

IN THE COURT OF APPEALS OF IOWA

No. 0-425 / 09-1236
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY PINAIRE,
Defendant-Appellant.

Appeal from the Iowa District Court for Jackson County, Mark J. Smith,
Judge.

Terry Pinaire appeals from his convictions and sentences for theft and
burglary. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant
Appellate Defender, for appellant.

Terry Pinaire, Mt. Pleasant, pro se.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Chris Raker, County Attorney, and James Kivi, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J.,
takes no part.

DANILSON, J.

Terry Pinaire appeals from his convictions and sentences for first-degree theft by exercising control over stolen property valued at more than \$10,000, and third-degree burglary. Pinaire's appellate counsel contends his trial counsel was ineffective in several respects. In a pro se brief, Pinaire alleges additional claims of error. We affirm.

I. Background Facts & Proceedings.

From the evidence presented at trial, a jury could have found the following facts: Seventy-eight-year-old Irene Wyatt lived by herself in a home located off Highway 62 in rural Jackson County. Wyatt worked full-time on the first shift at WADY Industry in Maquoketa. Wyatt once told a second-shift coworker, Jacob Camp, that she did not trust banks. Defendant Terry Pinaire had worked on the second shift at WADY.

During the last weekend in February 2009 Wyatt and her son counted \$21,000 in cash, which was then placed in a lock-box. Wyatt hid the lock-box in the back of her closet.

At 5:00 a.m. on March 9, 2009, Wyatt left her home and drove to work. About 9:00 a.m., Larry Davis saw a white Jeep stuck in the ditch at the end of the lane leading to Wyatt's house. He stopped and asked the driver if he needed any help. Davis identified Pinaire in court as the driver of the Jeep and said a photograph of Pinaire's white Jeep looked like the Jeep he saw on March 9, except that it then had a shell or topper over the back area of the Jeep. In their efforts to get the Jeep out of the ditch, Pinaire twice walked to and behind

Wyatt's house; once in an unsuccessful search for chain, and once returning with a shovel. Eventually Davis was able to extract Pinaire's Jeep from the ditch.

When Wyatt returned to her home after work, she first noted the garage door would not open. She went into her house and discovered her new television was missing from the kitchen. Upon further investigation, she discovered that many other items were also missing from the house, including the lock-box containing her money, another box containing important papers, jewelry, a suitcase, a piggy bank, and other items. Missing from her garage were a toolbox, a clothes basket, and a shovel.

On March 11, 2009, Larry Werning, the site manager of a mini-storage facility in Clinton, rented a storage unit to a man who drove a white vehicle Werning thought was an SUV. The man gave the name "Terry Pinaire" and spelled it for Werning. As Werning drove away from the storage facility, he saw Pinaire carrying something from his vehicle and putting it into the storage unit. Werning identified Pinaire in court as the man who rented the storage unit.

Pinaire's girlfriend, Janet Streets, testified Pinaire drove a white Jeep. She also testified that she went with Pinaire to rent a storage unit in Clinton and that Pinaire put items into the storage unit while she was present. Streets further testified reluctantly that she saw Pinaire with a duffle bag that "[c]ould have" contained money, and that she "could have" gone with Pinaire to his sister's house with the duffle bag.

On March 25 police executed a search warrant at the apartment shared by Pinaire and Streets, seizing a pair of boots, keys, and an electronics store receipt

that indicated a March 13, 2009 purchase made with \$400 in cash. In a subsequent consent search, police found \$940 in cash in the closet of the master bedroom and a \$100 bill under the kitchen sink.

Police executed a search warrant at the storage unit rented by Pinaire and found a television with a serial number matching one recorded by Wyatt, a laundry basket, two lockboxes that had been pried open, a suitcase, a toolbox and tools, a smashed piggy bank, jewelry, and other items. Police found a shovel at Pinaire's mother's house. At trial Wyatt was shown photographs of these items and identified them as property that had been taken from her home and garage.

Jackson County Sheriff Russell Kettmann talked to Pinaire about the missing money. Without admitting involvement in the burglary of Wyatt's home, Pinaire said a black bag containing the money was hidden at the home of his sister, Stacy Nienkark. Pinaire accompanied Sheriff Kettmann to the basement of Nienkark's home. Pinaire appeared "very surprised" when the bag was not in the rafters in the corner of the basement. Pinaire stated, "That's where it was at."

Police later received a telephone call from a person who gave a last name of Stevenson telling them to look for a black duffle bag in a dumpster behind a Zephyr station in Maquoketa. Pinaire was in custody at the time. Police checked the dumpster and found a black duffle bag containing two manila envelopes. When opened, the envelopes were found to contain \$14,380 in cash and some "higher value" jewelry Wyatt identified as having been taken from her home.

In closing, Pinaire's counsel conceded Wyatt had "suffered a burglary," but he argued that Pinaire was not the person responsible. Counsel argued there was no evidence that placed Pinaire in Wyatt's house. He pointed out that Davis did not notice anything inside the Jeep and, although the Jeep was stuck in the mud, there were no muddy prints inside Wyatt's house. He also noted there was no forensic evidence linking Pinaire to Wyatt's house.

The jury found Pinaire guilty of third-degree burglary and first-degree theft. Pinaire filed a pro se motion for arrest of judgment, which the trial court denied as untimely and otherwise without merit.

