

FILED

AUG 29 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

384

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed August 29, 1985

vs.

)

CHARLES CLARENCE ANDREWS,

)

5-261

Defendant-Appellant.

)

84-663

Appeal from the Iowa District Court for Linn County - William R. Eads,
Judge.

Defendant appeals from his conviction for theft in the second degree
in violation of Iowa Code sections 714.1(4) and 714.2(2). **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Linda Del Gallo, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant
Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

SNELL, J.

Defendant was arrested outside his home at 9:15 in the morning in connection with the theft of four garden tractors the previous evening. A Mount Vernon police officer, Jeff Harnish, testified that he had stopped a truck carrying the four tractors earlier that morning after he noticed the back door to the truck was open. Harnish testified that the driver, whom he identified as the defendant, gave him his driver's license and that while he was running a check on the license, the defendant left the truck and escaped through a nearby field. The driver's license was in the defendant's name. Defendant claimed that he had lost his license a couple of weeks earlier.

At trial, the defendant presented an alibi defense that he had been with various people during the previous evening and in the morning before he was arrested. Defendant was convicted of second-degree theft and has appealed. On appeal, defendant asserts that he was denied effective assistance of counsel and that a mistrial should have been granted following the court's repeated inquiry into the status of the jury deliberations.

I. Ineffective Assistance of Counsel. The claim of ineffective assistance centers on the admission of the defendant's prior felony convictions. The record indicates that the defendant had been convicted of four felonies, only one of which, in 1978, had occurred within the last ten years. Prior to trial, a pretrial order was issued indicating that only the 1978 conviction could be used for impeachment purposes. At trial, defense counsel asked the defendant on direct examination whether he had ever been convicted of a crime. The defendant responded: "Once." The examination continued:

Q. All right. And when was that? A. '77, I believe.

Q. Could it have been '78? A. Possible, yes.

Q. All right. And that's the only felony you've ever been convicted of or charged with? A. Yes, sir.

On cross-examination the prosecutor questioned the defendant about his oath to tell the truth and whether the defendant wished to recant any of his testimony. The prosecutor then requested a hearing outside the presence of the jury to determine whether defense counsel had opened the question of the earlier convictions to allow the prosecution to question the defendant about these. The court heard arguments from both counsel and ruled that the county attorney could ask the defendant whether he had been convicted of the earlier felonies but could not inquire into the nature of the felonies.

During the hearing, the defense counsel stated that he was operating under the pretrial order when he advised his client that he would only be required to testify to the 1978 conviction. Counsel stated:

If the Court please, I think I explained to the Defendant here that under the law, as I understood it, that he would in all likelihood be asked of past felony convictions and that this would be limited to a ten-year period. I asked him how many he had had in the last ten years, and I asked about whether they were convictions. He said, "One," so I said, "Now, I'm probably going to ask you about felony convictions, and I assume, then, your answer will be 'one,' and I don't want you to get into blurting out what this was for or any other thing. I'll just ask you that." That's how this all occurred. And if there's a mistake, it certainly is mine because this is what I thought the law certainly was and I believe the law to be.

Out of the presence of the jury, defense counsel examined the defendant as to the circumstances surrounding his testimony:

Q. Mr. Andrews, is it your understanding when you gave these answers regarding your past criminal activities that you were only to bring up felony convictions, actual convictions, that happened within the last years?
A. Yes.

Q. And was that your intention in giving these answers? A. Yes.

Q. Did you have any intention of deceiving this jury in any way? A. No.

Q. And did I tell you or did Mr. Johnson tell you that in your testimony that you were only — you would be asked about past felony convictions within the last ten years and that you were to talk about once within the last ten years? A. That's right, sir.

Q. And was that the reason that you gave that answer? A. That's right.

Q. And so you did it really on the advice of counsel; did you not? A. Yes, sir.

Q. And you did it believing that your counsel was telling you what the appropriate law was and your responses should be in accordance with what happened within ten years and that they should be convictions? A. Yes.

Over defense counsel's objection the court ruled the previous convictions admissible. Back in the presence of the jury, the county attorney cross-examined the defendant about the earlier convictions. On re-direct defense counsel had the defendant explain that his earlier testimony was made under the belief that the earlier convictions were inadmissible and that he did not intend to deceive the jury.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); State v. Massey, 207 N.W.2d 777, 780 (Iowa 1973). "Such circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation." Hinkle v. State, 290 N.W.2d at 30.

The test for ineffective assistance was most recently set forth in Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In that case, the Court stated: "The defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at ____, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

Under the facts of this case, we cannot say that defense counsel's conduct fell below the range of normal conduct. His intention in questioning the defendant as he did was to limit defendant's testimony to the 1978 conviction, the only one admissible under the pretrial order. At the hearing outside the jury's presence, he strenuously argued against the admissibility of the previous convictions. After the county attorney cross-examined the defendant about the convictions, defense counsel had the defendant explain to the jury that his earlier testimony was intended to conform to what the law was, as understood by the defendant and his attorney. In light of the circumstances we cannot say that defense counsel could have anticipated the trial court's action. Once the previous convictions had been admitted, counsel took every step available to dilute the prejudice. We deny the claim of ineffective assistance.

II. Motion for Mistrial. The jury began deliberating at about 12:45 p.m., was dismissed for the day at 4:30 p.m., and returned at 8:30 a.m. the next day. At about 1:20 p.m., a note was sent to the judge asking what the jury should do after three 7-5 votes for conviction. The court overruled a motion for mistrial and gave a verdict-urging instruction. The parties were advised that the court would make a further inquiry if no verdict had been reached by 4:00 p.m. At 4:05 p.m., the court was advised that the vote had changed but was still not unanimous. In response to questions the court was further advised by the foreman that the vote was 9-3 and that the jury was tired, but not done yet. Another juror opined that the vote would not change. The court overruled a motion for mistrial and informed counsel that if the same vote existed at 4:55 p.m.,

a mistrial would be declared. At 4:55, the foreman informed the court that no new vote had been taken but that significant discussions were taking place. A new motion for mistrial was overruled. The next morning the jury reconvened and reached a verdict of guilty at about 10:40 a.m.

The trial court has broad discretion in ruling on a motion for mistrial. State v. Washington, 308 N.W.2d 422, 424 (Iowa 1981). Defendant argues that the court's repeated inquiry into the progress of the jury and its numerical division had a coercive effect on the jury. He also argues that this coercion combined with the refusal to grant a mistrial forced the jury decision of guilty. We find that the record does not support his claim. The verdict-urging instruction that was given consisted of merely re-reading uniform jury instructions which had been initially presented to the jury. This practice was approved by the supreme court in State v. Campbell, 294 N.W.2d 803, 812-13 (Iowa 1980). The fact that the jury deliberated five additional hours after the verdict-urging instruction was given also indicates that the verdict was not coerced by the instruction. See, State v. Campbell, Id. at 811.

Under the circumstances, we cannot say that the court abused its discretion in overruling the motion for a mistrial.

The findings of the trial court are affirmed.

AFFIRMED.