IN THE COURT OF APPEALS OF IOWA

No. 7-095 / 05-1339
Filed June 27, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DEMETRAUS LAVELLE DAVIS, a/k/a DEMETRIUS DAVIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Demetrius Davis appeals his conviction, following jury trial, for robbery in the first degree. **AFFIRMED.**

Clemens Erdahl of Nidey, Peterson, Erdahl & Tindal, P.L.C., Cedar Rapids, and Laura J. Lemos, Amana, for appellant.

Thomas J. Miller, Attorney General, and Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

Demetrius[1] Davis appeals his conviction, following jury trial, for robbery in the first degree. He contends the trial court erred in (1) finding the guilty verdict was not contrary to the weight of the evidence, (2) allowing the in-court identification of Davis by the victim, (3) not granting Davis's motion to exclude certain witnesses' testimony based on inconsistencies in their prior statements and testimony, and (4) not giving a spoliation jury instruction. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. On the evening of December 11, 2003, several relatives and acquaintances were at the apartment of Kenneth and Anikia Coleman at 432 1/2 Western Avenue in Waterloo. They were: Anikia's daughter Kanisha Coleman; her nieces, Asha and Jaquita Hampton; her stepson, Marco Johnson; and the defendant, Davis, a cousin to Asha, Jaquita, and Marco. While there, they all began discussing ordering a pizza. According to Asha's testimony, Davis started talking about how he and his friends used to rob pizza men and stated he wanted to rob the pizza man that night. He later stated he was just joking about it so Asha called and ordered two pizzas. However, she gave a false name and address because she figured Davis was not joking. The person who took the pizza order testified the caller sounded like a black female and he could hear what sounded like the voices of two black males in the background. The name given for the order was "Kohls" and the address was 430 Western Avenue.

[1] In the district court record Davis's first name is spelled "Demetraus." However, it appears from his brief the correct spelling is "Demetrius" and thus we will use that spelling in this opinion.

Kenneth and Anikia arrived home a few minutes later. Anikia stayed at their home while Kenneth drove Asha to pick up her boyfriend. As Asha was leaving, she saw Davis and Marco outside the apartment building, standing near Davis's car. Jaquita testified that she looked out the window after Asha left and saw Davis and Marco in Davis's car listening to music. Both Jaquita and Asha testified Davis was wearing Asha's coat at that time.

Daniel Place was delivering pizza for Papa John's Pizza and delivered two pizzas to 430 Western Avenue on the night in question. Upon arrival at the address he put his cash between the seat and the console of the car, as was his habit when he delivered to a dark area. When no one answered the door at 430 Western he realized the apartment was empty and went back to his car to call Papa John's to make sure he had the right address. Place testified at trial that as he approached his car he heard footsteps and saw two men approaching, one a little shorter and one a little taller than he. Marco is shorter than Davis. He asked if they were there for the pizzas and the shorter one replied, "We're here to rob you," and the taller one said, "Don't run." Place stated he tried to get into his car and the shorter one blocked the door and hit him three times with his fists on the right side of his head. The shorter one yelled at the taller one to "Get the money, get the money." Place testified the taller one then started grabbing at and into his pockets while the shorter one continued hitting him in the head from the left. After the taller one stated he could not find anything in Place's pockets, the shorter one hit Place in the face, breaking his orbital bone and sending him to the ground in pain. Placed stated that as he lay on the ground he heard a female

scream from the direction of the apartment house, "What the hell did you guys do?" Place suffered serious facial injuries due to the beating.

Jaquita testified that she saw the pizza delivery man drive up, walk to the apartment house, and then turn around and walk back to his car. About the time he got back to his car she saw Marco and Davis walk up to him, exchange a few words, and start hitting him. The pizza guy was trying to block the hits with his hands and trying to keep them from going into his pockets. Jaquita stated she then called her Aunt Anikia to the window but Davis and Marco had already left and the pizza man was lying on the ground. Anikia and Jaquita went outside to help the pizza man and he had blood all over his face.

