IN THE COURT OF APPEALS OF IOWA

No. 0-785 / 09-1946
Filed December 8, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN FITZGERALD BENNETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas Bower, Judge.

John Bennett appeals his conviction for first-degree theft. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

EISENHAUER, P.J.

After a jury trial, John Bennett was convicted of first-degree theft. Bennett appeals arguing the court erred in failing to grant a new trial and his counsel was ineffective. We affirm.

I. Background Facts and Proceedings.

On June 28, 2008, Bennett started working John Deere's second shift, from 3:30 p.m. to midnight. Bennett worked as a plumber in facility maintenance, had access to every building, and was primarily on his own during his work hours. Bennett also had the use of a four-wheel utility vehicle while at work.

In mid-July 2008, electrical engineer Richard Jeray learned copper items were missing: wire, cable, pieces of copper, and bus work for test equipment. At first, Jeray thought it was a one-time incident. However, problems continued and it "seemed like every week something new was missing." Copper items were missing from multiple areas of the property. Jeray believed the copper was being removed by someone with site access because a badge is required to enter John Deere's property. By the end of the summer, Jeray contacted the police about the missing copper. Despite adding locks and adding a surveillance camera to one area of the plant, copper continued to be taken up to and including December 2008. In October 2008, Jeray discovered damage to the John Deere perimeter fence which would allow items to be pushed under the fence.

On December 31, 2008, the police received a report that two men were stripping large amounts of copper wiring at Lonnie Cochran's residence. Officer Michael testified he drove there and observed Bennett and Cochran at the rear of

a pickup backed up to a garage. As the marked police vehicle came into view, one of the men threw a piece of cardboard onto the truck bed. Officer Michael walked up and asked if they had any copper wiring and the men admitted they did. Officer Michael removed the cardboard and saw "[l]arge amounts of copper tubing, brand new stuff . . . much of it with the molding, the black molding on it." Officer Michael testified Bennett stated "they were just taking it to the dump." Bennett testified he did not make that statement. Bennett was arrested on an unrelated charge and taken to the police station.

Bennett was interrogated by Officer Moller, who testified Bennett first stated he found the copper laying in his front yard and he did not know why it was there. Bennett then changed his story and told Officer Moller "somebody gave it to [him] to sell because [he has] known all the junk people in town [his entire] life and [gets] top dollar." At this point, Officer Moller left the room and Bennett called his wife, stating: "[Y]ou know that copper I was gonna get rid of, well, the cops came over to Lonnie's." Officer Moller reentered the room and Bennett changed his story for the third time: about a month earlier Bennett had picked up the copper from someone and Bennett was storing it in his shed before selling it. Bennett refused to tell Officer Moller who gave him the copper but did admit he knew the copper in his truck on December 31 was stolen.

In January 2009, Jeray identified the items in Bennett's truck as "parts that belonged to John Deere that were missing." John Deere fired Bennett on January 4, 2009.

In February 2009, Bennett was charged with first-degree theft. At trial in October 2009, Jeray testified Bennett's truck contained a new, flexible connector part that is "very unique specific to our furnaces." Jeray testified some of the plugs in the truck were parts Bennett "would have been in charge of changing out" as a part of his job and Bennett had no authority to have the parts outside of John Deere. Jeray testified the copper found in the back of Bennett's pickup truck were some, but not all, of the items missing from the John Deere plant. Jeray valued the copper in Bennett's truck at $11,691. Jeray testified there were no thefts at John Deer in the two years before Bennett started working there and there was no significant theft after Bennett was fired.

Bennett testified he sold copper before he began working at John Deere. Bennett and his brother-in-law, Troy Laughlin, stripped and sold salvage-yard copper given to them in November 2007. Laughlin testified this copper was all sold by August 2008. Bennett testified he followed the copper prices "so we could get the most out of what we had" and most of the copper was sold in August/September 2008, when the price "peaked out." Laughlin stated the salvage-yard copper he and Bennett sold did not contain a heat exchanger or forklift plugs like the items found in Bennett's truck on December 31, 2008.

Bennett explained he changed the story the told Officer Moller three times because he felt that nothing he could say would matter. Bennett told the jury his fourth version of the events: he took the pickup to Cochran's house because Cochran wanted his help repairing a water heater and also because Cochran wanted to borrow his truck. Upon his arrival Bennett saw "a large pile of copper,

copper wire, and a condenser" lying on Cochran's garage floor. Bennett walked to a grocery store to buy two sodas and upon his return "the rear of the box was mostly loaded." Bennett stated he helped Cochran load the heat exchanger into the back of the truck and Cochran tossed a piece of cardboard over the contents when Officer Michael arrived. Bennett testified he "never removed anything from Deere's."

On cross-examination, Bennett admitted the three stories he told Officer Moller were lies and he did not tell Officer Moller the facts he told the jury. Bennett also admitted he did not tell the investigator who came to his house after the Moller discussion the facts he told the jury. Cochran did not testify.

