IN THE COURT OF APPEALS OF IOWA

FILED
MAR 30 1995
CLERK SUPREME COURT

No 4-593 / 94-0390

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RANDY L. SANFORD,

Defendant-Appellant

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

The defendant appeals from his conviction of two counts of burglary in the third degree in violation of Iowa Code sections 713.1 and 713.6A (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hinsey, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Mary E. Richards, County Attorney, and Ronald Sotak, Assistant County Attorney, for appellee.

Considered by Hayden, P J., and Sackett and Huitink, JJ.

SACKETT, J.

Defendant-appellant Randy L. Sanford was convicted of two counts of burglary in the third degree in violation of Iowa Code sections 713 1 and 713.6A (1993) Defendant contends his trial counsel was not effective because she failed to object to prejudicial hearsay evidence He contends, had she objected, she would have been successful Defendant contends the admission of the hearsay prejudiced him. We affirm

Michael's Super Valu grocery store in Huxley, Iowa, had break ins in the early mornings of October 28, and 30, 1993. Entry was gained to the store on both occasions by breaking a window with a piece of concrete. Cartons of cigarettes were taken from a display case near the cashier's counter.

The police noticed footprints outside the store on October 28, and footprints inside and outside the store on October 30. The police felt the prints had been made by someone wearing Britannia tennis shoes.

On October 26, a store employee saw three black men spend time in the store. When they left, twelve cartons of Marlboro Lights were missing. The employee said the men left the store in a small silver car.

On October 27, defendant came to the store and asked to cash a Minnesota check He left in a small silver car.

On October 31, the officers were working on the store's burglar alarm when a small silver car drove behind the store. The officers followed the car and stopped it. Dicky Bonwell, a brother of defendant, was driving. Defendant was in the car. Defendant was

wearing Britannia tennis shoes such as could have been worn by the person making the footprints inside and outside the store.

Defendant consented to a search of his hotel room No cartons of cigarettes were found. Defendant's girlfriend, Ms. Stokes, told police defendant and Bonwell sold cigarettes to an Asian food store. Five cartons of cigarettes were found at the Asian food store bearing a stamp of Michael's Super Valu. Defendant's fingerprint was found on one of the cartons.

Defendant contends, at his trial to the court, the following evidence, which came in without objection, was inadmissible hearsay:

1. Detective Echer testified Ms. Stokes told him defendant sold cigarettes to the Asian food store. Echer also testified Stokes told him defendant left with Bonwell on the evening of October 29, and did not return home until early October 30. Echer further testified Stokes told him defendant had paid cash for the hotel room even though he was not employed. Stokes did not testify at trial.

2. Cheryl Stupka, an employee of Michael's Super Valu, testified at trial. She testified to her personal observations of the black men in the store. She also testified to suspicions addressed about the men by another employee, Parker, who was in the store at the time. Parker did not testify.

3. Michael Brown, the store owner, testified to statements made by Parker, who did not testify, and Stupka, who did testify, as to activities of the men in the store.

4. Echer testified to statements made about the men's activities. The statements were made by Parker, who did not testify, Stupka, who did testify, and Brown, who testified. Echer also testified to statements Brown said Parker made.

5 Echer testified to statements Bonwell made to Officer Bachellor. Echer said Bonwell said he and defendant had sold cartons of cigarettes to an Asian food store. Neither Bonwell or Bachellor testified at trial.

"Hearsay" is a statement, other than one made by declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. State v. Judkins, 242 N W 2d 266, 267 (Iowa 1976) Ordinarily, hearsay consists of repetition of an out-of-court statement made by another. Id.

The general rule is error in the admission of hearsay is presumed prejudicial unless the contrary is affirmatively established. State v. McKettrick, 480 N.W.2d 52, 60 (Iowa 1992).

When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay. State v. Mitchell, 450 N.W 2d 828, 832 (Iowa 1990). For a statement to be admissible, however, it must not only tend to explain the responsive conduct but the conduct itself must be relevant to some aspect of the State's case. Id.

If the statements in issue are relevant only if accepted as true, the statements are hearsay and, unless subject to some other applicable exception, are inadmissible. State v Hollins, 397 N.W.2d 701, 706 (Iowa 1986). If, on a review of the record, the evidence is deemed relevant and otherwise inadmissible for the purpose for which it supposedly was offered, then that purpose is supported objectively in the record and will be accepted. Id. In essence, the court must determine whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence. Mitchell, 450 N.W.2d at 832.

The State contends the evidence in question here is not hearsay because it was not offered to show the truth of the statements but was offered to show responsive conduct. The

State believes the evidence was admissible to show the relevance of actions taken in response to the statements.

The State claims defendant did not receive ineffective assistance because a hearsay objection to the evidence would have been rejected.

Defendant claims, even if the evidence was offered to show responsive conduct, the conduct was not relevant to the State's case. In particular, he states Brown's conduct was not relevant to the case. Also, he believes the evidence offered went far beyond that necessary to show responsive conduct. He points out Detective Echer could have stated he proceeded in his investigation on information received, instead of testifying to statements made to him by Parker, Stokes, and Bonwell.

We agree with defendant that the challenged testimony was hearsay and would not have been admitted had proper objection been made.

In order to prevail on his claim of ineffective assistance of counsel, defendant must show, by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131-32 (Iowa 1987); Edman v State, 444 N.W.2d 99, 101 (Iowa App. 1989). Defendant must establish both of these requirements by a preponderance of the evidence. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131. The State contends there is overwhelming evidence of guilt.

We agree that some of the challenged evidence, particularly, part of the evidence concerning the activities of the three men in the grocery store is cumulative and, standing

alone, would not be sufficiently prejudicial to enable defendant to succeed on his claim However, other of the challenged testimony, placed defendant away from his lodging when one break in occurred; tied defendant to the cigarettes marked with the Super Valu stamp in the Asian food store; showed defendant had money even though he was not employed; and contained an admission by defendant's brother that he and defendant had sold the stolen cigarettes to the Asian food store It fortified and tied together the other evidence the State had introduced against defendant

We agree the record contains substantial evidence to prove beyond a reasonable doubt defendant was involved in the break in. The most damaging evidence being the footprint consistent with defendant's type of tennis shoes, defendant's fingerprint on the cigarette carton and the testimony of the Asian food store owner that defendant had tried to sell her cigarettes However; we note the trial judge, in his findings, relied on portions of the hearsay evidence, including the statements defendant's brother made about he and defendant selling cigarettes to the Asian food store.

We note this matter was tried to the court. It would seem at least some, if not all, of the persons whose testimony came in by way of hearsay would be available to testify. There may be a reason or reasons why defendant's trial counsel let it come in in that manner and did not force the State to call the respective witnesses.

We find the challenged evidence was inadmissible hearsay and did prejudice defendant's case On this record, we are not able to determine whether defendant's attorney

may have had a tactical reason for not objecting. We reserve defendant's right to raise this issue in a postconviction relief proceedings

AFFIRMED.