

**IN THE COURT OF APPEALS OF IOWA**

No. 1-731 / 10-0931  
Filed November 9, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**RENA SHANNELL KIRK,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Christine Dalton,  
District Associate Judge.

Rena Kirk appeals her conviction for theft in the third degree claiming the district court erred in denying her motion for judgment of acquittal and her attorney rendered ineffective assistance. **AFFIRMED.**

Timothy J. Tupper, Davenport, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County Attorney, and James J. Crosby, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

**SACKETT, C.J.**

Rena Kirk appeals her conviction for theft in the third degree, in violation of Iowa Code sections 714.1(1) and 714.2(3) (2009). Kirk asserts the district court erred in denying her motion for judgment of acquittal as there was insufficient evidence to support her conviction. She also claims trial counsel was ineffective when he failed to file a motion for a new trial based on the weight of the evidence. We affirm.

**I. BACKGROUND AND PROCEEDINGS.** On November 27, 2009, Lisa McComb was shopping for coats with her three sons at the Burlington Coat Factory in Bettendorf, Iowa. While shopping, she became warm and decided to remove her jacket and purse, placing both on the floor at the end of the aisle of coats. A little while later, a woman approached her making comments about the coats and the narrow aisle. McComb felt like the woman invaded her personal space, so she backed down the aisle allowing the woman to pass. A few minutes later, McComb went to pick up her belongings and found her purse missing.

She contacted police who reviewed the store surveillance cameras. The video showed four women meeting in an aisle adjacent to the aisle where McComb was shopping. One of the women is seen observing McComb's purse at the end of the aisle. This woman returns briefly to the location of her friends and then walks back to McComb and engages her in conversation. She holds up a coat to block McComb's view, while another woman in a blue coat, white shirt, and braids bends down in the vicinity of the purse, turns quickly, and walks back

to the group's original location. The two other women of the group remain in the vicinity during the theft and appear to be keeping a look-out. The four women then exit the aisle as the one wearing the blue coat, white shirt, and braids, places the purse in the shopping cart the group had been using.

After observing the surveillance video and taking McComb's statement, the police left the store only to be called back two hours later by the store's loss prevention officer. The store employee had watched the surveillance video with the police officer earlier, and called the officer back to the store because she had seen two women from the same group return to the store. The two women were wearing the same clothing as in the surveillance footage and had the same braided hair with beads. The officer took the women into custody, and identified the woman in the blue coat, white shirt, and braids as the defendant.

Kirk was charged with theft in the third degree as a result of having been convicted at least twice before of theft. The case proceeded to trial on May 3, 2010, and the jury found Kirk guilty. Kirk stipulated to her prior offenses, and on June 3, 2010, she was sentenced to a term of incarceration not to exceed two years. Kirk appeals asserting the district court erred in denying her motion for judgment of acquittal as there was insufficient evidence to support her conviction. In addition, Kirk claims her trial counsel rendered ineffective assistance by failing to file a motion for a new trial based on the weight of the evidence.

**II. SUFFICIENCY OF THE EVIDENCE.** We review sufficiency of the evidence claims for correction of errors at law. *State v. Hearn*, 797 N.W.2d 577, 579 (Iowa 2011). A jury's verdict is binding on appeal if it is supported by

substantial evidence. *State v. Hennings*, 791 N.W.2d 828, 832 (Iowa 2010). “Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.” *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). We consider all the evidence and view it in the light most favorable to the State drawing all legitimate inferences in support of the verdict. *Hearn*, 797 N.W.2d at 580. But the evidence must do more than merely raise suspicion, speculation, or conjecture. *Id.*

The marshaling instruction on theft submitted to the jury<sup>1</sup> stated the State had to prove the following elements:

1. On or about the 27th day of November, 2009, the defendant took possession or control of a purse, or knowingly aided and abetted another in taking possession or control of a purse.
2. The defendant did so with the intent to deprive Lisa McComb of the purse.
3. The purse, at the time of the taking, belonged to Lisa McComb.

