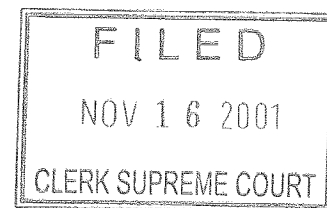


IN THE COURT OF APPEALS OF IOWA

No. 1-477 / 00-1756
Filed November 16, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

MAURICE L. COLEMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, J. C. Irvin,
Judge.

Maurice Coleman appeals from his convictions and sentences for three
counts of delivery of crack cocaine in violation of Iowa Code section
124.401(1)(c)(3)(1999). **REVERSED AND REMANDED FOR NEW TRIAL.**

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

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney
General, Richard Crawl, County Attorney, and Jeffrey R. Tekippe and
Christopher M. Wilson, Assistant County Attorneys, for appellee.

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

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MILLER, J.

Maurice Coleman appeals from his convictions for three counts of delivery of crack cocaine in violation of Iowa Code section 124.401(1)(c)(3) (1999). He contends he was denied due process of law because the entrapment instruction submitted to the jury allowed a guilty verdict without requiring the State to prove all the elements of the crime charged. Coleman raises this issue as a claim of ineffective assistance of counsel. We reverse the convictions and remand for a new trial.

I. BACKGROUND FACTS

Maurice Coleman was charged by trial information with three counts of delivery of crack in violation of Iowa Code section 124.401(1)(c)(3) (1999). The trial court gave the jury an instruction on entrapment, Instruction No. 16. See Iowa Crim. Jury Instructions 200.17 (1988). In relevant part it instructed the jury: "If the State has proved beyond a reasonable doubt that the defendant was not entrapped, he is guilty. However, if the State has disproved the defense of entrapment, the defendant is not guilty." A few instructions later the court instructed the jury on the other elements the State was required to prove in order to prove Coleman guilty of delivery of a controlled substance under each of the three counts. In each marshalling instruction the jury was instructed that if the State had proved the elements in that instruction (which did not include disproving entrapment) Coleman was guilty. Defense counsel requested Instruction No. 16 and neither party objected to it at any point. Coleman was found guilty as charged and was sentenced to three concurrent, indeterminate ten-year prison terms. He appeals from these convictions.

Coleman contends the jury instruction on entrapment denied him due process of law as it allowed the jury to convict him solely on the basis of the State disproving his defense of entrapment without requiring the State to prove the essential elements of the crimes charged. He alleges his trial counsel was ineffective for requesting the entrapment instruction in the form in which it was given and failing to object to it being submitted to the jury in that form.

The State concedes that Iowa Criminal Jury Instruction 200.17, given as Instruction No. 16, is flawed as urged by Fisher. It argues, however, that the instruction does not warrant reversal because when all of the instructions are read as a whole the one flawed instruction did not infect the entire trial so as to violate Coleman's due process rights. It urges Coleman was thus not prejudiced by defense counsel's request and failure to object to the entrapment instruction as given.

II. STANDARD OF REVIEW

A defendant is entitled to the assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 10 of the Iowa Constitution. The right to counsel is a right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). Because a claim of ineffective assistance of counsel implicates constitutional rights, we review de novo the totality of the circumstances surrounding counsel's representation of the defendant. *Wenmark v. State*, 602 N.W.2d 810, 814 (Iowa 1999); *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

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III. MERITS

To establish an ineffective assistance of counsel claim, the defendant must show “(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom.” *Wenmark*, 602 N.W.2d at 814. The defendant has the burden of proving, by a preponderance of the evidence, both of the two elements of a claim of ineffective assistance. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001); *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996); *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

The defendant must show that counsel’s performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. “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); see also *Wenmark*, 602 N.W.2d at 814. In order to prove prejudice the defendant must show a reasonable probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. “A ‘reasonable probability is a probability sufficient to undermine confidence in the outcome’ of the defendant’s trial.” *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997) (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

While we often preserve ineffective assistance claims for possible postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). We

believe the record here is adequate to address Coleman's ineffective assistance claims.

The fourteenth amendment to the United States Constitution prohibits a state from depriving any person of liberty without due process of law. Due process entitles a defendant to certain minimal basic procedural safeguards, including the requirement that the prosecution must prove every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970).

Iowa Criminal Jury Instruction 200.17 on entrapment, quoted in relevant part above, contains no mention of the essential elements set forth in the later-appearing marshalling instructions. It allows the jury to find Coleman guilty without requiring the State to prove every element of the crime charged beyond a reasonable doubt. We conclude the quoted portion of the instruction should not have been submitted to the jury because not only is it an incorrect statement of the law, it also violated Coleman's constitutional right to due process of law under *Winship*.

While the State concedes that the entrapment instruction is "flawed" it argues that when all of the instructions are read together the "ailing instruction by itself" did not "so infect[] the entire trial that the resulting conviction violates due process," citing *State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988). The State asserts that because the jury was fully instructed on the elements of the crimes of delivery of a controlled substance, it was instructed the State must prove all the elements of the offenses beyond a reasonable doubt, it was instructed it must consider all of the instructions together, and it was instructed that no one

instruction included all of the applicable law, Coleman was not prejudiced by this one faulty and unconstitutional instruction and therefore his counsel was not ineffective. We disagree.

Error in jury instructions “is presumed prejudicial unless the contrary appears beyond a reasonable doubt from a review of the whole case.” *State v. Bone*, 429 N.W.2d 123, 127 (Iowa 1988) (quoting *State v. Davis*, 228 N.W.2d 67, 73 (Iowa 1975)); *State v. Engle*, 590 N.W.2d 549, 551 (Iowa Ct. App. 1998); see also *Anderson v. Webster City Community School Dist.*, 620 N.W.2d 263, 268 (Iowa 2000) (“Prejudice results when the trial court’s instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized.”). It has also been established that giving instructions which are conflicting and confusing is reversible error. *Moser v. Stallings*, 387 N.W.2d 599, 605 (Iowa 1986); *Sammons v. Smith*, 353 N.W.2d 380, 385 (Iowa 1984).

