

IN THE COURT OF APPEALS OF IOWA

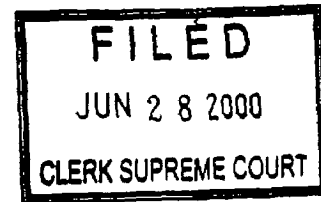
No. 0-230 / 99-0743

Filed June 28, 2000

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**MARVIN RANDALL SUTTON,
Defendant-Appellant.**



Appeal from the Iowa District Court for Wright County, Allan L. Goode,
Judge.

On appeal from his conviction for third-degree burglary, defendant contends the trial court erred in (1) submitting joint criminal conduct instructions, and (2) failing to grant a motion for judgment of acquittal as the facts did not support a finding of joint criminal conduct. He also contends he was provided ineffective assistance of counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann Ryan, Assistant Attorney
General, and Michael E. Houser, County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MILLER, J.

Marvin Sutton appeals his conviction of burglary in the third degree following jury trial, contending the trial court erred in 1) giving a joint criminal conduct instruction; and 2) failing to grant a motion for judgment of acquittal. Sutton also advances four ineffective assistance of counsel claims on direct appeal. We affirm.

Background Facts and Proceedings

From the evidence presented at trial, the jury could find certain facts. Mike Sims bought a car from John Shelton on September 27, 1998. Sims and Sutton worked on the car during the day, then brought it back that evening to pick up Shelton, because they needed a licensed driver to drive the car. The three men then drove to Clarion in the late evening to see Sims's girlfriend. After this, the three men drove to a rural farmstead, and after discussing the matter decided to break into a machine shed and steal some tools. Shelton waited in the car while Sims and Sutton stole a quantity of tools from Roger Schulz. They drove to Shelton's apartment, where the three men unloaded the tools. They then returned to the farmstead and took a second load of items.

Schulz, the owner of the tools, had awakened at 3:30 a.m. to smoke a cigarette in his garage. He had heard a car door slam an hour earlier, but had heard no other noises and had fallen back asleep. However, while smoking his cigarette he heard a car door slam again, heard an engine start and saw a car drive by with no headlights on. Schulz drove after the car. He then saw the car, unoccupied, on the side of the road and noted its license plate number. He returned home, discovered his machine shed had been broken into and there

were many tools missing. He contacted authorities and reported the burglary and the license plate number of the car.

The three men had stopped and got out of the car when they saw they were being followed. After Schulz left they re-entered the car and started driving again. They saw a police car waiting ahead of them, and pulled over so Sims could get out of the car because he did not want to be caught with guns, though when he left the car he still had one in his possession. After passing the police car and seeing it follow them, Sutton and Shelton realized they were probably going to jail, and decided to tell the police the items in the car came from Sutton's brother's house in Renwick. The deputy who pulled them over did not believe that story because he knew Sutton's only brother was either in custody in Illinois or at the Eldora School for Boys. Shelton finally admitted to most of the facts of the burglary, and was a witness for the State at trial.

Sutton was charged by trial information with burglary in the third degree, in violation of Iowa Code section 713.6A. Sutton filed a pre-trial motion to recuse the Wright County Attorney's office from prosecuting the case, contending the county attorney had violated professional ethics by communicating with Sutton through the county sheriff while Sutton's counsel was not present. After hearing, the defendant withdrew his motion. After the jury's guilty verdict, Sutton moved for a new trial based upon his contention the court erred by giving a joint criminal conduct instruction. The motion was denied, and Sutton was sentenced to a term of imprisonment not to exceed five years, a five hundred dollar fine, restitution, court costs and attorney fees. Sutton appeals. Additional facts as relevant will be discussed below.

Merits

The Joint Criminal Conduct Jury Instruction

Challenges to jury instructions are reviewed for correction of errors of law. Iowa R. App. P. 4; *State v. Walker*, 600 N.W.2d 606, 608 (Iowa 1999). The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 18(5)(f); *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. *Id.* When a single instruction is challenged, it will be judged in context with other instructions relating to the criminal charge, not in isolation. *Id.* Any error in jury instructions must be prejudicial to warrant reversal. *State v. Countryman*, 572 N.W.2d 553, 561 (Iowa 1997).

Sutton contends the trial court erred in giving jury instruction number 13, which stated:

When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The Defendant's guilt is the same as the other person's(s') unless the act(s) could not reasonably be expected to be done in aiding the commission of the crime.

