IN THE COURT OF APPEALS OF IOWA

No. 3-103 / 12-0537
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY DANIEL MCGREAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

A defendant appeals from his conviction for criminal mischief in the third degree challenging the sufficiency of the evidence and his attorney's effectiveness. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John Sarcone, County Attorney, and Justin Allen, Assistant Count Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Timothy McGrean appeals from his conviction for criminal mischief in the third degree alleging there was insufficient evidence to prove (1) he aided and abetted another in the commission of the offense, (2) he had the requisite specific intent, and (3) he damaged property with a value exceeding $500 but no more than $1000. He also asserts his counsel was ineffective in (1) failing to request a jury instruction on the specific intent necessary for aiding and abetting, (2) failing to object to a jury instruction that did not conform to the evidence, and (3) failing to object to prosecutorial misconduct. As we find insufficient evidence to support the jury verdict, we reverse McGrean's conviction and remand for a new trial.

I. BACKGROUND FACTS AND PROCEEDINGS.

McGrean and his wife, Pam, were formerly neighbors of Merle Powell. On September 1, 2011, Pam asked Powell for a ride to her ex-husband's house. Pam was intoxicated, but Powell obliged. Powell left after a fight erupted between Pam and her ex-husband.

Meanwhile, McGrean had learned Pam was intoxicated at Powell's home. McGrean contacted Pam's son, Jacob, to pick him up and take him to Powell's home to retrieve Pam. When Jacob and McGrean arrived, they discovered Pam had already left with Powell.

Charlotte Howard, Powell's long-term girlfriend, heard her dogs barking and looked out her window to see McGrean striking Powell's truck with what she believed was a baseball bat. She also observed Jacob standing nearby.

Howard watched as McGrean broke the windows, side mirrors, and headlights out of the truck. She contacted the police, who arrived after McGrean and Jacob left. Powell was also alerted to the incident and arrived back home after the police were on scene.

The State filed a trial information charging McGrean with criminal mischief in the second degree. The case proceeded to a jury trial, where Jacob testified he was the one that struck Powell's truck breaking all the windows, mirrors, and lights. Jacob claimed McGrean did not know he was going to do it until right before he struck the truck with a crowbar. Powell, an automobile mechanic, testified the non-operable truck was worth $2500, and it had not been repaired because the repair shop said the damage was more than the truck was worth.

The jury found McGrean guilty of the lesser-included offense of third-degree criminal mischief. He received a two-year suspended sentence and was placed on probation for two years. He now appeals.

II. SCOPE AND STANDARD OF REVIEW.

Our review of challenges to the sufficiency of the evidence is for correction of errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We consider all the evidence in the light most favorable to the State including all reasonable inferences. *Id*. The jury's verdict will be upheld if it supported by substantial evidence, which is evidence that can convince a rational jury that the defendant is guilty beyond a reasonable doubt. *Id*.

McGrean's claims that his counsel rendered ineffective assistance are reviewed de novo as they involve a defendant's right to counsel under the Sixth

Amendment. *See State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). These claims are normally preserved for possible postconviction relief proceedings, unless the record is adequate to address the issue on direct appeal. *Id*.

> To prevail on a claim of ineffective assistance of counsel, a claimant must satisfy the *Strickland* test by showing "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."

Id. at 495 (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

III. SUFFICIENCY OF THE EVIDENCE.

The marshaling instruction on the charge of criminal mischief in this case stated:

> 1. On or about the 1st day of September, 2011, the Defendant damaged, altered, or destroyed a motor vehicle belonging to Charlotte Howard or Merle Powell, or aided and abetted another person in doing so.
> 2. The Defendant or the person he aided and abetted intended to do the acts which damaged, altered, defaced, or destroyed the motor vehicle.
> 3. When the Defendant or the person he aided and abetted damaged, altered, defaced, or destroyed the motor vehicle, he did not have the right to do so.

In a later instruction, the jury was asked to determine the degree of criminal mischief based on the cost of repairing or replacing the damaged property. On appeal, McGrean challenges the sufficiency of the evidence to prove he was the perpetrator or aided and abetted the crime or that he had the specific intent to commit the offense. He also claims the evidence is insufficient as to the value of the property.