We recognize that jury instructions are to be considered as a whole and not in isolation, *Anderson*, 620 N.W.2d at 268, *McMullin*, 421 N.W.2d at 520,¹ and that an instruction is not confusing if a full and fair reading of all the instructions leads to an inevitable conclusion that the jury could not have misapprehended the issue presented by the challenged instruction. *Moser*, 387 N.W.2d at 605. A conviction should not be reversed for error in jury instructions unless there is a reasonable basis for finding the jury was confused or the

¹ We note that it is questionable whether this rule even applies under the facts of this case. See *State v. Rullestad*, 259 Iowa 209, 214, 143 N.W.2d 278, 281 (1966) (“If the jury is given a choice to follow between incorrect and correct statements of law, the instructions are prejudicial and the rule the instructions are to be viewed as a whole has no application.”) However, for purposes of this appeal we will assume this rule does apply.

instructions were so contradictory the jury may have followed the wrong one. *State v. Lee*, 494 N.W.2d 706, 707 (Iowa 1993).

Giving the jury unfettered choice between applying law that is not applicable to the case or applying a proper standard, essentially requires an appellate court to impermissibly speculate as to which instruction the jury followed. *Davis*, 228 N.W.2d at 73. The jury was told in Instruction No. 16 that if the State had disproved entrapment then Coleman was guilty, and was told in the marshalling instructions (without any reference to entrapment) that if the State had proved the elements listed in the marshalling instructions then Coleman was guilty. Therefore, the jury could have found Coleman guilty on the basis of the entrapment instruction alone without considering the essential elements of the offenses, the marshalling instructions alone without considering the entrapment defense, or a combination of both the entrapment instruction and the marshalling instructions. We decline to engage in the type of speculation, found impermissible in *Davis*, that would be necessary in order to guess which the jury did.

Viewing the jury instructions and the record as a whole we cannot conclude beyond a reasonable doubt Coleman was not prejudiced by the unconstitutional entrapment instruction. The instructions were of a sufficiently contradictory and confusing nature that the jury may well have found Coleman guilty without considering both the elements listed in the marshalling instructions and the entrapment defense.

Our preceding three paragraphs have analyzed Coleman's claim as if error had been preserved by timely objection to the instructions. Because

Coleman's appeal comes to us on the theory that his trial counsel was ineffective for failing to object to the instructions as submitted to the jury we must analyze his claim under the ineffective assistance standards set forth above. However, we believe our conclusion on the underlying legal issue regarding the prejudicial effect of the instructions is very informative in determining Coleman's ineffective assistance of counsel claim.

Coleman must prove his trial counsel failed to perform an essential duty and he was prejudiced by such failure. *Wenmark*, 602 N.W.2d at 814. In deciding whether trial counsel failed to perform an essential duty, "we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Petitioner must overcome a presumption that counsel is competent." *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1985) (citations omitted). "Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *Aldape*, 307 N.W.2d at 42. Therefore, the question is whether a reasonably competent attorney would have requested Instruction No. 16 (Iowa Criminal Jury Instruction 200.17) without objecting to the form in which it was given.

Based on our determination that the entrapment instruction was flawed and clearly violated Coleman's right to due process of law, we find Coleman's trial counsel clearly had a duty not to request such a flawed instruction, or at a minimum had a duty to object to the unconstitutional form of the instruction as submitted to the jury. No possible advantage could flow to Coleman from his trial counsel's request for such a faulty instruction or his failure to point out its flawed

and unconstitutional nature. Defense counsel's failure in this regard simply cannot be attributed to improvident trial strategy or misguided tactics. There is no reasonable basis for counsel's request for the instruction in the form given, or his failure to object to an instruction which, if given over timely objection would constitute reversible error. We conclude, therefore, that Coleman's trial counsel failed to perform an essential duty in requesting the flawed entrapment instruction be submitted to the jury and in failing to object to the form of the instruction.

Coleman must also show that counsel's failure to perform an essential duty resulted in prejudice. *Wenmark*, 602 N.W.2d at 814. Our determination of that underlying legal issue also leads us to conclude Coleman has proved resulting prejudice. We have determined the submission of the unconstitutional entrapment instruction was in fact prejudicial to Coleman as it allowed the jury to convict him without addressing the essential elements of the charges, much less requiring the State to prove them beyond a reasonable doubt.² If defense counsel had not specifically requested the flawed instruction in the form given the prejudice to Coleman would not have occurred. We find counsel's failure resulted in prejudice to Coleman. We therefore conclude trial counsel's failure violated Coleman's Sixth Amendment right to effective assistance of counsel.

IV. CONCLUSION

We conclude Iowa Criminal Jury Instruction 200.17 on entrapment as given unconstitutionally deprived Coleman of due process of law by allowing the jury to find him guilty without requiring the State to prove beyond a reasonable

² As noted above, the marshalling instructions themselves also allowed convictions without the jury being required to address the entrapment defense.

doubt all the elements of the crimes charged. Furthermore, in viewing the record and the instructions as a whole we find the instructions were contradictory and so potentially confusing that the jury may well have found Coleman guilty without requiring the State to prove the essential elements beyond a reasonable doubt. Therefore, the erroneous instruction was prejudicial to Coleman. Defense counsel's request for the instruction and failure to object to its form was a breach of an essential duty which resulted in prejudice to Coleman in violation of his constitutional right to effective assistance of counsel. We conclude Coleman's convictions must be reversed and the case remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.