Jaquita further testified that later that evening when she arrived home she found Marco and Davis at her house in the kitchen with the lights off. She stated that she told them to go because she was mad at them, so Marco left but Davis stated he did not want to leave because he was afraid the police might be outside and he kept looking out the windows. Jaquita's mother, Cynthia Morgan, was at home when Marco and Davis arrived there. She testified Marco was out of breath and, "Just looked stupid to me, like he did something stupid." Cynthia talked to Jaquita and then told Marco to leave and drove Davis to his girlfriend's house after yelling at him for robbing the pizza man.

On or around January 15, 2004, the lead investigator on the case, Waterloo police detective Lynn Moller, put together a photo line-up with six photographs for Place to see if he could identify his assailants. Photograph number five depicted Marco, and allegedly unbeknownst to Moller photo number

one was Davis. There is conflicting testimony in the record as to what Moller actually told Place or how long it took Place to make his identification, but he eventually pointed to photograph number one as the "one who looked most similar to" one of the robbers. The next day Moller went to Kenneth and Anikia's apartment and talked to them and Marco about the events on the night in question. He explained to them that anyone who knew what happened and was not talking was going to be in "trouble." Asha and Jaquita were also there and overheard the conversation.

Approximately an hour after Moller returned to his office he received a call from Cynthia and agreed to talk to her, Jaquita, and Asha at her home because the girls were ready to cooperate and tell the truth. Moller testified that during the ensuing conversation at Cynthia's home they told Moller that Demetrius's last name was Davis, as Moller had heard only his first name up to that point.

On January 23, 2004, Davis voluntarily went into the police station to give a statement. At that time he admitted to Detective Moller that he had a conversation with the others present in the Coleman apartment on the night in question about how he and his college friends used to rob pizza guys. During the interview Davis also admitted to Moller that he was behind Marco when the pizza man was walking back to his car. Marco then walked up to the pizza man and hit him. The pizza man fell and was bleeding but Marco continued to hit him so Davis ran away. He also stated that Marco ended up with the pizza, hiding it under a car, and "they ate the pizza that night."

On February 5, 2004, the State charged Davis, by trial information, with robbery in the second degree. In July 2004, the information was amended to charge robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2 (2003). Trial on the matter resulted in a hung jury and a mistrial was granted. Davis was retried in March 2005. Prior to Davis's first trial Marco pled guilty to second-degree robbery. During both trials Place made an in-court identification of Davis as one of the robbers. The jury in the second trial found Davis guilty as charged.

Davis filed a motion for new trial and in arrest of judgment on April 6, 2005, arguing: the verdict was contrary to the evidence; the court erred in failing to give a spoliation jury instruction; the court failed to exclude perjured testimony offered by the State; the court erred in allowing Place to make an in-court identification when that was not included in the trial information and/or minutes of testimony; and the State was allowed to argue in closing arguments that Place never failed to identify Davis's photograph as being one of the robbers. A hearing was held on Davis's motions. After discussing and considering the testimony of witnesses, the court overruled the motions. The trial court noted, in part, that Davis admitted he was present at the location of the robbery and the admission was consistent with the victim's and other witnesses' testimony. The court sentenced Davis to a term of imprisonment of no more than twenty-five years.

Davis appeals his conviction, contending the court erred in (1) finding the guilty verdict was not contrary to the weight of the evidence, (2) allowing the in-

court identification of Davis by the victim, (3) not granting his motion to exclude certain witnesses' testimony based on inconsistencies in their prior statements and testimony, and (4) not giving a spoliation jury instruction.

II. MERITS.

A. Motion for New Trial.

Davis first claims the court erred in overruling his motion for new trial. More specifically, he argues that because of inconsistencies in the testimony of State's witnesses the verdict was contrary to the weight of the evidence. Our scope of review for denial of a motion for new trial is for abuse of discretion. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997). When a defendant argues the trial court erred in denying a motion for new trial based on the claim that the verdict is contrary to the weight of the evidence our review is limited to a review of the exercise of discretion by the trial court. *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). "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.'" *State v. Ellis,* 578 N.W.2d 655, 658 (Iowa 1998) (citation omitted). Trial courts should use their discretion to grant a new trial with caution and only in exceptional cases. *Id*. at 659.

