IN THE COURT OF APPEALS OF IOWA

No. 3-118 / 92-444

FILED
MAY 25 1993
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

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vs.

ERIC C. GREER,

Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Defendant appeals from his conviction and sentence, following a jury trial, for first-degree robbery and second-degree sexual abuse. **AFFIRMED.**

Alfredo Parrish and Andrew J. Dunn of Parrish & Kruidenier, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Bridget Chambers and Virginia Barchman, Assistant Attorneys General, William E. Davis, County Attorney, and James D. Hoffman, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., Habhab, J., and Keefe, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

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PER CURIAM

On September 4, 1991, John Felske worked the night shift at a Coastal Mart in Davenport. At approximately 2:40 a.m. he waited on a man who bought a pack of Newport cigarettes. The customer, later identified as defendant, Eric Greer, also asked for change for the telephone. Greer failed to produce any money and left the store. Felske attended to duties around the store and waited on one customer, who bought a soda. Approximately five minutes later, Greer reentered the store and again asked for change for the telephone. Greer allegedly moved behind the counter with Felske and flashed a five-inch long knife. According to Felske, defendant forced him to turn over money from the cash register and get down on the floor behind the register. Defendant then forced him to perform oral sex upon him until Felske said he was going to be ill. Defendant asked if the beer cooler was open, walked up to the cooler, and took one twelve-pack of Miller Genuine Draft beer in cans. Defendant apparently left the store. Ten seconds later, Felske heard someone come in the store, stay for a few seconds, and then leave. Later, Felske and the store manager determined a two-foot high plastic case containing watches had also been taken during the robbery.

Felske described his assailant as a black male, about six feet tall, and weighing about 180 pounds. Felske identified defendant from a photographic line up and again

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at trial. Felske also identified clothing and shoes belonging to defendant as being identical to the ones worn by his assailant on September 4, 1991. Felske did not report the sexual abuse until three months after the assault because of his embarrassment.

On September 16, 1991, defendant was charged with first-degree robbery. After Felske reported defendant had forced him to perform oral sex upon him, the State amended its information to also charge defendant with second-degree sexual abuse. Defendant filed his notice of intent to rely upon an alibi defense. According to defendant, he left his mother's apartment at 9 p.m. and drove to the Vicker's station to make a telephone call. He then went to Dempsey's Bar and Grill, arriving at approximately 10 p.m. He stayed at Dempsey's until the bar closed, which he contends was 3 a.m. Defendant testified he had allowed Michael Cortez to borrow his car and was waiting for his return. Cortez allegedly returned with the vehicle around 3:20 a.m. He was furious with Cortez because he was late. Defendant claimed Cortez gave him some watches to pay for the inconvenience, and he then returned to his mother's apartment.

The State conducted a search of Greer's apartment. Four watches were recovered from the apartment. They were identified as ones stolen from the Coastal Mart. A Miller Genuine Draft beer can was found outside the apartment. Defendant's fingerprints were not found on the can. There

were no latent fingerprints developed from the Coastal Mart suitable for identification.

At the close of the State's case and at the close of defendant's case, defendant moved for judgment of acquittal. The district court denied these motions. The jury returned a verdict of guilty on both counts. Greer was sentenced to prison for up to twenty-five years on each charge. The terms are to be served consecutively. Defendant appeals. We affirm.

Defendant raises two arguments on appeal. First, he argues there was insufficient evidence to support the jury's finding he was guilty of either offense. Second, he argues he was denied effective assistance of counsel.

I. Sufficiency of the Evidence.

Our scope of review is on assigned error only. Iowa R. App. P. 4. We will uphold a verdict where there is substantial evidence in the record to support the charges. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Substantial evidence is that evidence which would convince a rational finder of fact defendant is guilty of the crimes charged beyond a reasonable doubt. State v. Hy, 458 N.W.2d 609, 612 (Iowa App. 1990). It is a function of the fact finder, not the appellate court, to decide fact questions and determine the credibility of witnesses. State v. Parkey, 200 N.W.2d 518, 518 (Iowa 1972).

