IN THE COURT OF APPEALS OF IOWA

No. 1-537 / 00-1480
Filed September 26, 2001

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CLERK SUPREME COURT

**STATE OF IOWA,**
Plaintiff-Appellee,

vs.

**ROBERT ARCHIE PACK, JR.,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, G. C. Abel, Judge.

Robert Pack appeals from his conviction and sentence for second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher M. Wilson, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

**HECHT, J.**

Robert Pack appeals from his conviction and sentence for second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (1997). He contends (1) the court erred in finding there was sufficient evidence to support his conviction, and (2) his trial counsel was ineffective in failing to object to prosecutorial misconduct. We affirm.

I. **Factual Background and Proceedings**. On the evening of October 6, 1998, James Eaglefeather entered a Council Bluffs convenience store wearing a dark, hooded sweatshirt, a blue bandana over his face, and carrying a sawed-off shotgun draped with a pink cloth. He ordered the clerk to open the register and empty its contents. While he waited for the clerk, Eaglefeather racked his firearm. The clerk placed cash, change, food stamps, and a check payable to the store into a white plastic bag. Eaglefeather took the bag, left the store, and headed for a nearby alley.

After receiving a radio dispatch about the robbery, an officer working uniformed patrol stopped a red Plymouth Sundance approximately a mile from the store. The car contained two occupants: Pack, the driver, and Eaglefeather. Pack consented to a search of the vehicle. Officers observed a dark blue, hooded sweatshirt in the passenger seat, and a white plastic bag containing the contents of the store's cash register on the passenger side floor. Eaglefeather confessed to the crime, but denied possessing a weapon. He also informed officers Pack was not involved in the robbery. A search of the alley behind the store revealed the shotgun, a pink t-shirt, and a blue bandana inside a trash can.

Pack was charged with robbery in the first degree under an aiding and abetting theory, in violation of Iowa Code sections 711.1, 711.2, and 703.1 (1997). The matter proceeded to trial on July 18, 2000. Pack was found guilty by a Pottawattamie County jury of robbery in the second degree, a lesser included offense. Pack appeals.

**II. Discussion.**

**A. Sufficiency of the Evidence.** Pack contends the State presented insufficient evidence to support his conviction for robbery in the second degree because the State failed to prove he aided and abetted Eaglefeather in the commission of the robbery. Pack asserts the State failed to show he knew Eaglefeather was planning to rob the store when he transported Eaglefeather to and from the robbery scene.

We review claims of insufficiency of the evidence for errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.*; Iowa R. App. P. 14(f)(1). Substantial evidence is evidence upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Thomas*, 561 N.W.2d at 39; *State v. Robinson*, 288 N.W.2d 337, 341 (Iowa 1980).

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, "including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record." *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). All evidence is considered, "not just that of an inculpatory nature." *Id.* Evidence that merely raises suspicion, speculation, or conjecture will not be considered substantial

evidence. *Id.* The weight of the evidence and credibility of witnesses are to be determined by the fact finder, as this court's review of the evidence is not de novo. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984).

In order to establish a conviction based on aiding and abetting, the State must prove by substantial evidence the accused "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (quoting *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977)). Proof may be established by circumstantial evidence, including "presence, companionship, and conduct before and after the offense is committed." *Lewis*, 514 N.W.2d at 66 (citing *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984)).

We find the State produced substantial evidence from which a jury could reasonably find Pack aided and abetted Eaglefeather in the robbery. It is clear from the record Eaglefeather had a shotgun when he entered the store. At trial, an officer testified Eaglefeather admitted Pack dropped him off in the alley behind the store. Pack testified he transported Eaglefeather from Omaha, Nebraska, to Council Bluffs in a Plymouth Sundance, a small car. A reasonable jury could conclude Pack was aware of Eaglefeather's plan to rob the store because Eaglefeather possessed a gun and requested to be dropped off in the alley. Furthermore, a reasonable jury could conclude Eaglefeather was in possession of the gun when he exited the Plymouth Sundance, due to the short amount of time between drop off and pick up. Pack testified approximately five minutes elapsed between the time Eaglefeather exited and re-entered the car. A

reasonable juror could reject Pack's assertion Eaglefeather had sufficient time during that short interval to locate a shotgun, blue bandana, and pink t-shirt, enter the store, rob the store, dispose of the evidence, and re-enter the car.

Finally, Pack gave inconsistent explanations for being in Council Bluffs on the night of the robbery. The officer who searched the car testified Pack initially stated he was coming back from a club in Omaha. Pack later told the officer he had dropped Eaglefeather off at a friend's place, although unable to remember where, and he had picked Eaglefeather up again after he appeared on a street in Council Bluffs, waving him down. At trial, Pack testified he drove Eaglefeather to Council Bluffs, dropped him off at a friend's house, and by the time he had turned his car around, Eaglefeather had returned. A reasonable jury could infer Pack's inconsistent statements to officers and at trial suggest an attempt to cover up his involvement in the robbery. *See State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) (stating a false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt). Accordingly, because the weight of the evidence and credibility of the witnesses are matters for the jury's determination, we affirm on this issue.

**IV. Ineffective Assistance of Counsel.** Pack contends his trial counsel was ineffective in failing to object to prosecutorial misconduct. Specifically, he points to his trial counsel's failure to object when the prosecutor repeatedly racked the shotgun used in the robbery in the jury's presence during direct examination of the store clerk and two witnesses.

Our review of constitutional issues is de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000); *State v. Pace*, 602 N.W.2d 764, 768 (Iowa 1999).

In order to prevail upon a clam of ineffective assistance of counsel, a defendant must demonstrate (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). "Both elements must be proven by a preponderance of the evidence." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) (citing *State v. Ramirez*, 616 N.W.2d 587, 593 (Iowa 2000); *Oetken*, 613 N.W.2d at 683; *State v. Carrillo*, 597 N.W.2d 497, 499 (Iowa 1999); *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995); *State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992); *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App.1999)).

To establish deficient performance, "[t]he test is 'whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence.'" *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (quoting *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981)). "A defendant is not entitled to perfect representation, rather representation which is within the normal range of competency." *Id.* The defendant must also demonstrate the error caused prejudice. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697. To meet this burden, the defendant must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*; *Carrillo*, 597 N.W.2d at 500. An ineffective assistance of counsel claim will fail if the defendant is unable to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addressed the issues. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). We deem this record sufficient.

We conclude Pack failed to prove the first prong of the *Strickland* test. The behavior of the prosecutor did not constitute misconduct. "[C]ounsel may reasonably display exhibits which are in evidence." *State v. Pepples*, 250 N.W.2d 390, 396 (Iowa 1977). "This includes the right to use such exhibits demonstratively so long as the demonstration is for illustrative purposes and does not constitute creation of new evidence." *Id.* The prosecutor in this case racked the shotgun for the limited purpose of allowing witnesses to identify the sound made by Eaglefeather's gun during the robbery. The shotgun was already admitted into evidence, and "was therefore an exhibit the prosecutor had a right to display to the jury." *State v. Griffey*, 457 N.W.2d 13, 17 (Iowa Ct. App. 1990). Pack's trial counsel did not fail in an essential duty by not objecting to the prosecutor's actions because he was under no duty to do so. As such, we find Pack's argument on this issue to be without merit.

**AFFIRMED**.