The State concedes McGrean preserved error with respect to his challenge to the sufficiency of the evidence on the value of the property, but it asserts he failed to make an adequate motion for judgment of acquittal with respect to his challenge to his identity as an aider and abettor and his challenge to the specific intent. We agree.

To preserve error on a challenge to the sufficiency of the evidence, a defendant "must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). At trial, defense counsel only specifically challenged the sufficiency of the evidence on the value element. Therefore, McGrean failed to preserve error on his challenge to the specific intent or the identity elements.

Anticipating the error preservation issue, McGrean raises the claim in the vein of ineffective assistance of counsel. *See State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (stating that a claim of ineffective assistance of counsel is an exception to the normal error-preservation rules and the law-of-the-case doctrine). While normally ineffective-assistance-of-counsel claims are preserved for postconviction relief proceedings, "[a] claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal." *Truesdell*, 679 N.W.2d at 616.

> Clearly, if the record in this case fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted. On the other hand, if the record reveals substantial evidence, counsel's failure to raise the claim of error could not be prejudicial.

Id.

A. Value of the Property. The jury returned a verdict finding "[t]he cost of repair or replacement is more than $500 but not more than $1000." McGrean claims there is not sufficient evidence to support this verdict. Powell testified he was an automobile mechanic, and while the truck was not running before the incident, it was worth $2500 as a four-wheel drive vehicle. He also testified that he took the truck to a body shop but was unable to have it fixed because the damage exceeded the value of the truck. Defense counsel challenged the value of the truck at trial pointing out that the police officer who investigated the crime put in his report that there was not a substantial loss of property. However, in his closing argument, defense counsel suggested the $500 figure to the jury on several occasions: "Maybe 500 bucks, maybe. Look at the pictures of that truck and ask yourselves, would you pay $2500 for that truck with the windows back in it? No, you wouldn't. . . . I submit to you that it absolutely was not a $2500 truck. Maybe $500."

Jurors are entitled to use their own common knowledge and experience with respect to the value of the property damaged. *See State v. Theodore*, 150 N.W.2d 612, 616 (Iowa 1967) ("The jurors could find from their common knowledge and experience that 91 boxes of loins, 5 boxes of cooked hams, 3 boxes of smoked hams and 1 box of shankless hams were worth more than $20 in today's market."). We find sufficient evidence to support the jury's verdict as to the value of the property damaged.

B. Identity. This case was submitted to the jury with alternate theories. The jury could either find McGrean was guilty as the principal or as an aider and abettor. McGrean does not attack the sufficiency of the evidence with respect to his identity as the principal. Howard's testimony provided ample support for the charge that McGrean himself caused the damage as she specifically identified him as the perpetrator. However, McGrean asserts on appeal that the evidence is not sufficient to prove he aided and abetted another in the commission of the offense.

The jury was instructed in the alternative, but there is no indication as to what theory they accepted.

> The rule in Iowa is that while the jury must be unanimous on whether a defendant committed a crime, when alternative modes or theories of commission of a particular crime are presented, the jury need not be unanimous on a particular means of commission of the crime if substantial evidence to support each alternative [exists], and those alternative modes are not repugnant or inconsistent with [each] other.

Gavin v. State, 425 N.W.2d 673, 678 (Iowa Ct. App. 1988); *see also State v. Corsi*, 686 N.W.2d 215, 222 (Iowa 2004). However, if substantial evidence does not support each alternative theory, then the case has to be remanded for a new trial because we do not know whether the verdict rests on valid or invalid grounds. *See State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996) (ordering a new trial when the evidence was only sufficient to support one of three theories of culpability submitted to the jury).

To provide sufficient evidence that McGrean aided and abetted, the record has to show he "assented to or lent countenance and approval to the criminal act

by either actively participating or encouraging it prior to or at the time of its commission." *See State v. Hearn*, 797 N.W.2d 577, 580 (Iowa 2011). Neither mere knowledge of the crime nor presence at the scene is sufficient. *Id*.

