IN THE COURT OF APPEALS OF IOWA

No. 7-585 / 06-0999
Filed September 19, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANNY WAYNE RANKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Danny Rankins appeals from his conviction for robbery in the first degree.

CONDITIONALLY AFFIRMED AND REMANDED.

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and James P. Ward, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

HUITINK, P.J.

Danny Rankins appeals from his conviction for robbery in the first degree in violation of Iowa Code sections 711.1, 711.2, 902.3, 902.9, and 902.12 (2005). We conditionally affirm Rankins's conviction and remand to the trial court for a ruling on the new trial motions.

I. Background Facts and Proceedings.

Rankins was charged with robbery based on allegations he aided and abetted another person in the robbery of a Des Moines Arby's restaurant on January 18, 2006. According to the State's theory of the crime, Rankin was the driver of a car used to initially survey the restaurant and later used as the getaway car.[1] Rankins denied any involvement in the robbery and entered a not-guilty plea to the offenses charged in the trial information.[2]

The trial record includes evidence of the following: On January 18, 2006, Anne Michelle Harvey-Crouch, an assistant manager at the Arby's on Northeast 14th Street in Des Moines, observed a suspicious car at the restaurant. The car, a gold Cadillac, drove in the drive-through and stopped for a moment without placing an order. The car then briefly parked in the Arby's parking lot before leaving the area.

At approximately 11:00 p.m., Crouch and Shannon Campbell, a shift manager, closed the restaurant. After they left the restaurant, they were confronted by a masked man with a gun, who demanded the night deposit and

[1] The State originally claimed Randy Cason, a friend of Rankins's, was the masked gunman. However, the robbery charges against Cason were later dismissed.

[2] Rankins was also charged with transportation and/or possession of a firearm by a felon in violation of Iowa Code section 724.26, which was subsequently dismissed.

repeatedly threatened to kill them. Crouch unlocked the door to the restaurant and attempted to disable the alarm. Crouch accidently typed in the wrong code, triggering a silent alarm. In the resulting confusion, Crouch and Campbell escaped and called police. Their assailant fled on foot south on Northeast 14th Street.

Richard Knutson, who was walking on Northeast 14th Street near Arby's at approximately 11:30 p.m., saw a man running south "faster than a track star almost" from Arby's to a bowling alley parking lot. The man stopped running when he came to the bowling alley parking lot and got into a "yellowish, goldish, cream" car. The car hurriedly left the parking lot without its headlights on and headed south on Northeast 14th Street.

Derek Pettijohn, a security officer at AMB Bowling near Arby's, saw a cream or beige Cadillac, Seville, or Lincoln pull into the parking lot and park in its west end with the engine idling. After some time, the car drove to the east end of the lot, parked, and then drove toward the west end of the lot. As Pettijohn approached the car, he saw a man come from the west end of the lot and get into the car. Pettijohn also saw the car drive south on Northeast 14th Street.

Shortly thereafter, a police officer stopped a car driven by Rankins because it matched the description of the car seen in the Arby's and bowling alley parking lots. An unidentified passenger got out of the car and fled on foot. Police were unable to apprehend the passenger. Rankins was arrested. During a search of the trunk, police discovered a loaded revolver, which Crouch and Campbell later identified as the gun used in the robbery. Crouch identified the car as that seen in the Arby's parking lot earlier that day. Knutson and Pettijohn

identified the car as the car seen leaving the bowling alley's parking lot. They also identified Rankins as the driver of the car.

As noted earlier, Rankins denied any involvement in the robbery. According to Rankins's version, he was parked at a Kum & Go, which is between the Arby's and the Shop 'N Save (where the stop was made), when an unknown man approached him and asked him for a ride. Rankins agreed to drive the man as far as the Shop 'N Save.

At the close of the State's evidence, Rankins moved for judgment of acquittal. The trial court denied Rankins's motion. In addition, Rankins objected to the court's aiding and abetting instruction "(1) because a person cannot aid and abet him or herself and (2) because the State has not named a specific principal that he allegedly aided and abetted." Rankins also renewed his motion for judgment of acquittal. The trial court overruled Rankins's objection to the proposed instruction and denied his renewed motion for judgment of acquittal.

