IN THE COURT OF APPEALS OF IOWA

No. 3-957 / 12-0857
Filed December 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY TOBIAS COBBINS JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Marion County, John D. Lloyd, Judge.

A defendant appeals his conviction for murder in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger and Andrew B. Prosser, Assistant Attorney General and Ed Bull, County Attorney, for appellee.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

TABOR, J.

After being convicted as the hit man in an alleged murder-for-hire scheme, Terry Cobbins seeks to overturn the jury's verdict based on insufficient evidence. He generally claims he did not commit the murder and specifically asserts a lack of corroboration for the testimony of would-be accomplice Bernard Bussey. Cobbins alternatively asks for a new trial based on ineffective assistance of counsel and improper impeachment.

Reviewing the evidence in the light most favorable to the State, we find ample proof that Cobbins murdered Teresa Miller, including facts independent of Bussey's testimony. Because the record contains strong corroboration, we reject Cobbins's ineffective-assistance claims concerning accomplice testimony. We also find any error in the district court's admission of Cobbins's prior conviction for absence from custody to be harmless. We reserve Cobbins's claim that counsel breached an essential duty by allowing the jury to learn of his prior theft offenses for a postconviction relief action.

I. Background Facts and Proceedings

Terry Cobbins worked at Marzetti's Frozen Pasta in Clive. His boss was Mike Miller, the production supervisor. Miller lived in Knoxville with his wife, Teresa.

Miller also supervised Neida Pinon. Miller told Pinon he was unmarried and the two began having an affair about three months after Pinon started at Marzetti's in October 2009. Miller would often go to Pinon's home in Waukee in the mornings between 5:30 and 6:00. Miller bought her many gifts including a

diamond and pearl ring. But when Pinon found out Miller was married, she ended the relationship. The affair rekindled when Miller showed Pinon some divorce papers, but faltered again when Pinon saw Miller with his wife, Teresa. Pinon told Miller he would have to choose between her and Teresa. Pinon left to spend Christmas vacation of 2010 in Mexico, and told Miller to take that time to think it over. When Pinon returned ten days later, Miller picked her up in Kansas City and drove her home to Waukee. Pinon told him if he left that night, their relationship was over. Miller left.

According to Cobbins, it was about that same time, around Christmas of 2010, when Miller started dropping by his house unexpectedly. Miller knew where Cobbins lived because Miller sometimes gave him a ride home from work. Cobbins described Miller as "on edge" and recalled that Miller asked him to find a gun. Cobbins also said Miller requested that Cobbins "take care for some business for him."

Cobbins told his neighbor, Tyree Lewis, that he and his boss were "pretty cool" or "tight." Cobbins also told Lewis the boss wanted his wife killed. Cobbins asked if Lewis would be willing to drive Cobbins to do the job and Cobbins would "do everything else." Cobbins asked Lewis if he could get a gun. He told Lewis the job would be lucrative: they would split $30,000 or Lewis would get $30,000. Cobbins broached the subject with Lewis several times, most recently during December of 2010.

Cobbins also talked about his boss with Amber Lyons, his wife's cousin. In the fall of 2010, Cobbins told her he was being paid $50,000 to "do a hit on

some female" in Knoxville. Cobbins told Lyons he was going to wear a trash bag over his clothes so he could "get away with it." One time when Lyons was babysitting for Terry and Monica Cobbins, she saw Miller stop by and duck into Monica's car. When Lyons told Cobbins, he said: "Don't worry about it, it's my boss, he's putting something in the car for me." Cobbins later told investigators Miller left him coveralls and gloves in a bag.

Cobbins twice discussed killing his boss's wife with his friend, Mario McPherson. On the first occasion in the fall of 2010, Cobbins told McPherson he had a way to make some quick money and all McPherson had to do was drive. A few weeks later, he told McPherson he needed to hurt his boss's wife in Knoxville and he would pay McPherson $1000 or $2000 to drive him to Knoxville and back. McPherson also overheard Cobbins on the phone asking where he could get a gun.

