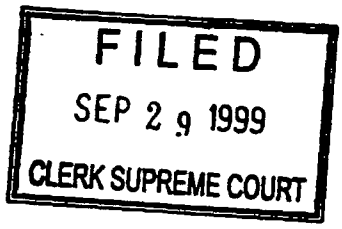
IN THE COURT OF APPEALS OF IOWA

No. 9-306 / 97-2083
Filed September 29, 1999



STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY M. KERCHNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Douglas McDonald, District Associate Judge.

On appeal from his convictions for assault with intent to inflict serious injury and assault causing bodily injury, the defendant argues there was insufficient evidence to support the conviction for assault with intent to inflict serious injury, and his trial counsel was ineffective. **AFFIRMED.**

Derek Jones and James M. Stein of Wells & Wells, P.L.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, William E. Davis, County Attorney, and Robert C. Bradfield, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Zimmer, JJ.

STREIT, P.J.

A father appeals his conviction of assault after he drove his truck at family and friends who were trying to stop his leaving a ball game with his son. We affirm the verdict as being supported by substantial evidence.

I. Background Facts & Proceedings.

The defendant, Gregory M. Kerchner, was charged with assault with intent to inflict serious injury to Greg Heitman, the tee-ball coach of Kerchner's son and the current boyfriend of the son's mother; assault causing injury to Sherry Zaruba, an uninterested good Samaritan; and child endangerment. The charges arose out of an incident occuring at the end of visitation by Kerchner with his son after a tee-ball game. There were allegedly only fifteen minutes left in Kerchner's visitation time, and his son's mother tried to stop Kirchner from leaving with her son. The State alleged Kerchner struck Heitman and Zaruba with his truck while Kerchner tried to leave with his son.

The case proceeded to a bench trial. Witnesses testified Kerchner was out of control that evening and intentionally drove his truck at Heitman. One witness, Linda Stearman, testified Kerchner stopped before any contact occurred between his truck and Heitman and that Heitman jumped onto the truck. Kerchner's trial counsel did not cross-examine Stearman. At the close of the case, the State dropped the child endangerment charge. The court found the defendant guilty on the remaining charges.

With respect to the assault with intent charge, the judge made the following observation:

> We have Sherry Zaruba, who was on the witness stand for half an hour, both on direct examination and cross-examination, who was there, was in front of the truck, has a good recollection of what happened, was able to describe these things, and what she described would support assault with intent to do serious injury, that's an assault with a pickup truck, when somebody's standing in front of it -- and I realize that we had brief testimony from Mrs. Stearman who said that he jumped on the truck, but we don't know because everybody just left it at that, didn't cross-examine her whether she was there, actually saw that he jumped or was thrown up on the truck, but we have Mr. Trujillo who of course substantiates what Mrs. Zaruba said. So based upon her testimony, without reason to tell it like it wasn't, I think that supports the charge of assault with intent to do serious injury and I'll find him guilty of that charge.

The district court then sentenced the defendant to concurrent one-year jail terms, with all but sixty days suspended.

The defendant appeals the assault with intent to inflict serious injury charge. First, he contends the trial court did not specially find he had the necessary specific intent in its findings of fact. Second, he argues the State failed to sufficiently prove he had the specific intent to inflict serious injury. Finally, he claims his trial counsel was ineffective for failing to cross-examine or recall Stearman and failing to file a motion to reconsider his sentence.

II. Preservation of Error Regarding Special Finding of Fact.

In failing to file a motion for arrest of judgment, Kerchner waived any error regarding the trial court's alleged failure to specially find specific intent. In order to properly preserve an issue for appeal, the alleged error must first be raised at trial.

State v. Heacock, 521 N.W.2d 707, 710 (Iowa 1994). "This principle acknowledges we are a court of review and provides the needed symmetry in our judicial process by requiring the trial judge to be alerted to the claim of error at trial and given an opportunity to correct it without an appeal." *State v. Escobedo*, 573 N.W.2d 276, 276-77 (Iowa App. 1997); *see State v. Halliburton*, 539 N.W.2d 339, 342 (Iowa 1995). We cannot review the trial court's decisions or actions, when it was not afforded an opportunity to rectify alleged error. *Escobedo*, 573 N.W.2d at 277; *see State v. Wages*, 483 N.W.2d 325, 326 (Iowa 1992). "Nearly all error . . . may be waived." *Escobedo*, 573 N.W.2d at 277.

