IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No 6-437 / 95-0671

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SEAN CURTIS SINCLAIR,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Sean Sinclair appeals from his conviction, following a jury trial, for first-degree robbery in violation of Iowa Code sections 711 1 and 711 2 (1995). **AFFIRMED.**

Francis C. Hoyt, Jr., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P Sarcone, County Attorney, and Mary Pat Hofmann, Assistant County Attorney, for appellee.

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

STREIT, J.

Defendant appeals the district court's denial of his application for postconviction relief alleging ineffective assistance of counsel during trial.

In 1989, Harvey Spencer, Jr. was convicted on two counts of first-degree murder. His convictions were affirmed on appeal and claims of ineffective assistance of counsel were preserved for postconviction proceedings.

In May, 1994, Spencer filed an application for postconviction relief alleging trial counsel had been ineffective in: (1)failing to move for a change of venue; (2) failing to object to jury instruction number 18; and (3) failing to have opening and closing arguments recorded. Following a hearing the district court denied the application.

In response to the denial, Spencer filed a timely Iowa Rule of Civil Procedure 179(b) motion alleging additional reasons counsel was ineffective. These included: (1) failing to preserve record on the issue of an allegedly unlawful search of Spencer's house; (2) failing to preserve record on an allegedly unlawful search and impoundment of his car; (3) failing to preserve record on alleged Miranda violations; (4) failing to object to the State's improper comments during closing arguments; (5) failing to challenge the selection of the jury pool; and (6) failing to strike a juror after learning the juror knew the victim's son-in-law. The court rejected these claims.

Spencer appeals. He argues the court erred in finding his counsel was not ineffective for failing to assist at trial given the allegations presented in postconviction

is evidence which 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).

Sinclair contends there was insufficient evidence to support his conviction particularly in view of the victims' and witnesses' contradictory testimony. We find there was substantial evidence to support defendant's conviction, based on the testimony. The jury was not required to accept defendant's version of the facts. *State v. Trammell*, 458 N W.2d 862, 863 (Iowa App. 1990). The function of the jury is to sort out the evidence presented and place credibility where it belongs. *Id.* The jury believed the testimony of Ramirez and found Sinclair guilty as charged. We affirm the conviction.

II. Suborning Perjury. Sinclair claims that testimony of an accomplice at trial should have been excluded. A trial court's rulings on the admissibility of evidence are discretionary. *State v. Hubka*, 480 N.W.2d 867,869 (Iowa 1992). We will reverse an evidentiary ruling only when a trial court is shown to have abused its discretion in balancing the probative force of the challenged evidence against the danger of undue prejudice or influence. *Id.*

Sinclair argues the State was suborning perjury because the accomplice testified he was not involved in the robbery after he had plead guilty in juvenile court. The State called the accomplice to the witness stand, however, to identify which defendant at the scene of the crime had the gun during the robbery and the involvement of the other defendants. The degree of his own participation was not at issue. The accomplice's testimony on identity of the gunman was not inconsistent at trial from his deposition testimony or testimony in the juvenile court. Therefore, we find there was no perjury as to this issue before the court and thus, no suborning perjury by the State. The district court acted within its discretion in overruling Sinclair's objection.

III. Prosecutor Misconduct. Finally, defendant seeks reversal based on alleged prosecutor misconduct for adding a witness eleven days before trial. The State contends defendant failed to preserve error on this issue, and we must agree. While Defendant did object to the State calling this witness at trial, the reason was not based on this ground. Defendant also did not move for a mistrial based upon the claim of prosecutor misconduct. Such a tactical decision constitutes a waiver of the purported misconduct. *State v. Delay*, 320 N.W 2d 831, 835 (Iowa 1982).

AFFIRMED.

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