On the morning of January 7, 2011, Miller picked up Bernard Bussey, a former employee at Marzetti's, and drove to Pinon's home. Pinon was not expecting Miller. Miller told Bussey to take his car, ostensibly so Bussey could look for a temporary job. Miller knocked on Pinon's door around 6:30 a.m. to ask for a ride to work. Pinon agreed to give him a ride, but they were delayed in leaving because Miller locked Pinon's keys in her car and had to wait for a locksmith to open it.

When Miller and Bussey met later at Marzetti's, Miller told Bussey to use his car to pick up Cobbins from Iowa Lutheran Hospital, where he was recovering from an asthma attack. Cobbins suffered the attack the day before and was

admitted to the hospital overnight. Cobbins checked himself out of the hospital when Bussey arrived. The two left the hospital at 8:49 a.m.

Bussey testified he drove Cobbins to a "big old house" in Knoxville, following the directions given by Cobbins. According to Bussey, Cobbins went to the door of the house and was let in. Cobbins stayed inside for five to ten minutes and then returned to the car. Bussey then drove them back to Marzetti's—estimating their arrival at between 11 a.m. and noon.

Meanwhile, Teresa's adult daughter, Shawna Mendenhall, tried to reach her mother the morning of January 7, 2011, and found it unusual she did not answer the telephone. Teresa had severe vision problems and did not have a driver's license. Worried, Mendenhall went to the Millers' Knoxville home just after 10:30 a.m. and found the door uncharacteristically unlocked. Her mother was dead on the kitchen floor, shot once in the head.

An analysis of cell phone records confirmed Cobbins and Bussey arrived in the Knoxville area at the approximate time of Teresa's death. Signals from various cell towers indicated Cobbins's phone was moving from Des Moines to Knoxville between 9:01 a.m. and 10:37 a.m. Then after 10:41 a.m., the cell phone moved back through Pleasantville and toward Des Moines. The cell records revealed a number of calls between Cobbins's cell phone and Miller's cell phone or the phone at Marzetti's.

When Bussey and Cobbins returned from Knoxville, Miller accompanied them to the airport and paid for a rental car for Cobbins. The manager at the Enterprise Rent-A-Car thought Miller and Cobbins seemed "quite antsy and

nervous throughout the transaction," which was completed just after noon. Cobbins drove the rented Chevy Suburban to Milwaukee, Wisconsin.

On January 8, 2011, the morning after the murder, Miller went to Pinon's house to express his love for her. Pinon told Miller about her son finding bullets in the parking spot where her car had been parked when Miller locked the keys inside the day before. Pinon had placed the bullets into a tequila glass on a kitchen shelf. Although Miller denied the bullets belonged to him, he put them in a bag and left with them.

On January 10, 2011, Cobbins started his trip back from Milwaukee, but after receiving a call from his son's mother that there was a warrant out for his arrest in Iowa, he turned around. He was taken into custody by the Wisconsin Division of Criminal Investigation as a material witness. The Wisconsin agents interviewed Cobbins on January 10 and 11. The Wisconsin agents knew Iowa law enforcement searched Cobbins's house and found a MapQuest printout with directions from Marzetti's in Clive to the Millers' house in Knoxville. The map had been printed out on December 8, 2010.

In the interviews Cobbins repeatedly denied going to Knoxville. Cobbins initially said he wasn't sure if Miller was married, but acknowledged "there may be somebody on the side." Cobbins eventually described a situation where Miller "wanted someone handled" in exchange for money. Cobbins said Miller asked him to do it or to find him a gun. Cobbins also admitted Miller brought coveralls to his house to be used in the murder. Cobbins said he carried his cell phone with him on January 7.

The Wisconsin agents, who made audio-recordings of the interviews, explained that at a couple of points, Cobbins became visibly shaken. Cobbins began sweating profusely when asked about turning around and heading back to Milwaukee after learning Iowa authorities issued a warrant for his arrest. He also uttered "no, no, no" in a low voice with his head in his hands when asked a question about Mike, coveralls, and large amounts of money.

Following the investigation, on March 25, 2011, the Marion County Attorney charged Cobbins with first-degree murder in the death of Teresa Miller. The case went to trial on February 21, 2012, and the jury returned a guilty verdict on March 1, 2012. The court sentenced Cobbins to life in prison. He now appeals.

