IN THE COURT OF APPEALS OF IOWA

No. 1999-535 (9-796) / 98-1969
Filed February 23, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LORAS PETE FISHER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn Pille, Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of third-degree burglary and second-degree arson. **AFFIRMED.**

Robert P. Montgomery and Matthew Boles of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and George Kamas, Assistant County Attorney, for appellee.

Heard by Streit, P.J., Miller, J., and Schlegel, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (1999).

SCHLEGEL, S.J.

I. Background Facts and Proceedings.

Loras Fisher was convicted of one count of third-degree burglary and one count of second-degree arson. These allegations were based on evidence that Fisher broke into the Missionary Baptist Church in Des Moines and that he set fire to the church causing serious damage. The evidence included Antorik (Tony) Young's testimony claiming he witnessed Fisher entering the north, side door of the church and later exiting the front door on the east side. The jury found Fisher guilty on both counts, and the court sentenced him to five years on the burglary charge and ten years on the arson charge.

On appeal Fisher raises three claims. Fisher first claims there was a complete lack of any physical evidence that connected him with the fire at the church, thus, there was insufficient evidence to properly convict him on both charges. Second, Fisher contends the court violated his constitutional right to confrontation by refusing to allow him to impeach Young with evidence of the specific acts of dishonesty underlying Young's prior theft convictions. Finally, Fisher argues that during the closing argument the prosecutor improperly referred to Fisher's failure to testify, and that the court abused its discretion in refusing to grant a mistrial on that basis.

II. Sufficiency of the Evidence.

We review a challenge to the sufficiency of the evidence for errors of law. Iowa R. App. P. 4.

We initially note the State's assertion that Fisher failed to preserve error on this issue because Fisher's general motion for judgment of acquittal failed to identify specific elements of the charges that the evidence allegedly failed to support. We nevertheless address Fisher's claim on the merits because, preserved or not, we reach the same result.

Where a defendant challenges the sufficiency of the evidence supporting a jury verdict, our standard of review is that the verdict will be upheld if there is substantial evidence to support it. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Evidence is substantial if it would have convinced a rational fact finder the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993). When considering sufficiency of the evidence challenges, we examine the evidence in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). We consider all evidence presented at trial, not just the evidence supporting the verdict. *Id.* All legitimate inferences and presumptions that can fairly and reasonably be deduced from the evidence are resolved in favor of the State. *State v. Blair*, 347 N.W.2d 416, 418-19 (Iowa 1984).

Fisher argues the testimony of Young, the only eyewitness who testified seeing Fisher near the church, was so inconsistent and self-contradictory, and so badly impeached by other evidence, that it could not be given any weight as a matter of law. Furthermore, he argues there was simply no sufficient credible or independent evidence presented to the jury to permit it to find that defendant was involved in the arson or burglary at the church. Applying the appropriate

standard of review and viewing the evidence presented to the jury in the light most favorable to the State, we disagree.

At trial the State presented evidence that, if believed, would allow a rational juror to conclude Fisher was involved in the arson or burglary at the church. Fisher relies most heavily on the fact that Young either told the officers he saw Fisher enter the church by the north door, or said something to the officers which gave them the impression that is what he saw. The north door was locked and could not have been the point of entry. However, the plywood cover to the coal chute was found lying on the ground and was not removed by the firefighters. The coal chute is also located on the north side of the church. This is considered the possible point of entry. Young explained in his testimony:

> The --when I seen him at first, when I seen him standing at that door, I told the police officers that I seen him go in that door. But to honestly tell you the truth, I seen him standing at that door. By the time I looked over to see him again he wasn't at that door, so I figured he went in that door. But I didn't actually see him go in that door. But I did see him go in the front door.

A rational juror could have reasonably believed Young's testimony. As the State argued, Young could have seen Fisher loitering around the north side of the church in the area of the coal chute, and later coming out of the church hastening away with black smoke "roaring" out behind him.

An acquaintance of Young and Fisher, Blanton "Roscoe" Edmond, noticed the smoke coming from the church and stopped his car to take a look. At that time, he noticed the two shadows of Young and Fisher to his right standing on the sidewalk. He yelled at them, "Hey, [does] anyone live around here? That church is on fire. Got to -- need to get to a phone." Young came towards

Edmond's car, and Fisher began walking away. Edmond drove after Fisher and stopped him. Young caught up with them and stayed with Fisher while Edmond returned to his car and left to find a police officer. Edmond testified that he and Young witnessed Fisher walking away from the church even after they had called Fisher's attention to the fire.

Also, officers who arrested Fisher found a working Bic cigarette lighter in Fisher's pants pocket. Merlin Kosht, Fisher's landlord of twenty years, had never seen Fisher smoke. He was surprised when officers told him Fisher had a cigarette lighter. Officers who searched Fisher's apartment found no matches or lighters and no evidence of smoking. In essence, there was no obvious innocent explanation for Fisher's possession of the cigarette lighter.

Thus we find the State presented evidence which, if believed, would allow a rational juror to conclude Fisher committed arson or burglary. We therefore find Fisher's conviction is supported by sufficient evidence.

