

IN THE COURT OF APPEALS OF IOWA

No. 8-275 / 07-1246
Filed May 14, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN SCOTT REX,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Kevin Rex appeals from conviction and sentence for second-degree theft.

AFFIRMED.

Susan Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Justin G. Allen, Assistant County Attorney, for appellee.

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

BAKER, J.

Kevin Scott Rex appeals from the conviction and sentence entered by the district court after a jury found him guilty of second-degree theft. We affirm the conviction and preserve Rex's ineffective assistance claim for a possible postconviction proceeding.

I. Background and Facts

At approximately 5:30 p.m. on Thursday, June 15, 2006, Kevin Rex attempted to cash a \$7000 cashier's check at the drive-through line of a Bank of America branch in Des Moines. The check was drawn on the Pen Air Federal Credit Union in Pensacola, Florida. The teller, Seth Fisher, refused to cash a check for that amount on an out-of-state check. Fisher accepted the check for deposit in Rex's account, which had been overdrawn \$130 for the previous three weeks. Fisher gave Rex \$100 in cash and advised Rex that the remaining amount of the deposit would not be available until the following Tuesday.

Fisher observed Rex in the bank two other times in the next few days attempting to withdraw the full balance of his account. On Monday, June 19, 2006, Rex was allowed to withdraw \$4565.98 from his account. Later that day, Rex withdrew another \$302 from his account.

On June 22, 2006, the certified check deposited by Rex was returned to Bank of America from the issuing institution with "counterfeit" written in a stamped portion of the check. The bank shut down Rex's account and sent Rex a notice that the check had been returned unpaid. The notice was sent to the address on the deposit slip. It was later learned that the address is a domiciliary

associated with Veteran's Hospital in Des Moines, and that Rex had not been living there for quite some time.

On August 1, 2006, a fraud investigator with Bank of America, Steve Geniuk, attempted to contact Rex using the telephone number listed for his account. Geniuk left a message with a male who answered the telephone, but Rex never returned the call.

On November 29, 2006, Rex was charged by trial information with second-degree theft in violation of Iowa Code sections 714.1(6) and 714.2(2) (2005). On March 12 and 13, 2007, a jury trial was held. The jury found Rex guilty of second-degree theft. Rex filed motions for a new trial and in arrest of judgment, which were denied. Rex was sentenced to a prison term not to exceed five years. Rex appeals.

II. Merits

Rex contends (1) the district court erred in denying his motion for judgment of acquittal because there is insufficient evidence to support the theft conviction, (2) the court erred in denying his motion for a new trial because the verdict is contrary to the evidence, (3) the court abused its discretion in allowing admission of a copy of the returned cashier's check, and (4) his trial counsel rendered ineffective assistance by failing to object to hearsay evidence.

A. Motion for Judgment of Acquittal

Rex contends the district court erred in denying his motion for judgment of acquittal based on the sufficiency of the evidence. We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). We give consideration to all the

evidence, not just the evidence supporting the verdict, and we view the evidence in the light most favorable to the State. *Id.* We will uphold a district court's denial of a defendant's motion for judgment of acquittal if there is substantial evidence to support the conviction. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Adney*, 639 N.W.2d at 250.

A person commits theft when he “[m]akes, utters, draws, delivers, or gives any check . . . on any bank . . . and obtains property . . . in exchange for such instrument, if the person knows that such check . . . will not be paid when presented.” Iowa Code § 714.1(6). Deception on the part of the maker at the time the check is delivered is an implicit element of the offense. *State v. Rojas-Cardona*, 503 N.W.2d 591, 594 (Iowa 1993) (*overruled on other grounds by State v. Hogrefe*, 557 N.W.2d 871, 879 (Iowa 1996)). “Deception is established by the obtaining of something of value through the use of a check which the perpetrator knows is worthless. This guilty knowledge is the mens rea of the offense.” *State v. Smith*, 300 N.W.2d 90, 92-93 (Iowa 1981) (citation omitted).

Rex argues the court erred in denying his motion for judgment of acquittal because the evidence submitted at trial is insufficient to establish he knew the check would not be honored when he presented it. There exists, however, strong circumstantial evidence that Rex knew the check was worthless. For example, despite being told that the funds would not be available until Tuesday, Rex made earlier attempts to withdraw the money. Additionally, at the time he deposited the check, Rex had not been living at the address he wrote on the deposit slip for some time. We find the record as a whole supports an inference

of guilty knowledge. The district court did not err in denying Rex's motion for judgment of acquittal based on the sufficiency of the evidence.

B. Motion for a New Trial

Rex also contends the district court erred in denying his motion for a new trial. We review a court's ruling on a motion for a new trial for an abuse of discretion. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006).

A trial court should grant a defendant's motion for a new trial "only if the jury's verdict is contrary to the weight of the evidence." *Id.* at 134-35 (citing *State v. Ellis*, 578 N.W.2d 655, 657-59. "A verdict is contrary to the weight of the evidence where 'a greater amount of credible evidence supports one side of an issue or cause than the other.'" *Id.* at 135 (quoting *Ellis*, 578 N.W.2d at 658). The court's power to grant a new trial "should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." *Ellis*, 578 N.W. 2d at 659 (citation omitted).

Rex argues that the weight of the evidence does not support the verdict. Strong circumstantial evidence supports a conclusion that Rex knew the check was worthless. We find that the evidence in this case does not preponderate heavily against the verdict. The district court did not abuse its discretion in denying Rex's motion for a new trial.

