

IN THE COURT OF APPEALS OF IOWA

No. 2-592 / 11-0522
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHERECE ROCHELLE ARMSTRONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve,
Judge.

Cherece Armstrong appeals her convictions for theft in the second degree
and credit card fraud. **AFFIRMED.**

Sally H. Peck, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney
General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

Cherece Armstrong challenges her convictions for theft in the second degree (property value exceeding \$1000 but not exceeding \$10,000) and credit card fraud (not exceeding \$1000), alleging the State failed to offer substantial evidence, the trial court abused its discretion in denying a motion to sever, and her trial counsel was ineffective in several respects. We affirm her convictions.

I. Background Facts and Proceedings.

Jennifer West ate lunch at a Panera Bread restaurant in Davenport on June 8, 2010. With her she brought her \$280 designer-brand purse containing a \$175 Coach-brand wallet, several gift cards, her checkbook, driver's license, and credit or debit cards. She placed her purse on an extra chair and slid it under the table. West forgot to pick it up when she left; she had carried her car keys in a jacket pocket and drove home without realizing she left her purse behind. It was not until later that afternoon that West realized she left her purse at the restaurant. She called the restaurant and the manager told her that no one had turned in the purse.

Concerned that her purse and its contents had been stolen, West checked her bank account online. She learned that several transactions had been posted to her account without her approval, including charges at Hibbett Sports, Foot Locker, Kwik Shop, Amoco, and All Cell World. West called her bank to cancel her charge card.

West also contacted Hibbett Sports to ask who had used her credit or debit card. The manager recalled waiting on two customers who used her card, including a woman who was wearing a tan polo shirt emblazoned with the

Panera Bread logo. An investigation revealed that Panera Bread employee Cherece Armstrong matched the description of the customer who used West's credit card at the sporting goods store. Armstrong had been working at the restaurant on June 8, 2010, while West was dining there, and Armstrong clocked out that day at 1:44 p.m.

Police executed a search warrant at Armstrong's residence, discovering a Coach-brand wallet that West identified as hers. Officers also found goods they believed to have been purchased with West's credit or debit card. When officers returned to Armstrong's residence to place her under arrest, her boyfriend Byron Harrison, who shared the apartment with Armstrong, was present. A detective recognized Harrison from surveillance videos obtained from two stores where West's credit or debit card had been used without her permission.

West's Visa card was used at Hibbett Sports to charge two purchases, one for \$156.21 and another for \$94.16. Charges appeared on that same card from Kwik Shop in the amount of \$39.52, Amoco for \$98.31, and All Cell World for \$107.00. West's Discover card incurred a charge of \$194.73 from Foot Locker and \$151.10 from Hy-Vee.

The State filed an amended trial information, charging Armstrong and Harrison with theft in the second degree, in violation of Iowa Code sections 714.1(1) or (4), 714.2(2), and 703.1 (2009), and credit card fraud, in violation of Iowa Code section 715A.6.¹ Armstrong and Harrison were tried together. The jury returned verdicts finding Armstrong guilty of theft, pegging the value of the

¹ This trial information also charged Harrison and Armstrong with two additional offenses involving another victim, but the State dismissed those counts before trial.

property taken by Armstrong at more than \$1000 but not more than \$10,000, and credit card fraud—under \$1000. The court sentenced Armstrong to concurrent terms of incarceration, not to exceed five years on the theft conviction and not to exceed two years for the credit card fraud. She now appeals from her convictions.

II. Scope and Standards of Review.

Our review is at law when considering Armstrong's sufficiency-of-the-evidence claim. See *State v. Armstrong*, 787 N.W.2d 472, 475 (Iowa Ct. App. 2010). We will uphold a jury verdict if it is supported by substantial evidence. *Id.* Substantial evidence is proof upon which a rational finder of fact could determine the defendant's guilt beyond a reasonable doubt. *Id.* We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *Id.*

We review a district court ruling on a motion to sever for an abuse of discretion. *State v. Thornton*, 506 N.W.2d 777, 779 (Iowa 1993).

We review Armstrong's ineffective-assistance-of-counsel claims de novo. See *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). "Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate." *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999).

III. Discussion.

A. Sufficiency of the Evidence of Second-Degree Theft.

At trial, the State pursued the theory that Armstrong's theft embraced the personal property taken from West, as well as the charges placed on her two credit or debit cards. On appeal, Armstrong argues the value of the purchases made with the credit or debit cards should not be included in the value of stolen property under the second-degree theft charge.² The State disputes that Armstrong raised that claim in her motion for judgment of acquittal.

In our review of counsel's motion, we do not find Armstrong raised the same deficiencies before the trial court as she advances on appeal.³ In moving for judgment of acquittal, trial counsel claimed there was insufficient evidence Armstrong "stole the purse [and] that she was in possession of any of the items [in the purse]." Further, she argued there was no evidence Armstrong had anything to do with the use of the cards. She did not assert the credit or debit card transactions could not constitute theft by taking or exercising control over

² The value of the purse and its contents was \$895 (purse—\$280, wallet—\$175, gift cards—\$30, and cell phone—\$410). Theft of these items, valued at less than \$1000, would be an aggravated misdemeanor. See Iowa Code § 714.2(3). In order to support a conviction for second-degree theft, a class "D" felony, the value of the property must exceed \$1000 but not exceed \$10,000. *Id.* § 714.2(2). Only by aggregating the credit or debit card purchases with the value of the purse and its contents does the value of the property exceed \$1000.

