FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-88 / 89-649

354

STATE OF IOWA,

Appellee,

vs.

WILLIAM TIMOTHY SALING,

Appellant.

Appeal from the Iowa District Court for Marshall County, Timothy J. Finn and Dale E. Ruigh, Judges.

Defendant appeals from his convictions, following a jury trial, for two counts of second-degree burglary. He challenges the sufficiency of the evidence to identify him as the burglar. He also contends his trial attorney rendered ineffective assistance by failing to object to testimony which indicated he terminated questioning by the police. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Diann Wilder-Tomlinson, County Attorney, and Paul G. Crawford, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

DONIELSON, P.J. 355

A jury found William Timothy Saling guilty of two counts of second-degree burglary. Saling has appealed from the resulting convictions. Saling challenges the sufficiency of the evidence to identify him as the person who committed the burglaries. He also contends his trial attorney rendered ineffective assistance by failing to object to testimony which indicated Saling had terminated police questioning about the burglaries.

I. Sufficiency of the Evidence. Saling claims there was insufficient evidence to support his convictions. We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987). The standards governing a challenge to the sufficiency of the evidence are well established:

> 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 which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." 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. Substantial evidence means evidence which would convince a rational factfinder [sic] that the defendant is guilty beyond a reasonable doubt.

Id. (citations omitted). The record in this case reveals sufficient evidence from which a rational fact finder would be convinced Saling was guilty beyond a reasonable doubt.

Two cash boxes which were kept in a desk and a file cabinet were removed from two Marshalltown day care centers on either the evening of December 15, 1988, or in the early morning hours of December 16th. There was no sign of forced entry at either building, and other than the absence of the cash boxes, the care center offices were undisturbed.

Service Master, a janitorial company, was retained to clean the day care centers. Saling was an employee of Service Master and had access to the keys which would give him admittance to the day care centers.

Saling had cleaned the day care facilities in the past, and on the evening of the 15th, he commented to a fellow employee that he had seen a cash box in one of the care centers and he had counted the money it contained. On this same evening, the fellow employee witnessed Saling pilfer a coffee mug from one of the businesses they were cleaning.

The exterior of the Southside Day Care Center sustained some damage on the night of the burglary. The damage was not consistent with evidence of a forced entry, but instead indicated a car had hit the building. When it was pointed out to Saling that there was damage to his car which matched the damage to the Southside building, he admitted he had been there at approximately 11:00 p.m. on the 15th and he had run into the building with his car.

Saling further admitted that after leaving the Southside Day Care Center he drove to a location near the

Iowa River in the vicinity of the Veterans Home. On the next day, December 16th, a skater found the two stolen cash boxes on the ice of the Iowa River in the vicinity of the Veterans Home in Marshalltown.

Sufficient evidence existed from which the jury could conclude Saling burglarized the day care centers. The absence of signs of forced entry is consistent with Saling's ability to acquire and use keys to enter the day care centers. On the night of the thefts, Saling displayed knowledge regarding the location of cash in one of the centers. His own admissions regarding the night of the theft place him at the day care centers and in the area where the cash boxes were later found.

The record reveals Service Master employees were allowed into the centers for the sole purpose of cleaning the buildings, and the evidence supports the finding that Saling had no right, license, or privilege to otherwise enter the centers and remove the cash boxes. Iowa Code § 713.1 (1987). The trial court properly overruled Saling's motions for a directed verdict of acquittal, and his convictions are affirmed.

II. **Ineffective Assistance of Counsel.** Saling contends his trial counsel was ineffective in failing to object to testimony which indicated Saling terminated questioning by the police. The admission of testimony concerning a criminal defendant's silence during questioning has been found to constitute reversible error.

State v. Porter, 283 N.W.2d 351, 352 (Iowa 1979), and it is possible the failure to object to such testimony could constitute the failure to perform an essential duty by counsel.

However, we generally consider postconviction proceedings under Iowa Code Chapter 663A to be the best forum for resolution of ineffective assistance of counsel claims. State v. Johnson, 445 N.W.2d 337, 339 (Iowa 1989). This is so because in postconviction proceedings a full evidentiary hearing may be held where counsel may respond to the defendant's charges or otherwise state for the record the reasons for actions which were taken at trial. Id.

Counsel in this case made strategic determinations regarding whether to allow the admission of statements after defendant invoked his right to silence. Similar strategic considerations may have gone into counsel's decision not to object to Officer Packer's statement which indicated Saling did not wish to talk any longer about the thefts. Under the circumstances, counsel may not have wished to draw attention to what might have otherwise appeared to be an innocuous statement. In declining to address Saling's claim of ineffective assistance of counsel, we are not precluding him from raising it in a proper application for postconviction relief.

AFFIRMED.