IN THE COURT OF APPEALS OF IOWA

No. 6-127 / 94-2073

FILED
MAY 31 1996
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

CORWIN BOYD WALLING,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, R. J. Curnan, Judge.

Defendant appeals judgment and sentence, following jury trial, entered upon his conviction of first-degree theft **AFFIRMED.**

Margaret Stuart and Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn, Montgomery & Thomas, Des Moines, for appellant.

Thomas J Miller, Attorney General, Susan M Crawford, Assistant Attorney General, Thomas J Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee

Heard by Sackett, P J., and Cady and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

Corwin Walling was convicted of first-degree theft, in violation of Iowa Code section 714.2(1)(1993), for taking $10,300 from Dean Shores' bank account. When Dean noticed a large withdrawal from his share draft account, the credit union informed him the money had been transferred from his savings to his share draft account and then to his sister Sandra Shores' account. The $10,300 was then withdrawn from Sandra's account.

Sandra Shores was arrested for theft and later pleaded guilty as charged. In exchange for her plea and testimony at Walling's trial, Sandra was placed on probation. Sandra alleged Walling masterminded the scheme to steal the money from Dean's account. At trial, Sandra testified she, her daughter, her sister, and her sister's husband, Walling, planned to move to Denver and needed cash. Sandra testified Walling told her he had gotten Dean's telephone identification number (TIN) from a man at Dean's credit union and he then transferred money from Dean's account to Sandra's. She testified they drove to an automatic teller machine to make sure the money was indeed in Sandra's account. Eventually, Sandra and Walling went to the main branch and withdrew the money. Sandra signed IRS paper for receipt of $10,300. Sandra testified she and Walling then split the money. She testified they spent all the money.

Sandra's sixteen-year-old daughter's testimony substantiated many events of the day the money was withdrawn. A credit union employee testified a man called and

asked how to transfer money over the phone. A man called again and transferred money from Dean's account to Sandra's. Another employee testified about Sandra, accompanied by a man, withdrawing the funds. Walling, his wife, and his mother-in-law testified Dean gave them the money. Walling testified Dean gave him another $5500 later, after insurance covered Dean's losses. Walling testified the additional money was used to pay his past due child support in Missouri so Walling would not have to go to jail. Walling testified Dean was currently living in Denver with Walling, Dean's sister, Walling's wife, and Dean's mother.

During closing arguments, which were not recorded, Walling objected to a statement made by the prosecutor about Walling's failure to call Dean as a witness. The court overruled Walling's mistrial motion and instructed the jury the defendant did not have a duty to present evidence and that the burden of proof was on the State. Walling was convicted as charged. He now appeals.

I. Prosecutorial Misconduct.

Walling claims the district court should have granted his motion for a mistrial based on prosecutorial misconduct. Walling argues the prosecutor's reference in closing argument to Walling's failure to call the victim, Dean, as a witness was prosecutor misconduct in that it shifted the burden of proof to Walling.

"A prosecutor's misconduct will not warrant a new trial unless the conduct was 'so prejudicial as to deprive the defendant of a fair trial.'" *State v. Anderson*, 448

N.W.2d 32, 33 (Iowa 1989) (quoting *State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973). The party claiming the prejudice bears the burden of establishing it. *Anderson*, 448 N.W.2d at 33. It is the resulting prejudice which prevents a fair trial, not the prosecutor's misconduct which entitles a defendant to a new trial. *Id.* Trial courts are vested with broad authority to determine whether prejudice actually results from misconduct, and the trial court's ruling will only be overturned upon finding an abuse of discretion. *Id.* "An abuse of discretion appears only when it was 'exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *Id.* (quoting *State v. Vickroy*, 205 N.W.2d 748, 751 (Iowa 1973).

We cannot find an abuse of discretion in denying Walling's motion for a mistrial because, even if there was prosecutorial misconduct, defendant was not prejudiced to the extent he was deprived of a fair trial. At the close of arguments by both counsel, the district court told the jury: "The defendant in a criminal case has no duty to present evidence. The burden of proof as defined for you in the instructions is upon the State." The formal jury instructions also stated: "The plea of not guilty is a complete denial of the charges and places the burden on the State to prove guilt beyond a reasonable doubt." A jury is presumed to follow its instructions, and cautionary instructions are usually sufficient to remove any danger of prejudice. *State v. Simpson*, 438 N.W.2d 20, 21 (Iowa App. 1989). *See also State v. Delaney*, 526 N.W.2d 170, 175 (Iowa App. 1994). The judge's statement at the close of arguments in addition to the formal jury

instruction eliminated the possibility of prejudice stemming from the prosecutor's comment. We reject Walling's claim and affirm the district court on this issue.