In ruling on the motion for new trial the trial court acknowledged the inconsistencies in some of the witnesses' testimony, and found them explainable by the familial relationships the witnesses had with Davis and their attempts at times to avoid implicating him in the robbery. The court also, however, found the

testimony implicating Davis to be consistent with undisputed facts and to be fully credible. It concluded, in part:

> With regard to the witnesses in this case . . . what was really apparent in this case is that your [Davis's] relatives and friends did their very best to try and avoid implicating you in this case. But eventually at least some portion of the truth did come out through these witnesses. And I'll grant you that they did their very darndest to help you out and gave conflicting testimony and gave earlier statements denying all knowledge . . . so the record's replete with those inconsistencies and however they want to testify at any given time. . . . But there were at least a couple that gave a basic kernel of the truth as to what occurred that night. And there was substantial cross-examination of these witnesses and there were a lot of inconsistencies. And those are all matters for the jury to weigh and consider in reaching their decision in this case. And so I believe the evidence is more than sufficient to warrant a conviction in this case. All the evidence indicates that there were two people involved, and the Court is going to overrule the defendant's motions on each of the grounds asserted.

We fully agree with the trial court's findings and conclusions on this issue. It is clear that several of the witnesses' statements and testimony did vary over time. As the trial court found, however, this appears to have been largely attributable to their familial relationships to Davis and the jury was made aware of those relationships. Nevertheless, the record fully supports the court's conclusion that the inconsistencies are insufficient to require a conclusion that the evidence preponderates heavily against the verdict. We conclude the court did not abuse its considerable discretion in denying Davis's motion for new trial based on the inconsistencies in some of the State's witnesses' statements and testimony.

Davis also contends the evidence weighs strongly against concluding he intended to or purposely did inflict serious injury on Place, but instead shows

Marco was the primary aggressor. However, the jury was correctly instructed it could find Davis guilty as an aider and abettor if it determined Davis "knowingly approve[d] and agree[d] to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed," and either had the required specific intent or knew that the others who directly committed the crime had the required specific intent.

Davis admitted to Detective Moller that he participated in the discussion regarding robbing the pizza man; he was there when Asha called for the pizza and gave a false name and address; he was outside with Marco when Place arrived and was behind Marco when Marco approached Place; and he saw Marco repeatedly hit Place to the point Place was on the ground and bleeding. Asha's, Jaquita's, and Place's testimony all corroborate portions of Davis's admissions. In addition, Place testified he was sure two men attacked him, and that the taller of the two told him not to run and searched his pockets for money. Davis is taller than Marco.

Based on the evidence set forth above, we conclude there is more than enough evidence for the jury to conclude that at a minimum Davis knowingly advised and encouraged the robbery and was aware of Marco's specific intent to steal from Place. Accordingly, the evidence does not preponderate heavily against the jury convicting Davis on an aiding and abetting theory, even if he was not the primary aggressor or did not actually strike Place.

Davis also appears to raise some additional arguments relating to the trial court's denial of his motion for new trial, which we will briefly address. First, he asserts there was little or no evidence in support of the use of a weapon. This assertion is irrelevant to any issue that was presented at trial. The State did not prosecute the case under the "dangerous weapon" theory of first-degree robbery, but under the "serious injury" theory. *See* Iowa Code § 711.2 (providing person commits robbery in the first degree if the person purposely inflicts or attempts to inflict serious injury, *or* is armed with a dangerous weapon). Here, the marshalling instruction mentioned only the "serious injury" alternative.

Second, Davis argues the trial court breached its promise to read the transcripts from Davis's first trial in considering his motion for new trial. This claim is not supported by the record and is in fact contradicted by it. The trial court actually stated it would "review the case and review the deposition," and that statement was made at the conclusion of a hearing on a motion in limine, related to ruling on the motion in limine, and had nothing to do with the motion for new trial.