The evidence in this case showed McGrean contacted his step-son, Jacob, to come get him so the two could retrieve Pam from her drunken binge at Powell's house. The two arrived at Powell's house only to find out Powell had given Pam a ride elsewhere. They soon discovered Pam was at her ex-husband's house, and a fight had broken out there. Jacob testified he became enraged and grabbed the crowbar out of his back seat. McGrean asked Jacob what he was doing. Jacob responded that he was going to smash out the windows on Powell's truck "right as [he] hit the windows." Jacob could not hear if McGrean said anything to him while he was hitting the truck.

The State asserts sufficient evidence supports the verdict because the jury could conclude based on the testimony that McGrean and Jacob were working together to find Pam and to express their anger toward Powell for helping Pam when she was drunk. Circumstantial evidence—such as presence, companionship, and conduct before and after the offense is committed—can support a finding of aiding and abetting. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994). However, in this case the evidence does nothing more than "create suspicion, speculation, or conjecture" as to McGrean's participation as an aider and abettor. *See State v. Johnson*, 534 N.W.2d 118, 123 (Iowa 1995). Because sufficient evidence does not support one of the two theories submitted to the jury in the criminal mischief marshaling instruction and we have no way of knowing

which theory the jury accepted, this case must be reversed and remanded for a new trial.[1]

REVERSED AND REMANDED.

Vaitheswaran, P.J., concurs; Tabor, J., dissents.

[1] Because we find in favor of McGrean on the aiding and abetting issue and have ordered a new trial, we need not address McGrean's other claims, specifically that sufficient evidence does not support a finding of specific intent, and that his counsel was ineffective in (1) failing to request a jury instruction on specific intent, (2) failing to object to a factual error in the jury instruction, and (3) failing to object to prosecutorial misconduct.

TABOR, J. (dissenting)

I respectfully dissent. The majority finds sufficient evidence Timothy McGrean acted as the principal in committing criminal mischief but finds insufficient evidence he aided and abetted his stepson in the crime. Based on *Hogrefe*, 557 N.W.2d at 881, the majority remands for a new trial.

Initially, I disagree the record lacks substantial evidence to convict McGrean as an aider and abettor to the crime. The jurors did not have to choose exclusively between the testimony of eyewitness Charlotte Howard, who saw McGrean striking the truck with a baseball bat, and the testimony of Jacob Schmitz, who took sole blame for the damage. *See State v. Metcalf*, 260 N.W.2d 857, 860 (Iowa 1977) (noting a jury may "believe part of a witness' testimony and disbelieve another part"). McGrean and Schmitz were together by the truck. Schmitz admitted they shared a motive for the crime. The jury could have believed that McGrean aided and abetted Schmitz by actively participating in causing damage to the truck. *See State v. Phams*, 342 N.W.2d 792, 796 (Iowa 1983) (defining aiding and abetting as assenting to a criminal act either by active participation or in some manner encouraging it). "Juries are often called upon to reconcile conflicting evidence and judge the credibility of witnesses." *State v. Salkil*, 441 N.W.2d 386, 387 (Iowa Ct. App. 1989) (finding sufficient evidence when an accomplice testified the defendant did not know he was going to burglarize the car and the police testified the defendant was acting as a lookout).

But even if the State failed to offer substantial evidence to support its aiding and abetting theory, I do not believe *Hogrefe* dictates that we remand for a

new trial. In *Hogrefe*, the defendant challenged the jury instructions in his prosecution for theft by deception. 557 N.W.2d at 875. Hogrefe argued that, as a matter of law, he could not be convicted under the three alternative scenarios described in the theft marshaling instruction. *Id*. The Iowa Supreme Court held two of the three theories of culpability were not viable under the language of Iowa Code section 714.1(3), defining theft by deception. *Id*. at 881 (deciding post-dated checks could not be evidence of deception). The supreme court concluded the district court erred in giving the marshalling instruction and reversed and remanded for a new trial. *Id.* ("With a general verdict of guilty, we have no way of determining which theory the jury accepted.").

