

**IN THE COURT OF APPEALS OF IOWA**

No. 8-1014 / 07-1831  
Filed January 22, 2009

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

**vs.**

**JOSHUA MOSBY JR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Bruce Zager,  
Jon Fister, and George Stigler, Judges.

Joshua Mosby Jr. appeals following conviction and sentence for theft in  
the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney  
General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith,  
Assistant County Attorney, for appellee.

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

**MAHAN, J.**

Joshua Mosby Jr. appeals following conviction and sentence for theft in the first degree in violation of Iowa Code sections 714.1(5) and 714.2(1) (2005), and the offense of being an habitual offender in violation of sections 902.8 and 902.9. He asserts the following on appeal: (1) there was insufficient evidence to support his conviction for theft in the first degree; (2) the district court erred in admitting evidence related to Mosby's prior convictions for theft and forgery; and (3) his trial counsel was ineffective in failing to (i) preserve error on the prior bad acts evidence and (ii) object to prosecutorial misconduct. We affirm.

**I. Background Facts and Proceedings.**

In August 2004 Mosby and a business partner, Julien Madsen, opened an account for an L.L.C. named Streetainment at TCF Bank in Minneapolis, Minnesota. The account was opened with deposits totaling \$15, and after \$14.25 was withdrawn to cover the cost of printing checks, a balance of \$0.75 remained in the account. On September 5, 2004, Mosby deposited a \$17,000 check drawn on the Streetainment account and payable to himself into his account at a John Deere Community Credit Union branch (John Deere) at the Crossroads Hy-Vee store in Waterloo.<sup>1</sup> Because the amount of the check was so large, John Deere placed a five-day hold on Mosby's account. Prior to the deposit, Mosby had maintained a balance of \$5.51 in his John Deere account since October 2003.

The five-day hold expired at noon on September 11, 2004. At 12:01 p.m. on that day, \$300 was withdrawn from Mosby's John Deere account at an

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<sup>1</sup> John Deere Credit Union is now known as Veridian Credit Union.

automated teller machine (ATM) in St. Paul, Minnesota.<sup>2</sup> At 3:46 p.m. on that day, Mosby withdrew \$14,000 in cash from a John Deere branch at the University Hy-Vee store in Waterloo. The next day, September 12, 2004, Mosby withdrew \$2698, leaving a balance of \$5 in the account.

On September 14, 2004, TCF Bank returned the \$17,000 check to John Deere because TCF Bank had closed the Streetainment account. Norma Wightman, a John Deere loss prevention and credit consultant, tried to contact Mosby by phone, but his number was disconnected. Wightman also sent a letter to Mosby on September 14, 2004, informing him that TCF Bank had returned the unprocessed \$17,000 check to John Deere. Wightman sent another letter thirty days later, informing Mosby that his account had been closed and he had twenty-one days to cure the default. Neither letter was returned to John Deere. When Wightman contacted TCF Bank fraud prevention about the Streetainment account, she learned the account had been closed due to suspected fraud and abuse.

Waterloo police issued a warrant for Mosby's arrest. In December 2006 Mosby was arrested by Minnesota police. On December 22, 2006, the State charged Mosby with theft in the first degree. Trial began on March 30, 2007, and on April 4, 2007, a jury found Mosby guilty as charged. On August 17, 2007, in a separate trial to the court following Mosby's conviction in the jury trial, the court found Mosby had twice previously been convicted of felony offenses and

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<sup>2</sup> The total amount deducted from the account was \$302 due to a \$2 transaction fee on the withdrawal.

determined he was an habitual offender.<sup>3</sup> Mosby was sentenced to a term of incarceration not to exceed fifteen years, with a mandatory minimum of three years, to be run concurrently with his sentence imposed from a previous conviction. The court also ordered Mosby to pay court costs, attorney fees, and restitution. Mosby now appeals.

## **II. Merits.**

### **A. Sufficiency of the Evidence.**

Mosby argues there was insufficient evidence to support his conviction for theft in the first degree because the evidence failed to establish he had actual knowledge the check would not be honored. We review challenges to the sufficiency of the evidence for the correction of errors of law. Iowa R. App. P. 6.4; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Keeton*, 710 N.W.2d at 532.

To convict Mosby of theft in the first degree, the State had to show:

1. On or about September 5, 2004, the Defendant did make, utter, draw, deliver, or give to John Deere Community Credit Union a check in the amount of \$17,000.00.
2. The check was drawn on TCF Bank.
3. The Defendant received money in exchange for the check.
4. The Defendant knew at the time he gave the check to John Deere Community Credit Union it would not be paid by the bank because of insufficient funds and/or a closed account.

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<sup>3</sup> From the minutes of the evidence the court found that an Iowa court convicted Mosby of theft in the first degree in 2002 and a Minnesota court convicted Mosby of uttering a forged check in 1999.

Mosby contends John Deere made no effort to contact TCF Bank when Mosby withdrew cash to verify the check would be honored and he therefore had no actual knowledge the \$17,000 check would not be honored by TCF Bank. He further argues that John Deere never successfully communicated to Mosby that there was a problem with the check and he thought he had a right to the check for severance pay.

