FILED
APR 23 1996
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 6-198 / 95-1080

000379

STATE OF IOWA,

Appellee,

vs.

DONALD ALLEN SLYE,

Appellant.

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

Slye appeals his conviction and sentence for third-degree burglary. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Kevin Parker, County Attorney, and Douglas D. Hammerand, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Donald Allen Slye appeals his conviction and sentence for third-degree burglary in violation of Iowa Code sections 713.1 and 713.6A (1995). We affirm.

Donald Allen Slye, Michael John Fridley, and Vickie Pierce were charged with third-degree burglary following allegations they broke or entered the Noble Ford body shop in Indianola with the intent to commit a theft. Slye had formerly been employed as a painter in the Noble Ford body shop and involuntarily left his employment approximately one month before the alleged burglary.

At trial, Warren County Sheriff's Deputy Roger Lettington testified that in the early morning hours of November 14, 1994, he drove his personal car into the Noble Ford parking lot to search for his squad car which was being serviced. While in the parking lot, he noticed a small car parked twenty-five to thirty feet from the walk-in door with its headlights off. Lettington testified that he could see at least two people in the car and became suspicious there might be a burglary in progress. Lettington, who was off-duty, then noted the license number of the car, left the property, and reported what he had seen to the Warren County Sheriff's office.

After leaving the lot, Lettington positioned himself on an adjacent highway about 100 yards from Noble Ford. When the car he was observing left the parking lot, Lettington followed the car until he noticed another sheriff's deputy, Eric Haworth, also following the car. Lettington then returned to Noble Ford to investigate, at which time

he observed silver-colored gallon cans, aerosol cans, and rolls of tape inside the dealership near the door.

After Lettington had returned to Noble Ford, Deputy Haworth pulled next to the car Lettington had been following as the car entered a driveway. Haworth then turned on his red lights and stopped Slye, Fridley, and Pierce for questioning. Although Haworth noted there were several tools in the car including pliers, a screwdriver, and a lock-back knife, he determined there was not reason to detain the occupants of the car any further. He then drove back to Noble Ford to check the property and did not observe any damage.

A Noble Ford employee arrived at work several hours later and noticed the paint supplies Lettington had observed by the front entry of the dealership. Included among those supplies was a roll of blue masking paper which was frequently used by Slye when he worked at Noble Ford. A subsequent investigation by the employee and one of his colleagues revealed damage to the dealership's front doors including pry marks and lock tampering. The manager on duty immediately called the sheriff's department who took several fingerprints and lifted a hand print from a paint can that was later determined to match Slye.

Slye, Fridley, and Pierce were charged with third-degree burglary. At trial, the State emphasized the blue masking paper found near the doorway was used only by Slye when he was working at Noble Ford and that no other painters used that particular

kind of paper. The State also noted the tools that were found in the dashboard tray and relied on the fact Slye was a passenger in the car seen at Noble Ford only a few hours before the burglary was discovered. The State also presented evidence showing that while there was no way to determine when Slye had placed the palm print on the can lid, it was unlikely Slye would have handled that particular lid while he was employed at Noble Ford. Slye argued the State provided no witnesses or other proof he had been involved in the burglary. He claimed the evidence against him was purely circumstantial and that the palm print on the can lid could have been placed there while he still worked at Noble Ford. Following the district court's denial of Slye's motion for judgment of acquittal, the jury found Slye guilty as charged but acquitted Fridley and Pierce. The court sentenced Slye to an indeterminate five-year prison term. Slye appeals.

Slye first argues the district court erred in failing to grant his motion for judgment of acquittal on the grounds there was insufficient evidence to support his conviction. Our review of this issue is for correction of errors of law. Iowa R. App. P. 4. Where a defendant challenges the sufficiency of the evidence supporting a jury verdict, we will uphold the verdict if there is substantial evidence to support it. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Evidence is substantial or sufficient if it could convince a rational fact finder the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Constable*, 505 N.W.2d 473, 479 (Iowa 1993).

When considering challenges to the sufficiency of the evidence, we examine the evidence in the light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). We consider all of the evidence presented at trial, not just the evidence supporting the verdict. *Id.* Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A guilty verdict can rest on circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993).

