IN THE COURT OF APPEALS OF IOWA

No. 1-523 / 00-1015
Filed December 12, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CRAIG STEFFEN BOWMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

The defendant appeals from his convictions for second-degree kidnapping, terrorism with intent, and assault while participating in a felony. **AFFIRMED.**

Jerald W. Kinnamon and Jon M. Kinnamon, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Fred H. McCaw, County Attorney, and Ralph R. Potter, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Mahan and Hecht, JJ.

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SACKETT, C.J.

Defendant-appellant Craig Steffen Bowman appeals following his conviction of second-degree kidnapping in violation of Iowa Code sections 710.1 and 710.3; terrorism with intent in violation of Iowa Code section 708.6; and assault while participating in a felony in violation of Iowa Code sections 708.1 and 708.3. Defendant contends reversal is warranted on a number of grounds. We affirm.

The problem that formed the basis of the charges against the defendant resulted when Karla Schwaegler and Todd Williams, two friends of defendant's girlfriend, Theresa, arrived on foot at defendant's house to get Theresa's car which was parked near defendant's home. Defendant and Theresa had problems earlier while frequenting the area nightspots. At some point they scuffled and two men intervened. At that point defendant left Theresa and returned home. Theresa had given Schwaegler and Williams keys to her car. Schwaegler started Theresa's car and defendant came out of his house holding a handgun, which he shot. Defendant then came towards Schwaegler with the gun and asked her where her buddies were. Schwaegler said she was getting the car for Theresa and there were no buddies around. Defendant ordered Schwaegler into his house saying if she did not go in he would shoot her. During the meantime Williams went to a nearby motel and called the police. The police surrounded defendant's house. The police then tried to call defendant and defendant had Schwaegler answer the telephone. The dispatcher told defendant to go to the door. Defendant, still carrying the gun, went on the front porch of his

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house. When requested by police to put the gun down, defendant went back inside. There he put the gun on the counter and came outside with his hands up and was taken into custody.

At trial defendant contended he took his gun outside because he was afraid the men who intervened in his fight with Theresa were after him. He said he did not recognize Schwaegler when he approached the car. He said he asked her to go in the house while he called the police. He said he never threatened or forced her and she voluntarily went in the house.

Defendant makes three challenges to the jury instructions. He first contends the district court in instructing on terrorism incorrectly defined the word "at". Defendant contends the definition of the word "at" used by the district court came from an unpublished decision of the Iowa Court of Appeals. The defendant argues the district court erred in taking the definition from an unpublished opinion in violation of the then existing rule.[1] The issue is whether the instruction was in error, not where the wording originated. The challenged instruction was crafted by the judge with input from defendant's trial counsel who made no objection to the instruction finally given. A claim not raised in the trial court will not be considered on appeal. *State v. Gogg*, 561 N.W.2d 360, 368 (Iowa 1977). Furthermore, defendant has failed to show any prejudice suffered from giving the instruction.

Defendant next contends that the marshalling instruction on all three charges failed to instruct the jury that the State was required to prove the

[1] 1. The August 31, 2001 amendment to Supreme Court Rule 10 deleted the text of paragraph (f) which, prior to the amendment, had prohibited citation of unpublished court of appeals decisions except in certain limited circumstances which are not applicable in this case.

defendant's actions were not justified. The instructions now urged were not requested at trial, consequently error on this issue was not preserved. *Id.*

Defendant contends there was not sufficient evidence to convict him of kidnapping or terrorism. The State contends error was not preserved on these issues and we agree. Defendant's general motion was insufficient to preserve error. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

Defendant contends that his trial counsel was not effective in a number of ways. To prevail on a claim of ineffective assistance of counsel defendant must demonstrate both ineffective assistance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Oetken*, 613 N.W.2d 683, 679 (Iowa 2000); *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Both elements must be proven by a preponderance of the evidence. *State v. Ramirez*, 616 N.W.2d 587, 593 (Iowa 2000); *Oetken*, 613 N.W.2d at 683. Yet both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995); *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

To establish his trial attorney was ineffective the defendant must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94; *Artzer*, 609 N.W.2d at 531. We measure the

attorney's performance against "prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694; *State v. Risdal*, 404 N.W.2d 130, 132 (Iowa 1987). There is a presumption that the attorney performed competently. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95; *Oetken*, 613 N.W.2d at 683. The claim is reviewed in light of the totality of the circumstances. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. The inquiry is an individualized fact-based analysis. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416 (2000). Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. *Wissing*, 528 N.W.2d at 564; *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992).

Even after the defendant proves ineffective assistance, he must show that the error caused prejudice. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697; *State v. Westeen*, 591 N.W.2d 203, 211 (Iowa 1999). To sustain this burden, the defendant must demonstrate "that there is 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 2068, 80 L. Ed. 2d at 698; *see Artzer*, 609 N.W.2d at 531; *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). "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.

Strickland establishes that prejudice exists when "there is 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

2068, 80 L. Ed. 2d at 698. In making the decision whether there is a reasonable probability that the result of the trial would have been different, the burden of proof is on the defendant to establish this standard by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Defendant contends that his trial counsel should have objected to the district court's failure to include a self-defense instruction in the marshalling instruction for each graduation of a second-degree kidnapping offense. The defendant argues this is an element the State had to disprove before a finding could be made that the defendant was guilty of second-degree kidnapping or a lesser included offense. The defendant further argues that justification should have been included in the marshalling instruction for assault while participating in terrorism.

