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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

473

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
JON BARRY MOORE,) 9-70
Defendant-Appellant.) 88-532

Appeal from the Iowa District Court for Polk County (CR36987), Gene L. Needles, Judge.

Defendant appeals his convictions, following a jury trial, for three counts of second-degree burglary. **AFFIRMED.**

William L. Wegman, State Public Defender, and B. John Burns, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J. 171

The defendant, John Barry Moore, and a companion were accused of committing three burglaries in the same neighborhood on the same night. When apprehended, the companion was placing stolen items in a truck box while the defendant was crouched down in the front seat of the truck. A jury found the defendant guilty of three counts of second-degree burglary. He appeals those convictions. We affirm.

I. Moore first seeks a new trial because he believes his trial counsel was ineffective in failing to object when a police officer's testimony included a reference to the defendant's exercise of his constitutional right to remain silent during police interrogation. During his testimony on behalf of the State, Sergeant Jim Button, a police officer employed by the City of Urbandale, was asked the following question and gave the following answer:

> Q. And he wouldn't identify Mr. Riley, is that right?
>
> A. Correct. We asked him who his--who the other individual was. He said he didn't know. He was advised of his rights per Miranda, and refused to answer any questions.

Moore claims that the comment by the witness was an impermissible intrusion on his fifth and sixth amendment rights to remain silent. He acknowledges that his trial counsel failed to object to the comment. He claims he is not precluded from raising the issue on appeal, because

counsel's failure to object was a specific instance of ineffective assistance of counsel.

Issues not presented in the trial court may not ordinarily be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). The supreme court may not consider an issue for the first time on appeal, even if it is of constitutional dimension. Patchette v. State, 374 N.W.2d 397, 401 (Iowa 1985). "The general rule is that issues, including constitutional issues, which are not raised in the trial court cannot be raised on appeal." State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983)(citing State v. Taylor, 310 N.W.2d 174, 178 (Iowa 1981)). The orderly, fair, and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice, an opportunity to be heard, and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling. See State v. Buckner, 214 N.W.2d 164, 167-68 (Iowa 1974). In State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982), our supreme court has recognized that review of an appellate issue is not precluded when failure to preserve error results from a due process denial of effective representation.

Moore refers us to State v. Porter, 283 N.W.2d 351, 352 (Iowa 1979), where the court held that an officer's trial testimony that the defendant "didn't answer" a number of questions, "was hesitant to say anything, which was his right," and "wouldn't tell me specifically where" he had been, required a new trial. In Porter, the supreme court held that the testimony fell within the proscription explained in State v. Kyseth, 240 N.W.2d 671, 674 (Iowa 1976). In Kyseth, the supreme court held that the trial court erred in failing to suppress testimony relating to the defendant's exercise of his fifth and sixth amendment rights, where the prosecutor knew in advance what the testimony would be, but asked the defendant questions in the jury's presence which elicited testimony showing defendant's exercise of his constitutional rights. Kyseth, 240 N.W.2d at 674.

We believe there is substantial distinction between Porter and Kyseth, on the one hand, and this case on the other. In both of those cases, the questioning was obviously aimed at emphasizing the defendants' silence about the details of the crime, where the defendants chose to remain silent. In this case, however, the question was asked concerning Moore's failure to identify his companion. The answer, once given, was not pursued further, as was the case in Porter and Kyseth.

We do not need to address the problem discussed in Porter, however, because we believe that the record is sufficient for us to determine if the defense attorney's failure to object to the offending remark was ineffective assistance of counsel, such as to preserve the error for consideration on this appeal. We are concerned, in claims of ineffective assistance of counsel, with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). We review de novo the totality of circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. To constitute ineffective assistance of counsel, the record must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Id. "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Prejudice requires proof of a "reasonable probability that but for counsel's unprofessional errors, the result would have been different." State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987).

From the record in this case, it is reasonable to believe that counsel, being aware of the comment by the witness, believed it to be more damaging to call it to the attention of the jury, than to let it pass without comment,

and without it being pursued further. It is not unreasonable for counsel to assume that no prejudice was created by the answer in question. The activity in this case falls far short of the occurrences in Porter and Kyseth. From our de novo review, we do not find that but for counsel's failure to object to the offending statement, the result would have been different. Accordingly, the prejudice branch of the requirement to show ineffective assistance of counsel is also missing in this case. We do not find counsel to have been deficient in failing to preserve error on this issue.

II. Moore's next claim is that there was insufficient evidence in the whole record for a rational jury to find he was guilty of aiding and abetting in the commission of the burglaries. He claims that the record fails to show that he knew what was going on, and that when he found out, he was ready to leave. He correctly states that there was no direct evidence of his participation in the burglaries. There is, however, circumstantial evidence which, if believed, would justify the jury finding him guilty of aiding and abetting in the commission of the burglaries.

Moore spent a considerable amount of time with Riley, the admitted burglar, both before and after the commission of the burglary. Fingerprints on a beer can connected him with having been at the location of the burglary in which Riley loaded certain stolen goods into the pickup truck in

which Moore was found. On the whole record, we find that there was sufficient evidence to submit the question of his guilt to the jury, and that there was sufficient evidence to sustain the guilty verdicts.

> When sufficiency of the evidence is challenged, . . . we review the evidence in the light most favorable to the state. The evidence must be such that, when considered as a whole, a reasonable person could find guilt beyond a reasonable doubt. All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict. A jury verdict is binding on us if there is substantial evidence to support it. By "substantial evidence" we mean evidence which could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.

State v. Doss, 355 N.W.2d 874, 877 (Iowa 1984) (quoting State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981), cert. denied, 459 U.S. 841, 103 S. Ct. 90, 74 L.Ed.2d 83 (1982). Even though, as earlier stated, there was no direct evidence of Moore's involvement in the burglaries, he, as an aider and abettor, may be found guilty on the basis of circumstantial evidence. Id. at 878. The circumstantial evidence, viewed in the light most favorable to the State, provides substantial evidence to support the jury verdicts.

III. Moore next contends the State exceeded the permissive scope of its opening statement and thereby shifted the burden upon Moore to present evidence on his own behalf. Prior to the commencement of trial, counsel for the defendant raised the issue with the court that it would be improper for the court to permit the prosecutor to mention that a witness might appear for the defendant. He claimed that it would place a burden upon the defendant to

produce evidence, or would leave defendant severely prejudiced if he did not call a witness. The court disagreed and overruled the objection to the mention of any defense witnesses in the State's opening statement.

The opening statements were not reported, and no record of the contents of the opening statement was made or objected to until after the trial. The issue was again brought to the court's attention in a motion for new trial. Later, following the court's ruling on the motion for new trial, defendant filed a Bill of Particulars setting out that the prosecutor had mentioned the possibility of defense witnesses in opening statement.

We hold that the issue of the State's opening statement was not preserved. The trial court was given no opportunity to deal with any potential error on the basis of the statement made by the prosecutor, and no timely objection was made to any of the contents of that opening statement. Consequently, Moore waived any error committed by the court in this respect. See State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978).

On the whole record, we affirm the district court on each and all of the issues raised on this appeal.

AFFIRMED.