Kerchner claims the trial court failed to specially find the facts and conclusions of law as mandated by Iowa Rule of Criminal Procedure 16(2). We need not reach the merits of his claim because error was not preserved. When upon the whole record no judgment may be rendered, a defendant must make a motion in arrest of judgment. Iowa R. Crim. P. 23(3)(a). Kerchner failed to make such a motion, thus denying the trial court the opportunity to rectify any allegation of error. The issue, therefore, is waived. *See State v. Farmer*, 482 N.W.2d 682, 684 (Iowa App. 1992).

III. Sufficiency of the Evidence.

Kerchner next argues the record contains insufficient evidence of the element of specific intent to inflict serious injury, and the trial court therefore erred in denying his motion for a directed verdict.

A. Standard of Review.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to support it, or it is clearly against the weight of the evidence. *State v. Schrier,* 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light most favorable to the State. *State v. Robinson,* 288 N.W.2d 337, 340 (Iowa 1980). All evidence is considered, not simply the evidence supporting the verdict. *Id.*

B. There Is Sufficient Evidence to Sustain the Conviction.

Evidence of specific intent "is rarely capable of direct proof and must usually be shown by circumstantial evidence." *State v. Delay*, 320 N.W.2d 831, 835 (Iowa 1982). Thus we must turn to "all circumstances attending the assault, together with all relevant facts and circumstances as disclosed by the evidence." *State v. Decklever*, 172 N.W.2d 109, 110 (Iowa 1969). Furthermore, "[a] person is presumed to have intended the natural result of his intentional act." *Id.*

There is ample evidence to support the district court's finding that Kerchner had the requisite intent. First, as cited by the trial court, there were two independent witnesses that corroborated the victim's testimony regarding Kerchner's assaultive behavior. Second, the circumstances surrounding the assault demonstrate Kerchner's irrational behavior and his desire to flee with son in tow. Finally, Kerchner is

presumed to have intended the natural result of his intentional act. Kerchner intentionally drove his vehicle at a pedestrian. The natural result of such an act is injury to that pedestrian. It is fair to conlude Kerchner assaulted Heitman with the intent to inflict serious injury. The evidence sufficiently supports Kerncher's conviction for assault with intent to inflict serious injury.

IV. Ineffective Assistance of Counsel.

Finally, Kerchner claims his trial counsel was ineffective for failing to cross-examine or recall Stearman and failing to file a motion to reconsider his sentence.

A. Standard of Review.

Normally, "we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Query*, ___N.W.2d ___ (Iowa App. 1999). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Claims of ineffective assistance of counsel may be resolved on direct appeal "when the record is adequate to decide the issue." *Query*, ___ N.W.2d at ___. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

B. Counsel Was Not Ineffective in Failing to Cross-Examine.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v.*

Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *See Hinkle v. State*, 290 N.W.2d 28, 34 (Iowa 1980). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d. at 131.

The decision not to cross-examine one of the State's witnesses was reasonable trial strategy on the part of defense counsel. When a statement beneficial to the defense is voluntarily offered by a State's witness, it is a reasonable trial strategy to simply take the statement on face value and utilize it in final argument. Inquiry as to the specifics or the basis of such an observation on cross-examination could potentially expose the witness's unreliability or even lead to the witness's recantation. Because defense counsel did not fail to perform an essential duty, under these particular circumstances, we need not reach the prejudice prong of the test.

As to Kerchner's claim of ineffective assistance of trial counsel for failing to seek sentence reconsideration, appellate counsel withdrew this allegation in oral argument as it was not ripe for review.

Finding no merit to Kerchner's numerous claims, we affirm his convictions.

AFFIRMED.

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