Our review of the record reveals substantial evidence supporting Slye's conviction. The State presented testimony showing Slye was familiar with the Noble Ford premises and that he had previously stated the body shop would be "easy to break into." The jury could also have reasonably inferred Slye was at the Noble Ford body shop at the time of the burglary based on his presence in the car seen by Deputy Lettington in the Noble Ford parking lot. The jury may also have concluded the tools found in the automobile were used to break into the Noble Ford body shop. Moreover, the fact that the articles stacked near the door were all supplies for which Slye had a preference and would have proven useful to him in his bodywork and painting trade further supports the jury's guilty verdict. Finally, Slye's palm print on the paint can lid combined with the unlikelihood the print was placed there during Slye's employment at Noble Ford also provides a substantial basis for the jury's conclusion Slye burglarized the body shop.

Slye next contends he was denied effective assistance of counsel. He claims he was prejudiced by counsel's failure to sever his trial from that of his co-defendants, Fridley and Pierce. He contends that severance would have prevented the introduction of evidence which was admissible only against Fridley but which allegedly influenced the jury's guilty verdict. The evidence at issue consists of a statement made by Fridley placing Slye at the Noble Ford body shop on the night of the burglary. Because Slye's claim implicates his constitutional right to effective assistance of counsel, our review is de novo. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980).

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. In evaluating counsel's performance, we presume that counsel acted competently. *See id.* at 131.

Slye's ineffective assistance of counsel claim comes to us on direct appeal. Generally, we will not decide ineffective assistance claims on direct appeal as we prefer to reserve them for postconviction proceedings where counsel has an opportunity to respond. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference if the record is adequate to evaluate appellant's claims. *State v.*

Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *See Hinkle v. State*, 290 N.W.2d at 34.

On our de novo review, we find the record adequate to conclude Slye's counsel did not breach an essential duty in failing to file the motion to sever. When an indictment or information jointly charges two or more defendants, those defendants may be tried jointly if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties. Iowa R. Crim. P. 6(4)(b). Severance may be warranted if admission of evidence in a joint trial would have been inadmissible and prejudicial if a defendant was tried alone. *State v. Williams*, 525 N.W.2d 847, 849 (Iowa 1994).

Slye contends trial counsel should have moved to sever his trial from his co-defendants based on a statement made by Fridley placing Slye at the Noble Ford body shop on the night of the burglary. He claims Fridley's statement would have been inadmissible if offered against Slye alone. Although counsel did not move to sever Slye's trial from Fridley's on these grounds, counsel requested a limiting instruction

prohibiting the jury from considering Fridley's statement as evidence against Slye. We find counsel's decision to request a limiting instruction was a reasonable trial strategy and not a breach of duty. In light of the other evidence placing Slye at the scene of the burglary, Fridley's statement was of relatively little importance and, accordingly, was not so prejudicial as to make severance the only reasonably strategic option. While severance may have been one in a range of tactical options for dealing with Fridley's statement, counsel's decision to request a limiting instruction was a reasonably effective means by which to limit the statement's effect. We find counsel's conduct did not fall below the standard for normal competence.

Even if counsel did in fact breach an essential duty by failing to sever Slye's trial from that of his co-defendants, we find no prejudice. The jury was instructed that it could consider Fridley's statement against Fridley only. Such instructions are normally sufficient to avoid any potential prejudice. *State v. Brown*, 397 N.W.2d 689, 697 (Iowa 1986). Moreover, Fridley's statement was a single, simple item of evidence in a short, uncomplicated trial. As a result, there is no reason for us to believe the jury was unable to separate Fridley's statement from the evidence offered against Slye. Finally, because other evidence placed Slye at the scene of the burglary, Fridley's statement had little inculpatory effect as, even absent the statement, it is likely the jury would have reached the same result.

We find substantial evidence supports Slye's conviction of third-degree burglary. We further find Slye's counsel was not ineffective in failing to move to sever Slye's trial from that of his co-defendants. We affirm.

AFFIRMED.