The language of this instruction embraces the legal doctrine contained in Iowa Code section 703.2, and mirrors Iowa Criminal Jury Instruction No. 200.7 (1988).

Aiding and abetting is distinguished from joint criminal conduct as follows:

Under section 703.1, the aider and abettor is held liable for the same crime which he or she has knowingly aided the principal in committing, either by active participation in it or by some manner encouraging it prior to or at the time of its commission. Joint criminal conduct, on the other hand, takes the enterprise a step

further. It contemplates two acts—the crime the joint actor has knowingly participated in, and a second or resulting crime that is unplanned but could reasonably be expected to occur in furtherance of the first one. Depending on the case, it may be appropriate for the court to instruct on both doctrines.

State v. Satern, 516 N.W.2d 839, 843 (Iowa 1994) (citations and internal punctuation omitted). Defense counsel objected to Instruction No. 13, contending there was no factual basis for giving the joint criminal conduct instruction because no crime was committed in excess of the one the actors arguably conspired to commit. The court agreed with the State's position that no additional or different crime need be committed to submit an instruction on joint criminal conduct, and overruled the objection. After a recess, defense counsel cited to the trial court a case on point,¹ but the court still believed the joint criminal conduct instruction to be appropriate. The trial court offered, however, to replace the joint criminal conduct instruction with an aiding and abetting instruction, but defense counsel stated he "prefer[red] to leave it the way it is."

In its marshalling instruction, Instruction No. 14, the court informed the jury:

The State must prove all of the following elements of Burglary in the Third Degree:

1. On or about September 28, 1998, the Defendant entered an outbuilding owned by Roger D. Schulz;
2. The outbuilding was an occupied structure as defined in Instruction No. 15;
3. The Defendant did not have permission or authority to enter the outbuilding;
4. The outbuilding was not open to the public;
5. The Defendant did so with the specific intent to commit a theft.

¹ The record does not indicate which case was cited to the trial court.

After the guilty verdict Sutton moved for a new trial, contending the joint criminal conduct instruction should not have been given. In his motion he relied on essentially the same reason given when he initially objected to the instruction, lack of evidence to support the instruction.

The State acknowledges the defendant made timely objection to Instruction No. 13. The State urges, however, the defendant waived any error on this issue by stating he preferred retaining the joint criminal conduct instruction rather than substituting an aiding and abetting instruction. Because an aiding and abetting instruction would have been proper under the facts (no direct evidence the defendant entered the machine shed, but substantial evidence he otherwise participated), we agree he has waived the error on this issue as urged by the State. However, we will reach the issue as if the error had been preserved as Sutton also contends trial counsel was ineffective for not preserving the error and under the holdings of the cases set forth in the following paragraph the record is adequate to address this issue.

Our supreme court has held in *State v. Jackson*, 587 N.W.2d 764 (Iowa 1998), *State v. Thompson*, 397 N.W.2d 679 (Iowa 1986), and *State v. Kern*, 307 N.W.2d 22 (Iowa 1981) that the giving of a joint criminal conduct instruction in instances in which the alleged multiple participants are either principals or aiders and abettors in the same crime does not require reversal if there is no opportunity for the defendant to have been found guilty based on anything other than his own conduct as a principal or an aider and abettor of the crime with which he is charged. *Jackson*, 587 N.W.2d at 766; *Thompson*, 397 N.W.2d at 684-86; *Kern*, 307 N.W.2d at 28. Cf. *State v. Hershberger* 534 N.W.2d 464, 466

(Iowa App. 1995) (holding it was error to give joint criminal conduct instruction where there was no evidence the defendant acted as an aider or abettor or a joint criminal actor, as it allowed the jury to speculate as to the participation of others). In this case, as in *Jackson*, the jury was not instructed on an aiding and abetting theory. Instruction No. 13, taken together with the immediately following marshalling instruction, Instruction No. 14, did not allow the jury to speculate as to a "different crime." Therefore, because there was no opportunity for the defendant to have been found guilty based on anything other than his own conduct as either a principal or an aider or abettor, he cannot have been prejudiced by defense counsel's decision to retain the joint criminal conduct instruction. We therefore conclude the trial court did not commit reversible error by giving Instruction No. 13.

