

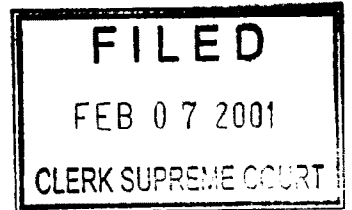
IN THE COURT OF APPEALS OF IOWA

No. 0-586 / 99-1218
Filed February 7, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GEORGE (NMN) COFFER,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

The defendant appeals his convictions and sentences, following a jury trial, for delivery of a controlled substance (cocaine base) and possession of stolen property. **AFFIRMED.**

John A. Stitely, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

HECHT, J.

George Coffey appeals from a conviction of possession of stolen property and delivery of a controlled substance. We affirm.

I. Factual Background and Proceedings. The trial information filed in Black Hawk County case number FECR 082205 alleged Coffey possessed stolen property in violation of Iowa Code section 714.1(4) and delivered a controlled substance in violation of Iowa Code section 124.401(1)(C)(2)(b) (1997) on or about October 31, 1998. At trial, the State called witness Jon Becker who testified he used forged checks to purchase personal property that he then traded to Coffey for crack cocaine. A jury returned a guilty verdict on both charges on May 12, 1999. Coffey contends the district court erred when it: (1) permitted comment on his silence; (2) made certain evidentiary rulings; (3) permitted a second prosecution for a single offense; (4) submitted to the jury matters not supported by substantial evidence.

II. Constitutional Issues. Coffey raises two constitutional issues. We review them de novo. See *Callender v. Skiles*, 591 N.W.2d 182, 184 (Iowa 1999). A substantial amount of personal property was seized during a search of Coffey's house pursuant to a warrant. Coffey claims the district court permitted a violation of his Fifth Amendment rights during the following testimony of Detective Boldt:

Q [By the prosecutor]: Do you recall any other items that were seized that evening? A: There were multiple items seized. I have, I believe, about a two and a half, maybe three-page list of properties taken from the house.

Q: Do you remember anything specifically with regard to hats? A: Yes, sir. There were somewhere around 20, 25 hats. I'd

have to refer back to my report for the exact number. Mr. Coffey saw those, the hats being removed from his house and he told me, he said, "Those stay here. Those are not stolen." I asked him, I said, "Well, what about the rest of the property?" And he refused to answer anything.

Q: Did you find that particular statement to be significant?

A: Yes, I did.

Q: Why?

Defense counsel then voiced an objection the prosecutor was "attempting to elicit a comment on Fifth Amendment privilege." The objection was sustained, but after a bench conference, the court changed the ruling. The examination of the witness continued as follows:

Q: Why did you consider that particular statement to be significant? A: The reason why that was significant is because Mr. Coffey was aware that we had taken probably a pickup load of property out of his house and the only concern he had was these 20, 25 hats and he specifically said those were not stolen.

Coffey contends Officer Boldt's testimony was an improper comment on defendant's post-arrest silence. The State asserts: (1) error was not preserved because Coffey's counsel failed to make a timely objection to the testimony and failed to move to strike the testimony; and (2) if error was preserved, it was harmless.

We need not reach the question of whether Boldt commented improperly on Coffey's silence when he testified "[Coffey] refused to answer anything" in response to a question posed after the arrest. No objection was interposed to the question that elicited the answer, and no motion to strike the answer was made. "The rule is well established that failure to object to evidence . . . when the grounds for objection . . . are first apparent precludes the party from asserting on appeal admission of evidence was error." *State v. King*, 225 N.W.2d 337, 341

(Iowa 1975). Failure to make timely objection to inadmissible evidence results in waiver to challenge the admission of the evidence either in motion for new trial or on appeal. *State v. Love*, 302 N.W.2d 115, 121 (Iowa 1981); *State v. Whitfield*, 212 N.W.2d 402, 406 (Iowa 1973). Error which is not preserved is waived. See *State v. Farnum*, 554 N.W.2d 716, 719 (Iowa Ct. App. 1996).