Mosby opened the Streetainment account with his business partner, Julien Madsen. Mosby and Madsen were co-signators on the account. The account was opened with deposits totaling \$15 and never exceeded that balance. For nearly a year prior to the \$17,000 deposit, Mosby's John Deere account had maintained an average balance of \$5.51. John Deere placed a five-day hold on Mosby's account when he deposited the \$17,000 check, and within thirty-six hours after the hold was removed, Mosby had withdrawn all but \$5 from the account.

At trial the jury also heard about Mosby's involvement in a similar crime in 2000. In that incident, Mosby's account at the Iowa Community Credit Union had a balance of \$5.38. In October 2000 Mosby deposited two checks totaling \$15,825.16 into the account. The checks were posted to his account on October 6, 2000, and by October 12, 2000, Mosby had withdrawn all but \$6.64 from the account. The checks were soon returned to the credit union as forgeries. In 2002 Mosby was convicted of theft in the first degree and two counts of forgery for that offense.

In this case, the reason Mosby thought he could deposit the check (for severance pay) does not matter when the evidence overwhelmingly suggests Mosby knew there were insufficient funds in the Streetainment account to cover the check. Furthermore, the fact that John Deere never successfully communicated to Mosby that there was a problem with the check has no bearing on Mosby's actual knowledge when he deposited the check that it would not be paid by TCF Bank. Considering the evidence in the record in the light most favorable to the State and making all reasonable inferences that may fairly be drawn, we find the evidence substantially supports the jury's finding that Mosby did have actual knowledge the \$17,000 check from the Streetainment account would not be honored by TCF Bank. We affirm on this issue.

**B. Admission of Prior Bad Acts Evidence.**

Mosby argues the district court erred in admitting evidence of his prior convictions for theft and forgery.<sup>4</sup> He alleges the convictions were irrelevant to the crime for which he was being prosecuted and were highly prejudicial. We review claims of error in the admission of evidence for abuse of discretion. *State v. Boggs*, 741 N.W.2d 492, 499 (Iowa 2007). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law. *Id.*

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<sup>4</sup> The State contends Mosby failed to preserve error on this issue. We will address this claim assuming, *arguendo*, that error has been preserved.

Following a hearing on Mosby's motion in limine to prevent the State from introducing evidence related to his prior convictions, the district court found:

The Court does find that these other prior convictions for theft in the first degree are, in fact, relevant and also can go to the issue of knowledge in this particular case. The Court has also done the relevant weighing of the factors in this case, whether there is a danger of unfair prejudice outweighs the probative value of the evidence in this matter pursuant to Iowa Rule of Evidence 5.403. And again, to make this determination we have to determine whether the actual need for the evidence in light of the other available evidence, the strength of the evidence showing the prior bad act was committed by the accused, the strength or weakness of the evidence supporting the issues sought to be proven, and the degree to which the jury will probably be roused by the evidence improperly.

Based upon all those factors, the Court does not believe that this evidence should be excluded. It does go to some of the elements that the State must prove as part of this case specifically, it sounds like, related to the issue of knowledge. And the Court does find, again, that it's not overly prejudicial and it is probative to the issues to be presented as part of this trial, so the Court will allow that evidence in.

Upon our review of the record, we cannot say the district court abused its discretion in allowing evidence of Mosby's prior convictions for theft and forgery. Evidence of prior bad acts may be admitted where it is relevant to prove some fact or element in issue other than the defendant's general criminal disposition. *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001); *State v. Crawley*, 633 N.W.2d 802, 807-08 (Iowa 2001). Permissible objectives for proof include: "(1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity . . . , (5) identity of the person charged with the commission of a crime." *Castaneda*, 621 N.W.2d at 440. In this case, the evidence of Mosby's prior convictions for similar crimes shows his intent and the absence of mistake or accident. Furthermore, the evidence was not unfairly

prejudicial because it pertained directly to the issue of knowledge, an element the State was required to prove. We find the evidence was properly admitted and affirm on this issue.

**C. Ineffective Assistance of Counsel.**

Mosby contends his trial counsel was ineffective in failing to (i) preserve error on the prior bad acts evidence and (ii) object to prosecutorial misconduct. To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). We conduct a de novo review of ineffective assistance of counsel claims. *Maxwell*, 743 N.W.2d at 195.

We conclude the record is adequate to address Mosby's claim of ineffective assistance in failing to preserve error on the prior bad acts evidence. We have already determined the evidence of Mosby's prior convictions for theft and forgery were properly admitted and, therefore, prejudice did not result upon his counsel's failure to preserve error. We find this claim to be without merit.

We find, however, the record is inadequate to rule on Mosby's claim of ineffective assistance in failing to object to prosecutorial misconduct. Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. See *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008); *State v.*



*DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We therefore decline to rule on this issue of ineffective assistance in this direct appeal and preserve it for a possible postconviction proceeding.

### **III. Conclusion.**

We affirm Mosby's conviction and preserve his claim of ineffective assistance of counsel for a possible postconviction proceeding.

**AFFIRMED.**