II. Scope and Standards of Review

We review challenges to the sufficiency of the evidence for corrections of errors at law. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). We will "uphold a finding of guilt if 'substantial evidence' supports the verdict." *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). "'Substantial evidence' is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id*. We view all the evidence in the light most favorable to the verdict, including all reasonable inferences that could be fairly made by the jury. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

We review claims of ineffective assistance de novo. *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013). Although we often preserve ineffective-assistance claims for postconviction relief actions, "we will address such claims

on direct appeal when the record is sufficient to permit a ruling." *State v. Finney*, 834 N.W.2d 46, 49 (Iowa 2013).

We generally review evidentiary claims for an abuse of discretion. *State v. Harrington*, 800 N.W.2d 46, 48 (Iowa 2011). A court abuses its discretion when its admission of evidence is based upon erroneous application of the law or not supported by substantial evidence. *Id*.

III. Analysis

A. Motion for Judgment of Acquittal

On appeal, Cobbins attacks the State's evidence in two ways. First, he generally alleges he was not involved in the murder. Second, he claims the prosecution offered no independent corroboration of the accomplice testimony.

The State challenges error preservation on the second claim because the defense did not include that argument in its motion before the district court. *See State v. Westeen*, 591 N.W.2d 203, 206 (Iowa 1999) (noting this court's review is limited to the specific grounds argued in a motion for judgment of acquittal). Cobbins contends the claim may be considered under an ineffective-assistance-of-counsel rubric. *See State v. Barnes*, 791 N.W.2d 817, 824 (Iowa 2010). Finding the corroboration issue was not preserved, we will consider it below as a claim of ineffective assistance of counsel.

We now turn to Cobbins's general denial that he committed the murder as a principal or as an aider and abettor. Under Iowa Code sections 703.1, 707.1, and 707.2, the State had to prove beyond a reasonable doubt that:

> 1. On or about the 7th day of January, 2011, the defendant or someone he aided and abetted, without justification, shot Teresa Miller.
> 2. Teresa Miller died as a result of being shot.
> 3. The defendant acted with malice aforethought.
> 4. The defendant acted willfully, deliberately, and premeditatedly and with a specific intent to kill Teresa Miller.

On appeal, Cobbins highlights the evidence missing from the State's case: fingerprints, DNA, footwear impressions, or other physical evidence linking him to the murder scene. He also points out police never recovered the gun used to shoot Teresa. He argues he did not admit involvement in Teresa's death, only his "unknowing" presence outside the Millers' house near the time of her murder. The State contends we should uphold the jury's verdict based on the strength of the circumstantial case presented at trial.

Iowa courts "follow a rule that direct and circumstantial evidence are equally probative for the 'purposes of proving guilt beyond a reasonable doubt.'" *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). While jurors may not rely on evidence that creates no more than speculation, suspicion or conjecture, they may use all direct and circumstantial evidence and the inferences that flow from the proof presented. *Id*.

It is significant that Cobbins had a "tight" relationship with Miller, who was his boss, and knew Miller wanted his wife dead. Cobbins discussed killing Teresa with several people and shared details regarding the location of her home, the desired weapon, the proposed fees, and how to cover up to avoid detection. Cobbins repeatedly tried to recruit acquaintances to drive him to the victim's home and sought help finding a gun.

The jury also could have inferred from the evidence that Miller was working to come up with cash during the same time period Cobbins was quoting the promised payment for the murder. Miller borrowed $10,000 from co-worker Bill Chiles in October 2010, ostensibly to buy a classic car, but Miller never purchased the car nor repaid Chiles.

Miller behaved unusually the morning of the murder, lending his car to Bussey, showing up unannounced at his girlfriend's house where he delayed his arrival to work by locking her keys in her car, and perhaps dropping bullets in the parking space when he was trying to open the car. Miller also directed Bussey to pick up Cobbins from the hospital, where Cobbins abruptly checked himself out.

The evidence undeniably placed Cobbins in Knoxville at the time of the murder. Bussey testified he drove Cobbins to a house in Knoxville in Miller's car by following Cobbins's directions. Police found a MapQuest printout with directions to Miller's house when searching Cobbins's residence. Bussey recalled Cobbins went inside for enough time to commit the shooting. Cell tower records verified the timing of their trip. Moreover, the jury could reasonably have interpreted the cell phone evidence as establishing Cobbins was in contact with Miller while en route to kill his wife. When Cobbins and Bussey returned from Knoxville, Miller paid for a rental car for Cobbins to leave the state. The rental agent noticed their agitated state.