Finally, Davis contends the trial court improperly "cut off" consideration of his motion for new trial. We disagree. The court heard post-trial motions on July 15, 2005, at a time at which sentencing was apparently also scheduled, contingent on the court's rulings on any motions. After ruling on the motions the court stated it had "run out of time and I'm going to continue sentencing . . . ." At the continued sentencing hearing, about three weeks later, Davis was given an

opportunity to expand the record but chose not to do so. Davis's claim the court "cut off" consideration of his motion for new trial is entirely without merit.

B. Motion to Exclude Testimony.

Prior to trial Davis filed a motion in limine seeking exclusion of the testimony of Jaquita and any testimony by other witnesses regarding statements made by Jaquita. After reviewing Jaquita's deposition and stating its understanding that her testimony in the first trial contained "stark inconsistencies," the trial court denied the motion and allowed her testimony. The court concluded

> Certainly the reasonable review of this shows that [Jaquita] is reluctant to testify concerning family members, and apparently most of the family members don't want to testify about what happened. . . . [I]f there is some inconsistencies, she has corrected those in her later testimony, at least both in her deposition and also, I assume, in her trial testimony, although I have not reviewed that.

In Davis's motion for new trial he also claimed his right to fair trial was denied because the court failed to exclude "perjured testimony." On appeal he contends the court erred by "failing to grant [Davis's] motion to exclude testimony from witnesses who perjured themselves in the first trial and who continued to give incoherent perjured testimony in the second trial."

We review this challenge to the admission of evidence for an abuse of discretion and will reverse only if the court's discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999); *State v. Query*, 594 N.W.2d 438, 443 (Iowa Ct. App. 1999).

As noted above, there were a substantial number of inconsistencies in the statements and testimony given in this case. Davis specifically challenges the court's failure to exclude Jaquita's testimony, and the testimony of any other witness concerning what she had said, based on inconsistencies between her statements to the police, her testimony in her deposition, and her testimony at the first trial. It is true that Jaquita gave differing versions of what precisely happened on the night in question, particularly as to what she did or did not remember and the extent of Davis's involvement in the crime. For example, shortly after the events in question she initially gave a complete and detailed statement to the police fully implicating Davis. Then at her deposition a few months later she stated she had lied in her statement to the police. But at the end of the deposition Jaquita admitted she had lied during the deposition and reaffirmed her earlier statement to the police. Thus, by retracting any false statements she avoided perjuring herself. *See* Iowa Code § 720.2 ("No person shall be guilty of perjury if the person retracts the false statement in the course of the proceeding where it was made before the false statement has substantially affected the proceeding.").

The State acknowledges that Jaquita *may* have committed perjury at the first trial. However, nothing in the record compels a determination that she did, or intended to so do, at the second trial. The court properly left that determination to the jury, under instructions that the jury could use any prior inconsistent statements under oath (some were apparently favorable to Davis)

both as substantive evidence and for impeachment, and could use any prior inconsistent statements not under oath for impeachment.

Generally, a jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence and place credibility where it belongs. *Id*. The credibility of witnesses, in particular, is for the jury. *Id*.

However, a witness's testimony may be so "impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993) (citing *Graham v. Chicago & Northwestern Ry. Co.,* 143 Iowa 604, 615, 119 N.W. 708, 711 (1909)). This is a narrow exception to the general rule that witness credibility is for the jury. *Id.* In *Smith* the court concluded there was insufficient evidence to support the defendant's conviction because the alleged victims' testimony was "inconsistent, self-contradictory, lacking in experiential detail, and, at times, border[ed] on the absurd." *Id*.

