IN THE COURT OF APPEALS OF IOWA

No. 3-826 / 12-1643
Filed September 18, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL MITRISIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas G. Reidel, Judge.

Michael Mitrisin appeals from his convictions of arson and burglary, contending there is insufficient evidence he was the perpetrator of the offenses. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and Kimberly Shepherd and Will Ripley, Assistant County Attorneys, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

Michael Mitrisin appeals from his convictions of arson and burglary, contending there is insufficient evidence he was the perpetrator of the offenses. He also asserts his trial counsel was ineffective in various respects. Because substantial evidence supports the convictions, we affirm. We preserve one ineffectiveness claim for possible postconviction proceedings.

I. Background Facts and Proceedings.

On February 5, 2011, a window on the security door to R.S.'s condominium building was broken out. In R.S.'s condominium, which showed no signs of forced entry, two fires had been set. One fire was set at the base of her bed. Another fire burned R.S.'s favorite rug in the living room. Investigators estimated the fires had been set sometime between 8 or 9 p.m. that evening.

At about 9 p.m. on February 5, R.S. entered a bar with friends to listen to a band. Mitrisin was there at the bar, but was asked to leave because he was following R.S., staring at her, and acting "creepy." After he was asked to leave the bar, Mitrisin approached R.S., brushed aside one of her friends, and whispered to R.S., "I'll see you later, sweetheart."

Mitrisin and R.S. had been in a romantic relationship for more than a year, but the relationship ended in January 2011. Mitrisin had had keys to the condominium before the breakup: the key to the exterior security door indicated it was not to be duplicated; the key to the apartment door was not similarly marked. After their breakup, R.S. and Mitrisin continued to have communication through texts and emails, and met in person a few times. R.S. was concerned about Mitrisin's well-being after reading some of his communications and contacted his

mother to check on him. Ultimately, R.S. contacted the police and cut off communication with Mitrisin, including blocking his phone numbers and his access to her Facebook accounts. Nonetheless, she received two voicemails from Mitrisin using numbers different than his usual phone number.

In order to communicate with R.S., Mitrisin created a bogus Facebook account using the name Amir Petrosian. He used an Armenian-sounding name to get R.S.'s interest, as she had lived in Turkey for a time. R.S. communicated with Petrosian through Facebook, and it was through Petrosian's access to one of her Facebook pages that Mitrisin learned R.S. was planning to attend a concert at the bar, Mound Street Landing, on February 5, 2011.

Lieutenant Fire Marshall Jim Morris interviewed Mitrisin on February 7, 2011. Mitrisin said he had recently broken up with R.S. after dating her for a year and that he saw her on February 5 when he left a magazine belonging to her on her car windshield. Mitrisin admitted being at Mound Street Landing to meet friends on the night of February 5, speaking to R.S., and acting a little "creepy." He said after he left the bar he went back to his parents' house where he had been staying since a recent suicide attempt and spoke to his mother for a bit. Morris told the jury that he felt Mitrisin was trying to hide his right hand behind his head or in his pocket during their conversation. Later that night, a sheriff's deputy who served legal papers on Mitrisin stated he saw a white bandage on Mitrisin's right hand.

Mitrisin moved in with his parents after the breakup of his relationship with R.S. After the fires, police searched Mitrisin's parents' home and on their computer found a letter Mitrisin had delivered to R.S.; numerous searches for

picking locks and creating bombs; a link to an arson "cookbook"; videos on how to hack into a Facebook account; entries related to the creation of the Petrosian Facebook identity and an email account; and evidence of numerous visits to R.S.'s Facebook account.

Mitrisin, an avid text message sender, sent no texts and made no calls from his cell phone between 8:36 and 9:08 p.m. on February 5, 2011.

Michael and Frieda Brinck lived to the south of R.S.'s condominium building and testified they observed a Jeep Wrangler X with a black bike rack on the back parked next to their drive the night of the fire. Frieda testified the Jeep arrived in front of her house around 8:30 the night of February 5, 2011. At the time, the person triggered the motion-sensitive security light on her neighbor's garage and she saw a white male in a dark hoodie and baseball cap walk away from the vehicle. She had seen the vehicle before.

Mitrisin owned a Jeep matching the one described by the Brincks and he often parked his Jeep on their street when he visited R.S. The drive between the Mound Street Landing bar and the street near R.S.'s condominium took seven to eight minutes.

According to Mitrisin and both of his parents, he arrived at his parents' house around 9:40 p.m. on February 5. He spoke with his mother in his bedroom until he went to bed around 11:00 p.m.

The jury found Mitrisin guilty of first-degree arson and second-degree burglary.

Mitrisin now appeals, contending the evidence was insufficient to establish he was the person who set the fire or the person who broke into or entered R.S.'s

condominium. He argues that if there is sufficient evidence to sustain the convictions, his trial counsel was ineffective in failing to assert a post-trial motion that the convictions should be set aside as being against the weight of the evidence. He also argues trial counsel was ineffective in failing to object to evidence indicating he researched lock picking, incendiary devises, and how to hack a Facebook account, or "at a bare minimum, request a cautionary instruction describing to the jury the proper purpose for such evidence."

II. Standards of Review.

We will review a challenge to the sufficiency of the evidence for correction of legal errors. *State v*. *Schories*, 827 N.W.2d 659, 663 (Iowa 2013).