Cochran's wife, Theresa, testified Ruben Howard brought a truckload of material she believed to be copper to their house and put it on the floor of the garage. Theresa admitted her testimony conflicted with testimony she had given during an earlier administrative hearing. Howard testified he did not drop off any copper items at Cochran's house. Jeray testified Ruben Howard and Lonnie Cochran did not work at John Deere and had no access to John Deere copper.

The jury found Bennett guilty of first-degree theft and this appeal followed.

II. Weight of the Evidence.

Bennett argues the court erred in denying his motion for a new trial because the "verdict is contrary to the weight of the evidence." *See State v. Reeves*, 670 N.W.2d 199, 201 (Iowa 2003). Bennett claims the evidence preponderates against the jury's verdict because: (1) no witness testified they saw Bennett take anything from John Deere; (2) while the State's exhibits

included copper-sale invoices listing Bennett or Cochran, no copper sale "was shown to involve copper from John Deere"; and (3) the copper found in the back of Bennett's pickup "might have been similar to copper that is used at John Deere, but it was not conclusively proven that the copper was indeed stolen from John Deere."

Under the "weight of the evidence standard," the trial court weighs the evidence and considers credibility as it determines whether "a greater amount of credible evidence supports one side of an issue . . . than the other." *Id*. at 202. While trial courts have wide discretion in deciding motions for new trial, such discretion must be exercised "carefully and sparingly" to insure the court does not "lessen the role of the jury as the principal trier of the facts." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The trial court grants a new trial only in the "exceptional case" where "a miscarriage of justice may have resulted." *Reeves*, 670 N.W.2d at 202.

Our appellate review "is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *Id*. at 203. We do not "reweigh the evidence" nor "judge the credibility of the witnesses." *Id*. Rather, we determine whether the district court's ruling "is a clear and manifest abuse of discretion." *Id*.

The trial court explained its denial of Bennett's motion for new trial:

> In looking at the evidence, the weight of the evidence . . . could prove that either you took the property or you possessed stolen property knowing it to be stolen. That's plain and simple.
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> You had access, you had opportunity, you worked [at John Deere], there weren't any thefts of that type of material before you

> worked there . . . there wasn't any theft of material after you left. So that's all circumstantial evidence that you were involved in this.
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> There was also circumstantial evidence that you had access to all this—all these items that were removed. You had a background with electrical work so you would know the manner in which things could be removed. You had a background as far as doing scrapping [of copper] before, so you would know that there would be a market for that. You were aware of the variation in prices and that copper was at an all-time high.
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> . . . .
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> [T]he fact that nobody saw you take this stuff simply doesn't matter. You either did it when nobody was around, you were able to hide it, you stuffed it under the fence . . . but the fact nobody saw you take it doesn't mean you are not guilty of this charge.
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> . . . [T]here was evidence that you knew the property was stolen and you did something, whether it was covering it up like the officer thinks he saw you do, whether it was cutting the rubber or the plastic casing off of it, whether it was taking just a little bit at a time so maybe no one would be suspicious, there were all kinds of things that you did that would indicate that it wasn't just you being in the wrong place at the wrong time.
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> . . . .
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> [T]he property was consistent with John Deere property. It would be impossible to put a serial number of every piece of copper wiring for every inch because segments were cut out.

After our review of the record, we conclude the district court properly applied the weight-of-the-evidence standard and gave sufficient reasons for its denial of a new trial. We conclude the court acted well within its discretion and affirm the judgment of the district court.

III. Ineffective Assistance of Counsel.

After Bennett was convicted on October 30, 2009, sentencing was set for December 17, 2009. An hour before the sentencing hearing, Bennett decided to discharge his attorney and represent himself due to "differing opinions on both the motion for new trial as well as arguing for the appropriate sentence." The

district court allowed Bennett to represent himself with trial counsel appointed as stand-by counsel. Bennett proceeded to argue the motion for new trial.[1]

On appeal, Bennett claims ineffective assistance of counsel because the "withdrawal of counsel was a last minute development and [he] had little opportunity to prepare evidence in support of his motion." Therefore, Bennett is not asserting ineffective assistance based on his attorney's acts or omissions during the criminal trial.

In order to prevail on his claims of ineffective assistance of counsel, Bennett must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). His inability to prove either element is fatal. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392.

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Resolution on direct appeal is appropriate, however, when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of the ineffective-assistance claim. *Id*. The record is sufficient for us to resolve Bennett's claim as a matter of law.

First, we note Bennett's decision to discharge his counsel an hour before the hearing was his own choice. Second, as the trial court observed and Bennett

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[1] When the focus of the hearing shifted from the new trial motions to sentencing, Bennett changed his mind and requested his attorney start representing him again. The court granted Bennett's request.

admitted, he had from the end of October to the middle of December to take action rather than waiting until the last minute. Third, Bennett cannot assert ineffective assistance of stand-by counsel for acts and omission occurring after Bennett started representing himself. *See State v. Hutchison*, 341 N.W.2d 33, 41-42 (Iowa 1983). Finally, Bennett cannot assert he gave himself ineffective assistance of counsel. *See Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 2541 n.46, 45 L.Ed.2d 562, 581 n.46 (1975) (stating "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'"). Under the circumstances of this case, we conclude Bennett's claim of ineffective assistance of counsel has no merit.

AFFIRMED.