Pinaire now appeals. Pinaire's appellate counsel claims Pinaire was denied effective assistance of counsel by six alleged failures of duty on the part of his trial counsel, John Kies. Pinaire, pro se, also raises several claims.

II. Discussion.

Pinaire's appellate counsel argues trial counsel was ineffective in failing to object to hearsay testimony on five specific occasions, and in admitting in closing argument that a burglary and theft had occurred.

We review ineffective-assistance-of-counsel claims de novo. *State v. Martin*, 778 N.W.2d 201, 202 (Iowa Ct. App. 2009). We normally do not decide such claims on direct appeal, but will where the record is adequate to do so. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). In this case, both parties assert that the record is sufficient to permit a ruling, and we agree.

In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) counsel failed to perform an essential duty and

(2) prejudice resulted. *Id.* Representation by counsel is presumed competent. *Id.* at 196. In making our determination of whether an attorney failed to perform an essential duty, we are to avoid second-guessing and hindsight. *Id.*

Hearsay. First, Pinaire contends trial counsel should have lodged a hearsay objection to testimony by Deputy Sheriff Russell Long that Davis identified the Jeep he was shown as the one he helped pull out of the ditch. Even if objectionable as hearsay, Pinaire cannot establish prejudice by counsel's failure to object, because the identification of the Jeep was cumulative. Davis had previously identified a photograph of Pinaire's Jeep at trial as similar to the one he and Pinaire pulled from the ditch. *See State v. Shanahan*, 712 N.W.2d 121, 138 (Iowa 2006) (rejecting ineffectiveness claim because prejudice did not result from counsel's failure to object where other evidence "not much different in character was admissible").

Pinaire next complains of testimony by Deputy Long that Wyatt had recorded the serial number of the television, which matched the number on the television recovered from the storage shed. Again, even if objectionable as inadmissible hearsay, Wyatt was shown photographs of the items in the storage shed, which included a box containing a television, and she identified the items as being those taken from her home. The testimony about which Pinaire complains is cumulative, and he cannot establish he was prejudiced by counsel's failure to object. *Id.*

Pinaire complains about Deputy Long's testimony about a telephone call from a man named Stevenson regarding the whereabouts of the duffle bag.

Pinaire apparently asserts this is hearsay. However, the State argues the testimony was not offered to prove the truth of the matter asserted, but rather only to explain the responsive conduct of the police in searching the dumpster behind the Zephyr station. We agree with the State that the testimony does not constitute hearsay. *State v. Williams*, 360 N.W.2d 782, 787 (Iowa 1985) (“Third-party statements that are offered only to explain responsive conduct are not hearsay.”).

Pinaire also complains that his trial counsel was ineffective in eliciting hearsay testimony from Deputy Long by asking about the electronics store receipt, to which the deputy answered that Streets denied she or defendant had recently spent \$100 on anything. The State responds that Streets’s denial was not hearsay because the State offered it as a false denial. “A statement is not hearsay unless it is offered for the truth of the matter asserted.” *Id.* The statement by Long that Streets denied spending \$100 was not hearsay as it was not offered for the truth of the matter asserted.

Pinaire finally complains that Deputy Steve Shroeder testified that Streets identified storage unit No. 23 as the unit she observed Pinaire place items into storage. The State concedes the testimony was hearsay and could have been objected to. However, this testimony was cumulative to Streets’s testimony, and Pinaire cannot establish prejudice. *Shanahan*, 712 N.W.2d at 138.¹

Closing argument. Pinaire asserts trial counsel was ineffective in admitting in closing argument a burglary had occurred and the only question was

¹ Other testimony established Pinaire was the sole tenant of unit No. 23, and the storage rental agreement was executed two days after the burglary.

whether it was defendant who committed the crimes. We cannot say counsel's trial strategy here was unreasonable. Counsel could hardly argue a burglary had not occurred as the door to Wyatt's house was pried open, and her belongings were gone. In any event, "[m]iscalculated trial strategies and mere mistakes of judgment normally do not rise to the level of ineffective assistance of counsel." *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001).

Pinaire has failed to establish his claims of ineffective assistance of trial counsel asserted by appellate counsel.

Pro se claims. In his pro se brief, Pinaire asserts the issuance of an arrest warrant for Streets and search warrant were "for the sole purpose to question Ms. Janet Streets with no probable cause, no sufficient evidence." However, Pinaire has no standing to assert claims that Streets's rights were violated. See *State v. Ortiz*, 618 N.W.2d 556, 559 (Iowa 2000) (noting a party challenging a search or seizure "must establish that his or her *own* Fourth Amendment rights have been violated, not the rights of someone else"); see also *State v. McGonigle*, 401 N.W.2d 39, 40 (Iowa 1987) (noting challenger has standing to the extent the challenge implicates the challenger's own constitutional rights).

Pinaire also claims: Werning's identification of defendant was tainted; Pinaire was improperly required to appear before the jury in orange shorts, white t-shirt, and flip flops; trial counsel failed to object to photographs admitted into evidence; Pinaire's statements about the location of the duffle bag should not have been admitted; and he was denied competent standby counsel at the posttrial hearing on his motion in arrest of judgment. We conclude we are unable

to evaluate these pro se claims of Pinaire, which suggest his counsel was ineffective. We therefore preserve these claims for possible postconviction relief proceedings. See Iowa Code § 814.7(3) (2009); *State v. Johnson*, ___ N.W.2d ___, ___ (Iowa 2010)

We affirm the convictions and sentences for theft and burglary.

AFFIRMED.