IN THE COURT OF APPEALS OF IOWA

No. 4-417 / 93-1346

FILED
DEC 14 1994
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JAMES A. CARTER,

Appellant.

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Judge.

Defendant appeals from his conviction, following a jury trial, on three counts of burglary in the third degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, William E. Davis, County Attorney, and Hugh Pries, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

CADY, J.

In May 1993, James A. Carter was charged with four counts of burglary in the third degree, in violation of Iowa Code section 713.6A (1991). The trial information alleged defendant and Edgar White had stolen property from four residences. White entered into a plea bargain. At defendant's trial he implicated defendant in the burglaries in question. One of the counts was later dismissed by the district court.

Count I involved a burglary at 619 West Sixth Street in Davenport, Iowa, at the residence of Michael Hibbs. Hibbs testified items, including tools, a vacuum cleaner, and a leather jacket, were taken from his home on March 17 and March 18, 1993. With the help of police officers, Hibbs' tools and vacuum cleaner were recovered from Joe's Pawnshop. According to police officer William Thomas, Jr., an employee of the pawnshop picked a photograph of defendant out of a photo array as the person who had brought Hibbs' property to the pawnshop.

Hibbs' leather jacket was recovered from Central Jewelers and Loan Company. Richard Schreiner, the owner of Central Jewelers identified defendant as the person who pawned the jacket.

Count III involved a burglary at 510 Western Street, at a house owned by Michael Gustofson. Gustofson testified a lawnmower which had been stored in the house was stolen. Merril Roland of M & R Mower Repair testified defendant had sold him this lawnmower.

Count IV involved a burglary at 614 West Fifth Street, at a different house owned by Gustofson. Gustofson testified several items were taken from the house, including a chain saw. Todd Huebbe of Red's Towing testified defendant sold him a chain saw.

The State also presented a videotape interview of defendant at police headquarters. In the tape he admitted pawning the items in question, although he stated he pawned them at the request of someone else.

Defendant was tried before a jury. The jury returned a verdict finding him guilty of all three counts. The district court entered judgment against defendant and sentenced him to a period not to exceed five years on each count. The sentences were ordered to run concurrently to each other. Defendant appeals.

I. Defendant contends the State failed to present sufficient evidence to corroborate White's testimony. Under Iowa Rule of Criminal Procedure 20(3):

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The requirement of corroborative evidence serves two purposes: (1) it independently tends to connect defendant to the crime; and (2) it supports the credibility of the accomplice whose motives are clearly suspect because of the accomplice's self-interest in focusing blame on the

defendant. State v. Brown, 397 N.W.2d 689, 694 (Iowa 1986).

The existence of corroborative evidence is a question of law for the court, but its sufficiency is a question of law for the jury. State v. Jones, 511 N.W.2d 400, 404 (Iowa App. 1993). Corroborative evidence need not be strong as long as it can fairly be said to connect the defendant with the commission of the crime. State v. Berney, 378 N.W.2d 915, 918 (Iowa 1985). A defendant's possession of property stolen in the alleged offense is corroborative evidence. State v. Dickerson, 313 N.W.2d 526, 529 (Iowa 1981).

We find the State presented sufficient evidence to corroborate White's testimony on each of the three burglaries for which defendant was convicted. Schreiner testified defendant had possession of a leather jacket stolen from 619 West Sixth Street. Roland testified defendant had possession of a lawn mower stolen from 510 Western Street. Huebbe testified defendant had possession of a chain saw stolen from 614 West Fifth Street. Furthermore, in the videotape interview defendant admitted he had pawned the goods in question. Defendant's possession of these stolen goods is sufficient to corroborate the testimony of White. We find there is sufficient evidence in the record to support defendant's convictions.

II. Defendant contends the district court erred by admitting hearsay evidence. Officer Thomas testified an employee of Joe's Pawnshop, Khoi Dan, identified defendant from a photo array. Defendant claims this out of court identification is hearsay and was prejudicial to him.

We give the trial court broad discretion in evidentiary matters, disturbing its rulings only upon a showing of abuse. State v. Howard, 501 N.W.2d 764, 768 (Iowa 1993). The general rule is that error in the admission of hearsay evidence is presumed prejudicial unless the contrary is affirmatively established. State v. Farris, 359 N.W.2d 190, 193 (Iowa 1984). There is no prejudice where substantially the same evidence appears in the record. Id.

We determine the admission of the testimony here, even if hearsay, was not prejudicial to defendant because the same evidence was already in the record. In the videotape interview of defendant he admitted to pawning all of the goods in question. Officer Thomas' testimony was only cumulative on this issue.

