IN THE COURT OF APPEALS OF IOWA

No. 2-1077 / 10-1711
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN ARTHUR WILSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

A defendant appeals his judgments and sentences for second- and third-degree theft, (1) challenging the sufficiency of the evidence supporting the jury's findings of guilt, (2) contending his trial attorney was ineffective in failing to require the jury to determine whether the acts involved a common scheme and should be aggregated, and (3) raising several other issues on appeal. **AFFIRMED.**

Tammi M. Blackstone of Harrison & Dietz-Kilen, P.L.C., Des Moines, for appellant.

John Wilson, Des Moines, appellant pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Justin Allen, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

VAITHESWARAN, P.J.

A jury found John Wilson guilty of second- and third-degree theft in connection with a series of transactions involving the purchase of Apple iPods from Target department stores in the Des Moines area. On appeal, Wilson (1) challenges the sufficiency of the evidence supporting the jury's findings of guilt, (2) contends his trial attorney was ineffective in failing to require the jury to determine whether the acts involved a common scheme and should be aggregated, and (3) raises several other issues that, in his view, support reversal.

I. Sufficiency of the Evidence

The jury was instructed that, to prove theft, the State would have to establish the following: (1) during a designated time period, "the defendant and/or someone he aided and abetted took possession and/or control of property belonging to Target Stores;" (2) "[t]he Defendant and/or someone he aided and abetted did so with the intent to deprive the owner, Target Stores, of the property;" (3) "[t]he property, at the time of the taking, belonged to Target Stores."

Wilson contends the instructions "of necessity require[d] the victims to have actually been deceived," a finding that is "not circumstantially clear" on this record. To the contrary, the instructions did not require a finding of actual, subjective deception. They simply required the taking of property with the intent to deprive Target of that property. *See* Iowa Code § 714.1(1) (2007) (stating a person commits theft when he or she "[t]akes possession or control of the property of another, or property in the possession of another, with the intent to deprive the other thereof"). The record contains more than substantial evidence

to support those findings.[1] *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984) (setting forth the standard of review).

An investigation specialist employed by Target recounted the store's comprehensive inventory-tracking procedures, which included the linking of purchase and return receipts and associated digital video recordings. He identified cash purchases of five Apple iPods and returns of essentially empty iPod packages for cash refunds.

A police officer who reviewed the video recordings identified one of the people involved in the transactions as John Wilson. The officer executed a search warrant on Wilson's car and found purchase and return receipts for an iPod. He also found an envelope used in an undercover purchase of a stolen iPod. A reasonable juror could have found from this evidence that the State satisfied the elements of theft contained in the jury instructions.

II. Absence of Jury Instruction on Aggregation

Iowa Code section 714.3 explains the concept of aggregation as follows:

> If money or property is stolen from the same person or location by two or more acts, or from different persons by two or more acts which occur in approximately the same location or time period, or from different locations by two or more acts within a thirty-day period, so that the thefts are attributable to a single scheme, plan, or conspiracy, these acts may be considered a single theft and the value may be the total value of all the property stolen.[2]

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[1] We addressed this question in a companion case, *State v. Wilson*, No. 09-0898, 2010 WL 4484347, at *1–2 (Iowa Ct. App. Nov. 10, 2010).

[2] A 2004 amendment added the language "or from different locations by two or more acts within a thirty-day period." 2004 Iowa Acts, ch. 1087, § 1.

In *State v*. *Amsden*, 300 N.W.2d 882, 886 (Iowa 1981), the Iowa Supreme Court discussed the fact-finder's role in implementing this language. The court stated, "If the State generates a fact issue on aggregating, that issue is ultimately to be decided by the fact finder." *Amsden*, 300 N.W.2d at 886. The court continued,

> Although the five incidents were joined, both the State and Amsden had the right to have the jury pass on each incident separately. The jury not only had to decide the aggregation issue; it could find that some incidents were not established at all. As to each incident, the court should have submitted guilty-not guilty verdicts with an interrogatory as to the amount of the theft if the jury found that theft was proved. A final interrogatory should have been submitted to be answered if the jury found that three or more established thefts were to be aggregated. That interrogatory would ask the jury which thefts were to be aggregated.[3]

Id. (citations omitted).

It is undisputed that five iPods were purchased for $349.99 each and five iPod boxes were returned for cash refunds of $349.99 each. It is also undisputed that two of these transactions took place within thirty days in the month of January 2008 and three took place within a thirty-day period spanning the months of March and April 2008.

The State charged Wilson with two crimes arising from these transactions: (1) third-degree theft, which required proof that the value of the stolen property was in excess of $500 but not in excess of $1000 and (2) second-degree theft, which required proof that the value of the stolen property was in excess of $1000 but not in excess of $10,000. *See* Iowa Code § 714.2(2), (3).

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[3] While *Amsden* was decided prior to the 2004 amendment to section 714.3, the amended language does not affect the court's conclusion that the question of aggregation was for the fact-finder.

The jury was instructed on the values associated with different degrees of theft and was further instructed that it would have to determine the applicable degree of theft for each of the two counts. The jury was not instructed that, to arrive at a particular degree of theft, it could aggregate the values of separate transactions if it found the values to be part of a "single scheme, plan, or conspiracy." *See id.* § 714.3.

