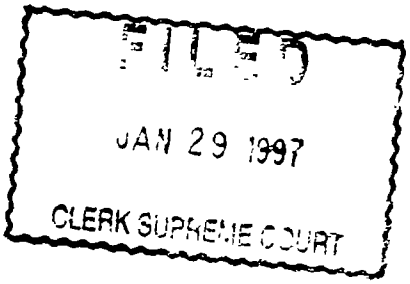
IN THE COURT OF APPEALS OF IOWA

No. 6-664 / 96-410

000157




**GARY E. GROVE,**

Appellee,

**vs.**

**STATE OF IOWA,**

Appellant.

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Appeal from the Iowa District Court for Black Hawk County, William G. Klotzbach, Judge.

The State appeals from a district court ruling granting Gary Grove's application for postconviction relief. **AFFIRMED.**

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn S. Wehde, Assistant County Attorney, for appellee.

Kellyann M. Lekar of Clark, Butler, Walsh & Hamann, Waterloo, for appellee.

Considered by Habhab, C.J., Cady, and Huitink, JJ., Sackett, J., takes no part.

**CADY, J.**

The State appeals from a ruling by the district court granting postconviction relief to applicant based on ineffective assistance of counsel. We affirm the district court on our review.

Gary E. Grove was convicted of the second-degree murder of Robert Ball following a jury trial in 1987. Grove claimed he shot Ball in the head in self-defense after Ball lunged at him with a butterfly knife. The conviction was affirmed on appeal.

Grove subsequently sought postconviction relief based, among other grounds, on ineffective assistance of counsel. The ineffective assistance of counsel claim stemmed from the failure of his trial counsel to object to the trial court's jury instructions on self-defense. The trial court instructed the jury that Grove was not acting in self-defense if, among other circumstances, the State proved Grove had an alternative course of action. The court told the jury this meant if Grove was at risk of having unlawful force used against him, he had to avoid the confrontation by using an alternative course of action. The trial court, however, failed to further explain in its instructions the alternative course of action was not required if it involved a risk to Grove's life or safety.

The district court granted postconviction relief based on ineffective assistance of counsel. It did not address the remaining grounds for relief, and Grove did not file a post-trial motion requesting the district court to rule on the remaining claims.

The State appeals. It claims trial counsel was not ineffective for failing to object to the trial court's instructions in view of the evidence supporting Grove's particular theory of self-defense. It also asserts Grove suffered no prejudice.

Our standard of review in postconviction actions involving constitutional claims, such as the right to effective assistance of counsel, is to make an independent evaluation of the totality of the circumstances. *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). To establish a claim of ineffective assistance of trial counsel, the applicant must prove counsel breached an essential duty and prejudice resulted. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

The State acknowledges an exception to the alternative course of action rule exists when the alternative action involves a risk to the defendant's life or safety. *See* Iowa Code § 704.1 (1985). Nevertheless, it argues defense counsel had no duty to object to the trial court's failure to include the exception in its jury instructions because the exception was inapplicable under the facts of the case. The State asserts there were no circumstances presented or argued at trial which would have justified a jury finding Grove had an alternative course of action available.[1]

Our review of the evidence supports the claim Grove had potential alternatives short of pulling out his handgun, cocking the triggering mechanism, and firing a shot.

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[1] The State's argument is based on evidence the incident erupted quickly, took place in a relatively small room, and the victim would surely have pursued Grove with the knife had he attempted to flee.

This evidence was highlighted by the prosecuting attorney in closing argument, when he suggested such alternative courses of action for Grove as firing a warning short, shooting the victim in a place of his body other than the head, running out the door, asking his companion for help, asking the victim to step back, or announcing an intention to shoot before firing the gun. Clearly, the jury should have been instructed Grove was not required to pursue an alternative course of action if it would have presented a risk to his life or safety.

The trial court's instructions did not fully and fairly instruct the jury on the applicable law, and trial counsel should have responded with an objection. *See State v. Stallings*, 541 N.W.2d 855, 858 (Iowa 1995). Thus, we turn to the issue of prejudice.

The test for prejudice is whether there is a reasonable probability that, but for the error by counsel, the fact finder would have had a reasonable doubt respecting guilt. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 674, 698 (1984). A reasonable probability is a probability sufficient to undermine confidence in the verdict. *Id.* When assessing prejudice, we assume the jury reasonably, conscientiously and impartially applied the legal standards that frame the decision. *Id.* Furthermore, we consider the totality of the evidence, recognizing a verdict only marginally supported by the record is more likely to have been affected by error than a verdict with overwhelming support in the record. *Strickland*, 466 U.S. at 696, 194 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Our review of the evidence in the case reveals the self-defense claim was not made without supporting evidence. The only eyewitness to the incident, who testified for the State, indicated he observed Ball assume a "martial arts stance" just before the shooting and suddenly raise his hand above his head. There was an object in his hand which made a clicking noise, similar to the noise made by the butterfly knife found near Ball by police after the shooting. Immediately after the eye witness observed Ball raise his hand above his head, he saw Grove remove the gun from his pocket and fire it. Thus, while the State had a reasonable argument Grove had an alternative course of action available, Grove had a reasonable argument it would have jeopardized his safety.

We are also presented with trial counsel error which affected a legal standard the jury could have utilized to reach their verdict. The jury was told they could reject the claim of self-defense if the State proved Grove had an alternative course of action, but was never told this principle did not apply if the alternative course of action involved a risk to Grove's safety. The State argues on appeal, as Grove did at trial, there was in fact no legitimate alternative course of action available. Thus, it claims now there was no basis to believe the jury convicted Grove by concluding he had an alternative course of conduct available. At trial, however, the State argued Grove had numerous alternative courses of action. Clearly, the issue was raised and the jury could have considered it in reaching their verdict. Moreover, the faulty instruction would have resulted in prejudice if the jury found Grove had an alternative course of

action for shooting Ball without further considering if that course of action involved a risk to his safety.

We agree with the district court Grove met his burden of proving prejudice. We assume the jury acted reasonable and thoughtful in its deliberation of the self-defense issue, but they were given an incomplete legal standard to apply in reaching their decision.

Without the correct and complete legal standard for the jury to apply, we lose confidence in the trial's outcome. We cannot presume the jury considered an exception to the legal standard which was never explained to them.

We affirm the decision of the district court.

**AFFIRMED.**