

IN THE COURT OF APPEALS OF IOWA

No. 9-380 / 08-0998
Filed July 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARCUS DESHAWN COSBY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

A defendant appeals his judgment and sentence for first-degree arson, contending (1) the evidence was insufficient to support the jury's finding of guilt, (2) the district court abused its discretion in denying his motion for new trial, and (3) counsel was ineffective for failing to object to evidence of his drug use.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Charity Sullivan, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

Marcus Cosby appeals his judgment and sentence for first-degree arson arising from a fire in an apartment. He (1) challenges the sufficiency of the evidence supporting the jury's finding of guilt, (2) suggests that the district court abused its discretion in denying his motion for new trial, and (3) contends that counsel was ineffective in failing to object to evidence of his drug use.

I. Cosby did not preserve error on his challenge to the sufficiency of the evidence, as he did not specify which elements of the crime were insufficiently supported by the evidence. See *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) (“To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal.”); *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (“Although counsel made a general motion for judgment of acquittal, he failed to identify in the district court the specific elements of the charge that were insufficiently supported by the evidence.”). Therefore, we need go no further with respect to this appellate argument.

II. We turn to Cosby's assertion that the district court should not have denied his new trial motion. That motion, grounded in Iowa Rule of Criminal Procedure 2.24(2)(b)(6), alleged that the verdict was “contrary to the evidence as a whole and the law provided by the court.” This allegation implicates the “weight of the evidence” standard. See *State v. Shanahan*, 712 N.W.2d 121, 134–35 (Iowa 2006).

A verdict is contrary to the weight of the evidence if “a greater amount of credible evidence supports one side of an issue or cause than the other.” *Id.* at

135 (quoting *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998)). Our review of a district court's ruling under this standard is fairly circumscribed:

On a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence. [*Commonwealth v. Widmer*, 744 A.2d 745, 753 (Pa. 2000)]; see also *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988) (appellate court neither sits to judge credibility of witnesses nor to reweigh the evidence; rather appellate court is limited to examining the evidence produced at trial to determine whether the district court's determination that the evidence does or does not "preponderate heavily against the verdict" is a clear and manifest abuse of discretion).

State v. Reeves, 670 N.W.2d 199, 203 (Iowa 2003).

The district court did not independently assess the credibility of the witnesses. See *State v. Scalise*, 660 N.W.2d 58, 66 (Iowa 2003). However, before overruling the motion, the court invoked the *Ellis* standard and stated it "considered all the evidence presented in the case." Therefore, the issue was preserved for our review. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). On our review of the evidence, we conclude that the court's ruling did not amount to an abuse of discretion.

The elements of the crime as given to the jury were as follows:

1. On or about the 8th day of November, 2007, the defendant caused a fire or explosion or placed a burning, combustible, incendiary or explosive device or material in or near property.
2. Isopropyl alcohol, acetone or ethyl acetate were combustible, incendiary or explosive materials.
3. The defendant intended to destroy or damage the property or knew the property would probably be destroyed or damaged.
4. The presence of a person in the property could have been reasonably anticipated.
5. The defendant did not have the consent of the owner, or the acts were done in such a way that the property or life of another was unreasonably endangered.

Much of the evidence relating to these elements was undisputed. For example, there was no question that Cosby was inside the apartment when the fire started. There was also no question that flammable liquid residue appeared on Cosby's hands and clothing. And there was no question that Cosby knew or reasonably believed two women were still inside the apartment after the fire began.

The disputed evidence centered on whether Cosby or someone else started the fire. The State presented testimony that Cosby had an argument over drugs minutes before the fire erupted. The State also presented testimony that the fire was caused by the intentional placement of flammable nail polish remover on areas of the living room carpet.

Cosby and his witnesses countered that he became aware of the fire while in the apartment, immediately broke out of the apartment, assisted a woman and her baby out, and made efforts to drag the other two women out. These witnesses noted that one of the women in the apartment also had flammable material on her body and the flammable material on Cosby's body could have been acquired during his attempts to wrest the woman from the apartment.

The State, in turn, pointed out that Cosby changed his story multiple times, he did not get far enough into the apartment during the rescue to acquire flammable residue from the surroundings, and it was unlikely that smoke would carry and deposit the residue on his clothing.

The evidence proffered by Cosby does not "preponderate heavily" against the verdict. See *Reeves*, 670 N.W.2d at 203. Accordingly, we conclude the district court did not abuse its discretion in denying Cosby's new trial motion.

III. Cosby finally contends that trial counsel was ineffective in not objecting to the admission of testimony regarding his drug use. The record is adequate to address this issue. *See State v. Nitcher*, 720 N.W.2d 547, 553 (Iowa 2006).

On our de novo review, it is apparent that defense counsel introduced evidence of Cosby's drug use and did not object to similar evidence proffered by the State because it furthered Cosby's explanation of why he was in the apartment. Specifically, Cosby testified that he went there to smoke crack cocaine and he did so alone in a back bedroom, away from the living room where the fire was set. As the evidence was part of defense counsel's trial strategy, we conclude counsel was not ineffective in failing to object to it. *See State v. Brokaw*, 342 N.W.2d 864, 866 (Iowa 1984) ("The testimony that defendant now asserts should have been challenged tended to support his defense. That the jury was unconvinced by this strategy does not, in our view, show ineffective assistance of counsel.").

We affirm Cosby's judgment and sentence for first-degree arson.

AFFIRMED.