Cobbins gave several inconsistent statements to law enforcement first in Wisconsin and then in Iowa. He told the Wisconsin DCI that he had not gone to Knoxville, but changed his version at trial. He originally said he did not know if

Miller was married, then told the agents Miller had a wife and "someone on the side." Cobbins also denied Miller asked him to do something in exchange for a large sum of money, only to later admit Miller asked him to "handle" someone in exchange for money, or to find him a gun. "Inconsistent statements are probative circumstantial evidence from which the jury may infer guilt." *State v. Turner*, 630 N.W.2d 601, 609 (Iowa 2001); *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982).

The absence of physical evidence connecting Cobbins to the shooting does not defeat the jury's verdict. A wealth of circumstantial evidence links Cobbins to the murder plot. *State v. Boley*, 456 N.W.2d 674, 679 (Iowa 1990) (noting circumstantial and direct evidence are equally probative and either is sufficient to support a conviction). The jury's verdict is supported by substantial evidence.

B. Ineffective Assistance Of Counsel

To succeed on his ineffective-assistance-of-counsel claims, Cobbins must show his attorneys breached a duty and prejudice resulted. *See Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012); *see also Strickland v. Washington*, 466 U.S. 688, 687 (1984). Cobbins "must prove both elements by a preponderance of the evidence." *See State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). To establish his counsel breached a duty, Cobbins must show their performance fell below the standard of reasonably competent attorneys. *See Strickland*, 466 U.S. at 687.

Generally, we do not resolve ineffective-assistance issues on direct appeal, preferring to leave them for possible postconviction relief proceedings.

State v. Biddle, 652 N.W.2d 191, 203 (Iowa 2002). Those proceedings allow the parties to develop an adequate record and the attorneys accused of error to respond to the defendant's claims. *Id*. But we will decide ineffective-assistance claims on direct appeal when the record is sufficient to resolve them. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

Cobbins argues his trial attorneys were ineffective in three ways. First, they failed to allege the lack of corroboration for the accomplice testimony when moving for judgment of acquittal. Second, they failed to request a jury instruction requiring corroboration of accomplice testimony. Third, they failed to object to the impeachment of Cobbins by his prior theft convictions. We will address each claim in turn.

1. Substantial evidence to corroborate Bussey's testimony

The State cannot obtain a conviction solely on the testimony of an accomplice. Iowa R. Crim. P. 2.21(3). Cobbins contends his counsel should have challenged the sufficiency of the evidence to corroborate Bussey's testimony. Bussey testified he drove Cobbins to the Millers' home in Knoxville. The record does not show that the State charged Bussey with any crime or that Bussey had the knowledge or intent necessary to charge him with any crime. But we will assume without deciding that Bussey and Cobbins were accomplices. *See State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004) (stating an accomplice is a person who could be charged with and convicted of the specific offense for which an accused is on trial).

The only question then is whether the State offered sufficient independent evidence to corroborate Bussey's testimony. *See Barnes*, 791 N.W.2d at 824. If the State presented sufficient evidence independent of the accomplice testimony, counsel's failure to challenge the corroboration could not be prejudicial. *See State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Our cases do not require corroborative evidence to be strong as long as it connects the accused to the crime and backs the accomplice's credibility. *See Barnes*, 791 N.W.2d at 824; *see also State v. Bugley*, 562 N.W.2d 173, 176 (Iowa 1997) (explaining corroborative evidence may be direct or circumstantial).

We find abundant evidence in the record to corroborate Bussey's testimony. Tyree Lewis, Amber Lyons, and Mario McPherson all testified Cobbins discussed a plan to kill his boss's wife for money. Cobbins tried to recruit Lewis and McPherson to drive him to Knoxville to commit the murder. Those witnesses also were aware Cobbins was trying to locate a gun. The analysis of cell phone records showing Cobbins's movements the morning of the murder and his connection with Miller likewise link Cobbins to the crime and support Bussey's truthfulness. No reasonable probability exists that the outcome of the prosecution would have been different had counsel moved for judgment of acquittal on this basis.