While the inconsistencies in Jaquita's testimony do raise an issue concerning her credibility, we conclude this was not a case like *Smith* where the testimony was so inconsistent, self-contradictory, and impossible that the court should have deemed it a nullity and excluded it. When viewed as a whole Jaquita's testimony was not so contradictory "as to render finding of facts thereon a mere guess." *Id.* (quoting *State ex rel. Mochnick v. Andrioli*, 216 Iowa 451, 453, 249 N.W. 379, 380 (1933)). Furthermore, the majority of Jaquita's

testimony was corroborated by other evidence, including testimony from Asha, Cynthia, and Place, as well as Moller's testimony regarding Davis's own statements to the police. Thus, Jaquita's testimony was also sufficiently corroborated by other evidence in the record. *See, e.g., State v. Mitchell*, 568 N.W.2d 493, 503-04 (Iowa 1997) (distinguishing *Smith* based in part on other evidence corroborating the victim's testimony). The trial court did not err in denying Davis's motion to exclude Jaquita's testimony.

C. In-Court Victim Identification.

Davis claims the trial court erred in allowing Place's in-court identification of him as one of the robbers because it was based on a constitutionally tainted photo line-up. On January 6, 2005, Davis filed a motion in limine asking the court to not allow Place to identify him in court as one of the robbers because of "the uncertainty that he (Daniel Place) had in identifying Mr. Davis in [a] photo array," which "tainted" any later identification. The court ordered the motion in limine issues to be argued on the morning of trial before the first witness was called. On March 10, 2004, Davis filed a second motion in limine seeking to preclude Jaquita from testifying. At the pre-trial hearing on the motions in limine Davis argued only the issue raised in his second motion in limine. He did not mention the photo array/in-court identification issue raised in the first motion.

Place was the State's first witness. In questioning Place about the events of the robbery the prosecutor asked if he had been able to identify either of his attackers, and Place answered: "Yeah, I picked him out from a picture." Davis then objected, Place then testified he "believe[d]" he had picked one out, and

Place then identified Davis as one of the two robbers. The trial court later stated on the record that it had overruled the objection to Place's in-court identification of Davis, finding it to be reliable because Place had more than sufficient opportunity to observe his attackers and make the identification. The court did not mention anything about the "tainted" photo line-up in making a record on its ruling on the objection, and no one indicated that such an issue had been the subject of or basis of the objection overruled by the court.

Later, Detective Moller testified about Place's identification of Davis in the photo array. Davis's counsel extensively cross-examined Moller but did not object to his testimony or to the admission of the photo line-up itself. Furthermore, in Davis's post-trial motion he did not allege any error regarding the in-court identification based on an allegedly "tainted" photo line-up, claiming only that the court erred in allowing the in-court identification by Place because it was "not included in the trial information and/or minutes of testimony." The court denied the motion for new trial without any mention of the photo line-up or the allegedly tainted in-court identification.

In summary, although Davis raised the photo line-up issue in his first motion in limine he did not argue it at the hearing on the motions and there is no indication the court ever ruled on it. Davis made a general objection to Place's in-court identification of Davis as one of the robbers, however the record shows the court overruled the objection on the basis it found Place's in-court identification reliable because he had sufficient time to identify Davis. The court mentioned nothing about the photo line-up. Finally, Davis's motion for new trial

challenged Place's in-court identification on completely different grounds than the allegedly tainted photo line-up.

On appeal Davis's challenge to Place's in-court identification of him as one of the robbers is based entirely on his theory of the "constitutionally tainted" photo line-up. The trial court never ruled on the alleged constitutional taint or impropriety of the photo line-up. "Issues must ordinarily be presented to and passed on by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995). We conclude that because this issue was never ruled upon by the trial court it is not properly preserved for our review.

Davis also contends the prosecutor made an improper argument related to the photo line-up during closing arguments. He contends the prosecutor, over his objection, argued that Place never failed to identify Davis's photo as one of the robbers. However, closing arguments were not reported. In dealing with a claim of alleged impropriety in closing arguments our supreme court has stated:

> [T]here are two requirements which must be satisfied before we can afford relief on a complaint such as defendant makes here. First, the improper matter must appear of record in some way so that we may review it. Second, objection must have been made in timely and proper fashion.
>
> Defendant has failed to give us a record upon which we can predicate prejudicial error. It is true he has set out the language he finds objectionable, but that is all.

