IN THE COURT OF APPEALS OF IOWA

No. 0-206 / 98-1577
Filed June 28, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JIMMIE DALE RASMUSSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Jimmie Dale Rasmussen appeals from the judgment and sentence entered upon a jury verdict finding him guilty of involuntary manslaughter in violation of Iowa Code section 707.5(1) (1997). He contends there was insufficient evidence to support his conviction and his trial counsel was ineffective in failing to object to the wording of a jury instruction. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Frank Severino and Mike Hunter, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Jimmie Rasmussen appeals his conviction of involuntary manslaughter by public offense following jury trial, contending (1) the trial court erred in denying his motion for judgment of acquittal based on insufficient evidence, and (2) trial counsel was ineffective for failure to object to the wording of a justification defense instruction. We affirm.

Our review is for errors of law. Iowa R. App. P. 4. Denial of a motion for judgment of acquittal is reviewed on a "substantial evidence" standard. *State v. Talbett*, 590 N.W.2d 732, 733 (Iowa App. 1999). The evidence is viewed in a light most favorable to the State. *Id.* The reviewing court must consider all of the evidence and not just the evidence which supports the verdict. *Id.* Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *Id.* (quoting *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980)).

By application of the above standard, we are satisfied the record fairly reveals the following facts. During the afternoon hours of February 7, 1998, Rasmussen played pool and drank beer with two friends, Mark and Maureen Frette. At about five p.m., they decided to go to a new bar, where they encountered the victim, Owen Williams. Rasmussen and Williams argued. Williams left the bar, went to his truck, and returned to the bar, which was something normal for him to do when a patron of the bar. At some point Williams stated he hated a certain biker gang, and would just as soon shoot them as look at them. It is unclear whether he made this statement before or after he left the bar and returned. After Williams returned to the bar he stared at both

Rasmussen and Mr. Frette. Rasmussen apparently came to believe, perhaps in whole or in part from comments made by one or more of the other patrons, that Williams had a gun and might be contemplating using it to shoot Rasmussen.

At about 6:20 p.m., Rasmussen decided to confront Williams about having a gun, as he didn't want to wait for shooting to begin. Rasmussen hit Williams about five or six times in the head, knocked him to the ground, and checked Williams for a gun, but did not find one. The two were separated, and Williams was asked to leave the bar, which he did.

Rasmussen and the Frettes left the bar about a half hour later to go get Rasmussen's and Maureen's vehicles at a gas station on 63rd Street. Maureen was driving, heading west on Interstate 235. Rasmussen was in the front passenger seat, and Mark was in the back passenger seat. Between the 56th and 63rd Street exits, Maureen heard a "pop, pop, pop" and thought she smelled "something like a gun." Maureen notice a pickup truck in the far left lane and that the male driver had his arm extended, pointed in their direction. She did not recognize the driver or notice a gun in his hand. Maureen then started to exit at 63rd Street, and the pickup truck changed lanes, pulled in front of her as she exited, and exited ahead of her on 63rd Street. Rasmussen told Maureen to follow the truck, allegedly to get the license plate number, and told Mark to call 911 on his cell phone.

Instead of going south on 63rd to their vehicles, they followed the pickup truck north. The truck turned right at an intersection and went around two curves and out of sight. When Maureen rounded the second curve, she found the truck

stopped in the middle of the road and rear-ended it. She tried to back up, but the bumpers were locked.

The man jumped out of the truck, and Maureen recognized him to be Williams. Rasmussen got out of the Frette vehicle at about the same time Williams exited his truck. Rasmussen ran for some nearby trees while Williams pointed the gun back and forth between the Frette vehicle and Rasmussen. Williams then got back into his truck. Rasmussen then ran back to Williams' truck and entered it from the passenger side. After a brief struggle, the gun was fired into Williams' right temple, instantly killing him. Rasmussen returned to the Frette vehicle with the gun in his hand, and said words to the effect, "Oh, my God, I shot him. I think he's dead. Let's get out of here." Medical examination determined the gun was held tightly against Williams' head when it was fired.

