IN THE COURT OF APPEALS OF IOWA

No. 6-635 / 05-2072
Filed October 25, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER BARRON SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Jeffrey L. Larson, Judge.

Christopher Smith appeals from his convictions of willful injury causing serious injury, assault on a peace officer using or displaying a dangerous weapon, assault while participating in a felony, and theft in the first degree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier, Assistant County Attorney, for appellee-State.

Considered by Sackett, C.J., and Vaitheswaran, J., and Robinson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

SACKETT, C.J.

In November of 2004, defendant, Christopher Barron Smith, was a passenger in a stolen Lincoln Navigator driven by Colton Dineen. The vehicle was stopped for a traffic violation by a Pottawattamie County deputy sheriff. During the course of the stop Dineen shot the deputy four times and seriously injured him. As a result of the incident a jury returned a general verdict finding defendant guilty of willful injury causing serious injury, in violation of Iowa Code section 708.4(1) (2003); assault of a peace officer using or displaying a dangerous weapon, in violation of section 708.3A(2); assault while participating in a felony, in violation of section 708.3(a); and theft in the first degree, in violation of section 714.2(1).

On appeal defendant contends (1) there was not substantial evidence to support the verdict, (2) the district court erred in instructing the jury, and (3) his trial counsel was not effective. We reverse the conviction of willful injury and remand for new trial on this count. We affirm the convictions on the other counts.

BACKGROUND FACTS

The jury could have found the following facts. The stolen Navigator was stopped on Interstate 80 at 3 a.m. on November 10, 2004, by Pottawattamie County Deputy Sheriff Brain Loomis after Loomis clocked the Navigator going eighty-six miles an hour. Dineen was driving. Defendant was in the passenger seat and a third man, Jeremy Clark, was in the backseat. All three men were using methamphetamine. The deputy approached the Navigator on the passenger side and asked Dineen to roll down all four windows. He then ascertained Dineen's name and social security number and got the registration

for the Navigator. The deputy returned to his car to check the information he had collected.

Meanwhile in the Navigator[1] Dineen told the others, who apparently were on their way to Illinois to steal cars, that the Navigator was stolen and there were firearms in the back. Dineen testified he offered to take responsibility but defendant, who was on probation, and Clark, who was in drug court, rejected the offer and suggested that Dineen back up and smash the deputy and his car. They also discussed shooting the passenger side window out if Loomis returned and approached the Navigator on that side. At some point defendant and Dineen had been looking for a Glock pistol in the area where Clark was seated. Dineen and Clark were unsure how the Glock got on the console between the two front bucket seats in the car. Neither was sure whether or not defendant had a part in making the Glock available to Dineen. Clark could not say whether the Glock went from Clark to the console or from Clark to defendant to the console.

Loomis returned on the driver's side of the Navigator asking Dineen to get out and come with him to the sheriff's car. Dineen took the Glock pistol, opened the driver's door, and shot Loomis four times. Before approaching the car for the second time Loomis had called for backup. Backup arrived shortly thereafter to find Loomis severely injured and assisted in getting him medical care.

Loomis suffered life-threatening injuries to his upper chest and left arm. He suffered long-term weakness and a loss of sensation in his left hand and arm.

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[1] The testimony as to what happened in the Navigator came from Dineen and Clark, who were witnesses for the State. The men admitted they were both under the influence of drugs at the time. Neither man gave a clear rendition of what transpired.

After shooting Loomis, Dineen drove off, and the men stopped away from the scene of the shooting to ingest methamphetamine. Later, defendant drove the Navigator. Eventually the Navigator crashed. Defendant was not in it at the time.

SUFFICIENCY OF THE EVIDENCE

Defendant contends his convictions of causing serious injury, assault on a police officer while using or displaying a dangerous weapon, and assault while participating in a felony are not supported by substantial evidence and should be dismissed. He argues there was not substantial evidence to find that he shot Loomis, that he aided or abetted Dineen in shooting Loomis, or that he was engaged in joint criminal conduct at the time Loomis was shot.

A challenge to the sufficiency of the evidence is for correction of errors at law. *State v. Petithory*, 702 N.W.2d 854, 856 (Iowa 2005). 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. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). Consequently, where the record contains substantial evidence to support the finding, we are bound by the jury's finding of guilt. *State v. Hickman*, 623 N.W.2d 847, 849 (Iowa 2001). In determining whether there was substantial evidence, we view the record evidence in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from it. *Id.* Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *State v. Sutton*, 636 N.W.2d 107, 110 (Iowa 2001).

A reviewing court cannot make a substantial evidence determination if it considers only the evidence supporting guilt. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). This is so because a rational fact finder cannot render a verdict without taking into consideration all the record evidence. *Id.* So in determining whether there is substantial evidence, we must consider all the record evidence, not just the evidence supporting guilt. *Sutton*, 636 N.W.2d at 110; *Torres*, 495 N.W.2d at 681.

