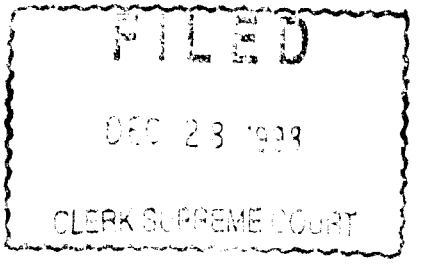
IN THE COURT OF APPEALS OF IOWA

No. 8-525 / 97-1260
Filed December 28, 1998



STATE OF IOWA,
Appellee,

vs.

GREGORY PAYNE,
Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

Gregory Payne appeals his convictions and sentences, following a jury trial, for three counts of first-degree theft and one count of second-degree theft. **AFFIRMED.**

Dennis A. Bjorkland, Coralville, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, William E. Davis, County Attorney, and Joseph Grubisich, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

VOGEL, J.

Gregory Payne appeals his convictions and sentences, following a jury trial, for three counts of first-degree theft and one count of second-degree theft. We find 1) the prior bad acts testimony was relevant to overcome Payne's defense; 2) statements made by the prosecutor in closing arguments were reasonable inferences from the record; and 3) substantial evidence supports Payne's convictions. We therefore affirm.

Background facts. On September 23, 1996, Payne was arrested after attempting to resell cellular phones he had obtained from United States Cellular. The Jaguar Payne was driving was impounded and ultimately returned to Lujack Auto, who had been unsuccessfully trying to obtain payment for the vehicle pursuant to a lease, in addition to another Jaguar which Payne had purchased.

Payne was ultimately charged with three counts of first-degree theft and one count of second-degree theft. A jury trial was held on March 31, 1997; guilty verdicts were returned on all counts. The trial court denied Payne's motion for new trial. Payne now appeals on multiple grounds.

I. Substantial evidence. Payne first argues that the trial court erred in failing to grant a directed verdict of acquittal or grant a new trial. He asserts that the State failed to present sufficient evidence to establish all elements for each count of theft.

We review substantial evidence claims on error Iowa R. App. P. 4; *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). We are bound by the jury verdict unless

the verdict is not supported by substantial evidence. *State v. Lewis*, 514 N.W.2d 63, 65-66 (Iowa 1994). In making this determination, we must consider all the evidence in the light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). "Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *Bayles*, 551 N.W.2d at 608.

For each count of theft, Payne was charged under Iowa Code sections 714.1(1), (2) and (3). He asserts that the evidence at trial does not support a finding under any of the sections. These sections provide that a person commits theft when he does any of the following:

> 1) A person commits theft when the person takes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof.
>
> 2) Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person. . . .
>
> 3) Obtains the labor or services of another, or a transfer of possession, control, or ownership of the property of another, or the beneficial use of property of another, by deception. . . .

Counts 1 and 2 charged Payne with the theft of two Jaguars from Lujack Auto in Davenport, Iowa. In August of 1996, Payne visited Lujack's and signed a purchase agreement and service contract for a Jaguar convertible as "Midwest Legal Services"[1]

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[1] Evidence at trial revealed that Midwest Legal Services is a company headquartered in Des Moines which has no affiliation with Payne. There was no "Midwest Legal Services"

by Greg Payne. Payne told the salesperson that he owned an "attorney franchise" and had eighteen attorneys working for him.[2] Payne wrote a check for approximately $30,000 and asked that Lujack's hold the check for a few days until he returned with a cashier's check.[3] Lujack's attempted several times over the following weeks to get Payne to pay for the vehicle, without success. In the meantime, Payne had complained that several items on the convertible needed to be serviced. Lujack's gave Payne another Jaguar to use while the convertible was being serviced; Payne decided to lease that vehicle as well. When Lujack's repeatedly contacted Payne to seek payment for the vehicles he told them the check was in the mail.