Both of the Frettes had cell phones. Mark had called 911 as they exited onto 63rd Street, and told the operator somebody had been shooting at them on the freeway. After Williams was shot, Maureen asked a passing motorist to call 911. When the police and fire department arrived, Williams was found in the front seat of his truck, with the transmission in drive and his foot on the brake. All of the windows were rolled down, although it was a chilly February evening. Two bullet holes were found in the Frette's vehicle. Williams' blood alcohol content was 0.161. 911 records indicated one phone call made from Mark Frette's cell phone that evening.

Defendant was tried and convicted of involuntary manslaughter, defined in Iowa Code section 707.5(1) as follows:

> A person commits a class "D" felony when the person unintentionally causes the death of another person by the

> commission of a public offense other than a forcible felony or escape.

The underlying public offense must be committed recklessly in order to form the basis of involuntary manslaughter. *State v. Ayers*, 478 N.W.2d 606, 608 (Iowa 1991). Recklessness is conduct that shows a willful or wanton disregard for the safety of others. *Id.* A defendant's reckless conduct must proximately cause the death in order to support a manslaughter conviction. *Id.*

The State alleged the public offense underlying the charge of involuntary manslaughter by public offense was assault. Iowa Code section 708.1 defines assault. In Instruction No. 16 the court informed the jury:

> [A]n assault is committed when, without justification, which is explained in Instruction No 18, a person does an act which is meant to cause pain or injury or meant to result in physical contact which will be insulting or offensive or meant to place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive to another person, when coupled with apparent ability to do the act.

Rasmussen contends in his brief that assault is a specific intent crime. However, as he correctly notes in his reply brief, this court concluded in *State v. Brown*, 376 N.W.2d 910, 912-15 (Iowa App. 1985) that assault as defined in section 708.1 is a general intent crime. Rasmussen invites is to revisit the issue. We decline to do so.

Rasmussen contends the State failed to prove the underlying public offense, assault. After the Frette and Williams vehicles collided, Rasmussen quickly exited the Frette vehicle. After Williams withdrew from the confrontation, re-entered his truck with the gun, and apparently placed the transmission in drive, Rasmussen pursued Williams into the truck and there was a struggle. The struggle ended when the gun, previously in Williams' possession, was fired into

Williams' temple at close range. A rational trier of fact could find Rasmussen acted with a willful or wanton disregard for Williams' safety and with the requisite general criminal intent explained in Instruction No. 16.

Rasmussen also contends the State failed to disprove his justification defense. A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any imminent use of unlawful force. Iowa Code § 704.3. When the defense is raised, the burden rests upon the State to prove--beyond a reasonable doubt--that the alleged justification did not exist. *State v. Rubino*, 602 N.W.2d 558, 565 (Iowa 1999).

The State had to prove any one of the following as to each justification defense (self-defense, and defense of others) to prove justification did not exist:

> 1. The defendant started or continued the incident which resulted in death. (Self defense.) The defendant knew the person he helped had started or continued the incident, or the defendant himself started or continued the incident which resulted in death. (Defense of others.)
>
> 2. An alternative course of action was available to the defendant.
>
> 3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save himself. (Self defense.) The defendant did not believe the person he helped was in imminent danger of death or injury and the use of force was not necessary to save the person. (Defense of others.)
>
> 4. The defendant did not have reasonable grounds for the belief.
>
> 5. The force used by the defendant was unreasonable.

See id.; Iowa Code §§ 704.1, 704.3; *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993); *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997). With the exception of that part of the first numbered item which relates to defense of

others, which is challenged by the defendant and discussed below, the court so instructed the jury.