A jury found Rankins guilty of robbery in the first degree. Rankins filed a pro se motion in arrest of judgment, arguing that the verdict was contrary to the evidence. Rankins's attorney also filed a combined motion for new trial and motion in arrest of judgment, arguing that the verdict was contrary to the weight of the evidence. The trial court's resulting ruling stated:

> [T]he Court would state that I was present throughout the trial. I reviewed all of the evidence; I listened to all the witnesses. I ruled that there was sufficient evidence for this case to go to the jury. And I now overrule the motions in arrest of judgment because I have determined that there was sufficient evidence to support the conviction.

The trial court entered judgment in accordance with the jury's verdict and sentenced Rankins to a term of imprisonment not to exceed twenty-five years.

On appeal, Rankins claims: (1) The trial court erred in overruling his motions for judgment of acquittal and for a new trial; (2) the trial court erred in overruling his objections to the aiding and abetting instruction; (3) the trial court erred in failing to instruct on mistake of fact; and (4) if error has not been preserved, counsel was ineffective. We will address each argument in turn.

II. Judgment of Acquittal.

We review challenges to sufficiency of the evidence for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997) (citing *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996)). A jury's verdict is binding on appeal if it is supported by substantial evidence. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984) (citing *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981)). Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995) (citing *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993)). Evidence, however, that only raises "'suspicion, speculation, or conjecture'" does not constitute substantial evidence. *Randle*, 555 N.W.2d at 671 (quoting *State v. Barnes*, 204 N.W.2d 827, 829 (Iowa 1972)).

When reviewing challenges to sufficiency of the evidence, we view the evidence "in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record." *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996) (citing *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984); *State v. Hall*, 371 N.W.2d 187,

188 (Iowa Ct. App. 1985)). "Although direct and circumstantial evidence are equally probative, the inferences to be drawn from the proof in a criminal case must 'raise a fair inference of guilt as to each essential element of the crime.'" *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001) (quoting *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992)). Finally, we must consider all of the evidence, not just that which supports the jury's verdict. *State v. Conroy*, 604 N.W.2d 636, 638 (Iowa 2000) (citing *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998)).

Iowa Code section 703.1 provides:

> [a]ll persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

To "aid or abet" means to knowingly approve and agree to the commission of a crime "either by active participation in it or in some manner encouraging it prior to or at the time of its commission." *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984). Mere knowledge of the crime or proximity to the scene of the crime is insufficient in itself to show aiding and abetting. *State v. Vesey*, 241 N.W.2d 888, 891 (Iowa 1976). Furthermore, aiding and abetting need not be shown by direct evidence and "may be inferred from circumstantial evidence including presence, companionship and conduct before and after the offense is committed." *Fryer v. State*, 325 N.W.2d 400, 406 (Iowa 1982) (citing *State v. Myers*, 158 N.W.2d 717, 721 (Iowa 1968)). "A person cannot aid and abet the commission of a crime unless another commits the offense; one cannot aid and abet himself in the

commission of an offense." *State v. Mays*, 204 N.W.2d 862, 864 (Iowa 1973) (quoting 21 Am. Jur. 2d *Criminal Law* § 119, at 197). The State, however, is not required to name or prove the identity of the principal. *State v. Kern*, 307 N.W.2d 29, 30 (Iowa 1981). The State's burden is to show that someone other than the defendant committed the offense and that defendant aided and abetted that person. *See State v. Murray*, 512 N.W.2d 547, 551 (Iowa 1994) (stating that "there was some evidence that more than one person participated in . . . the . . . crimes").

We find the earlier-described evidence sufficient to support Rankins's robbery conviction under the State's aiding and abetting theory. Based on this evidence, a reasonable juror could find another person committed the robbery and that Rankins actively participated in it by driving the car used to survey the restaurant before the robbery and used as the getaway car after the robbery. Contrary to Rankins's claim, the State's failure to prove the identity of the masked gunman was not fatal to the State's case. *Kern*, 307 N.W.2d at 30. We affirm on this issue.