C. Admission of Hearsay Evidence

At trial, the State offered exhibit number two, a copy of the returned cashier's check. Defense counsel objected to its admission on the grounds that the State had failed to lay proper foundation for the check in that it had failed to establish the chain of custody, and that the word "counterfeit" written in the

stamped portion of the copy was hearsay. The objection was overruled. Rex contends the district court abused its discretion in admitting the exhibit.

“Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Iowa R. Evid. 5.801(c). Hearsay is generally inadmissible and must be excluded as evidence at trial unless a recognized exception or exclusion applies. Iowa R. Evid. 5.802; *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). “Subject to the requirement of relevance, the district court has no discretion to deny the admission of hearsay if it falls within an exception, or to admit it in the absence of a provision providing for admission.” *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006) (citing *Dullard*, 668 N.W.2d at 589). We review the admission of hearsay for errors at law. *Id.*

Certain records “kept in the course of a regularly conducted business activity . . . as shown by testimony of the custodian or the qualified witness” are an exception of the hearsay rule. Iowa R. Evid. 5.803(6). “Admissibility under rule 803(6) is based on the guarantees of reliability and trustworthiness usually associated with business records.” *State v. Propps*, 376 N.W.2d 619, 620 (Iowa 1985) (citations omitted).

Rex challenges the admission of a copy of the returned cashier’s check on hearsay grounds, arguing the State failed to lay adequate foundation for admission under the business records exception. The State concedes the stamp on the copy of the cashier’s check with the handwritten word “counterfeit” is hearsay and that the court erred in admitting the exhibit without additional foundation to support the stamped information. See *Union Story Trust & Sav.*

Bank v. Sayer, 332 N.W.2d 316, 321 (Iowa 1983) (holding trial court did not err in excluding copies of checks as hearsay where they were offered to prove the defendant's business purpose in issuing the checks or whether the proceeds were in fact disbursed to the named payees). The State argues, however, that there is other evidence in the record establishing that the bank suffered a loss of more than \$4000 due to Rex's deposit of the check and withdrawal of funds.

"Under Iowa Rule of Evidence 5.103(a), we presume prejudice arises from nonconstitutional error and reverse unless the record affirmatively establishes otherwise." *State v. Reynolds*, ___ N.W.2d ___, ___ (Iowa 2008) (citing *State v. Sullivan*, 679 N.W.2d 19, 30 (Iowa 2004)). "However, we will not find prejudice if the admitted hearsay is merely cumulative." *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (citation omitted).

Here, Geniuk testified without objection that he became involved in the case when he was notified of a "counterfeit check on an overdraft account" and that "the check came back as counterfeit" Because the counterfeit status of the certified check was otherwise in the record through Geniuk's testimony, we conclude the court's admission of the copy of the check with the word "counterfeit" written on it did not result in reversible error. See *Reynolds*, ___ N.W.2d at ___ (holding district court's erroneous admission of evidence did not result in reversible error where hearsay evidence offered and received "were cumulative on the issue of the counterfeit status of the money orders"); *Hildreth*, 582 N.W.2d at 170 (holding allegedly inadmissible hearsay testimony that was repeated by other witnesses to be "merely cumulative and therefore not prejudicial"); *State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997) (noting lack of

prejudice in admission of hearsay evidence if “substantially the same evidence has come into the record without objection”).

D. Ineffective Assistance

Rex contends his trial counsel rendered ineffective assistance by failing to object to hearsay evidence. Because a criminal defendant’s right to reasonably effective assistance of trial counsel is derived from the Sixth Amendment of the United States Constitution, we review ineffective assistance claims de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

To establish that he received ineffective assistance, Rex must prove both that his trial counsel failed to perform an essential duty and that prejudice resulted. See *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To prove the first prong, Rex must overcome a strong presumption that his counsel performed in a competent manner. See *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). To show prejudice, he must prove “a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). “[I]t is not enough to simply claim that counsel should have done a better job. [Rex] must state the specific ways in which counsel’s performance was inadequate and identify how competent representation probably would have changed the outcome.” *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (citations omitted).

Here, Rex contends his counsel rendered ineffective assistance by failing to object to Geniuk’s testimony, which allegedly contained hearsay about the

attempts by other persons to contact Rex and about information Geniuk learned through talking to and reviewing the work of other persons. Rex contends he was prejudiced by this failure “because if the State’s case is considered minus this inadmissible evidence, it consists primarily of evidence that Mr. Rex made a deposit at the Bank of America,” which would be insufficient to support a theft conviction.

When an ineffective assistance claim is raised on direct appeal, “the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination” under postconviction relief procedures. Iowa Code § 814.7(3). Because the trial record is often inadequate to allow us to resolve the claim, we frequently preserve ineffective assistance claims for possible postconviction proceedings to enable a complete record to be developed and to give trial counsel an opportunity to explain his actions. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004); *State v. Martin*, 587 N.W.2d 606, 611 (Iowa Ct. App. 1998). Such is the case here. We therefore preserve Rex’s claim that his trial counsel rendered ineffective assistance in failing to object to hearsay evidence for a possible postconviction proceeding.

III. Conclusion

Because the record as a whole supports an inference of guilty knowledge, the district court did not err in denying Rex’s motion for judgment of acquittal. Because the evidence does not preponderate heavily against the verdict, the court did not abuse its discretion in denying Rex’s motion for a new trial. Because the status of the certified check was otherwise in the record, the district court’s admission of the copy of the check with the word “counterfeit” written on it

did not result in prejudice to Rex. We preserve Rex's ineffective assistance claim for a possible postconviction proceeding.

AFFIRMED.