

IN THE COURT OF APPEALS OF IOWA

No. 6-530 / 05-0962
Filed August 9, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CURTIS LAVERNE DEMICHELIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Lucas County, John D. Lloyd,
Judge.

The defendant appeals from his convictions of second-degree theft, third-degree burglary, and conspiracy to commit a felony. **CONDITIONALLY AFFIRMED AND REMANDED WITH DIRECTIONS.**

Linda Del Gallo, State Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Paul M. Goldsmith, County Attorney, and Tanya Fawcett, Student Legal Intern, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Curtis Lavern DeMichelis appeals from his convictions of second-degree theft, third-degree burglary, and conspiracy to commit a felony. He contends there is insufficient evidence he committed the crimes and the district court erred when it applied the wrong standard to his motion for new trial.

We review claims of insufficient evidence for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* “Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt.” *Id.* We view the evidence in the light most favorable to the verdict. *State v. Acevedo*, 705 N.W.2d 1, 4 (Iowa 2005).

We conclude substantial evidence supports the jury’s verdict. On May 13, 2004, it was discovered that the interior door of Tom’s Bargain Warehouse had been broken. A large quantity of property was missing from inside. A witness placed DeMichelis with Joseph Hickcox and Daryl Long around the time of the burglary. Law enforcement officers also saw DeMichelis with Hickcox and Long near Tom’s Bargain Warehouse around the time of the burglary. Both Hickcox and Long testified they participated in the burglary and theft with DeMichelis. Long testified he and DeMichelis planned the break-in.

DeMichelis argues the evidence is not sufficient because of inconsistencies in Hickcox and Long’s versions of events. However, the jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the

evidence and “place credibility where it belongs.” *Id.* A limited exception to this rule has been recognized. The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court. *State v. Smith*, 508 N.W. 2d 101 (Iowa Ct. App. 1993). This exception has no application here as the testimony of Hickcox and Long, while sometimes inconsistent with prior statements, does not rise to the level of absurdity and self-contradiction envisioned by the *Smith* case. In addition, other evidence provides support for the jury’s conclusions.

We next consider DeMichelis’s contention that the district court erred in denying his motion for new trial. Rulings on motions for new trial are reviewed for errors at law. Iowa R. App. P. 6.4. The district court has broad, but not unlimited discretion in ruling on new trial requests, and its decision will be reversed only for a demonstrated abuse of this discretion. *State v. Belt*, 505 N.W.2d 182, 184 (Iowa 1993). A motion for a new trial, asserting the verdict was contrary to evidence under Iowa Rule of Criminal Procedure 2.24(2)(b)(6), should be granted only if, after considering both inculpatory and exculpatory evidence, the jury’s verdict was contrary to the weight of the evidence. *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). The weight of the evidence refers to a determination by the court that “a greater amount of credible evidence supports one side of an issue or cause than the other.” *Id.* at 658.

In ruling on DeMichelis’s motion for new trial, the district court concluded:

With respect to the issues raised in the first motion for new trial, as they respect the weight and sufficiency of the evidence, and particularly the issue of corroboration of accomplice testimony, that motion for new trial is overruled for all of the reasons stated on the record at the time that the court denied the defendant’s motion for judgment of acquittal during trial.

The court believes, while the evidence is not overwhelming, that it is adequate to submit accomplice testimony to the jury and allow the jury to determine at that point in their opinion whether or not there was adequate corroboration as a fact matter. As a legal matter, I believe there was sufficient evidence to submit.

DeMichelis argues the district court wrongly used a sufficiency-of-the-evidence standard and failed to weigh the evidence or make any independent determinations of credibility.

Although the district court properly utilized a sufficiency-of-the-evidence standard in ruling on DeMichelis's motion for judgment of acquittal, it is not the proper standard to apply to a motion for new trial. *Id.* Consequently, the district court's reliance on its previous ruling to support its decision to deny DeMichelis's motion for new trial is problematic because the incorrect standard of review was inherently incorporated and applied. The record does not indicate the district court made an independent evaluation of the evidence or assessed the credibility of the witnesses presented at trial. As a result, it appears the district court utilized an incorrect standard of review and thereby abused its discretion in denying the motion for new trial. Consequently, we conditionally affirm the judgment and sentence. We vacate the trial court's ruling on DeMichelis's motion for new trial and remand solely for the purpose of allowing the district court to rule on defendant's motion applying the correct weight-of-the-evidence standard. If on remand the district court determines DeMichelis's motion for new trial should be overruled, the judgment and sentence shall stand affirmed. If, on the other hand, the district court grants the motion, DeMichelis's judgment and sentence shall be vacated, and a new trial shall be granted. We do not retain jurisdiction.

CONDITIONALLY AFFIRMED AND REMANDED WITH DIRECTIONS.