IN THE COURT OF APPEALS OF IOWA

No. 8-230 / 07-0797
Filed June 25, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SETH MICHAEL FEYE,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard II, Judge.

Seth M. Feye appeals his conviction, following jury trial, for theft in the fourth degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Janet M. Lyness, County Attorney, and Meredith Rich-Chappell, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

MILLER, J.

Seth M. Feye appeals his conviction, following jury trial, for theft in the fourth degree. He contends his trial counsel was ineffective for failing to object to an omission in the aiding and abetting instruction. We affirm Feye's conviction and preserve his ineffective assistance claim for a possible postconviction proceeding.

The record reveals the following facts. On March 10, 2006, Feye drove himself, Suzanne Armstrong, and Cary Taylor from Cedar Rapids to the Kohl's store in Coralville. The three entered the store together and went to the shoe department. In the shoe department, Taylor and Armstrong began quickly putting several boxes of shoes into a cart Taylor was pushing. Feye did not put any merchandise into the shopping cart.

This activity caught the attention of Kohl's loss prevention supervisor, Corey Roberts, who was in the security office watching a bank of video monitors. He continued to watch as Armstrong and Taylor added more boxes of shoes to their cart. Roberts had to switch cameras and swivel a security camera to follow the trio as they left the shoe department and then headed toward the front door. He lost them for a short time but then reacquired them on the monitors as Taylor pushed the cart out of the store and into the parking lot. He could tell by the short amount of time it took them to get from the store to the parking lot "there was no possible way" they could have purchased the shoes because they would not have had time. Roberts testified Taylor and Armstrong left the store together and Feye left approximately fifteen feet behind them.

Roberts followed the group as they left the store and began to approach them as Taylor and Armstrong were putting the shoe boxes into a white mini van while Feye stood by the side of the van. As Roberts approached, Feye saw him and got into the driver's seat of the van. The van left quickly with Feye driving. Roberts made note of the license plate number and called the police.

The van was stopped by a State Trooper as it headed north on Highway 380 toward Cedar Rapids. As the van slowed in response to the patrol car's lights, Taylor jumped from the van and ran. Armstrong and Feye remained with the van. Sergeant Douglas Alexander of the Coralville Police Department went to the scene of the stop to investigate the theft. Alexander testified that Armstrong initially denied being at Kohl's, but then changed her story and said she had been there but that Taylor was the one who had stolen the shoes. At the scene of the stop Feye told Alexander he had walked around the store, did not see anything, and then had waited for the other two outside the store. Taylor was soon located by Cedar Rapids police and was returned to the scene of the stop. He and Armstrong were taken into custody at that time. Alexander further testified that he informed Feye and Feye's father that charges might be filed against Feye. The boxes of shoes were recovered from the van. Roberts testified the value of the shoes was approximately $290.

The State filed a joint trial information charging Armstrong, Taylor, and Feye with theft in the fourth degree in violation of Iowa Code sections 714.1(1), 714.2(4) and 703.1 (2005). Feye was tried separately in a jury trial. He denied any involvement in the theft of the shoes. Feye also denied any knowledge that

Armstrong and Taylor were planning to steal the shoes, and any knowledge they had actually done so until Taylor told him so on the way back to Cedar Rapids. He testified he had not paid attention to what the other two were doing in the store, had separated from them to look at other clothing, and then had followed them from the store and caught up with them as they were already in the parking lot headed toward the van.

Included in the instructions submitted to the jury was Instruction No. 15, a definition of aiding and abetting. This instruction read:

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.
>
> "Aid and abet," as used in Instruction No. 10, means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."
>
> The guilt of a person who knowingly aids and abets the commission of a crime must be determined only on the facts which show the part he has in it, and does not depend upon the degree of another person's guilt.
>
> If you find the State has proved the defendant directly committed the crime, or knowingly "aided and abetted" other persons in the commission of the crime, then the defendant is guilty of the crime charged.

Feye's trial counsel made no objection to this instruction. The jury found Feye guilty of theft and found the value of the property stolen was more than $200 but less than $500. Feye was sentenced to five days in the county jail.

Feye appeals his conviction, contending his trial counsel was ineffective for failing to object to the aiding and abetting instruction because it omitted the

following language, found in Iowa Criminal Jury Instruction 200.8 on aiding and abetting, concerning the State's burden of proof in a case involving specific intent:

> The crime charged requires a specific intent. Therefore, before you can find the defendant "aided and abetted" the commission of the crime, the State must prove the defendant either has such specific intent or "aided and abetted" with the knowledge that others who directly committed the crime had such specific intent. If the defendant did not have the specific intent, or knowledge the other had such specific intent, [he] [she] is not guilty.

More specifically, Feye claims his trial counsel's failure to object to the omission of this paragraph from Instruction No. 15 constituted ineffective assistance because the instruction as given allowed the jury to find him guilty under a theory of aiding and abetting by finding he aided another person who had the requisite intent, even though he himself did not have such intent and was not aware of the other person's intent.