We find no significance in the fact that Lujack's never reported the cars as stolen, attempted to repossess the cars, nor questioned Payne's ability to pay. Payne was clearly extended credit based on his misrepresentations with regard to his fictitious "attorney franchise." Through Payne's deception, he was able to take possession of both cars without making an initial down payment or security payment, and was even allowed to take possession of the second car without having to sign a lease agreement. At the very least, the evidence at trial supported that Payne used deception to obtain possession or control over the Jaguars. *See* Iowa Code § 714.1(3).

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registered in Scott County; the address Payne gave out for the fictitious business was nothing more than a mail drop.

[2] There was no evidence introduced at trial to establish that Payne was, in fact, an attorney.

[3] The check Payne originally wrote was written on an account of the "Paynewhitney Corporation." The issuing bank had no such open account on file.

Counts 3 and 4 charged Payne with the theft of phones and phone service from United States Cellular. In June of 1996, Payne contacted a sales representative at the United States Cellular office in Davenport to purchase several cellular phones. Payne told the representative that he needed the phones to expand his law practice, "Midwest Legal Services," in the Quad City area. Based on this assertion, the representative gave Payne a business rate, extended credit and provided him with twenty-one phones. Payne sold several of these phones at a pawn shop, and United States Cellular had only been able to recover nine of the twenty-one phones as of trial. Between June of 1996 and Payne's arrest in September, nearly $40,000 in charges had been made to the phones they provided him.

Again, the evidence supports that Payne used deception to obtain possession or control over the phones. Payne attempts to argue that this situation was caused by Lujack's and United States Cellular's failure to make adequate credit inquiries. We disagree. Beyond Payne's clear misrepresentations and deceptions, Payne failed to return the property, did not make payments after being asked repeatedly to do so by Lujack's, and did not pay the bills sent by United States Cellular. We find more than sufficient evidence to uphold the jury's verdict on all four counts of theft.

II. Prior bad acts evidence. Payne asserts that the trial court erred in admitting evidence under Iowa Rule of Evidence 404(b) because its prejudicial effect outweighed its probative value.

In addition to employees of United States Cellular and Lujack's Auto, the prosection called representatives of six businesses at trial who testified that they had supplied goods and services to Payne without being paid. Payne asserts that this "parade" of witnesses for the State "presented insurmountable evidence that is equivalent to a lynching."

We apply a two-step analysis in reviewing challenges to evidence of prior "bad acts" under Iowa Rule of Evidence 404(b). *See State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997) (citations omitted). We first decide whether the evidence is relevant for a purpose other than to show that the defendant acted in conformity with his or her propensity to commit the wrongful act. *See Id.* If the evidence is relevant for one of these legitimate purposes, we then determine whether the probative value is substantially outweighed by the danger of unfair prejudice. *See Id.* We reverse the trial court decision only on finding a clear abuse of discretion. *Id.*

We agree with the district court that the additional witnesses' testimony was relevant to show intent, plan or absence of mistake or accident. The testimony was particularly relevant in helping the State prove the "intent to deprive" element. It also helped the State to overcome Payne's defense that he had merely "overextended" himself financially. Furthermore, the jury was instructed on the restricted use of this

testimony.[4] We find the trial court did not abuse its discretion in admitting the testimony as the probative value outweighed any possible prejudice to Payne.

III. Ineffective assistance of counsel. Payne asserts his trial counsel was ineffective in failing to preserve error on appeal for the 404(b) witness testimony of Marc Conway, who testified that Payne owed his employer approximately $3,600 for the leasing of various vehicles. Payne further argues his trial counsel was ineffective in failing to provide defense testimony to offset the allegations with regard to his bad credit transactions.

Our standard of review for the constitutional claim of effective assistance of counsel is de novo. *See State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997); *State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994). To prevail on a claim of ineffective assistance of counsel, the burden rests with the defendant to prove 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); *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997).

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[4] Instruction No. 10 provided:

Testimony, and related exhibits, of witnesses William Gabor, Susan Noel, Deb Talbot. Steve Conrad, Randy Fisher, Marc Conway and Todd Congdon have been received concerning the acts alleged to have been committed by the Defendant. The Defendant is not on trial for those acts.

This evidence must be shown by clear proof, and can only be used to show intent, absence of mistake or accident and common scheme.

