IN THE COURT OF APPEALS OF IOWA

No. 9-786/98-0509
Filed February 23, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDRE CARLOS BONNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

On appeal from his conviction for first-degree robbery, defendant contends the district court erred in admitting a letter he wrote to his girlfriend. He also contends his trial counsel was ineffective in failing to offer an alibi defense.

AFFIRMED.

Barry J. Boline, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeffrey K. Noble and Teresa K. Vens, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., and Streit and Miller, J.J.

MILLER, J.

Andre Bonner appeals his conviction of first degree robbery, arguing that the trial court abused its discretion in admitting evidence and that he received ineffective assistance of counsel. We affirm.

Shortly after 7:00 p.m. on July 6, 1997, two men punched and robbed a pregnant hotel clerk at gunpoint in Des Moines. After being implicated by the co-defendant, Bonner was arrested and charged with robbery in the first degree. Bonner pled not guilty, and after two mistrials, the third and final trial was held February 3, 1998.

While Bonner was in jail awaiting trial, he mailed a letter to his one-time girlfriend, sixteen-year-old Ashley Lord. Ms. Lord's mother intercepted the letter and turned it over to the police. In relevant part as admitted at trial, the letter read:

> i must tell you that the picture is not good. if nobody from indinola comes forward and says i was with them (like Scot edwards) then am on my way [redacted]. you could call and tell them i was at the swiming pool that evening and you saw me. Without any of that am really fucked So talk to Scott.

At trial, Lord testified that she saw Bonner at the Indianola swimming pool between 2:00 and 3:30 p.m. on the day of the robbery, and then again at the Indianola Dairy Queen at about 7:45 in the evening. The weekend before the third trial, Lord purportedly remembered for the first time that she had spoken to Bonner on the telephone around 7:15 or 7:20 p.m., and that she believed that the phone call came from the Indianola Hy-Vee grocery store. She testified at trial to

this effect.[1] Lord claimed that she remembered this only after seeing the letter referred to above, which she had not seen until after the first two trials.

Bonner's first assignment of error is that the trial court abused its discretion in admitting the letter because, he argues, the letter's prejudicial value outweighs any probative value it might have. *See* Iowa R. Evid. 403. On appellate review of an evidentiary ruling we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). To show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998). For us to hold that the trial court abused its discretion in determining the danger of unfair prejudice created by admission of evidence did not substantially outweigh its probative value, the complaining party must show that the trial court's action was unreasonable in the light of attendant circumstances. *State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979).

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. "The test is 'whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence.'" *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988) (quoting 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[07], at 401-48 (1986)).

[1]Ms. Lord did not testify as to the 7:15 phone call at the first two trials.

However, even relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 403. In *State v. Brown*, our Supreme Court stated that "unfair prejudice" as used in rule 403 is "an undue tendency to suggest decisions by the fact finder based on an improper basis, often an emotional one," and defined "unfairly prejudicial evidence" as evidence that:

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [which] may cause a jury to base its decision on something other than the established propositions in the case. The appellate court may conclude that "unfair prejudice" occurred because an insufficient effort was made below to avoid the dangers of prejudice, or because the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.

State v. Brown, 569 N.W.2d 113, 117 (Iowa 1997) (citation omitted).

Here, the evidence was relevant and probative as an admission of a consciousness of guilt. *See State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995) (citing *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993)) (stating that "[a]dmissions may be implied by the conduct of the defendant subsequent to a crime when such conduct indicates a consciousness of guilt."). Here, the jury could reasonably find that Bonner was indicating a consciousness of guilt by saying he would surely be convicted unless someone came forward with a false alibi defense. Further, the letter could be seen as an attempt to have Ms. Lord lie for him, or find someone to lie for him by testifying to an alibi. A false story is relevant to show the defendant attempted to fabricate evidence to aid his defense. *See, e.g., State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982).

Bonner states in his brief that the "probative value of the letter was substantially outweighed by the prejudicial effect of the letter on the jury." While acknowledging the contents of the letter tended to show he was attempting to find witnesses who could give him an alibi, he claims "the risk of misinterpretation by the jury was simply too great." He does not, however, suggest what any one or more "misinterpretations" might be.