III. Motions for New Trial.

The trial court has broad but not unlimited discretion in ruling on new trial motions. Iowa R. App. P. 6.14(6)(*c*). We therefore review the denial of new trial motions for abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Abuse of discretion means the trial court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997) (quoting *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (citations omitted)). We are "slower to

interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.14(6)(*d*).

A trial court may grant a new trial "[w]hen the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6). "Contrary to . . . [the] evidence" means "contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). A verdict is contrary to the weight of the evidence where "'a greater amount of the evidence supports one side of an issue or cause than the other.'" *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). The weight of evidence standard is distinguishable from the sufficiency of the evidence standard in that it is broader. *State v. Nicher*, 720 N.W.2d 547, 559 (Iowa 2006) (citing *Reeves*, 670 N.W.2d at 202).

The State concedes and the record indicates the trial court applied an incorrect legal standard in ruling on Rankins's motions for a new trial. The appropriate remedy under these circumstances is to reverse the trial court's ruling and remand for a new ruling applying the correct legal standard. *See Ellis*, 578 N.W.2d at 659.

IV. Jury Instructions.

We review challenges to the trial court's jury instructions for errors of law. Iowa R. App. P. 6.4. The trial court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 2.19(5)(*f*). Jury instructions must correctly state the law and be supported by substantial evidence. *State v. Predka*, 555 N.W.2d 202, 204 (Iowa 1996) (citing *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 824 (Iowa 1994)).

A. Aiding and Abetting Instruction.

Rankins argues the evidence in this case did not warrant an aiding and abetting instruction. He also argues the State's failure to prove the identity of the person who committed the robbery under an aiding and abetting theory precluded submission of the challenged instruction.

We initially reject the State's error preservation and waiver claims. Rankins's objection to the trial court's aiding and abetting instruction, as well as his arguments on appeal, implicates both the legal sufficiency of the instruction and the sufficiency of the evidence supporting submission of the instruction. For the reasons cited in Division II of our opinion, we conclude the trial court's aiding and abetting instruction correctly stated the law and was supported by substantial evidence. We accordingly affirm on this issue.

B. Mistake of Fact

Rankins argues the trial court had a duty to give a mistake of fact instruction based on the evidence presented at trial, even though he did not make such a request. The State argues that Rankins failed to preserve error by failing to request a mistake of fact instruction. While a trial court possesses a duty to instruct the jury, even without request, "'our adversarial system imposes the burden upon counsel to make a proper record to preserve error . . . by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in [the] event they are refused.'" *State v. Moore*, 276 N.W.2d 437, 442 (Iowa 1979) (quoting *State v. Sallis*, 262 N.W.2d 240, 248 (Iowa 1978)). A defendant's failure "'to make known to the trial court before the instructions were given to the jury his wish to so instruct deprives him of a basis

for successful appeal in this court for such failure to instruct.'" *Id.* (quoting *Sallis*, 262 N.W.2d at 248).

Rankins did not request a mistake of fact instruction or voice a specific exception in the event it was refused. Therefore, we find Rankins failed to preserve error, and we only consider this claim in the context of Rankins's ineffective assistance of counsel claim.

V. Ineffective Assistance of Counsel.

We review an ineffective assistance of counsel claim, arising from a defendant's Sixth Amendment right to counsel, de novo. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (citing U.S. Const. amend VI; *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996)).

In general, we preserve an ineffective assistance of counsel claim for postconviction relief proceedings "where preserving the claim allows the defendant to make a complete record of the claim, allows trial counsel an opportunity to explain his or her actions, and allows the trial court to rule on the claim." *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006) (citing *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986)). If, however, the record is adequate to determine the defendant is not able to establish either prong of an ineffective assistance of counsel claim as a matter of law, we will affirm the defendant's conviction without preserving the ineffective assistance of counsel claim for postconviction relief proceedings. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004) (citing *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003); *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003)).

Because the record is inadequate and trial counsel should be afforded an opportunity to explain his actions, we preserve the issue of whether counsel was ineffective for failing to preserve error regarding the mistake of fact instruction.

We conditionally affirm Rankins's conviction and remand to the district court for a new ruling on Rankins's motions for a new trial.

CONDITIONALLY AFFIRMED AND REMANDED.