We believe the record before us contains substantial evidence from which a jury could find, beyond a reasonable doubt, that Rasmussen's reliance on each justification defense was unfounded. First, substantial evidence was presented from which a reasonable jury could find beyond a reasonable doubt Rasmussen continued the incident which resulted in Williams' death. After the two vehicles collided, Williams and Rasmussen exited their vehicles. At this point the Frettes and Rasmussen were apparently in substantial danger. However, a jury could reasonably conclude the danger had passed when Williams withdrew from the confrontation and re-entered his truck. It is undisputed that when Williams returned to his truck Rasmussen ran to the truck, opened the passenger side door and entered the truck, and initiated a physical altercation with Williams that resulted in Williams being shot and killed.

Second, a reasonable jury could find beyond a reasonable doubt Rasmussen did not have reasonable grounds to believe either he or the Frettes were in imminent danger of death or injury when Williams re-entered his truck, and presumably tried to drive away, without firing any shots. A reasonable jury could find that because Williams had retreated without shooting while outside his truck, Rasmussen did not have any reasonable grounds for thereafter believing there was imminent danger of death or injury to himself or the Frettes.

Third, a reasonable jury could find beyond a reasonable doubt an alternative course of action was available to Rasmussen. It could find that when

Williams retreated to his truck, Rasmussen and the Frettes could have left the immediate area.

Rasmussen next contends his trial counsel was ineffective in failing to object to the jury instruction listing five elements, proof of any one of which would negate defense of others. The challenged first element of the instruction read as follows:

> If the State has proved any one of the following elements, then the defendant was not justified:
> 1. The defendant knew the person he helped start or continue the incident, or the defendant himself started or continued the incident which resulted in death.[1]

Rasmussen claims the language of the instruction "is incredibly confusing". He argues, "The phraseology allowed the jury to deny justification solely if it found that Rasmussen knew who Williams was." In other words, the jury could easily have found Williams was "the person [defendant] helped start or continue the incident" simply from what happened at the bar.

To establish an ineffective assistance of counsel claim, the applicant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The applicant must show that performance fell below an objective standard of reasonableness so that

[1] As applicable to the facts of this case, Iowa Criminal Jury Instruction No. 400.3 reads in pertinent part: "If the State has proved any one of the following elements, the defendant was not justified: 1. The defendant knew the person he helped *had started* or *continued* the incident, or the defendant himself started or continued the incident which resulted in death." The trial court omitted the italicized portions of this instruction.

counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The applicant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

We may dispose of an ineffective assistance of counsel claim if the applicant fails to prove either the breach of duty or the prejudice prong of such a claim. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Such claims are usually reserved for postconviction relief actions in order to give defense counsel an opportunity to respond to the allegation that counsel failed to perform an essential duty. *State v. Laffey*, 600 N.W.2d 57, 61 (Iowa 1999). Because the record is sufficient, however, we will consider Rasmussen's claim of ineffective assistance on direct appeal. *See id.*

A jury instruction must correctly state the law. *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). However, even when a jury instruction incorrectly states

the law, the defendant must still prove prejudice to prevail on an ineffective assistance of counsel claim. *See Foster v. State*, 378 N.W.2d 713, 721 (Iowa App. 1985).

We find Rasmussen suffered no prejudice from counsel's failure to object to the wording of the challenged instruction. In reaching the guilty verdict, the jury must have rejected Rasmussen's claim of self-defense. It is clear from the facts that after Williams re-entered his pickup Rasmussen was in much greater danger than the Frettes when he thereafter approached and entered Williams' pickup. Having rejected Rasmussen's claim his actions were justified to defend himself, under the facts there is no reasonable possibility the jury would have found Rasmussen's actions were justified to defend the Frettes. Therefore, there is no reasonable probability the outcome of the proceedings would have been any different had the challenged instruction been more clearly worded. Because Rasmussen suffered no prejudice by reason of the poorly worded first element of the instruction in question, we find this claim of ineffective assistance of counsel to be without merit.

AFFIRMED.