If it were necessary to address this issue on ineffective assistance of counsel grounds, based on the holdings of the cases cited in the preceding paragraph we would find the record adequate to address the claim in this direct appeal, would find the defendant suffered no prejudice, and would therefore find this first claim of ineffective assistance to be without merit.

The defendant also claims the court erred in denying his motion for new trial. For reasons previously stated we have found the defendant cannot have been prejudiced by the joint criminal conduct instruction. For that same reason we reject this assignment of error.

Sufficiency of the Evidence

Sutton next contends the trial court erred in overruling his motion for judgment of acquittal, contending the evidence is insufficient to support the conviction.

Our standard and scope of review in reviewing a denial of a motion for judgment of acquittal is well settled:

We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. Our review of sufficiency-of-evidence challenges is for correction of errors at law. The jury's findings of guilt are binding on appeal if supported by substantial evidence. Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.

In deciding whether there is such substantial evidence, we view the record evidence in the light most favorable to the State. Direct and circumstantial evidence are equally probative. A verdict can rest on circumstantial evidence alone. However, the evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient.

State v. Kirchner, 600 N.W.2d 330, 333-34 (Iowa App. 1999) (internal citations and quotations omitted). We give consideration to all the evidence, not just the evidence supporting the verdict. *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995). We further note it is for the jury to judge the credibility of the witnesses and weigh the evidence and therefore, unless the record lacks substantial evidence, we are bound by the jury's verdict. *State v. Laffey*, 600 N.W.2d 57, 59-60 (Iowa 1999).

In order to find Sutton guilty of burglary in the third degree, the jury must have found the State proved beyond a reasonable doubt the five elements of the marshalling instruction, Instruction No. 14. See Iowa Code §§ 713.1, 713.6A (1997). Sutton claims the State did not present sufficient evidence to support his

conviction because the joint criminal conduct instruction was not supported by the evidence, there was no direct evidence Sutton entered the machine shed, and a State's witness, Shelton, was not credible.

As discussed above, the joint criminal conduct instruction did not prejudice the defendant nor did he take the opportunity to substitute an aiding and abetting instruction for it. Further, any error in giving that instruction is not relevant to the motion for judgment of acquittal, as that motion was made and decided before instructions were considered and issues concerning them decided. We are satisfied there was sufficient evidence to submit the charge of burglary in the third degree to the jury, whether on a theory the defendant was a principal, on a theory he was an aider and abettor, or on both such theories in the alternative.

As noted above, it is for the jury to judge the credibility of witnesses. See *Laffey*, 600 N.W.2d at 59. We therefore reject defendant's claim there was insufficient evidence because Shelton was not credible.

Shelton's testimony, summarized above, when taken together with the testimony of other witnesses and the items recovered from the car the defendant was in, was sufficient to submit the charge to the jury. At the very least, a reasonable jury could find Shelton and Sims entered the machine shed and took tools and Sutton aided and abetted them. Further, from the large number of items taken, the substantial distance the items had to be carried from the machine shed to the location of the car some distance away on a public road, and the relatively short time period within which the tools were all removed from the machine shed the jury could reasonably infer Sutton must have entered the machine shed and helped remove tools from it. The jury could also infer Sutton

was heavily rather than minimally involved from evidence he jumped from the car and hid in a cornfield when followed by the victim and he made up a story and lied to the police as to where the tools came from when the car he was in with part of the tools was stopped by the police shortly after he had jumped from the car and hid. The trial court did not err in overruling Sutton's motion for judgment of acquittal.

Ineffective Assistance of Counsel

To establish an ineffective assistance of counsel claim, the applicant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). Such claims are usually reserved for postconviction relief actions in order to give defense counsel an opportunity to respond to the allegation that counsel failed to perform an essential duty. *Laffey*, 600 N.W.2d at 60-61.

We preserve three of the four ineffective of assistance claims Sutton brings on direct appeal for possible postconviction relief proceedings: 1) Failure to investigate and to call Michael Sims and David Johnson as witnesses in his defense; 2) failure to allow Sutton to testify in his own defense; and 3) failure to preserve error on the issue of recusal of the county attorney's office by withdrawing the motion to recuse. Having addressed on the merits Sutton's contention the trial court erred in giving the joint criminal conduct jury instruction, we do not preserve the claim counsel was ineffective by failing to preserve this issue for our review.

AFFIRMED.