III. Young's Testimony.

Prior to trial, the State filed a motion in limine noting Young had a criminal history and asking the court to determine what inquiry into that history would be permitted. Fisher argued evidence of Young's prior convictions should be admissible under Iowa Rules of Evidence 404(b) and 609. The court did not rule on Fisher's argument but asked Fisher to alert the court and the State before trying to elicit evidence of prior convictions. The court provided:

> I would simply ask that before the defense goes into any acts other than those that occurred on the day in question, that you alert both the Court and Mr. Karnas outside the presence of the jury so that Mr. Karnas has a chance to be heard in that regard and the Court

> has a chance to rule on it, other than the convictions of which we spoke earlier.

The court later ruled Young's prior convictions could be used for impeaching stating:

> COURT: Well, the Court acknowledges at least for purposes of the record at this point in time that those would be prior convictions that could be used for impeachment purposes of this witness under Rule 609. And consistent with my previous ruling, for purposes of Rule 609 and for purposes of impeachment, the witnesses can be asked whether or not they were convicted of and the particular offense and whether or not in case one and two it was a felony and in case three and four whether or not it was an aggravated misdemeanor carrying a sentence of two years, so that the jury understands the distinction.

With respect to Young's prior convictions, Fisher's counsel argued:

> MONTGOMERY [DEFENSE]: . . . But we think we should be able to inquire about that, as well as inquire about drug use and drug use in general given his history of drug crimes and drug-delivery and dealing crimes, given his history of being convicted for drug dealing and delivery crimes as a result of crack houses in that immediate vicinity, given that he was there doing the same kind of thing this day when something went down.
>
> He fingered our client. That is the motive for him fingering Mr. Fisher. By fingering Mr. Fisher, he diffused the law enforcement's attention toward him and his associates' activities, and that is what's necessary for motive. And pursuant to the Sixth Amendment right to fair trial in conjunction with Rule 404(b), it would be, we believe, improper to preclude Mr. Fisher from inquiring as to that when he is the accused in this case.
>
> Also there is testimony that Mr. Fisher told the police at that time while the incident was going on that Mr. Young attempted to rob him on the street and attempted to steal money from him. We want to be able to question Mr. Young about whether or not he has stolen money or valuable possessions in the past. In fact, his record suggests he has. He pled guilty to doing it, and he was found guilty of doing it in one case – in two cases. One he pled, one he was found. Under Rule 609, the conviction itself is admissible.
>
> Under 404(b) we want to ask him about the act that resulted in that conviction, the act of stealing from people, which is what he was alleged to have done that night in addition to the drug acts.

> Those are the nature of the things we want to get into pursuant to Rule 404(b), Your Honor.

Fisher's counsel argued that rule 404(b) and the Sixth Amendment right to a fair trial required the court to allow him to inquire into the details of Young's prior drug dealing conviction to support his argument that Young was engaged in a drug dealing activity earlier that same day. The court ruled the defense could present its theory that Young attempted to rob Fisher thereby having motive to diffuse Young's own drug dealing activities that day. However, the court would not allow Fisher to talk about the specific acts of theft under the previous convictions.

As indicated, Fisher raised his Sixth Amendment right to a fair trial concerning Young' s prior drug dealing activities. However, Fisher did not raise any constitutional issues with respect to the prior theft convictions. In his motion for a new trial, Fisher for the first time raised his claim concerning the prior theft convictions on a constitutional basis, claiming the court denied Fisher's right to confront the witnesses against him. However, a defendant cannot use a motion for a new trial to amplify the claims or add new ones. *State v. Buchanan*, 207 N.W.2d 784, 787 (Iowa 1973). It avails a trial court nothing for a defendant to save part of his exceptions for a motion for new trial, when the court can no longer change its instructions before reading them to the jury. *Id.* In addition, after the court held he would not allow Fisher to talk about specific acts of theft, Fisher did not ask to make an offer of proof to show what testimony he would have elicited if he had been allowed to inquire into the details of Young's prior thefts. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999) (holding an offer of proof serves to give the trial court an adequate basis for its evidentiary ruling and to

make a record for appellate review. Such a record is necessary so the reviewing court does not have to "base error on speculation as to the answers that would have been given to questions" had the questions been asked).

For these reasons, we find Fisher failed to preserve error on this issue.

IV. Fisher's Motion for a New Trial.

Fisher argues that during closing argument the prosecutor informed the jury they had not heard why the defendant was there in the area that night. The prosecutor specifically provided:

> He [Fisher's counsel] stated in his closing argument that one person sucked Mr. Fisher into this bad movie: Tony Young. You're right to ask yourselves this question: What was the defendant doing by the church Thursday night at midnight? You are right to ask yourselves this question.

Fisher contends this comment clearly infers Fisher's failure to testify on his own behalf. We disagree.

Ordinarily where the aggrieved party does not object at trial to statements made by opposing counsel in his closing argument and does not move for a mistrial due to the alleged misconduct either at the time an improper argument is made or at the close of the argument before submission of the case to the jury in those instances where the arguments are reported and constitute a part of the record such conduct indicates a willingness of counsel to take his chances on a favorable verdict and constitutes a waiver of the misconduct. *State v. Phillips*, 226 N.W.2d 16, 18-19 (Iowa 1975).

After the prosecutor made the statements at issue, the court submitted the case to the jurors. It was not until the next day at 11:30 a.m. Fisher first

complained the prosecutor's argument had constituted a comment on Fisher's motion for a mistrial. The complaint came too late to preserve error – more than a day after the case had been submitted to the jury. For these reasons, we find Fisher failed to preserve error on this issue.

We affirm Fisher's conviction and sentence.

AFFIRMED.