possess the property. Finally, from defendant's possession of the stolen property it is reasonable to infer that he knew the property was stolen.

Considering all fair and reasonable inferences that may be deduced from the evidence presented and viewing the evidence in the light most favorable to the State, a rational

jury could find beyond a reasonable doubt that defendant knew or believed the property was stolen. There is substantial evidence to support the verdict; therefore, it must be affirmed.

IV. Finally, defendant claims he was denied his constitutional right to effective assistance of trial counsel. He claims his attorney erred by failing to object to the admission of certain evidence at the habitual offender trial. He claims his counsel failed to perform his duty to investigate the mental health status of witness Brenda Butler, failed to take depositions from Butler and other State witnesses, and failed to investigate sales of stolen goods by Butler. Also, defendant asserts his trial counsel erred by failing to challenge the sufficiency of the arrest warrant.

Ordinarily we do not decide the question of ineffective assistance of counsel on direct appeal, preferring to reserve it for postconviction proceedings where counsel can defend against such a charge. State v. Poyner, 306 N.W.2d 716, 719 (Iowa 1981). As counsel has been given no such opportunity to explain his actions, the record is insufficient to review counsel's conduct.

Furthermore, to preserve the claim of ineffective assistance of counsel for postconviction review, a defendant must make some minimal showing from which this court can assess the potential viability of his claim. State v.

White, 337 N.W.2d 517, 519 (Iowa 1983). The standard to preserve the claim is:

Such a showing should not only demonstrate some need for further development of the record, but should indicate why the challenged actions are believed to have been ineffective and what prejudice is likely to have resulted from them. The bald assertion that certain acts constitute ineffective assistance of counsel will be insufficient to preserve the question for postconviction proceedings. State v. Wagner, 410 N.W.2d 207, 215 (Iowa 1987).

Smith has given no indication of what information could be developed with further proceedings. He provides no definitive instances of possible prejudice flowing from counsel's challenged errors and omissions. See Id. We conclude Smith has not raised a viable claim of ineffective assistance here and find no basis for presenting these issues for postconviction review.

AFFIRMED.