State v. Horsey, 180 N.W.2d 459, 460 (Iowa 1970). Here there is no record of the alleged misconduct, Davis's objection, or the court's ruling on any objection. Accordingly, Davis has not preserved this issue for our review. The absence of a

record has in fact left us with nothing to review. Additionally, although Davis made this same argument in his motion for new trial, the trial court did not discuss or rule on the challenge to the State's closing arguments in denying his motion or subsequently at sentencing. Thus, error was not preserved by his motion for new trial either. *See Benavides*, 539 N.W.2d at 356.

Davis also apparently argues the prosecutor intentionally and improperly questioned Detective Moller when he asked "Okay. And *you* didn't pick out number 5. *You* picked out number 1; is that correct?" (Emphasis added). First, this issue is not properly preserved because trial counsel did not make a timely objection to the question and the court never ruled on the issue. In addition, it is clear to us the prosecutor simply misspoke and should have said "he" instead of "you." This would have been clear to the jurors and thus could not have adversely influenced them in any way.

D. Spoliation Instruction.

Finally, Davis claims the trial court should have given a spoliation instruction to the jury concerning the destruction of Asha's coat, which Davis was alleged to have worn during the robbery, and destruction of a videotape of Moller's interview of Davis. Our review of a trial court's refusal to instruct on the spoliation inference is for the correction of errors of law. *State v. Hartsfield,* 681 N.W.2d 626, 630 (Iowa 2004).

Detective Moller described Asha's coat as a "heavier winter below-the-waist coat, dark blue in color." Police determined that Davis was wearing Asha's coat during the robbery. Place believed the coat worn by Davis was black. Asha

testified the coat was dark blue and baby blue. After the robbery, Jaquita told Asha her coat was in the alley and Asha's boyfriend went to the alley and got it for her. Asha noticed there was blood on the sleeve so she washed the coat. Detective Moller later seized the coat and had it tested for blood. Moller testified the lab found female blood on the back of the shoulder area but no blood of male origin. The coat was apparently destroyed after Marco pled guilty, prior to Davis's first trial. Photos of the coat were also destroyed.

During his testimony Detective Moller explained how the coat came to be destroyed. He stated the standard procedure is that when a case is resolved the clerk of court sends the information to the police records division who in turn notifies the police property division where all the physical evidence is stored. When the property division sees the case has been resolved all of the evidence dealing with that case is disposed of. Thus, when Marco's case was resolved all of the evidence was destroyed. Apparently the fact that Davis's companion case was still pending was not noticed or communicated by those persons involved in handling the physical evidence.

The videotape of Moller's interview with Davis was also destroyed under the same circumstances as the coat. Moller testified no one ever contacted him to ask if this evidence could be disposed of.

After both sides had rested Davis requested a spoliation instruction. The trial court denied the request, finding the destruction of the coat and videotape had not occurred at the request of the police or prosecutor, but rather was

attributable to the clerk's office error and although it was "intentional," it was "inadvertent and not through any bad intent."

A spoliation instruction is "a direction to the jury that it [may] infer from the State's failure to preserve [evidence] that the evidence would have been adverse to the State." *State v. Vincik*, 398 N.W.2d 788, 795 (Iowa 1987).

> [T]he general principle is that when evidence is intentionally destroyed, "the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its spoliation." This inference is based on the rationale that a party's destruction of evidence is "an admission by conduct of the weakness of [that party's] case." Accordingly, "the spoliation inference is not appropriate when the destruction is not intentional."
>
> There must be substantial evidence to support the following facts in order to justify a spoliation inference: (1) the evidence was "in existence"; (2) the evidence was "in the possession of or under control of the party" charged with its destruction; (3) the evidence "would have been admissible at trial"; and (4) "the party responsible for its destruction did so intentionally." Before instructing the jury on the inference, the trial court must make a threshold determination that the foundation for the inference is sufficient, in other words, that "'a jury could appropriately deduce from the underlying circumstances the adverse fact sought to be inferred.'" Once the court gives a spoliation instruction, it is up to the jury to decide whether to draw the spoliation inference in the particular case.