Wilson contends his attorney was ineffective in failing to insist on this aggregation language. To prevail, Wilson must show that counsel breached an essential duty and that prejudice resulted. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). "Ordinarily, ineffective assistance of counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim." *State v*. *Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Here, both sides agree the record is adequate to decide the issue on direct appeal. They also essentially agree that the question for our determination is whether Wilson was prejudiced by counsel's failure to insist on the inclusion of aggregation language. Their only real point of disagreement relates to the prejudice standard to be applied in this context.

We agree with the State that, because this issue is being raised under an ineffective-assistance-of-counsel rubric, we must apply the *Strickland* prejudice standard, which requires Wilson to show a reasonable probability that the outcome of the proceeding would have been different had his attorney lodged an objection to the instruction and succeeded in having aggregation language included. *Strickland*, 466 U.S. at 694; *State v*. *Barnes*, 791 N.W.2d 817, 825

(Iowa 2010) (concluding the defendant failed "to establish a reasonable probability exist[ed] that, had his attorney requested a corroboration instruction, the outcome of the defendant's trial would have been different").

On this record, Wilson cannot meet this prejudice standard. The jury made a specific finding that the value of the property underlying the first count exceeded $500 but was less than $1000. Based on the undisputed evidence that each iPod had a value of $349.99, the finding necessarily meant that the jury aggregated two iPod transactions to arrive at the value on the first count.

Similarly, the jury made a specific finding that the value of the property underlying the second count exceeded $1000 but was less than $10,000. This finding necessarily meant that the jury aggregated three transactions.

We conclude Wilson was not prejudiced by his attorney's failure to have aggregation language included in the jury instruction. Accordingly, his ineffective-assistance-of-counsel claim fails.

III. Other Issues

A. Speedy Trial. Wilson contends his right to a speedy trial was violated. *See* Iowa R. Crim. P. 2.33(2)(b) (stating, absent waiver, "the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown"). The district court found otherwise, reasoning that "[t]he cause for continuance and delay is attributable to the defense and not the State" and the withdrawal of one of Wilson's attorneys constituted good cause for the delay. We discern no abuse of discretion in this ruling. *State v*. *Campbell*, 714 N.W.2d 622, 627 (Iowa 2006) (setting forth the standard of review).

Wilson's first attorney withdrew following Wilson's belated allegations of misconduct against her. These allegations came on the heels of several delays instigated by Wilson. The court justifiably relied on these delays in finding good cause for failing to bring Wilson to trial within ninety days. *See id.* at 629 ("[D]efendant's own conduct was a substantial factor in the withdrawal of his new lawyer, necessitating yet another change in counsel and an additional period of time for new counsel to achieve familiarity with the case."); *State v*. *Ruiz*, 496 N.W.2d 789, 792 (Iowa Ct. App. 1992) ("[A] defendant may not actively, or passively, participate in the events which delay his or her trial and then later take advantage of that delay to terminate the prosecution.").

***B*. *Continuance*.** Wilson contends the district court abused its discretion in denying a motion for continuance he raised on the morning of trial. *See* Iowa R. Crim. P. 2.9(2) ("Motions for continuance are discouraged. A motion for continuance shall not be granted except upon a showing of good and compelling cause."); *State v*. *Clark*, 814 N.W.2d 551, 564 (Iowa 2012) (reviewing denial of continuance motion for abuse of discretion).

As discussed, trial was repeatedly postponed at Wilson's behest. Wilson's newly-appointed trial attorney made several attempts to contact him, going so far as to seek him out at an unrelated hearing that he knew Wilson would attend. Following the hearing, he asked Wilson to contact his office. The attorney "[d]id not hear from" Wilson. He persisted in attempting to reach Wilson, without success. Two days before trial, Wilson called the law office and scheduled a meeting with his attorney for the following morning. On the morning of trial, he advised the court that his attorney had "not had much time to prepare" and

Wilson did not "understand why." The district court responded, "If he hasn't had time to prepare the way he would like, that is not his fault. That is, as far as I'm concerned . . . your fault." The court continued, "I put the blame on you, Mr. Wilson, for not having your lawyer prepared and ready to go." Because Wilson delayed contacting his attorney, we conclude the district court did not abuse its discretion in denying the motion for continuance.

C. Trial Information and Arraignment. Wilson filed a pro se brief complaining of the absence of a trial information. The record reflects that Wilson checked out the original court file before trial. At trial, the court discovered that the original trial information was missing from the file. The court substituted a file-stamped copy provided by the prosecutor. That copy appears to comport with the requirements of Iowa Rule of Criminal Procedure 2.5(2) (requiring endorsement by the prosecuting attorney), (3) (requiring the filing of minutes of evidence), and (4) (requiring approval by a judge).

Wilson also contends he was not arraigned. The record belies this assertion.

We conclude Wilson's challenges to the trial information and arraignment do not require reversal or dismissal.

D. Prosecutor's Comments During Closing Arguments. Wilson finally contends his attorney should have objected to the prosecutor's reference to notable crime families during his closing argument. On our de novo review of this ineffective-assistance-of-counsel claim, we conclude there is no reasonable probability that the prosecutor's reference would have changed the outcome of trial. *See Strickland*, at 694. The reference was isolated. *See id.* at 696 (stating

some errors "will have had an isolated, trivial effect"); *State v*. *Blanks*, 479 N.W.2d 601, 604 (Iowa Ct. App. 1991) (considering whether prosecutor's conduct was isolated). The evidence was also overwhelming. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

We affirm Wilson's judgment and sentence for second- and third-degree theft.

AFFIRMED.