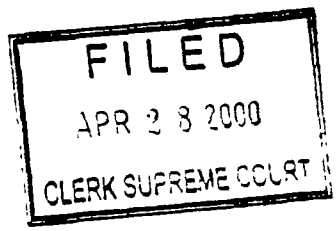
IN THE COURT OF APPEALS OF IOWA

No. 0-077 / 98-2166
Filed April 28, 2000

STATE OF IOWA,
Appellee,

vs.

KIMBERLY MICHELLE BEARDEN,
Appellant.



Appeal from the Iowa District Court for Pottawattamie County, J. C. Irvin, Judge.

Defendant appeals the judgment and sentence entered upon a jury verdict finding her guilty of first-degree arson in violation of Iowa Code section 712.2 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher Wilson, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

VOGEL, J.

Defendant, Kimberly Bearden, appeals the judgment and sentence entered upon a jury verdict finding her guilty of first-degree arson in violation of Iowa Code section 712.2 (1997). We affirm.

Background facts. Bearden shared a split-level house with Kim Maly and Maly's children. Bearden resided in the upper level of the house while Maly and her children resided in the lower level. On April 22, 1998, Bearden started a fire in the house. She claimed to have intentionally started the fire on a couch in her living room, but fire investigators determined the fire was started just outside Maly's door. The State charged Bearden with first-degree arson. The trial court denied Bearden's motions for judgment of acquittal and new trial. Bearden appeals asserting there was insufficient evidence of her specific intent to damage or destroy property or that she could have reasonably anticipated the presence of other persons on the property at the time of the fire.

Scope of review. The standard of review is for errors at law. *State v. Phams,* 342 N.W.2d 792, 795 (Iowa 1983). A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush,* 518 N.W.2d 778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft,* 506 N.W.2d 757, 762 (Iowa 1993). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after

viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Blair,* 347 N.W.2d 416, 418-19 (Iowa 1984). Circumstantial evidence is just as probative as direct evidence. *State v. Parrish,* 502 N.W.2d 1, 3 (Iowa 1993); *State v. Garr,* 461 N.W.2d 171, 173 (Iowa 1990). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Thornton,* 498 N.W.2d 670, 673 (Iowa 1993). A verdict is binding unless the finding is clearly against the weight of the evidence. *State v. Schrier,* 300 N.W.2d 305, 306 (Iowa 1981).

I. Sufficiency of the evidence. Bearden claims the fire was not started as the State purported and further claims her mental illness prevented her from forming the requisite intent to damage or destroy the house. At the trial, Bearden testified she set the couch on fire in a moment of anger because she believed a former boyfriend had been intimate with another woman on the couch. She stated she did not intend the fire or damage to go beyond the couch. Dr. Bruce Gutnik testified on Bearden's behalf, stating she suffers from bipolar disorder, a mental illness which causes rapid and unpredictable mood swings that alternate between depression and manic behavior. Bearden alleges that, because of this illness, the jury could not find she had formed the necessary intent.

The State presented contrary evidence. The State's expert witness, Dr. Mario Scalora, testified he was skeptical of Dr. Gutnik's diagnosis. He felt the analysis was incorrect because many other doctors who had treated Bearden over the years had not arrived at Gutnik's conclusion. He further testified that denying responsibility directly after an incident, as Bearden did, when the person did commit the act can be motivated by an awareness of the improper nature of the behavior. It also suggests that the person has the ability to control their thoughts and form specific intent.

The State also presented the testimony of four fire investigators. Based on their experience and knowledge of fire damage, they all determined the fire did not start on the couch. They testified that if, as Bearden claimed, she had poured an accelerant on the couch to start the fire, the couch would have been completely consumed. It was not. Further, they surmised the fire started outside Maly's door on the lower level of the house. The fire investigators based this finding on the extensive fire damage to this area. If the fire had started the way Bearden stated, the fire investigators all agreed it would have progressed up into the attic rather than down to the lower level.

Because proof of Bearden's intent or knowledge her actions would cause damage to or destroy the property requires a determination of what Bearden was thinking when the fire was started, it is not capable of being established with direct evidence. *See State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999); *see also State v. Fratzke*, 446 N.W.2d 781, 783 (Iowa 1989). Therefore, the facts and circumstances surrounding the act, as well as any reasonable inferences to

be drawn from those facts and circumstances, may be relied upon to ascertain the defendant's intent. *See State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995). The jury was free to accept whichever version of the events it chose. The requisite intent could be inferred from the State's version of the facts.