II. Ineffective Assistance of Counsel.

Walling also claims he was denied effective representation of counsel. He claims his trial counsel was ineffective in four ways: (1) failing to move for a directed verdict; (2) eliciting testimony about Walling's prior conviction for nonsupport of a child and failing to request a *Martin* hearing about this conviction; (3) failing to conduct discovery; and, (4) failing to file any pretrial motions.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984) In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result " *Id.* at 686, 104 S. Ct. at 2064, 80 L Ed 2d at 692-93 "In examining counsel's conduct we review de novo the totality of relevant circumstances " *State v. Risdal*, 404 N W 2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show 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." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). With these principles in mind we now turn to appellant's specific claims.

The Iowa Supreme Court has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor*, 352 N.W.2d at 685. The court quoted *Strickland v. Washington*:

> The object of an ineffectiveness claim is not to grade counsel's performance If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N W 2d at 685 (quoting *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L Ed 2d at 699-700) Pursuant to *Taylor v. State*, we may affirm applicant's conviction because he has not failed to prove prejudice, without deciding whether there was a failure of duty. *Taylor*, 352 N.W.2d at 685. Upon a review of the record in this

case, we determine applicant has failed to satisfy the prejudice component of an ineffectiveness claim. *See id.*, 352 N.W.2d at 685 (citing *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674).

With respect to the claim counsel was ineffective for failing to make a motion for judgment of acquittal, Walling argues evidence was insufficient to sustain his conviction because (1) the State failed to corroborate the testimony of his accomplice and (2) the State failed to prove Walling's specific intent to deprive the victim of $10,300.

"In determining whether a motion for judgment of acquittal would be successful, the relevant inquiry is whether the evidence presented is sufficient to sustain a conviction of the offense in question." *State v. Breitback*, 488 N.W.2d 444, 446 (Iowa 1992) There must be evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* We must examine the evidence in the light most favorable to the verdict. *Id.* We consider the entire record and accept all legitimate inferences therefrom to support the verdict. *Id.*

After full review of the record, we find there was sufficient evidence in the record to establish Walling's specific intent Such evidence was present in Sandra's testimony We also find the State sufficiently corroborated the accomplice's testimony Corroborative evidence need not be strong as long as it tends to connect the accused with the commission of the crime and support the credibility of the accomplice. *State*

v. Berney, 378 N.W.2d 915, 918 (Iowa 1985). In this case, the accomplice's testimony was corroborated by the testimony of her daughter and several credit union employees. Because there was sufficient evidence of Walling's intent and sufficient corroboration of the accomplice's testimony, a judgment of acquittal, had it been made, would have properly been denied. *See id.* at 477. Walling has failed to establish that, but for his trial counsel's failure to move for a judgment of acquittal, he would have had a reasonable probability of acquittal. Therefore, Walling's claim of ineffective assistance of counsel on this ground must fail.

Walling also claims his trial counsel was ineffective for eliciting testimony from Walling about his prior conviction for failure to pay child support and was ineffective for failing to object when the prosecutor cross-examined Walling about this prior offenses. Again, Walling has not established the prejudice component of this ineffectiveness claim. The jury was instructed that it was to use evidence of the nonsupport conviction only to help decide whether to believe Walling and how much weight to give his testimony. Additionally, even if the jury was not informed about the nonsupport conviction, their assessment of Walling's testimony would likely have been the same because they were also properly informed of his convictions for securities fraud and false issuance of a money order. It was not reasonably probable the outcome of the case would have been different if counsel would have prevented the admission of Walling's nonsupport conviction.

Lastly, Walling claims his trial counsel was ineffective for failing to conduct discovery and failing to file pretrial motions. As urged by the State, we find *Dunbar* controlling of this issue. When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* In *Dunbar*, our supreme court held it could not address ineffectiveness claims or preserve them where Dunbar merely alleged his counsel "failed to investigate . . . and failed to file affidavits." Dunbar's claims were too general in nature. *Id.* Dunbar failed to propose what an investigation would have revealed or how anything discovered would have affected the result obtained at trial. *Id.* In the case at bar, Walling also failed to explain how anything discovered would have affected the outcome of the trial. He also failed to explain how any specific pretrial motions would have affected the outcome of the trial. As such, we cannot address these allegations or preserve them for a second postconviction proceeding. *See id.*

AFFIRMED.