2. Jury instruction on corroboration

As discussed previously, the record contains sufficient independent evidence to corroborate Bussey's testimony. Accordingly, it is not reasonably

probable that the outcome of the trial would have been different if counsel had requested a jury instruction on this issue. *See Barnes*, 791 N.W.2d at 824.

3. Impeachment by prior theft convictions

Outside the presence of the jury, the district court heard argument from the prosecutor and defense attorneys concerning which, if any, of Cobbins's prior convictions were admissible to impeach him if he chose to testify. Cobbins claims his attorneys were ineffective for conceding his prior theft convictions could be used for impeachment purposes under Iowa Rule of Evidence 5.609(a)(2).

That rule states:

> For the purpose of attacking the credibility of a witness:
>
> . . . .
>
> (2) Evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Iowa R. Evid. 5.609(a)(2). "On its face, the rule's language leaves the district court no discretion" but to admit impeachment by prior conviction for crimes involving dishonesty or false statement. *Harrington*, 800 N.W.2d 46 at 50.

Cobbins proposes that not all theft convictions in Iowa are crimes involving "dishonesty or false statement." When conceding that point at trial, defense counsel undoubtedly believed it was "settled law in this state that convictions for theft . . . are crimes of dishonesty." *Id*. at 51–52. But *Harrington* anticipated a possible challenge to Iowa's longstanding view of crimes involving dishonesty based on the legislative history associated with the federal analog to Rule 5.609. *Id*. at 51 n.4.

We are asked to decide if Cobbins's counsel breached a material duty by not raising the issue footnoted in *Harrington*. When an area of law is unsettled, we don't require counsel to be a "'crystal gazer' who can predict future changes in established rules of law in order to provide effective assistance to a criminal defendant." *Westeen*, 591 N.W.2d at 210. We require counsel to use due diligence in deciding whether an issue is "worth raising." *Millam v. State*, 745 N.W.2d 719, 723 (Iowa 2008). Factors to consider in determining whether counsel's failure to raise an issue constituted a breach of duty include: (1) whether Iowa case law would have foreclosed the argument and (2) whether case law from other jurisdictions supported the defendant's position. *See State v. Schoelerman*, 315 N.W.2d 67, 72 (Iowa 1982).

Two camps exist on the question whether theft is a crime of dishonesty. One camp believes not all theft crimes involve dishonesty or false statement. *See, e.g.*, *United States v. Sellers*, 906 F.2d 597, 603 (11th Cir. 1990) (holding crimes such as theft, robbery, or shoplifting do not involve 'dishonesty or false statement' within the meaning of Rule 609(a)(2)); *United States v. Yeo*, 739 F.2d 385, 387 (8th Cir. 1984) (reasoning "[t]heft, which involves stealth and demonstrates a lack of respect for the persons or property of others, is not 'characterized by an element of deceit or deliberate interference with a court's ascertainment of truth.'" (quoting *United States v. Smith*, 551 F.2d 348, 363 (D.C. Cir. 1976)); *United States v. Entrekin*, 624 F.2d 597, 598–99 (5th Cir. 1980) (ruling shoplifting does not involve dishonesty or false statement); *see also State v. Broadnax*, 736 S.E.2d 688, 692 (S.C. Ct. App. 2013) (holding that stealing is

not always a crime of dishonesty without additional affirmative false statements or acts of deceit beyond the crime itself).

The other camp generally clings to common law predating the codification of the Iowa Rules of Evidence in 1983 and maintains prior theft convictions are admissible for impeachment purposes as proof of a crime involving dishonesty or false statement. *See, e.g., State v. Page*, 449 So. 2d 813, 815 (Fla. 1984); *People v. Spates*, 395 N.E.2d 563, 568 (Ill. 1979); *State v. Johnson*, 16, 460 N.E.2d 625, 629 (Ohio Ct. App. 1983) (describing stealing as dishonest act); *Cline v. State*, 782 P.2d 399, 400 (Okla. Crim. App. 1989) (noting deceit, fraud, cheating, and stealing are "universally regarded as conduct which reflects adversely on a man's honesty and integrity").