III. Defendant claims he received ineffective assistance of counsel. He contends his counsel was ineffective because he failed to object to the presentation of the videotape interview. He claims the videotape should not have been presented because it contained his invocation of his right to counsel, his refusal to take a polygraph examination, a statement regarding prior crimes, and misstatements of the law. Defendant also claims his

counsel should have made a hearsay objection to Officer Thomas' testimony that the chain saw found at Red's Towing was stolen from 614 West Fifth Street.

Where a defendant asserts violations of constitutional safeguards, such as the right to counsel, we make our own evaluation of the totality of the circumstances in a de novo review. Jones v. State, 479 N.W.2d 265, 271 (Iowa 1991).

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent that it denied defendant a fair trial. Caldwell v. State, 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. Jones, 479 N.W.2d at 272.

On the question of deficiency of performance, the ultimate test is whether counsel's performance was within the range of normal competency. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989).

On the question of prejudice, defendant must show counsel's failure worked to his substantial and actual disadvantage, to the end there is a reasonably probability that but for counsel's unprofessional errors, the result of

the proceeding would have been different. Brewer, 444 N.W.2d at 83.

A. During the videotape interview, Officer Thomas asked defendant if he would be willing to take a polygraph examination. Defendant responded, "I'll talk to my lawyer and everything." At a later point in the interview defendant stated, "That's what lawyers are for . . . " Defendant claims these statements invoked his right to counsel and should be inadmissible.

A defendant's exercise of his Sixth Amendment right to counsel is not admissible. State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976). We find neither of defendant's statements were sufficiently definite to invoke his right to counsel. We find defendant was merely stating he intended to talk to his lawyer at some point in the future. We find defendant has failed to show ineffective assistance due to his counsel's decision not to object to the admission of this evidence.

B. As noted above, Officer Thomas asked defendant if he would be willing to take a polygraph examination and defendant responded, "I'll talk to my lawyer and everything." Defendant claims his refusal to take a polygraph examination should not have been admitted.

Testimony regarding a defendant's refusal to submit to a polygraph examination is inadmissible. State v. Zaehringer, 280 N.W.2d 416, 421 (Iowa 1979). We find defendant's statement is not a refusal to take the

polygraph examination, but was a statement he preferred to talk to his attorney before making a decision. We find defendant has failed to show ineffective assistance due to his counsel's decision not to object to the admission of this evidence.

C. During the interview, Officer Thomas stated, "You're a fine example of somebody who's beaten everything you were charged with." Defendant claims this statement is an improper reference to prior crimes.

The general rule is that evidence showing the commission of a crime other than the one at issue is inadmissible. State v. Grosvenor, 402 N.W.2d 402, 405 (Iowa 1987). We find defendant has failed to show he was prejudiced by Thomas' statement. White testified defendant had participated in the burglaries and this evidence was corroborated by defendant's possession of stolen goods shortly after they were stolen. We find defendant failed to show prejudice due to his counsel's actions. Defendant did not show there was a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

D. Officer Thomas told defendant, during the videotape interview, that if someone is found with stolen property within a certain time period after a burglary, that person could be charged with burglary. He also stated, "That's all I have to prove is that you had possession." Defendant claims these are misstatements of the law which may have

misled the jury as to the level of proof needed for a conviction.

An inference of burglary may arise from possession of recently stolen property when surrounding circumstances are also considered. State v. Hall, 371 N.W.2d 187, 189 (Iowa App. 1985). A defendant's possession of stolen property may be considered corroborative evidence. Dickerson, 313 N.W.2d at 529. We find Officer Thomas did misstate the law when he stated all he needed to prove was possession, but our case law shows possession must be considered in light of other circumstances.

We find, however, defendant was not prejudiced by Officer Thomas' statements. The jury was properly instructed on the law and the level of proof needed for an instruction. A jury is presumed to have followed its instruction absent evidence to the contrary. State v. McMullin, 421 N.W.2d 517, 520 (Iowa 1988).

E. During the trial, Officer Thomas stated the owners of Red's Towing identified defendant as the person from whom they bought a chain saw. He then stated, "the chain saw came from the burglary of Mr. Gustofson's house on West Fifth Street." Defendant claims Officer Thomas' statement was inadmissible hearsay and that its admission was prejudicial because it was the only evidence linking him to the burglary at 614 West Fifth Street.

The erroneous admission of hearsay evidence is presumed to be prejudicial unless the contrary is affirmatively

established. Farris, 359 N.W.2d at 193. We find Officer's Thomas' statement was not hearsay. Officer Thomas was not testifying to what someone else had told him, but was testifying from his own knowledge based on his investigation of the case. Consequently, defendant's attorney breached no duty in failing to object to the testimony.

We conclude defendant has not shown he received ineffective assistance of counsel so that he was denied his Sixth Amendment right to counsel.

After considering all issues raised in this appeal, we affirm defendant's convictions. Costs of this appeal are assessed to defendant.

AFFIRMED.