IN THE COURT OF APPEALS OF IOWA

No. 3-513 / 12-1484
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DWIGHT MICHAEL MAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Dwight May challenges the sufficiency of the State's proof he committed burglary or possessed a firearm as a felon. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Thomas H. Miller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

Dwight May challenges the sufficiency of the State's proof he committed burglary or possessed a firearm as a felon. May contends the video evidence capturing the break-in of his co-worker's car is too grainy to show May was the perpetrator. Because ample circumstantial evidence supports the jury's verdicts, we affirm.

I. Factual and Procedural Background

A jury heard the following facts. Dwight May and Michael McSwain worked together at Tyson Foods, loading out boxes onto a conveyor belt. May, McSwain, and the other thirteen members of the "load-out" crew wore white hard hats and orange gloves when doing their jobs. These distinctive parts of their uniform came into play when authorities were attempting to solve the crime at issue in this case.

McSwain owned a modest gun collection and discussed his hobby with coworkers. Once after their shift in January 2012, McSwain offered rides home to May and another coworker, Martin Muse. On the trip, May and Muse saw McSwain's Sig Sauer Model P226 .40 caliber pistol in his glove box. McSwain testified he did not broadcast to other members of the load-out crew his habit of keeping a firearm in his car.

In late February 2012, McSwain agreed to sell one of his handguns to May. But when McSwain learned May was a felon, he had second thoughts about the sale. McSwain lied to May, telling him he sold the gun to someone else. May was angry, telling McSwain: "That's fucked up."

When McSwain returned to his car after having worked the overnight shift on March 6, 2012, he found his back window had been smashed. He also saw duct tape left on the ground. The car's console and glove box were open and McSwain's Sig Sauer .45 semi-automatic pistol was missing. Nothing else was disturbed in his car and no other vehicles in the Tyson lot had been burglarized that morning.

McSwain called the police, who asked him to watch security footage of the plant from the early morning hours of March 6. Two cameras on Tyson's property captured critical evidence. First, an interior camera shot allowed McSwain to identify May leaving the guard shack for the parking lot at 2:57 a.m. and returning at 3:24 a.m. Second, an exterior camera continuously panned the parking lot. Its footage was low quality, but McSwain was able to see a person dressed in dark clothing and orange gloves swinging "what looked like" a white hard hat into his car window at 3:07 a.m. McSwain could not identify that person as May, though the clothing was consistent with what May was wearing when he left the guard shack and the gear was the same as issued to members of the load-out crew.

Police interviewed May on the afternoon of March 6. May denied committing the burglary and denied even leaving the plant during his break. The next day, police showed May the video image of him re-entering the plant at 3:24 a.m. Faced with that evidence, May admitted leaving the plant, but continued to deny breaking into McSwain's car.

Police searched May's locker, as well as the vehicle and house May shared with his girlfriend, but did not find the firearm belonging to McSwain. But Muse testified that he saw May with a handgun on March 8, 2012.

The State filed a trial information on March 19, 2012, charging May with burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5 (2011), and being a felon in possession of a firearm, in violation of section 724.26. An amended trial information charged May as an habitual offender.

The case went to trial on June 12, 2012. On June 15, 2012, the jury found May guilty on both counts. The district court sentenced May to two fifteen-year terms to be served concurrently. The court suspended the sentences and as a condition of May's probation required him to live at a residential correctional facility for one year or until he achieved maximum benefits. May now appeals his convictions.

II. Legal Analysis

May raises a single issue:[1] whether the State proved beyond a reasonable doubt that he was the person who broke into his coworker's car and took the firearm.

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[1] May's appellate brief raises ineffective assistance of counsel as a back-up plan, alleging his trial attorney "had a duty to litigate and preserve the issues addressed above." The State alleges May's trial counsel failed to preserve error with his generic motion for judgment of acquittal. We find error was adequately preserved. *See State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (finding error preserved where record reveals the trial court understood grounds for the motion). Here, the district court recited the evidence creating a jury question in denying the defense motion for judgment of acquittal—giving us an adequate record to review. Accordingly, we do not need to reach the ineffective-assistance claim.

We review his challenge for correction of legal error. *See State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). The test is whether the evidence, taken in the light most favorable to the State, can be considered substantial; that is, whether it would convince a rational fact finder May is guilty beyond a reasonable doubt. *See State v. McCullah*, 787 N.W.2d 90, 93 (Iowa 2010). "We draw all fair and reasonable inferences that may be deduced from the evidence in the record." *Meyers*, 799 N.W.2d at 138. Circumstantial evidence is equally as probative as direct. *Id.*

May points to weaknesses in the State's case. For instance, he discusses the absence of his fingerprints on the duct tape found near McSwain's car, the "shadowy" and "grainy" nature of the parking lot footage, the questionable credibility of Muse's testimony, and the inability of the police to locate the stolen gun. But even taking those shortcomings into account, we find the State presented substantial evidence that May committed burglary and possessed the firearm as a felon.

To set the stage, his disappointment in not being allowed to buy McSwain's gun provided May a motive to take it from the car where he knew it would likely be. *See State v. Hearn*, 797 N.W.2d 577, 581 (Iowa 2011) (recognizing defendant's motive to visit his girlfriend in Illinois as contributing to substantial evidence for carjacking).

Next, the crime was caught on tape. Although May is correct that the footage is not clear enough to identify him as the burglar, the image does narrow the field of suspects to someone who has orange gloves and a white hard hat—

the same gear issued to the fifteen members of May's work crew. On top of that, the State's clearer video evidence placed May in the parking lot on his break during the precise time frame when the burglary occurred.

In addition to the strong circumstantial evidence placing May at the scene of the crime, May lied to investigators about his whereabouts during the critical time period until they confronted him with the video footage. A fact finder may infer guilt from false or shifting stories by a person accused of a crime. *State v. Turner*, 630 N.W.2d 601, 609 (Iowa 2001).

The jurors were free to believe or disbelieve Muse. *See State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994) ("Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence."). Either way, the State's remaining evidence was sufficient to convict May of the crimes charged.

Considering all of the evidence, and all of the reasonable inferences from the evidence, in the light most favorable to the State, we find no cause to disturb the jury's verdicts.

AFFIRMED.