IN THE COURT OF APPEALS OF IOWA

No. 3-230 / 92-628

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STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN ELWOOD ARMSTRONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Adams County, William H. Joy, Judge.

Armstrong appeals from his conviction, following a jury trial, of second-degree burglary, second-degree theft, possession of marijuana with intent to deliver, and possession of marijuana without payment of tax. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and Stuart D. Nielsen, County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

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OXBERGER, C.J.

Mr. and Mrs. Pafford own and operate a tavern called Kats Town Pump in Nodaway, Iowa. On the morning of September 25, Mrs. Pafford noticed the security bar on the tavern door was not attached. She discovered $100 was missing from the cash drawer and $400 in rolls of change was missing from a taco box underneath the bar. The bar was also missing about thirty bottles of liquor, candy bars, cigarettes, beer, "nude lighters," and chewing tobacco. She also found a footprint in some spilled grease in front of the door.

Mrs. Pafford recalled on the previous day Steven Elwood Armstrong had been present when she made change from the taco box. She also remembered when she counted the cash drawer the night before, one of the five dollar bills had red ink on it. Later that same day she noticed Armstrong bought a hamburger with a five dollar bill with red ink on it. Mrs. Pafford did not retain the bill. Armstrong visited Kats again that day, buying beer with change.

That afternoon, Mr. Pafford talked with Junior Steinbach, his neighbor's son. He also talked to Tim Barber about the burglary. Mr. Pafford then contacted the sheriff. He met the sheriff at an abandoned house in Nodaway. In a hole underneath the back porch they found duffel bags containing beer, liquor, cigarettes, and tobacco, which Pafford identified as merchandise missing from the tavern. Pafford also turned over to the sheriff a

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coffee can full of quarters which Pafford claimed was change stolen from the tavern which he had recovered.

The sheriff's department obtained a search warrant for Armstrong's trailer home. Sometime that morning Armstrong had consented to a search of his home and nothing had been found. The warrant was executed after 9:00 p.m. on September 25. The officers found merchandise which corresponded to merchandise from the abandoned house, packages of cigarettes with matching tax stamp numbers, chewing tobacco with matching markings on the bottom of the cans, and candy wrappers with matching lot numbers. The officers also secured a green plastic glass containing over forty-five dollars in change, a squirrel bank containing over forty dollars in change, empty beer bottles and cans, a "nude lighter," a pair of bolt cutters, and a large plastic bag containing five smaller bags of marijuana.

The sheriff also recovered a pair of bolt cutters from a shed across the street from the tavern. Fingerprint analysis was never done on any of the evidence.

The State filed a trial information charging Armstrong with possession of marijuana with intent to deliver in violation of Iowa Code section 204.401(1)(c) (1991), possession of marijuana without payment of tax, second-degree burglary, and second-degree theft.

At trial, Tim Barber testified he had met Armstrong late in the morning on September 25, 1991. Barber stated Armstrong had told him he had robbed the tavern using bolt

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cutters from the shed and police had searched his place that morning but he had put all the stolen property in the abandoned house. Barber also testified that two or three weeks previously he had confessed to a burglary and other offenses in another county.

Barber denied giving Pafford a jar of quarters or receiving any from Armstrong. Pafford had already testified that Barber had given him the jar full of quarters he had turned over to the sheriff. Pafford was recalled and he now said Junior Steinbach had given him the jar. Steinbach had said he thought it had been given to Barber by Armstrong.

A DCI criminalist said the tavern was broken into using the bolt cutters from the shed. The footprint in the grease did not match Armstrong's.

Witnesses testified Armstrong typically had much change in his house. He had been cleaning ducts for restaurants and used change for washing the duct screens in a car wash.

Armstrong testified he did not commit the robbery and denied knowledge of the marijuana found at his home. He said Barber had come over to his place shortly after lunch on September 25 and had sold him beer, cigarettes, and chewing tobacco which Barber said came from a junked car.