Given the split in authority and *Harrington's* open invitation to parties to argue this issue, we believe reasonable defense attorneys would have considered the issue "worth raising" for some prior theft convictions. Counsel would have no duty to raise the issue if Cobbins's prior convictions were for the kind of theft that involves dishonesty or false statement. *See, e.g.,* Iowa Code § 714.1(3) (defining theft by deception). Our record does not show what kind of theft Cobbins committed. Accordingly, we find it necessary to preserve this issue for postconviction relief proceedings to determine if counsel breached a material duty and whether that breach resulted in prejudice to Cobbins's case.

C. Admissibility of Absence-From-Custody Conviction

As discussed above regarding Cobbins's theft offenses, the district court conferred with the parties before Cobbins took the witness stand to determine

whether his prior convictions were admissible under Rule 5.609(a)(2). Cobbins pleaded guilty in 2008 to being absent from custody in violation of Iowa Code section 719.4(3) (2007). The prosecutor argued at trial that the absence-from-custody offense involved dishonesty as Cobbins promised to return to a community-based correctional facility and faced "liabilities" if he didn't. Defense counsel contended absence from custody was not a crime of dishonesty.

The district court ruled:

> Absence from custody involving the Fort Des Moines facility I believe does [come in]. To be out of the Fort Des Moines facility, you have to tell them where you're going and tell them when you'll be back and promise to come back, and I think that does go to honesty, and I am going to allow impeachment on the absence from custody charge.

On direct examination, defense counsel asked Cobbins if he had a conviction for absence from custody in the last five years, and Cobbins responded, "Yes, sir." When a defendant testifies and affirmatively discloses his prior convictions on direct examination, he does not waive the chance to appeal the court's ruling on admissibility. *State v. Derby*, 800 N.W.2d 52, 57–58 (Iowa 2011).

In his appellant's brief, Cobbins argues under *State v. Gavin*, 328 N.W.2d 501, 503 (Iowa 1983), that his prior conviction for absence from custody was not a crime of dishonesty. *Gavin* involved the admissibility of a prior conviction for felonious escape, but addressed misdemeanor violations of the statute as well: "While dishonesty in the form of deception or ruse might actually be present in some escape cases, this is not an element expressly or impliedly required by any of the various forms of escape under Iowa Code section 719.4." *Gavin*, 328 N.W.2d at 503.

In its appellee's brief, the State "assum[es], without conceding" that impeachment based on the absence-from-custody offense was improper. The State focuses its argument on harmless error. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Iowa R. Evid. 5.103(a); *see also State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008) (holding "error in an evidentiary ruling that is harmless may not be a basis for relief on appeal").

Like Cobbins, we read *Gavin* as precluding admission of any conviction under section 719.4 as a crime involving dishonest under Rule 5.609(a)(2). But like the State, we do not see the district court's error as affecting Cobbins's substantial rights on this record.

Because we are dealing with a claim of non-constitutional error, we ask the follow question: "Does it sufficiently appear that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?" *State v. Trudo*, 253 N.W.2d 101, 107 (Iowa 1977). We presume prejudice from error seeping into the trial unless the State affirmatively establishes the contrary. *See Parker,* 747 N.W.2d at 209. The risk of prejudicial impact from wrongful impeachment is higher when the prior convictions are for crimes similar to the crime for which the defendant is on trial. *Id*. at 210.

Here, the absence-from-custody offense had little similarity to the murder charge. Accordingly, the jury would not be inclined to misuse the conviction as substantive evidence suggesting if he did it once, he would do it again. *See Harrington*, 800 N.W.2d at 50 (noting accused faces most acute prejudicial risk if

impeached with a similar prior conviction). We also look to the strength of the properly admitted evidence. *See State v. Holland,* 485 N.W.2d 652, 656 (Iowa 1992) (holding defendant could not show prejudice due to admission of evidence suggesting he had previously been convicted of a crime "because of the overwhelming evidence, albeit much of it circumstantial, connecting [the defendant] with the charged crimes"). Here, the State's proof pointed plainly at Cobbins as the person who shot Teresa. Admission of the prior conviction was harmless.

AFFIRMED.