Coffer's counsel did interpose an objection based upon the Fifth Amendment when Boldt was asked to testify about the significance of Coffer's statement to the effect the hats were not stolen. The objection was overruled. A reasonable juror could infer from Boldt's answer if Coffer protested only the removal of the hats from the premises because they were not stolen, the remainder of the truck load of property seized may have been stolen. We find no prejudicial error resulting from the district court's ruling on this objection. Boldt had already testified without objection or motion to strike that Coffer refused to answer when asked whether the other property seized by law enforcement officers was stolen. Accordingly, any error resulting from the ruling on this objection was not prejudicial.

In the second of the two constitutional contentions raised in this appeal, Coffer contends he was tried twice for the same crime.¹ Coffer failed to present this issue to the district court and raises it for the first time on appeal. Issues not raised before the district court, including constitutional issues, cannot be raised

¹ Coffer raised a similar issue in Black Hawk County case number FECR 077503. In that case, he was convicted of theft in the second degree for exercising control over computer equipment stolen from Black Hawk Roofing Co. His appeal from that conviction was transferred to the Iowa Court of Appeals and was decided in case number 0-587. We rejected his double jeopardy argument in 0-587 because the case was the first of the two in which Coffer claims he was tried twice for the same crime.

for the first time on appeal. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). "It is elementary that we do not consider issues not presented to or decided by the district court." *State v. Gogg*, 561 N.W.2d 360, 368 (Iowa 1997) (citing *State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995)). The issue is waived for another reason as well. Coffey's citations to the appendix do not support his assertion "evidence admitted at trial that was alleged to be stolen from Hawkeye Roofing was the same evidence . . . that was the subject of the trial . . . in FECR077503." It is defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon. *State v. Ludwig*, 305 N.W.2d 511, 513 (Iowa 1981). Coffey has failed to support his double jeopardy assertion with appropriate references to the record, and the issue is therefore waived.

III. Sufficiency of the Evidence. Coffey challenges the sufficiency of the evidence: (1) to prove property in his possession was stolen; (2) to prove he delivered cocaine; and (3) to prove the value of the stolen property. Our standard of review on these matters is for errors of law. *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998); Iowa R. App. P. 4. The standards applied in such a review are well-established. We view the evidence in a light most favorable to upholding the jury's verdict. *State v. Kraklio*, 560 N.W.2d 16, 17 (Iowa 1997). The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Blair*, 347 N.W.2d 416, 418-19 (Iowa 1984). We do not make an independent determination of whether the evidence established guilt beyond a reasonable doubt; rather, we determine the legal

sufficiency of the evidence to support the verdict. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). A jury's verdict is binding on us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994). Circumstantial evidence is just as probative as direct evidence. *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993).

Coffer asserts the State "was unable to demonstrate that most of the items which it seized and put into evidence were any part of a crime or that George Coffer knew that they were stolen." He does not identify with specificity which of the items of property introduced in evidence is referred to in this general assertion. Coffer again fails to meet his obligation to provide this court with a record affirmatively disclosing the error relied upon. *Ludwig*, 305 N.W.2d at 513. In any event, we do find sufficient evidence in the record tending to prove Coffer exchanged crack cocaine for property he knew was stolen. Jon Becker testified he obtained the drug from defendant in exchange for personal property he had purchased with forged checks. The record contains evidence of Coffer's admission he "was really into taking property from people that shoplifted." We conclude the evidence in the record is legally sufficient to support the jury's findings the property Coffer received from Becker was stolen and Coffer knew it was stolen.

Coffer next contends the evidence in the record is insufficient to prove he delivered cocaine to Becker. The search of Coffer's premises produced no evidence of the drug. No cocaine was admitted in evidence. Coffer contends the only evidence of his participation in a drug transaction was the unreliable

testimony of Becker. Coffey encourages us to disregard the testimony because the credibility of Becker – a person who stole from his father to get high – “is extremely suspect.” Credibility questions are best left to the fact finder. *State v. Forsyth*, 547 N.W.2d 833, 837 (Iowa 1996). A jury’s assessment of credibility may only be ignored on appeal when the testimony is so impossible, absurd, and self-contradictory it may be deemed a nullity. *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993). We will not disturb the jury’s assessment of credibility in this case.