Kirk claims the State failed to prove she stole the purse because no one saw her take the purse, nor was she ever seen in possession of the purse. She contends her mere presence in the proximity of the crime is not substantial evidence to support her conviction. Therefore, she asserts the district court erred in denying her motion for judgment of acquittal.

We find sufficient evidence from which the jury could conclude Kirk took possession or control of the purse or aided and abetted another in taking possession or control of the purse. The surveillance video shows Kirk walking to

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<sup>1</sup> Because Kirk does not assert the law in the instructions was incorrect, we examine her claims in view of the instructions given to the jury. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

the location of the purse, bending down, turning, and quickly returning to an adjacent aisle. This move was completed while one of Kirk's partners held up a jacket to block McComb's view of her purse. Kirk was identified when she returned to the store two hours later wearing the same clothing and hair style as in the surveillance footage. As the district court pointed out in its ruling on Kirk's motion for judgment of acquittal, the video show no one else near the area where McComb testified she put the purse. While the purse was never recovered, the surveillance video and the testimony of the store personnel provide sufficient evidence from which the jury could conclude Kirk took possession of the purse, or aided and abetted another in taking possession of the purse. Therefore, the district court did not err in denying Kirk's motion for judgment of acquittal.

**III. INEFFECTIVE ASSISTANCE OF COUNSEL.** Kirk also claims her trial attorney rendered ineffective assistance when he failed to file a motion for a new trial challenging the weight of the evidence. We review ineffective-assistance-of-counsel claims de novo as they are based on the defendant's Sixth Amendment rights. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). Normally, claims of ineffective assistance of counsel are preserved for postconviction relief proceedings in order to develop a more complete record. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). However, this court may address the claim on direct appeal if the record is adequate. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). We determine the record is adequate to address this claim.

In order to succeed on a claim of ineffective assistance of counsel, Kirk must prove: (1) counsel failed to perform an essential duty, and (2) she suffered prejudice as a result. *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). We presume counsel is competent and the defendant bears the burden to establish inadequate representation. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). To establish prejudice, Kirk must also demonstrate, but for counsel's unprofessional errors, the results of the trial would have been different. *Lyman*, 776 N.W.2d at 878. Failure to prove either element is fatal, so we may resolve the defendant's claim on either prong. *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011).

Kirk claims the verdict in this case was against the weight of the evidence and counsel was ineffective in failing to file a motion for a new trial on that ground. The district court may grant a new trial if it determines the jury's verdict is contrary to the law or evidence. Iowa R. Crim. P. 2.24(2)(6). A verdict is against the weight of the evidence when "a greater amount of the credible evidence supports one side of an issue or cause than the other." *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Trial courts have broad discretion in deciding motions for a new trial, but this discretion must be exercised carefully and sparingly so that the court does not lessen the role of the jury. *Neitzel*, 801 N.W.2d at 625. Assuming without deciding that counsel was ineffective in failing to file the motion, the next question is whether Kirk was prejudiced by her trial counsel's failure.

Granting a new trial based on the weight of the evidence is to only be invoked in extraordinary cases in which the “evidence preponderates heavily against the verdict” and a court concludes “a miscarriage of justice may have resulted.” *State v. Ellis*, 578 N.W.2d 655, 658–59 (Iowa 1998). In order to establish prejudice Kirk has to show that had trial counsel made such a motion that this case is one of those rare cases where the trial court would substitute its own opinion for that of the jury, *Reeves*, 670 N.W.2d at 203, and there is a reasonable probability the district court would have granted her a new trial. *Neitzel*, 801 N.W.2d at 626. Kirk has failed to make such a showing.

Kirk not having established she was prejudiced, her claim of ineffective assistance of counsel fails as a result. See *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008) (stating an ineffective-assistance-of-counsel claim will fail if either the essential duty or prejudice element is lacking).

**AFFIRMED.**