IN THE COURT OF APPEALS OF IOWA

No. 6-033 / 95-0732

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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

JAMES ROSS,

Appellant.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

James Ross appeals his convictions, following a jury trial, for two counts of first-degree arson. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; and Richard R. Phillips, County Attorney; for appellee.

Heard by Sackett, P.J., Cady, J., and Peterson, S.J.*

*Senior Judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

The defendant, James Ross, appeals from his convictions on two counts of first-degree arson. He contends: 1) there was insufficient evidence to support the convictions; 2) the trial court abused its discretion in allowing police officers to testify about their impressions of whether the defendant was truthful during a police interview; and 3) his trial counsel was ineffective. We affirm with respect to the first two issues and reserve the third for postconviction proceedings.

I. Sufficiency of the Evidence.

The defendant argues the State failed to prove beyond a reasonable doubt he committed first-degree arson. Two homes and two garages were set on fire in a Muscatine, Iowa, neighborhood on the night and morning of October 28 and 29, 1994. The defendant was convicted of two counts of first-degree arson and acquitted of a third count of second-degree arson.

When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime

charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

The defendant argues his convictions must be reversed because the State did not prove he was the individual who started the fires. He contends the State only presented circumstantial evidence which, at most, proved he was in the neighborhood when the fires occurred. Direct and circumstantial evidence are equally probative, Iowa R. App. P. 14(f)(16), and a jury verdict of guilty can be supported by circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993).

The defendant was convicted of arson for fires which occurred at 508 Walnut Street and 313 West Fifth Street. On the night of the fires, a witness, Ms. Titus, walked to and from a convenience store. On her way to the store, at a few minutes before 11:00 p.m., she saw the defendant in an alley near the home at 508 Walnut Street. On her return from the store, around 11:30 p.m., Ms. Titus observed that the defendant was still in the alley. She watched him for approximately fifteen minutes and believed he was staring at the home at 508 Walnut Street. At approximately 12:30 a.m. the Muscatine Fire Department received an emergency call to respond to a fire at that home.

Another witness, Ms. Mealy, was driving in the neighborhood where the fires occurred. She saw a man running very fast, and she observed him jump into bushes near a home on West Fifth Street. Shortly thereafter, the house near the bushes caught fire. Ms. Mealy's description of the clothing worn by the man who jumped into the bushes, generally matched that given by Ms. Titus and was consistent with the clothing the police subsequently seized from the defendant.

On the night of the fires, Officer Schwarz patrolled the neighborhood looking for anything suspicious. At approximately 12:58 a.m. he spotted the defendant and put his spotlight on him and asked him to stop. The defendant did not do so and the officer walked after him and repeated his request for him to stop. The defendant again did not stop. When the officer caught up to within three feet of the defendant, the defendant stopped and faced the officer. Officer Schwarz questioned the defendant about his name and where he lived. The officer observed the defendant was very nervous. The officer had to leave when he received a report regarding the fire at the residence at 313 West Fifth Street.

Later that morning, two officers and a detective went to the defendant's home and asked him to come to the police station so they could speak with him. The defendant made a statement indicating he knew the officials would be coming to talk to him. During questioning the defendant initially denied having been stopped by Officer Schwarz on the prior night. He later changed his story and admitted he had

been stopped. The defendant also claimed he had stopped right away when Officer Schwarz asked him to do so. The defendant later changed his story again and admitted he had not stopped right away when told to do so by the officer.

The testimony of three witnesses place the defendant in the area of the fires. All three of the witnesses observed the defendant engaging in suspicious behavior in the immediate proximity of the homes which burned. The jury could have found the defendant stared for a prolonged amount of time at one of the homes which was set afire, the defendant ran and jumped into bushes in front of one of the homes which caught fire shortly thereafter, and he refused to stop when asked to do so by a police officer.

The jury could also find the defendant initially lied when he was asked if Officer Schwarz had stopped him in the alley. After he had changed his story and admitted the officer had stopped him, he lied again and said he had stopped immediately. "A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt." *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982); *see also State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) (false story told by defendant indicates consciousness of guilt).

Viewing the record in the light most favorable to the State, there was substantial evidence to support the verdict. The defendant's presence at the scene

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of the fires, his furtive behavior, and his subsequent lies are sufficient evidence to support the jury's verdict.

II. Admission of Officer's Testimony.

The defendant argues the trial court abused its discretion in allowing Officer Schwarz and Officer Hasty to testify about whether they believed the defendant was being truthful during police questioning. Over the defendant's objection, the State characterized these officers as experts in interpreting the body language of interviewees and elicited testimony as to whether they believed the defendant had been telling the truth.

It is well-established witnesses, including expert witnesses, are not allowed to directly or indirectly render an opinion on the credibility or truthfulness of a witness or offer an opinion that essentially passes on the guilt or innocence of a defendant. *State v. Myers*, 382 N.W.2d 91, 97-98 (Iowa 1986); *State v. Fox*, 480 N.W.2d 897, 899 (Iowa App. 1991). However, the State is correct in arguing the defendant has failed to preserve this issue for appellate review. In objecting to the testimony of officers Schwarz and Hasty, defense counsel objected on two grounds: 1) whether an adequate foundation had been made to qualify the witnesses as experts; and 2) whether the testimony would invade the province of the jury.

The general objection that a question "invades the province of the jury" lacks specificity and has no force or effect. *In re S.J.M.*, 539 N.W.2d 496, 499 n.1 (Iowa

App. 1995). When expert testimony is involved, an objection that an opinion is not a proper subject of expert testimony is adequate to preserve the issue for review; an objection that the opinion invades the province of the jury is invalid. *State v. Nimmo*, 247 N.W.2d 228, 231 (Iowa 1976). While the defendant objected to the qualifications of the witnesses to testify, at no point did he object to the nature of the testimony as an improper subject of expert testimony. We find the defendant failed to make an adequate objection to the testimony at trial, and this issue has not been preserved for appellate review.

III. Ineffective Assistance of Counsel.

The defendant claims his trial counsel was ineffective because he failed to object to testimony regarding his prior incarceration and his use of gang symbols. Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied*, 459 U.S. 841 (1982); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Preserving matters for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

Trial counsel may have had strategic reasons for not objecting to the evidence of the defendant's prior incarceration and his use of gang symbols. Improvident trial

strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). We conclude there is presently an inadequate record to adjudicate the defendant's claim and we reserve it for postconviction proceedings.

AFFIRMED.

Sackett, P.J., concurs; Cady, J., specially concurs.

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I concur with the result, but would rely on different reasons to affirm the trial court's decision to admit the opinion testimony of the two officers. I find the objection was sufficient to preserve error. *See State v. Nimmo*, 247 N.W.2d 228, 231 (Iowa 1976). Furthermore, I would find the trial court abused its discretion in admitting the evidence. *See State v. Payton*, 481 N.W.2d 325, 327 (Iowa 1986) (Expert testimony that either directly or indirectly renders an opinion on the truthfulness of a witness is inadmissible). Notwithstanding, I would affirm on the basis that the error was not prejudicial in light of all the circumstances. *See State v. Brotherton*, 384 N.W.2d 375, 378-79 (Iowa 1986).