The instructions allowed the jury to convict defendant as a principal, as an aider and abettor, or under a theory of joint criminal conduct. The State concedes that defendant could not be convicted as a principal on the challenged charges, but argues the evidence is sufficient to convict him as an aider and abettor or under the theory of joint criminal conduct. The State concedes the defendant did not shoot Loomis.[2]

The first question is whether there was substantial evidence defendant aided and abetted the shooting and assault on Loomis.

In order to sustain a conviction on an aiding and abetting theory, there must be substantial evidence defendant assented to or lent countenance and approval to the criminal act either by active participation or by some manner encouraging it prior to or at the time of its commission. *See State v. Dalton*, 674 N.W.2d 111,116-117 (Iowa 2004); *State v. Jefferson*, 574 N.W.2d 268, 277 (Iowa 1997). The State must prove the accused knew of the crime at the time of or before its commission. However, such proof need not be established by direct

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[2] When the State charges an accomplice as principal, specifying an accomplice theory is unnecessary. *State v. Irvin*, 334 N.W.2d 312, 315 (Iowa Ct. App. 1983); *see also Dalton*, 674 N.W.2d 111, 116 n.1 (Iowa 2004).

proof, it may be either direct or circumstantial. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994).

Neither knowledge of the crime nor proximity to the crime scene are enough to prove aiding and abetting. *State v. Tangie*, 616 N.W.2d 564, 574 (Iowa 2000). However, there are factors, which with circumstantial evidence such as "presence, companionship, and conduct before and after the offense is committed," may be enough to infer a defendant's participation in the crime. *Id*.; *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984). If intent is an element of the crime charged, a person may be convicted on a theory of aiding and abetting if he participates with either the requisite intent, or with knowledge the principal possesses the required intent. *Lewis*, 514 N.W.2d at 66; *State v. Lott*, 255 N.W.2d 105, 109 (Iowa 1977); *State v. Speaks*, 576 N.W.2d 629, 632 (Iowa Ct. App. 1998).

Viewing the evidence in the light most favorable to the State, we think a rational juror could have found defendant actively participated or by some manner encouraged the shooting and assault on Loomis. *See Sutton*, 636 N.W.2d at 112. Even though defendant did not shoot or assault Loomis there was evidence from which the jury could have believed that before Loomis returned to the Navigator defendant had verbalized his wish to get away from Loomis and was part of the agreement to shoot out the passenger side window if Loomis came there and of the discussion as to who would do the shooting. *See Dalton*, 674 N.W.2d at 117.

There was substantial evidence to prove that defendant aided and abetted in the commission of the challenged charges and we affirm on this issue.

We next address the defendant's claim that he did not engage in joint criminal conduct.[3]

Defendant argues there is no evidence suggesting he knowingly participated in a public offense prior to the shooting. He argues he had no control over the Navigator to suggest he was participating in a theft. He contends that, while he knew there were five guns in the back of the Navigator, there was no evidence showing he knew the guns were stolen until Dineen told him so after Loomis had pulled them over. Therefore, defendant contends that because he did not knowingly participate in a pubic offense it does not follow that Dineen's shooting Loomis was in furtherance of this offense.

There is substantial evidence that defendant was made aware the Navigator and guns were stolen prior to Loomis being shot. There was also evidence that the men were carrying and using methamphetamine in the Navigator.

We agree with the district court that the evidence supported the charge of joint criminal conduct. The two were acting together. Defendant acted "in furtherance" of the shooting. This provided evidence of a crime which a jury could have vicariously imputed to defendant through the joint criminal activity instruction. *See State v. Hohle*, 510 N.W.2d 847, 849 (Iowa 1994).

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[3] Iowa Code section 703.2 defines joint criminal conduct as follows:

> When two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in furtherance of the commission of the offense or escape there from, and each person's guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Defendant next contends his trial attorney was not effective when he failed to object to the jury instruction on aiding and abetting that failed to instruct the jury on how to consider intent when the underlying offense is a specific intent crime.

A defendant is entitled to the assistance of counsel under the Sixth Amendment of the United States Constitution, and Article I, section 10 of the Iowa Constitution. The right to counsel is a right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). To establish an ineffective assistance of counsel claim, the defendant must show "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The defendant has the burden of proving by a preponderance of the evidence both of the two elements of a claim of ineffective assistance. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001); *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996); *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). We may affirm on appeal if either element is lacking. *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996).

We need not decide whether counsel's performance is deficient before examining the prejudice component. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the

proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000); *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987).

Defendant contends willful injury causing serious injury is a specific intent crime and counsel was ineffective in not objecting to the jury instruction setting forth the elements of willful injury.