Hartsfield, 681 N.W.2d at 630 (quoting *State v. Langlet,* 283 N.W.2d 330, 333 (Iowa 1979)).

With respect to the "intentional destruction" factor: "Ordinarily evidence destroyed under a neutral record destruction policy is not considered intentionally destroyed so as to justify a spoliation instruction." *Id.* at 632 (citing *State v. Bowers*, 661 N.W.2d 536, 543 (Iowa 2003)). The State concedes the first three factors set forth above. However, the State argues the coat and videotape were

both destroyed unintentionally under a neutral record destruction policy and thus Davis has failed to prove the fourth factor.

Here, Moller explained the clerk of court's policy that once a case has been "resolved" the clerk initiates a process that results in all of the physical evidence related to that case being destroyed. It is precisely this routine administrative process that caused the evidence here to be destroyed. We believe it is also significant that the evidence was ordered destroyed by the clerk of court rather than the county attorney or law enforcement officials. The fact there was a companion case and thus the evidence should not have been destroyed clearly shows a mistake on the part of the clerk of court and/or the police department. However, it shows only negligence on their part. There is not substantial evidence in the record of any bad faith or purpose in the destruction of the coat and videotape. *See State v. Langlet,* 283 N.W.2d 330, 333 (Iowa 1979) ("[T]he circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case."). Because the record does not contain substantial evidence supporting the fourth *Hartsfield* factor, we conclude the court did not err in not giving the spoliation instruction.[2]

[2] Although we have found no error in the trial court's resolution of this issue, we hasten to note our strong disapproval of a procedure allowing evidence that may be needed for a trial to be destroyed or disposed of prior to that trial. This case makes painfully obvious, if it were not already obvious, that the conclusion of a particular charge against one criminal defendant simply does not in and of itself mean that evidence used, or which might have been used, in connection with that charge can be destroyed or disposed of. The evidence may be needed for the trial of severed counts of the same indictment or trial information, separate but related charges against the same defendant or a co-defendant, or, as in this case, the subsequent trial of a co-defendant. Repeated incidents of destruction of evidence such as occurred in this case may be viewed as

In addition, even if we were to find the trial court had erred by not giving a spoliation instruction such an error was not prejudicial. An instructional error, such as is asserted here, is not reversible error unless there is prejudice. *Hartsfield,* 681 N.W.2d at 633. "Prejudice exists when the rights of the defendant 'have been injuriously affected' or the defendant 'has suffered a miscarriage of justice.'" *Id.* (quoting *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998)).

The only exculpatory aspect of the coat was it did not have any traces of the victim's blood on it. This information was given to the jury through witness testimony. Similarly, the only exculpatory aspect of the videotape was that Davis did not confess the crime to Detective Moller. The jury was aware of this through Moller's testimony on cross-examination in which he readily acknowledged that Davis had not confessed, despite language in Moller's written complaint stating that "each confess[ed] to their *involvement* in the robbery." (Emphasis added). Any evidence adverse to the State that Davis asserts he would have presented through the coat and videotape was in fact before the jury through the testimony of witnesses. Thus, the outcome of the trial could not have been affected by the absence of the coat and videotape. The trial court therefore did not commit reversible error by denying Davis's request for a spoliation instruction.

III. CONCLUSION.

We conclude the trial court did not err in denying Davis's motion for new trial. Despite inconsistencies in the witnesses' statements and testimony the verdict was supported by the weight of the evidence. We further conclude the

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showing not mere negligence, but such a bad faith failure to implement necessary procedures as to prove the "intentional" destruction constituting the fourth element of the *Hartsfield* test.

trial court did not err in denying Davis's motion to exclude the testimony of certain witnesses based on some inconsistences in their prior testimony. Davis did not preserve error on his claim the court erred by allowing the victim's in-court identification of Davis as one of the robbers. We conclude the trial court did not err in not giving a spoliation instruction, and even if we were to find such error it was not prejudicial. Davis's conviction for robbery in the first degree is affirmed.

Neither party caused unnecessary matters to be included in the appendix and thus no additional costs need be taxed.

AFFIRMED.