The jury found Armstrong guilty on all counts. Armstrong filed motions for new trial and in arrest of judgment. At a hearing, he called Ms. Davis, who had testified at the trial, but whom he claimed would provide

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newly-discovered evidence. Ms. Davis lives near Armstrong and the abandoned house. She said on the night of the robbery she saw a car pull up to the abandoned house and two boys walk down to the closed tavern. She said she had not come forward with this evidence before "because she forgot" but also stated she felt something would happen to her if she testified on behalf of Armstrong. She felt townspeople had said they would not help her if her house caught fire and that someone was killing her cats. The court denied both motions.

The court sentenced Armstrong to a term not to exceed five years on each of the marijuana charges, a term not to exceed ten years on the burglary charge, and a term not to exceed five years on the theft charge. The two drug charges were to run concurrently. The burglary and theft charges were to run concurrently to each other but consecutive to the drug charges.

Armstrong appeals.

I. Motion for New Trial

Armstrong contends the district court erred in refusing to grant his motion for new trial on the basis of newly discovered evidence. We review for an abuse of discretion. Shepard v. Iowa State Reformatory, 279 N.W.2d 28, 32 (Iowa 1979).

To prevail on a motion for a new trial based upon newly-discovered evidence, a defendant must show: (1) that

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the evidence could not have been discovered earlier in the exercise of due diligence; (2) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) that the evidence probably would have changed the result of the trial. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983). In passing on motions for new trial based on evidence newly discovered, the trial court is vested with wide discretion. State v. More, 382 N.W.2d 718, 723 (Iowa App. 1985). Motions for new trials based upon newly-discovered evidence are not favored and should be closely scrutinized and granted sparingly. State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).

Armstrong has not shown he could not have discovered the proffered evidence in the exercise of due diligence. In fact, the proposed witness testified at the first trial. There is no indication she was even asked whether she heard anything on the night in question in spite of the fact she lived nearby and owned vigilant dogs. Furthermore, there is no evidence that the witness was deceptive with defense counsel. She initially claims she forgot and later claims, after coaxing, she was afraid of townspeople. We find no exercise of any diligence in investigating or questioning the witness.

In addition, we note the proffered testimony was not material and would not have changed the outcome of the trial. There is no evidence the witness saw anything that would tie the two boys to the crime. Also, the

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boys were too small to use the bolt cutter used to break in and were too small to carry the heavy cases of liquor.

Accordingly, we find no evidence the trial court abused its discretion in denying defendant's motion for new trial on the basis of newly discovered evidence. We affirm the district court.

II. Sufficiency of Evidence

Armstrong next challenges the sufficiency of the evidence on the theft, burglary and possession of marijuana convictions.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference

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of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

The victim testified Armstrong watched her move items which were later reported stolen the day of the robbery. A witness testified Armstrong told him details of the crime and admitted to the robbery and theft. Some of the stolen items were found in Armstrong's possession. Finally, when searching Armstrong's trailer, the sheriff found 2.4 ounces of marijuana, packaged in five smaller parcels. The evidence fairly clearly showed Armstrong was not currently using marijuana, strengthening the evidence that he intended to sell the drug. From this evidence, we conclude the jury's verdict was based on sufficient evidence and we affirm the trial court.

III. Ineffective Assistance of Counsel

Armstrong next contends he was denied effective assistance of counsel. He claims trial counsel's failure

to challenge the constitutionality of the drug tax law constituted ineffective assistance of counsel. However, each of the legal issues underlying Armstrong's claims have been affirmatively decided, not in Armstrong's favor, by recent case law and we will not address them here. See State v. Gallup, 500 N.W.2d 437 (Iowa 1993); State v. Franzen, 495 N.W.2d 714 (Iowa 1993); State v. Lange, 495 N.W.2d 105 (Iowa 1993).

Accordingly, we hold Armstrong was not denied effective assistance of counsel on the basis of failure to challenge the constitutionality of the drug tax law.

AFFIRMED.