When intent is an element of the crime charged, a person may be convicted as an aider and abettor by participating either with the requisite intent or with the knowledge that the principal possesses the required intent. *Tangie*, 616 N.W.2d at 573; *see also Lewis*, 514 N.W.2d at 66; *Lott*, 255 N.W.2d at 109; *Speaks*, 576 N.W.2d at 632.

The instruction given on willful injury was as follows:

> With regard to Count II, the State must prove all of the following elements of Willful Injury Causing Serious Injury:
>
> 1. On or about the 10th day of November 2004, the Defendant, or the person he aided and abetted assaulted Deputy Brian Loomis.
>
> 2. The Defendant or the person he aided and abetted specifically intended to cause a serious injury to Deputy Brian Loomis.
>
> 3. Deputy Brian Loomis sustained a serious injury.

The comment to the uniform jury instruction on aiding and abetting provides that, if the charged offense involves specific intent, the instruction should include the following paragraph:

> 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 the 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.

Iowa Crim. Jury Inst. 200.82 cmt. (2005).

The State appears to concede that while the district court's instruction on aiding and abetting substantially tracked the uniform instruction, it did not mention the concept of specific intent, even though willful injury causing serious injury is a specific intent crime.

The State contends that we should dispose of this claim on a prejudice prong, as defendant suffered no prejudice as a result of the instruction given.

Defendant contends this instruction allowed the jurors to convict him as an aider and abettor on a finding Dineen assaulted Loomis intending to cause and causing serious injury without finding defendant had knowledge that Dineen, the person he was alleged to aid and abet, possessed the requisite specific intent. We agree. Defendant's trial attorney failed in an essential duty in failing to object to the instruction on willful injury.

That said, we need next determine if the State is correct in arguing that defendant was not prejudiced by this omission. The State argues there was substantial evidence from which the jury could find defendant was aware of Dineen's intent. With this we agree. However, our inquiry does not end here.

A general verdict of guilty on willful injury was returned. Generally when a general verdict does not reveal the basis for a guilty verdict reversal is required. *State v. Heemstra*, ___ N.W.2d ___, ___ (Iowa 2006); *State v. Marten*, 569 N.W.2d 482, 485 (Iowa 1997). The validity of a verdict based on facts legally supporting one theory for conviction of a defendant does not negate the possibility of a wrongful conviction of a defendant under a theory containing legal error as with a general verdict of guilty we have no way of determining which theory the jury accepted. *Heemstra*, ___ N.W.2d at ___; *State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996). Consequently, defendant has shown both a failure to perform an essential duty and that prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We reverse his conviction for willful injury and remand for a new trial on this count.

Defendant next contends that first-degree theft is a specific intent crime and that the instruction was erroneous.

The following instruction was given:

> With regard to Count V, the State must prove all of the following elements of Theft
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> 1. A 2004 Lincoln Navigator was stolen
> 2. On or about the 10th day of November, 2004, the Defendant, or the person he aided and abetted exercised control over the property.
> 3. At the time, the Defendant, or the person he aided and abetted knew the property had been stolen.
> 4. The defendant, or the person he aided and abetted, did not intend to promptly return it to the owner or deliver it to an appropriate public officer.
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> Iowa Code section 714.1(4) makes it theft for a person to
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> [exercise] control over stolen property, knowing such property to have been stolen, or having reasonable cause to believe that such

> property has been stolen, unless the person's purpose is to promptly restore it to the owner or to deliver it to an appropriate public officer.

In *State v. Hutt*, 330 N.W.2d 788, 790 (Iowa 1983), the court held that the mens rea of this offense requires proof that the accused actually believe the property was stolen. But the offense does not require proof of specific intent. *State v. McVey*, 376 N.W.2d 585, 586 (Iowa 1997). The offense is a general intent crime because it is complete without intent to do a further act or achieve a further consequence. *Id.* General criminal intent exists when from the circumstances the prohibited result may reasonably be expected to flow from the voluntary act itself "irrespective of any subjective desire to have accomplished such result." *Id.*; *State v. Redmon*, 244 N.W.2d 792, 797 (Iowa 1976). Thus the crime of theft based on exercising control over stolen property does not require proof of any intent beyond the voluntary act of exercising the prohibited control over property the accused knows is stolen. *McVey*, 376 N.W.2d at 586.

The defendant's trial attorney was not ineffective in not objecting to the instruction given on first degree theft for the reasons stated above and we affirm the conviction for first degree theft.

We affirm on all issues except the conviction of willful injury in violation of Iowa Code section 708.4(1). We reverse that conviction and remand for a new trial on that charge.

Twenty-five percent of the costs on appeal are taxed to the State. The balance of the costs are taxed to the defendant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.