It is uniquely the province of the jury to resolve questions of fact. *See* Iowa R. Crim. P. 20(2) (questions of fact are to be tried by jury); *State v. Doss*, 355 N.W.2d 874, 879 (Iowa 1984) (stating where facts are in dispute and susceptible to different inferences, submitting the question to the jury is proper). Even if the jury interpreted the letter to mean something other than what the author intended, it is not the type of evidence that would appeal to the jury's sympathies, arouse its sense of horror, provoke an instinct to punish, or cause the jury to base its decision on something other than the established propositions in the case. Nor has the defendant shown the theory on which the State offered the evidence would elicit a response not justified by the evidence. Therefore, the letter was not "unfairly" prejudicial. The court did not abuse its discretion in admitting the letter.

Bonner's second claim is that he received ineffective assistance of counsel because his trial counsel failed to file a last-minute alibi defense, based upon the newly discovered evidence of Ms. Lord's memory of the phone call from the Indianola Hy-Vee at the time of the robbery.

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 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). While we often preserve ineffective assistance of counsel claims for 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). The record in this case is sufficient. Our review is de novo. *Id.*

"To prove the [breach of duty] prong of an ineffective-assistance-of-counsel claim, the defendant must prove 'his attorney's performance was not within the normal range of competence.'" *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998) (quoting *State v. Spurgeon*, 533 N.W.2d 218, 219 (Iowa 1995)). In determining whether the defendant has proved this element of the claim, we start with a presumption that counsel was competent. *Id.* In addition, we examine the merits of the issue counsel allegedly failed to raise. *Id.* Trial counsel is not ineffective in failing to urge an issue that has no merit. *Id.* (citing *State v. Crone*, 545 N.W.2d 267, 270-71 (Iowa 1996)).

Under the facts of this case counsel did not have a duty to seek to file a late notice of alibi. Counsel reasonably believed that the alibi defense Bonner wished to present to the jury was so lacking in credibility as to have no apparent merit. Ms. Lord "suddenly" remembered the alleged alibi the weekend before Bonner's third (and final) trial. She had testified at the previous trials, and although examined and cross-examined, did not remember the phone call allegedly made from the Indianola Hy-Vee near the time of the robbery in Des Moines. The third trial occurred more than seven months after the robbery and only after she had seen the letter, which she had not seen until after the second trial.

Before trial the court held a *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986), hearing at the request of defense counsel. Present at the hearing were the trial judge, the defendant, defense counsel, a law clerk

and the court reporter. At the hearing, defense counsel noted his strong concerns with the probable testimony of Ms. Lord as it related to a possible alibi. He noted that he did not know or believe whether her testimony about the telephone call was true or false, but was very concerned about it. His concern was apparently based on the highly improbably claim that such important evidence was suddenly "recalled" after two trials, after seven months, only after seeing the letter, and shortly before the third trial. Simply stated, defense counsel carefully expressed that did not believe the alibi defense was meritorious. Upon our de novo review of this constitutional question and our examination of the merits of the issue not raised by trial counsel, we agree the alibi defense Bonner wished to offer was so apparently lacking in credibility that trial counsel had no duty to seek to belatedly assert it. Trial counsel breached no essential duty in seeking not seeking to file a late notice of alibi defense.

Even had counsel been under a duty to seek to belatedly file notice of an alibi defense, Bonner has not carried his burden of proving the probability that prejudice resulted, that is the result of the proceeding would have been different but for counsel's unprofessional error. The evidence of Bonner's guilt was overwhelming. The hotel clerk who was punched and robbed identified Bonner with no hesitation, both at trial and in a photographic array after the robbery. Two people observed the vehicle owned by Bonner's co-defendant being driven near the hotel at the time of the robbery. Both testified that the car contained a black male passenger and a white male driver. Bonner is a black male and Bonner's co-defendant is a white male. When the police stopped and searched the co-defendant's car, they found both a gun and ammunition in it. When police

officers attempted to apprehend Bonner, he ran and hid. Given the strength of the State's case, we do not believe that a reasonable probability exists that the outcome of the trial would have been different had Bonner's counsel filed a late notice of alibi defense.

Bonner has failed to carry his burden of proving either that counsel breached an essential duty or that prejudice resulted. We therefore reject Bonner's ineffective assistance of counsel claim.

AFFIRMED.