We review de novo the constitutional claim of ineffective assistance of counsel. *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

III. Discussion.

A. *Sufficiency of the Evidence*. The fact-finder's verdict will be upheld if it is supported by substantial evidence. *State v*. *Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). Substantial evidence means evidence that could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v*. *Hagedorn*, 679 N.W.2d 666, 668-69 (Iowa 2004). "We will consider all the evidence presented, not just the inculpatory evidence." *State v*. *Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). "However, in making such determinations, we also view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *State v*. *Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). Inherent in our standard of review of jury verdicts in criminal cases

is the recognition that the jury may reject certain evidence and credit other evidence. *Sanford*, 814 N.W.2d at 615.

Viewing the evidence as a whole and in the light most favorable to upholding the verdicts, there is substantial direct and circumstantial evidence supporting Mitrisin's convictions. Mitrisin's vehicle was seen near the condo at the time the fires were set. Mitrisin admitted he was at the condominium on February 5, although he explained his presence by stating he was dropping off a magazine. A text message sent from his phone states, "I busted out one of my ex's windows last night."[1] The circumstances of the fire suggest the person who started the fire had access to the condominium, knowledge of the condominium and its contents, and the fire locations indicate a person with an intimate relationship with the inhabitant, all of which point to the defendant. Reasonable jurors could believe that Mitrisin's emotional involvement gave him a motive to strike out at R.S. Mitrisin was familiar with the condominium and would have known where R.S. kept the stick lighter, which was used to start the fires. In addition, two separate, non-connecting fires were set in the condominium. One fire began on the corner of R.S.'s bed and spread throughout the bedroom. The other, which did not spread, began on the fringe at the edge of a Turkish rug that had been given to R.S. by a previous boyfriend; R.S. "loved that rug," "[i]t was her favorite thing in the house" and a "really important piece" to her, and she "talked about it all the time." The matters found on Mitrisin's parents' computer also provide evidence of preparation or planning.

[1] The message was sent at 8:18 p.m. on February 5, and there was no evidence that any window at R.S.'s residence was broken the night before.

The finder of fact is free to use circumstantial evidence: "[c]ircumstantial evidence is equally probative as direct evidence for the State to use to prove a defendant guilty beyond a reasonable doubt." *State v*. *Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011). Here substantial evidence supports the jury's conclusion that Mitrisin was the perpetrator.

B. *Ineffective Assistance of Counsel*.

> To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove the following elements by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted from counsel's failure. We will address such claims on direct appeal only if we determine the development of an additional factual record would not be helpful and one or both of these elements can be decided as a matter of law.

State v. *Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). If an issue has no merit, counsel has no duty to raise the issue. *Id.*

1. *Weight of the evidence*. Iowa Rule of Criminal Procedure 2.24(2)(b)(6) allows a court to grant a new trial when the verdict is "contrary to law or evidence." Our supreme court has held that "contrary to . . . evidence" means "'contrary to the weight of the evidence' as defined in *Tibbs* [*v*. *Florida*, 457 U.S. 31, 37–38 (1982)]." *State v*. *Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

> A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

Tibbs, 457 U.S. at 37–38.

> The district court has broad discretion in ruling on a motion for new trial, and thus our review in such cases is for abuse of discretion. A court may grant a new trial where a verdict rendered by a jury is contrary to law or evidence. We have held the phrase contrary to evidence means contrary to the weight of the evidence.

> Unlike the sufficiency-of-the-evidence analysis, the weight-of-the-evidence analysis is much broader in that it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other.

State v. *Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006) (internal quotation marks, editing, and citations omitted). Because we cannot say that the verdicts are clearly against the weight of the credible evidence, Mitrisin has failed to establish prejudice.

2. *Other acts evidence*. At Mitrisin's first trial—which ended as a mistrial—Mitrisin's counsel, attorney Bell, filed a motion in limine seeking exclusion of evidence that Mitrisin was "stalking" R.S., including "any alleged contact with [R.S.] by the Defendant under any alleged assumed identity on FACEBOOK and its allegedly related e-mail address"; "any alleged uninvited appearances of the defendant at or near the residence" her residence; "any alleged events of the Defendant leaving or attempting to leave any items belonging to [R.S.] or any notes or letter to [her] in places where [she] would be certain to find them."

The State resisted Mitrisin's motion in limine concerning the evidence, arguing that Iowa Rules of Evidence 5.404(b) and 5.403 did not bar the evidence at issue because the

> evidence of the defendant's relationship with [R.S.], their Facebook and email exchanges and the interactions between the defendant and [R.S.] is material, relevant and probative to explain the nature and history of the relationship between [R.S.] and the defendant and to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

At the beginning of the second trial, the court informed attorney Bell that he should not rely on his previous objections and that it would be best for him to

re-state them for the court's benefit. Mitrisin argues that he was denied effective assistance of counsel by attorney Bell's failure to object to the evidence as irrelevant, as inadmissible evidence of other bad acts under Rule 5.404(b), and as unduly prejudicial. Mitrisin also complains that Bell did not ask for an instruction concerning the use the jurors could make of the evidence in question.

Iowa Rule of Evidence 5.404(b) has been read to deal primarily with "completely unconnected" acts and not "with evidence of other crimes that are somehow connected to the crime charged." *See State v*. *Sullivan*, 679 N.W.2d 19, 26 (Iowa 2004)). Such evidence may also be offered to show the nature of the relationship with and feelings toward a specific person. *State v. Reynolds*, 765 N.W.2d 283, 291 (Iowa 2009).

The record before us does not show the basis for Bell's decision not to object to the evidence. Attorney Bell may have decided to forgo an objection as futile or that much of the evidence at issue would be admitted. Bell is entitled to an opportunity to explain his actions. "A primary reason [for preserving ineffective-assistance claims] is to ensure development of an adequate record to allow the attorney charged to respond to the defendant's claims." *Brubaker*, 805 N.W.2d. at 170. We preserve this claim for possible postconviction proceedings.

AFFIRMED.