Defendant raised an alibi defense against the charges. He argues he was not near the Coastal Mart at the time of

the alleged robbery. He maintains he was drinking with Eddie Morgan at Dempsey's Bar and Grill at the time of the robbery. He contends Felske's version of the robbery and sexual abuse is implausible because the store was well lighted and frequented by customers.

There are several inconsistencies and contradictions in defendant's testimony and other defense witnesses' testimony. Alibi witness Eddie Morgan stated he left Greer standing outside Dempsey's after the bar closed but seemed unsure of the time. At various points in his testimony, Morgan testified he left Greer at 2:15, 2:30, 3:00, and 3:30. When the prosecutor later pressured Morgan regarding the exact time he left Dempsey's, Morgan claimed he left at exactly three o'clock. After making this statement, Morgan claimed he knew it was three o'clock because he looked at his watch. Greer claimed the bar closed at 3 a.m. However, the owner of the bar testified he closes the bar at 2 a.m. every day. Defendant's mother testified Greer returned to her apartment at 2:30 a.m. Greer contended he arrived at his mother's apartment between 3:30 and 4 a.m.

Other evidence placed defendant at the scene of the robbery. Felske described Greer for police officers as his assailant. He also identified defendant in a photo line up and again at trial. He also provided a description of the clothes defendant wore at the time of the crimes. These clothes were found during a search of defendant's home.

At trial Felske explained the incident in detail. He testified defendant reentered the Coastal Mart and requested money for the phone again. He came around to the back of the counter and flashed a knife in front of Felske. He forced Felske to open the cash register. Felske watched as defendant took money out of the register. Felske got a good look at defendant when he initially entered the store. Also, when he returned five to ten minutes later and committed the crimes. Felske was in close proximity to the defendant, who was not disguised. Felske testified Greer came within one foot of his face during the commission of the crimes and the store was well lighted.

There is also evidence watches stolen from the Coastal Mart were found at Greer's home. Felske and a store manager identified these watches. Greer contended the watches were given to him by Michael Cortez shortly after the time of the robbery. The truthfulness of a defendant's denial or explanation of the possession of such evidence is for the jury. State v. Dwinells, 259 Iowa 945, 951, 146 N.W.2d 231, 235 (Iowa 1966) (citations omitted). We affirm on this issue.

We also consider whether substantial evidence supports the sexual abuse charge. Felske alleged defendant forced him to perform an oral sex act. Although Felske was unable to see the knife during the commission of the sexual abuse, Greer flashed it in front of his face before the incident.

Defendant was still holding the knife in his hand when he said he could persuade Felske to perform oral sex. This was sufficient for the jury to find Greer threatened to use force against Felske during the incident.

The acceptability and reconciliation of the evidence and the credibility of the witnesses, including defendant, was for the jury. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980); Dwinells, 259 Iowa at 952, 146 N.W.2d at 236.

> "The jury evidently believed the State's witness[es], as it had every right to do. It is well settled that this court is powerless in a criminal case to interfere with the discretion of the jury to believe or disbelieve any witness."

Parkey, 200 N.W.2d at 519 (quoting State v. Kaster, 160 N.W.2d 856, 859 (Iowa 1968)).

After reviewing all the evidence in a light most favorable to the prosecution, we conclude the record contains substantial evidence to support the guilty verdict. A rational juror could find defendant was guilty beyond a reasonable doubt on the sexual abuse charge. We affirm on this issue.

II. Ineffective Assistance of Counsel Claim.

Greer maintains his trial counsel rendered ineffective assistance of counsel by (1) failing to make any pretrial discovery requests to produce exculpatory information, (2) failing to challenge the admissibility of his statement to the police, (3) failing to interpose one objection during trial, (4) failing to object to the jury instructions, and (5) failing to employ an investigator to

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search for Cortez. Greer claims trial counsel cross-examined the State's witnesses in a cursory manner only. Defendant also maintains the police elicited statements from him which were in violation of his Miranda rights.

Generally, ineffective assistance of counsel claims are preserved for postconviction relief proceedings to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), cert. denied, 459 U.S. 841 (1982); State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1992). Where the record is inadequate to permit us to resolve the claim, we preserve the claim in order to provide the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). The record is not sufficient for us to resolve this issue. Defendant's ineffective assistance claim is preserved for possible postconviction proceedings.

AFFIRMED.