We review claims of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prove trial counsel was ineffective the defendant must show that counsel breached an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Griffin*, 691 N.W.2d 734, 736-37 (Iowa 2005).

Theft under section 714.1(1) is a specific intent crime. All parties agreed Feye was charged with a specific intent crime. The jury was instructed that specific intent was an essential element of the charged offense. However, Instruction No. 15, as submitted to the jury, omits from Iowa Criminal Jury

Instruction 200.8 the paragraph essential to establishing the State's obligation to prove aiding and abetting in crimes involving specific intent. As set forth in the omitted paragraph quoted above, in order to convict a person of a specific intent crime the State must prove the defendant participated in the crime either (1) with the requisite specific intent, or (2) with the knowledge that the principal possessed the requisite specific intent. *See, e.g., State v. Tangie,* 616 N.W.2d 564, 573 (Iowa 2000).

The State acknowledges that the paragraph omitted from the aiding and abetting instruction is a correct statement of the law and could have been properly submitted to the jury under the facts of this case. However, it argues Feye cannot show he was prejudiced by his trial counsel's failure to object to this omission because (1) the record contains strong evidence against him, (2) when the instructions are read as a whole they adequately inform the jury of the State's burden to prove the requisite intent, and (3) to the extent the instructions did focus on Feye's actions and intent rather than the principals', they worked to Feye's benefit. For the following reasons, we cannot agree with any of the State's contentions.

First, we do not believe the evidence against Feye was overwhelming. Feye's defense at trial was that he simply drove Armstrong and Taylor to the store but did not assist them in stealing the shoes, he was separated from them in the store, he left separately from them, and he did not know either that they planned to steal the shoes or that they had done so until they were on their way back to Cedar Rapids. As set forth above, Kohl's loss prevention supervisor

testified that although he was sure the trio were in the store together, he did not see Feye pushing the cart or put any merchandise into the cart. He also testified Feye left the store approximately fifteen feet behind Armstrong and Taylor, and did not see him putting any of the shoes into the van. Furthermore, after the van was stopped Armstrong eventually stated to the investigating officer that Taylor was the one who had stolen items from Kohl's. She said nothing implicating Feye in the theft. Accordingly, we cannot conclude the evidence against Feye was so overwhelming that the omission of the specific intent language from Instruction No. 15 could not have possibly prejudiced his defense in any way, or that its inclusion would not have given rise to a probability of a different outcome.

Second, having reviewed the jury instructions as a whole, we find nothing that adequately substitutes for the language missing from Instruction No. 15. The jury was instructed that specific intent was an essential element of the offense of theft, and was given an instruction generally defining aiding and abetting, but was not instructed on how to address the issue of specific intent in relation to aiding and abetting. Thus, we cannot agree with the State's contention that when the instructions are read as a whole they adequately informed the jury of the State's burden to prove the required specific intent.

Third, we do not agree with the State that the instructions, by focusing on Feye's actions and intent rather than on the principals', worked to his benefit. To the contrary, the instructions as presented to the jury allowed it to find Feye guilty under a theory of aiding and abetting *without* having to find *either* that he had the requisite specific intent, the intent to permanently deprive the Kohl's department

store of the shoes, or that he knew that others who took the shoes had the requisite specific intent. As Feye argues, a finding of guilt as an aider and abetter under such circumstances would contravene the burden placed on the State to prove aiding and abetting in a specific intent crime. *See Tangie*, 616 N.W.2d at 573. Thus, we are left to speculate whether the jury found Feye guilty as a principal, based on unchallenged instructions permitting it to do so, or whether the jury found him guilty as an aider and abetter based on instructions that are deficient and thus incorrect for lack of direction concerning how to address the element of specific intent in relation to aiding and abetting. We decline to engage in the impermissible speculation that would be necessary in order to guess which the jury did and thus address the claim of ineffective assistance of counsel raised in this case. *Cf. State v. Davis*, 228 N.W.2d 67, 73 (Iowa 1975) (holding appellate court should not impermissibly speculate as to whether the jury followed an instruction applicable to the facts or an instruction inapplicable to the facts).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney

charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle,* 652 N.W.2d at 203.

As set forth above, Feye can succeed on his ineffectiveness claim only by establishing both that his counsel failed to perform an essential duty and that prejudice resulted. *Griffin*, 691 N.W.2d at 736-37. No record has yet been made before the trial court on this issue, trial counsel has not been given an opportunity to explain his actions, and the trial court has not ruled on this claim. Under these circumstances, we pass this issue in this direct appeal and preserve it for a possible postconviction proceeding to allow Feye's trial counsel an opportunity to explain his conduct. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

Accordingly, we affirm Feye's conviction and preserve his ineffective assistance of counsel claim for a possible postconviction proceeding.

AFFIRMED.