In *State v. Martens*, the Iowa Supreme Court recognized a general verdict in a case involving legal error, like *Hoegrefe*, required reversal and remand. 569 N.W.2d 482, 485 (Iowa 1997). The *Martens* court explained: "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." *Id*. Like *Hoegrefe*, *Martens* involved a legal challenge to the jury's instructions. *Id*. at 484 (claiming counsel was ineffective for not insisting the court instruct the jury that pubic hair was not part of genitalia for purposes of the sex act definition). The *Martens* court distinguished situations involving legal error from *Griffin v. United States*, 502 U.S. 46, 49 (1991), which "involved a question of insufficiency of the evidence." *Id*. at 485.

In *Griffin*, the United States Supreme Court held a general verdict does not need to be set aside merely "because one of the possible bases of conviction

was . . . unsupported by sufficient evidence." 502 U.S. at 56. *Griffin* differentiated between a flawed legal theory and a factually unsupported theory. If jurors are given the option of convicting on legally inadequate grounds, "there is no reason to think that their own intelligence and expertise will save them from that error." *Id.* at 59. But where jurors are given a choice between a factually supported and factually unsupported theory, we can assume they have chosen the one with factual support, "since jurors *are* well equipped to analyze the evidence." *Id*.

Griffin rebuffed the "semantical" argument that the distinction between "legal error" and "insufficiency of proof" is "illusory, since judgments that are not supported by the requisite minimum of proof are invalid as a *matter of law*—and indeed, in the criminal law field at least, are *constitutionally required* to be set aside." *Id*. at 58–59. Justice Scalia explained:

> In one sense "legal error" includes inadequacy of evidence—namely, when the phrase is used as a term of art to designate those mistakes that it is the business of judges (in jury cases) and of appellate courts to identify and correct. In this sense "legal error" occurs when a jury, properly instructed as to the law, convicts on the basis of evidence that no reasonable person could regard as sufficient. But in another sense—a more natural and less artful sense—the term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence. The answer to petitioner's objection is simply that we are using "legal error" in the latter sense.

Id. at 59; *see State v. Heemstra,* 759 N.W.2d 151, 152–53 (Iowa Ct. App. 2008) (discussing the difference between a legally erroneous instruction and insufficient evidence).

Martens is the only published case in Iowa citing *Griffin*. The Iowa Supreme Court has not announced its intent to depart, on state law grounds, from the logical distinction between legal error and factual insufficiency expressed in *Griffin*. Moreover, our court has followed *Griffin* in an unpublished case. *See State v. Horlas*, No. 01-1764, 2002 WL 31757451, at *2 (Iowa Ct. App. Dec. 11, 2002) ("If the evidence is sufficient to prove guilt under any one of the theories instructed, the jurors are presumed to have relied on that theory.").

In addition, long before *Griffin*, Iowa followed the rule that "a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *See Griffin*, 502 U.S. at 49-51 (citing *State v. Shelledy*, 8 Iowa 477, 511 (1859) and *State v. Bresee*, 114 N.W. 45, 48 (Iowa 1907)).

McGrean does not allege a "legal error" as *Griffin* defined that term. Instead he claims inadequate facts to prove aiding and abetting. Because we have no direction from the Iowa Supreme Court to depart from *Griffin*, I believe we must follow the United States Supreme Court's holding, and our own long-standing rule, and assume the jury knew the difference between the factually supported theory and the factually unsupported theory.[2]

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[2] State courts are, of course, free to decide questions under their own constitutions. Indeed, a few state courts have declined to follow *Griffin* on state law grounds. *See, e.g.*, *State v. Jones*, 29 P.3d 351, 371 (Haw. 2001); *Commonwealth v. Plunkett*, 664 N.E.2d 833, 837 (Mass. 1996); *State v. Ortega–Martinez*, 881 P.2d 231, 235 (Wash. 1994). But most jurisdictions that have passed on the general verdict question since 1991 have applied the *Griffin* rule. *See, e.g.*, *People v. Guiton*, 847 P.2d 45, 51 (Cal. 1993); *Atwater v. State*, 626 So. 2d 1325, 1327–28 n.1 (Fla. 1993), *cert. denied*, 511

U.S. 1046 (1994); *State v. Enyeart*, 849 P.2d 125, 129 (Idaho Ct. App. 1993); *State v. Grissom*, 840 P.2d 1142, 1171 (Kan. 1992); *State v. Olguin*, 906 P.2d 731, 732 (N.M. 1995).