IN THE COURT OF APPEALS OF IOWA

No. 1-129 / 00-0997
Filed April 27, 2001

FILED
APR 27 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JIMMIE McALISTER, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Guthrie County, Peter A. Keller, Judge.

The defendant appeals from his conviction, following a jury trial, of animal abuse in violation of Iowa Code section 717B.2 (1999). He contends (1) his due process rights were violated when a deputy destroyed photographs of the crime scene prior to trial, and (2) his conviction was not supported by sufficient evidence. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, and Mary Benton, County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

The defendant-appellant, Jimmie McAlister, appeals from his conviction after a jury trial of animal abuse in violation of Iowa Code section 717B.2 (1999). He claims (1) his due process rights were violated when a deputy destroyed photographs of the scene prior to trial, and (2) his conviction was not supported by sufficient evidence. We affirm.

Background facts and proceedings.

The State charged Jimmie McAlister with animal abuse, alleging he intentionally injured a German Shepherd by hitting it with his vehicle. At McAlister's jury trial, the State's witnesses testified McAlister swerved to hit the dog and showed no remorse after the accident. McAlister claimed he was distracted by a scream and could not stop in time to avoid the dog. He also maintained he showed no remorse because the dog had bitten his girlfriend's daughter on a previous occasion. McAlister discovered at trial that the deputy investigating the incident had taken photographs of the scene but destroyed them before trial. The court allowed the State to introduce other photographs of the scene taken the day before trial. The district court denied McAlister's motion for judgment of acquittal, and the jury found him guilty as charged. The court entered judgment and sentenced him to a suspended two-year sentence and probation.

Claims on appeal.

McAlister appeals, claiming the deputy's destruction of the photographs denied him his right to due process under *Brady v. Maryland*, 373 U.S. 83, 83 S.

Ct. 1194, 10 L. Ed. 2d 215 (1963). The State responds that McAlister waived the due process claim by not raising it in district court and argues, even if the claim were preserved, McAlister cannot show the photographs were destroyed in bad faith. McAlister also claims the district court erred in denying his motion for judgment of acquittal because the jury verdict is unsupported by substantial evidence, in that the State did not prove intent.

Analysis.

Destruction of Evidence. When we review claims that a defendant's constitutional rights were violated we make an independent evaluation of the totality of the relevant circumstances. *State v. Means*, 547 N.W.2d 615, 621 (Iowa Ct. App. 1996). This is the equivalent of de novo review. *State v. Pearson*, 547 N.W.2d 236, 240 (Iowa Ct. App. 1996). A due process violation based on destroyed evidence is only established if there exists "an unavoidable possibility the destroyed evidence would be favorable to the defendant." *State v. Atley*, 564 N.W.2d 817, 822 (Iowa 1997) (quoting *State v. Steadman*, 350 N.W.2d 172, 174 (Iowa 1984)).

During his investigation of the incident, the deputy took photographs of the scene, trying to show vehicle tracks and the dog's prints in the gravel at the side of the road. The deputy did not have those photographs at the trial. He testified he destroyed them after reviewing them and discovering they didn't turn out. Defense counsel objected to the new photographs "as to the prejudicial nature as to it does not accurately depict the roadway itself in there." No mention was made or objection raised concerning the destruction of the original photographs.

> We are a court of review, not a *nisi prius* court. We cannot "review" an issue unless it was raised in the trial court. The requirement that the issue be raised in the trial court is not something new or a device imposed as a barrier against constitutional rights. It is of long-standing and applies generally to claimed errors of all kinds, constitutional and otherwise; nor is it a rule peculiar to Iowa.

State v. Anderson, 517 N.W.2d 208, 215 (Iowa 1994) (quoting *State v. Holbrook*, 261 N.W.2d 480, 482 (Iowa 1978)). We conclude McAlister did not preserve error on his claim concerning destruction of evidence.

Even if error had been preserved, McAlister could not prove a *Brady* claim. To prove such violation, McAlister would have to establish the State suppressed the evidence, it was favorable to his defense, and it was material to the issue of guilt. *State v. Veal*, 564 N.W.2d 797, 810 (Iowa 1997). To prevail in his claim potentially exculpatory evidence was destroyed by the State, McAlister would have to show the destruction was the result of bad faith. *State v. Craig*, 490 N.W.2d 795, 796-97 (Iowa 1992). The United States Supreme Court has ruled, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281, 289 (1988). The Supreme Court stated in another case:

> Whatever duty the Constitution imposes on the State to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534, 81 L. Ed. 2d 413, 422 (1984) (citation omitted); *see also State v. Delaney*, 493 N.W.2d 787, 791 (Iowa 1992). As stated in *Youngblood*: "The presence or absence of bad faith by the [State] for purposes of the Due Process Clause must necessarily turn on the [State's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." 488 U.S. at 56, 109 S. Ct. at 336, 102 L. Ed. 2d at 288 n*. The deputy testified he destroyed the photos because they did not turn out and did not show anything because it was dark. Lending credence to the deputy's testimony about the photographs he took is the testimony that McAlister also took photographs of the scene the day of the incident and they did not turn out either. McAllister could not demonstrate bad faith.

Insufficient Evidence. McAlister's second claim is that the court erred in denying his motions for a directed verdict of acquittal because there was not substantial evidence concerning the intent element of the charge. In considering McAlister's motions for a directed verdict, the trial court views the evidence in the light most favorable to the State. Iowa R. App. P. 14(f)(2). Likewise, in determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Milner*, 571 N.W.2d 7, 10 (Iowa 1997). All evidence is considered, not merely the evidence supporting the verdict. *State v. Walker*, 538 N.W.2d 316, 319 (Iowa Ct. App.1995). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt about each element of the crime. *State v. Casady*, 491 N.W.2d

782, 787 (Iowa 1992). Evidence is substantial if it could "convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt." *State v. Veal*, 564 N.W.2d 797, 803 (Iowa 1997). Iowa Code section 717B.2 (1999) requires specific intent. Such intent is seldom capable of demonstration by direct evidence. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa Ct. App. 1999). "The fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experiences and observation." *State v. Howard*, 404 N.W.2d 196, 198 (Iowa Ct. App.1987). "The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true." *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994).

The State presented the testimony of the fifteen and thirteen year old children of the family who owns the injured dog. McAlister challenges their testimony as "incredible and suspect." He claims they did not know specific details and exaggerated other parts of their testimony. Normally, it is for the jury to determine the credibility of witnesses. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). This court does not invade the province of the jury unless the testimony is "so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993) (quoting *Graham v. Chicago & Northwestern Ry. Co.*, 143 Iowa 604, 615, 119 N.W. 708, 711 (1909)). The State's witnesses and McAlister provided differing interpretations of McAlister's comments and actions at the time of the incident. Implicit in its verdict is the jury's finding the State's witnesses were

more credible. We conclude there is sufficient evidence in the record from which the jury could find McAlister intended to hit the dog with his vehicle. We therefore affirm the jury's verdict.

Conclusion.

We conclude McAlister did not preserve his due process claim for our review. Even if he had, his claim would fail. We also conclude substantial evidence in the record supports the jury's verdict. We therefore affirm the judgment and sentence of the district court.

AFFIRMED.