IN THE COURT OF APPEALS OF IOWA

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WILLIAM FARNI)
Petitioner-Appellant,)
vs.) 4-140
STATE OF IOWA,) 83-768
Respondent-Appellee.)

Appeal from the Iowa District Court for Dubuque County-Thomas H. Nelson, Judge.

Petitioner-Farni appeals the summary dismissal of his application seeking postconviction relief from his 1981 conviction of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2. AFFIRMED.

Linda Del Gallo, Assistant Appellate Defender, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson, and Hayden, JJ.

Petitioner, Farni, appeals the summary dismissal of his application seeking postconviction relief from his 1981 conviction of first degree robbery. On appeal Farni asserts that his application raised genuine issues of material fact regarding ineffective assistance of trial counsel. We affirm.

The court dismissed Farni's application pursuant to Iowa Code section 663A.6, paragraph 2. Summary disposition under that section is proper if no material issue of facts exist; the issue turns upon whether reasonable minds could draw different inferences and reach different conclusions from them. Boge v. State, 309 N.W.2d 428, 430 (Iowa 1981).

Farni argues that counsel failed to preserve error on a confrontation claim, failed to adequately investigate and prepare for trial, and failed to raise an issue regarding allegedly improper curtailment of the testimony of a defense witness. When a defendant relies on a specific act or omission to prove a claim of ineffective assistance, two conditions must be met: (1) counsel must have failed to perform an essential duty and (2) prejudice must result therefrom. State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984). The burden on defendant to prove prejudice is great because it must be shown that the ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. Id. at 234.

Even assuming counsel did fail to perform an essential duty by failing to preserve error on the confrontation claim, we find that no prejudice within the meaning of Miles resulted. The victim of the robbery did not testify. However, the court allowed into evidence statements made by the victim under the excited utterances exception to the hearsay rule. Farni claims that prejudice resulted when he was not able to confront the victim because the only direct evidence that he had a gun at the time of the alleged assault was the hearsay testimony of the victim's mother. However, we find there was substantial circumstantial evidence warranting a jury to find that Farni was armed.

The evidence indicated that Farni's wife drove Farni to the Dubuque Inn to meet someone to return a gun; the gun was with Farni at that time. Farni left his wife and was observed shortly thereafter struggling with the victim in her car. After the victim screamed, Farni fled and two witnesses followed him. With the exception of about ten seconds, Farni was never out of the witnesses' sights. When Farni left the scene of the crime he was seen holding his left side. During the chase the witnesses observed Farni pull a gun out of a holster. Farni reached his vehicle, pointed the gun at the witnesses and fled the scene. When police stopped the vehicle several minutes later, a loaded gun was found.

Farni contended at trial that he was not armed and that the gun had been earlier concealed and he retrieved it as he was being chased. Circumstantial evidence and direct evidence are equally probative. See State v. Connell, 275 N.W.2d 197, 205 (Iowa 1979). The circumstantial evidence in this case could easily indicate that Farni had a gun when he attempted to rob the victim, that he put the gun under the left side of his shirt while fleeing, and that he subsequently pointed the same loaded gun at the witnesses.

As such, we believe the victim's statement only served to corroborate what the circumstantial evidence strongly indicated. Accordingly, we do not believe Farni's course of defense was substantially disadvantaged by admission of the victim's statement. A failure to preserve error may be sufficiently grievous that it denies a defendant his constitutional right to effective assistance of counsel. State v. Williams, 334 N.W.2d 742, 745 (Iowa 1983). However, this is not such a case.

Farni additionally contends that counsel did not adequately investigate and prepare for trial in that he failed to interview and adequately depose the victim's mother. Farni claims that his counsel was surprised by the mother's testimony

that her daughter stated that Farni was armed. Farni's counsel never specifically asked the mother during depositions whether Farni was carrying a gun.

Again, even if counsel was surprised, the circumstantial evidence in this case warrants the conclusion that Farni was armed. Farni is not entitled to perfect representation, only that which is within the range of normal competency. Karesek v. State, 310 N.W.2d 190, 192 (Iowa 1981). The minutes of testimony indicated that the mother would testify as to any and all statements made by her daughter. In light of the fact that other witnesses testified that Farni had a gun, we do not believe the mother's testimony should have surprised either Farni or his counsel; and failure to specifically ask the question is of no reversible consequence.

Lastly, Farni contends that counsel failed to raise on direct appeal the issue that his wife's testimony on redirect examination was improperly curtailed by the trial court. Even if this was the case, Farni's counsel made an offer of proof. The information curtailed would not have altered the course of this proceeding. In fact, the information elicited was information concerning the ownership of the gun. Ownership is irrelevant to the charge of robbery.

For the foregoing reasons, we agree with the trial court that no purpose would be served by any further proceedings. Farni's application for postconviction relief did not raise genuine issues of material fact regarding ineffective assistance of trial counsel. Accordingly, we affirm the trial court's ruling.

AFFIRMED.