³ We note the violation of the Iowa Rule of Appellate Procedure 6.903(2)(g)(1), which requires a statement addressing how the issue was preserved for appellate review with references to the places in the record where the issue was raised and decided. Armstrong's statement avers: "Preserved for review: Record as a whole." This statement does not even begin to comply with the letter or spirit of the rule. Nowhere in the brief does Armstrong tell us how the issue was preserved, nor does she provide us with references to the places in the record where the issue was raised and decided, probably because she was unable to do so. It is said that "even a blind pig finds an acorn once in a while." Nevertheless, constrained by limited resources and facing ever increasing numbers of cases transferred to this court, we cannot, nor is it our duty, to rout blindly through a trial record to find some acorn that may only exist in the mind of counsel or client.

stolen property. Accordingly, Armstrong's sufficiency claim involving the card transactions is not preserved for our review. See *State v. Lane*, 743 N.W.2d 178, 183 (Iowa 2007) (finding the motion for judgment of acquittal did not preserve error because the motion did not reference the grounds raised on appeal).

B. Denial of Motion to Sever.

Armstrong argues the trial court abused its discretion in denying her mid-trial motion to sever.⁴ After some new information came out during the testimony of a witness, Armstrong's counsel stated:

[T]hat information . . . would have been and is necessary with regard to the defense of [Armstrong]. In this situation it was not included [in the minutes of testimony]. I would be looking for a motion—a motion to dismiss, a mistrial or to—I guess we would have to do a mistrial, then, and to be able to sever the case at this point.

The court denied the motion to dismiss, the motion for mistrial, and the motion to sever. Armstrong has waived this issue on multiple levels.

A motion to sever under Iowa Rule of Criminal Procedure 2.11(2)(e) must be made before trial.⁵ Iowa R. Crim. P. 2.11(3). Failure to make the request before trial constitutes waiver thereof. *Id.*⁶ No such motion was made before trial, and is therefore waived.

Furthermore, when a defendant claims midtrial that it would be improper to continue with a joint trial, the question for the court is whether to grant the defendant a mistrial. *United States v. Blankenship*, 382 F.3d 1110, 1119 n.20

⁴ Armstrong's statement as to how and where this issue was preserved merely states: "Midtrial."

⁵ Once a motion to sever is made prior to trial, the trial court may consider renewed motions to sever during trial. See *State v. Belieu*, 288 N.W.2d 895, 899 (Iowa 1980).

⁶ For good cause shown, the court may grant relief from such waiver. No attempt to show good cause was made here.

(11th Cir. 2004). Such a motion for mistrial was made, but Armstrong makes no argument on appeal that the district court abused its discretion in denying the motion, so the issue is waived. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001) (failure to state or argue an issue in an appellate brief may be deemed waived).

Moreover, Armstrong makes some general statements as to what the evidence adduced at trial, without so much as a single citation to the record. Iowa Rule of Appellate Procedure 6.903(2)(g)(3) requires reference to the pertinent parts of the record. We therefore do not consider what Armstrong claims the evidence “adduced.”

Finally, as best we can tell, Armstrong’s basis for a severance articulated to the district court is different than what she claims on appeal. We therefore find the claim raised on appeal is waived. *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999) (“Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us that was not first sung in trial court.”).

We conclude Armstrong’s claim concerning her mid-trial motion to sever was not preserved for our review.

C. Ineffective Assistance of Counsel.

Armstrong also alleges trial counsel was ineffective in failing to: (1) file a motion to sever defendants, (2) file a motion to suppress the photographic lineup identification, (3) have the instruction conference recorded, (4) object to the instructions to the jury, and (5) “file and in permitting the withdrawal” of her motion for new trial. To prove an ineffective-assistance claim, a defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an

essential duty and (2) prejudiced resulted from that failure. *Ondayog*, 722 N.W.2d at 784.

When a defendant asserting an ineffective-assistance-of-counsel claim on direct appeal there must be “an adequate record to allow the appellate court to address the issue.” *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). “[I]t is for the court to determine whether the record is adequate and, if so, to resolve the claim.” *Id.*; see also Iowa Code § 814.7.

Armstrong makes no argument in her brief as to her claim of ineffective assistance of counsel for failure to file a motion to suppress. Armstrong’s argument concerning the remaining four claims of ineffective assistance of counsel is not supported by any authority. “When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived.” *Adney*, 639 N.W.2d at 250. A random mention of an issue, without elaboration or supportive authority, is not sufficient to raise an issue for review. *EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 785 (Iowa 2002) (citing *Soo Line R.R. v. Iowa Dep’t of Transp.*, 521 N.W.2d 685, 689 (Iowa 1994)). A party’s failure in a brief to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 6.903(2)(g)(3). Furthermore, Armstrong’s argument lacks the requisite specificity. See *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (stating it is not enough to simply claim that counsel should have done a better job; specific ways in which counsel’s performance was inadequate must be stated and how competent representation would have changed outcome must be identified).

Armstrong has failed to persuade us that her trial counsel was ineffective as enumerated in her brief.

IV. Conclusion.

For all the above reasons, we affirm Armstrong's convictions.

AFFIRMED.