Coffey contends the State failed to present sufficient evidence of the value of the stolen property. He was convicted of theft in the second degree. This statute requires proof of a theft of property valued in excess of \$1000. The record includes eight forged checks totaling \$2,876.58 used by Becker to obtain personal property exchanged for drugs from Coffey. The State clearly proved the value of the stolen property received by Coffey exceeded \$1000. Thus, Coffey’s challenge to the sufficiency of the evidence of value is without merit.

IV. Evidentiary Rulings. Coffey claims the district court erred in: (1) admitting certain exhibits; (2) admitting hearsay evidence; and (3) admitting evidence of a 1996 search of Coffey’s home. We generally review the admission of evidence under an abuse of discretion standard. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). Thus, we reverse rulings on such matters only when it is shown the trial court abused its discretion. *Id.* In order to show an abuse of discretion, one generally must show the court exercised its discretion “on

grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985).

Coffer contends the district court erred in admitting “dozens of photographs over counsel’s repeated objections.” Trial counsel objected to the admission of numerous photographs and items of property on the grounds of relevance and “prejudice.” The State asserts Coffer failed to preserve error on appeal because his brief fails to specifically cite to the record and fails to refer to the specific exhibits which he claims should not have been admitted in evidence. The State further asserts Coffer’s appellate brief challenges only the rulings on the admissibility of the photographs; and no prejudicial error resulted from the admission of the photographs because the property shown in the pictures was also admitted in evidence.

Although Coffer’s appellate brief refers us generally to “an extensive series of objections by counsel including but not limited to those found from pages 15-70 of the appendix,” we are left to speculate as to which of the more than fifty exhibits objected to by trial counsel are challenged on appeal. Similarly, appellant’s brief fails to present argument as to why each specific challenged exhibit should not have been admitted in evidence during the trial. This constitutes a failure to comply with rule 14(a)(5) of the Iowa Rules of Appellate Procedure which requires the appellant’s brief to set forth his “contentions . . . with respect to the issues presented and the reasons therefore. . . .” The State justifiably contends it is unable to formulate a responsive argument due to Coffer’s failure to identify the particular exhibits the appellant challenges on

appeal. We conclude Coffey's trial counsel did preserve error by objecting to the admission of certain exhibits. However, any error was waived by Coffey's failure on appeal to file a brief identifying the specific exhibits he claims should not have been received in evidence and presenting an argument setting forth one or more reasons why each challenged exhibit should not have been received in evidence.

The State offered evidence law enforcement officers had applied for and obtained a warrant to search Coffey's residence on prior occasions unrelated to the case now before the court. Officer Engel was asked to disclose in his testimony in this case what information was given to the court to support one of those prior applications. Coffey's trial counsel voiced a hearsay objection. The district court overruled the objection and allowed Engel to testify an informant, Ryan Damon, said he'd received drugs and cash from Coffey in exchange for stolen computer equipment in 1997. We find no abuse of discretion in the district court's ruling on this issue. "Evidence of an utterance offered to explain subsequent action of a person to whom it was addressed is not hearsay. Such evidence is not offered as an assertion but to give character to conduct." *State v. Nowlin*, 244 N.W.2d 596, 600 (Iowa 1976). In this case, Damon's statement was offered and admitted for the purpose of explaining Officer Engel's reasons for obtaining the 1997 search warrant. No relevance objection was interposed to this evidence. We find no abuse of discretion in the district court's ruling and affirm on this issue.

Coffey also challenges the district court's ruling admitting evidence concerning a 1996 search of his home. His trial counsel objected to the evidence

on grounds of relevance and Iowa Rules of Evidence 403 and 404(b). Officer Engle was permitted to testify the search produced evidence Coffey's pants pockets contained a large amount of cash. The officer also testified numerous televisions, VCRs, and microwaves were found on the premises during the search. The State contends no prejudice resulted from the admission of this evidence because Officers Meyer and Krogh who participated in the same search provided similar testimony. We agree. Coffey has failed to establish prejudice because substantially similar unchallenged evidence is found elsewhere in the record. *State v. Hood*, 346 N.W.2d 481, 484 (Iowa 1984).

AFFIRMED.