If you find other wrongful acts (1) occurred; (2) were so closely connected in time; and (3) were committed in the same or similar manner as the crime charged, so as to form a reasonable connection between them, then and only then may such other wrongful acts be considered for the purpose of establishing intent, absence of mistake or accident or common scheme of the Defendant.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.*

We find the record in this case sufficient to address both of Payne's claims on direct appeal and find them both to be without merit. Having already determined that all of the 404(b) testimony was properly admitted, there was no duty for Payne's counsel to object to Conway's testimony. Furthermore, Payne's complaint in regard to the lack of defense testimony is too general in nature to allow us to address the allegations or preserve it for postconviction proceedings. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). He fails to state what specific testimony, if any, would have offset the evidence of his bad credit transactions and how such testimony would have likely changed the outcome. *See Id.* We therefore reject both of Payne's ineffective assistance claims on direct appeal.

IV. Prosecutorial misconduct. Payne argues he was prejudiced by certain statements made by the prosecutor in closing arguments.

Counsel is allowed some latitude in closing argument. *See State v. Thornton*, 498 N.W.2d 670, 676 (Iowa 1993); *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). Counsel may draw conclusions and argue all permissible inferences which reasonably

flow from the record; however, counsel cannot create evidence or misstate the facts. *See Thornton*, 498 N.W.2d at 676; *Phillips*, 226 N.W.2d at 19.

The State asserts that Payne failed to preserve error because defense counsel did not object to the prosecutor's remarks during closing nor request a mistrial. Payne contends that error was preserved by his pro se filing of a motion for "reconstruction of closing arguments." We agree that error was not preserved. *See State v. Romeo*, 542 N.W.2d 543, 552-53 (Iowa 1996) (stating that unless an objection is made at the time of the argument, the defendant has waived his right to complain); *see also State v. Radeke*, 44 N.W.2d 476, 479 (Iowa 1989). Nevertheless, we find that the prosector's comments did not rise to the level of misconduct.

Payne complains that the prosecutor 1) indicated that he incurred a $39,000 phone bill with United States Cellular and never attempted to repay the debt; 2) indicated that he used the credit worthiness of a legitimate business in order to obtain credit; 3) stated that he gave Lujack's a worthless check on a closed bank account and effectively stole the Jaguar's from Lujack's; and 4) indicated that he used his clout as a big shot attorney to deceive Lujack's into giving him a second Jaguar.

We find that the prosecutor drew reasonable conclusions and made permissible inferences from the record. We therefore find Payne's claim to be without merit.

V. Sentencing. Finally, Payne asserts that the trial court abused its discretion in sentencing by failing to consider all attendant circumstances in sentencing him to twenty years imprisonment. Payne asserts that the court did not afford sufficient

weight to his health and failed to consider his ability to reform. Payne further contends that the prison sentence poses a danger to him due to his previous assistance in convicting gang members.

We review the district court's sentencing decision for an abuse of discretion. *State v. Mai*, 572 N.W.2d 168, 170 (Iowa App. 1997). No abuse of discretion will be found unless the defendant shows that such discretion was exercised for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

A sentencing court has a duty to consider all the circumstances of a particular case. *State v. Robbins*, 257 N.W.2d 63, 70 (Iowa 1977); *see also State v. Dvorsky*, 322 N.W.2d 62, 67 (noting that the nature of the offense, attendant circumstances, along with a defendant's age, character, propensities and chances of reform are "minimal essential factors" to be considered when exercising sentencing discretion). However, the court is not required to specifically acknowledge each claim of mitigation urged by a defendant. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa App. 1995). The failure to acknowledge a particular sentencing circumstance does not necessarily mean it was not considered. *Id.*

At the sentencing hearing, the district court discussed in detail its reasons for the sentence it imposed upon Payne. The court cited Payne's lengthy prior criminal history and noted that his previous short prison sentences had not worked to deter or rehabilitate him. The court further made special note of Payne's particular health

problems. After reviewing the record and the court's statements at sentencing, we find no abuse of discretion

Having considered all issues properly before us on appeal, we hereby affirm the convictions and sentences of Gregory Payne.

AFFIRMED.