Bearden next contends that the evidence presented was insufficient to prove she could have reasonably anticipated the presence of any other persons in the house at the time she started the fire. She stated she saw the Maly children playing outside and Maly leave the house prior to the fire. Maly's testimony, however, was in direct opposition to that of Bearden. Maly stated she and Bearden had become involved in a heated argument inside the house in which Bearden threw several items down the stairs at Maly and her children. One of Maly's children then went outside and Maly took the other one into their apartment. Bearden's own testimony was that after she started the fire, she lay down to sleep but awoke when the house was ablaze. She then yelled "fire" to alert anyone else who may have been present. She specifically stated she was concerned Maly's daughter may have been in the home.

We conclude there was substantial evidence in the record for the jury to find Bearden could have reasonably anticipated someone else's presence in the home at the time she set the fire.

II. Post trial motions. Bearden also argues she should have been granted a new trial as the verdict was against the weight of the evidence. The State contends Bearden failed to preserve this issue for appeal because the trial court did not rule on the motion. A motion that is not ruled on in the trial court,

where there has been no request or demand, preserves no error. *State v. Schiembeck*, 203 N.W.2d 546, 547 (Iowa 1973). Defense counsel filed a combined motion in arrest of judgment and a motion for new trial. The trial court ruled "[t]here is sufficient evidence in the record to support the jury's verdict. . . ." The State contends the issue of whether the verdict was against the *weight* of the evidence was not ruled on and therefore has not been preserved for appeal. "Issues must ordinarily be presented to and passed upon by the trial court before they can be raised and decided on appeal." *Johnston Equipment Corp. of Iowa v. Industrial Indemnity*, 489 N.W.2d 13, 16-17 (Iowa 1992). We agree the weight of the evidence was not addressed by the trial court. *State v. Ellis*, 578 N.W.2d 655, 656 (Iowa 1998) (a motion for new trial must be made under the weight of the evidence standard). Accordingly, we find this issue was not preserved for appeal.

III. Ineffective Assistance of Counsel. Bearden claims her trial counsel was ineffective on three grounds: 1) failure to preserve error on the motion for new trial; 2) failure to request an instruction on corroboration of Bearden's confession; and 3) failure to object to the alleged instances of misconduct by the prosecution. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice a defendant must prove there is a reasonable probability that but for counsel's unprofessional

errors the result of the proceedings would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

a. Ruling on the weight of the evidence. Bearden first claims her counsel was ineffective for failing to demand a ruling on the motion for new trial that addressed the weight of the evidence standard. The State concedes Bearden's attorney failed to perform this necessary task but contends Bearden was not prejudiced by this action. Based on the overwhelming evidence against Bearden as previously discussed in this opinion, we find the verdict was not against the weight of the evidence. Consequently, we find Bearden was not prejudiced by her counsel's failure to properly pursue a ruling on this motion.

b. Corroboration of confession. Bearden next contends her attorney was ineffective for failing to offer a jury instruction which informed the jury that they could discount her confession during police interrogation if they found it was not corroborated by evidence at the trial. Iowa R. Crim. P. 20(4). "The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed

the offense." *Id.* The State asserts Bearden's statement to police contained various admissions but was not a confession. "[A] confession comprises the whole criminal charge; whereas an admission relates only to a particular fact or circumstance covered thereby." *State v. Capper,* 539 N.W.2d 361, 364 (Iowa 1995). While Bearden admitted to certain facts that were relevant to the arson charge, she did not confess that she was guilty of setting fire to the house with the intent to cause damage, where a reasonable person would have anticipated that there were people inside. She only admitted to having started a fire. Therefore, we find Bearden's admission did not rise to the level of a confession. Without a confession, her attorney did not have a duty to seek a corroboration instruction for the jury.

c. Prosecutorial misconduct. Bearden finally contends the prosecutor committed several acts of misconduct throughout the trial by violating the stipulations set forth in a motion in limine. Because the record does not contain sufficient information to review Bearden's allegations nor her attorney's trial strategy, we preserve this issue for postconviction relief. *State v. Koenighain,* 356 N.W.2d 237, 238 (Iowa App. 1984) (where record on appeal is not adequate, preserve issue for postconviction proceedings so the facts may be developed).

AFFIRMED.