Defendant served notice of self-defense or justification. The district court found sufficient evidence to instruct on this defense and submitted at the end of the jury instructions an explanation of the justification defense. Defendant contends there was substantial evidence supporting the giving of the instruction and the district court did not properly instruct.

Because this is raised as a claim of ineffective assistance of trial counsel, our question is not whether the failure to object to the absence of inclusion of the instruction was erroneous, but whether defendant's trial attorney had a duty to object and whether the failure to object prejudiced defendant.

Defendant's position at trial was not that he was justified in committing the crimes but that he did not commit them. Defendant did not claim he was justified

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in firing the gun rather that he did not fire it. He did not claim he was justified in pointing the gun at Schwaegler, rather he did not do it. He did not claim he forced Schwaegler into his house but rather that she came in on her own accord. Even if a further justification instruction were supported by substantial evidence, and we question if there is more than scant evidence supporting the giving of the instruction, defendant's trial attorney appears to have omitted further requests as trial strategy. Furthermore, defendant has failed to show the required prejudice to succeed on this claim. He has failed to show by a prepondence of evidence that but for the alleged error the result would have been different. *Ledezma*, 626 N.W.2d at 143.

Defendant next contends his trial attorney was ineffective in not challenging the district court's hostage instruction. The court defined "hostage" as follows:

> A "hostage" is an innocent person confined or removed by one who threatens to kill or harm her if his demands are not met.

Defendant contends the definition should have included language that additionally a hostage is held as security for performance, or forbearance of an act by a third person. The Iowa courts have not adopted the definition that defendant urges. Nor do we find reason to do so. To adopt defendant's argument would put an unstated intent element not contemplated by the legislature in Iowa Code section 710.1(2).

Additionally, defendant after coming home left a message on Theresa's answering machine that he was waiting for her and it would not be pretty. He also ordered Schwaegler after he forced her in his house to call Theresa and get

her to his house. This was evidence from which the jury could infer defendant's intent was to use Schwaegler to secure the performance of another. Defendant has not shown his trial counsel was ineffective on this issue.

Defendant contends his trial attorney was ineffective in failing to request that entire uniform instruction 1005.5 be given.

The court instructed the jurors that they could not convict defendant of kidnapping unless he either "confined" Schwaegler or "removed [her] from one place to another." The court also instructed that

> A person is "confined" when her freedom to move about is substantially restricted by force, threat or deception. The person may be confined either in the place where the restriction began or in a place where she has been removed.

Defendant claims his counsel should have asked the court to instruct that:

> Confinement or removal requires more than what is included in the commission of the [underlying offense].
>
> A person is "confined" when [her] freedom to move about is substantially restricted by force, threat or deception. The person may be confined either in the place where the restriction began or in a place to which [she] has been removed.
>
> No minimum time of confinement or distance of removal is required. It must be more than slight. The [confinement or removal] must have significance apart from the [underlying offense].
>
> In determining whether [confinement or removal] exists, you may consider whether:
>
> 1. The risk of harm to [victim] was increased.
> 2. The risk of detection was reduced.
> 3. Escape was made easier.

Defendant contends this instruction was necessary for the jury to distinguish between the confinement or removal necessary to constitute kidnapping, and that

incidental to the underlying crime of assault while participating in terrorism or kidnapping.

The State charged defendant with kidnapping Schwaegler either with the intent to use her as a hostage, or with the intent to inflict serious injury on her.

> In the classic kidnapping case in which an individual is abducted for the express purpose of holding the person for ransom or as a hostage [, . . .] kidnapping is the central crime and any confinement or movement is sufficient to support the charge. The "merely incidental" rule can have no role when there is no underlying crime.

State v. Misner, 410 N.W.2d 216, 223 (Iowa 1987).

The jurors here were instructed they could not convict defendant unless they found that he "confined" or "removed" Schwaegler. Under *Misner* "any confinement or movement is sufficient" to convict a defendant under the "hostage" alternative. Defendant's counsel was not required to request an incorrect instruction. *State v. Steinkuehl*, 507 N.W.2d 716, 724 (Iowa Ct. App. 1993).

Additionally, there is not a reasonable probability a different instruction would have changed the verdict. The court instructed the jurors on the following elements of assault while participating in a felony:

> 1. On or about the 30th day of July, 1999, the Defendant committed an assault on Karla Schwaegler as defined in Instruction No. 32.
>
> 2. At the time of the assault, the Defendant was participating in any of the following crimes: Kidnapping in the Second Degree, Kidnapping in the Third Degree, Terrorism With Intent or Terrorism . . .

The court defined assault:

> 1. On or about the 30th day of July, 1999, the Defendant did an act which was intended to place Karla Schwaegler in fear of an immediate physical contact which would have been painful,

> injurious, insulting or offensive to Karla Schwaegler or the Defendant intentionally pointed a revolver toward Karla Schwaegler or displayed the revolver in a threatening manner toward Karla Schwaegler.
>
> 2. The Defendant had the apparent ability to do the act.

The Court defined "participation" as:

> A person participates in a crime beginning with the first act done toward the commission of the crime and ending when a person has been arrested or has escaped from pursuers. A person participates in a crime regardless if he is successful in committing it.

Under these instructions, the crime of assault while participating in a felony was complete at the moment when defendant, after firing his pistol, came up to the car, pointed the pistol at Schwaegler, and told her he would shoot her if she did not go into the house. Defendant then held the pistol on Schwaegler, forced her into the house, kept her there against her will for a period of time, and repeatedly threatened to kill or shoot her. This removal and confinement far exceeded what was incidental to the assault. Defendant's claim of ineffective assistance of counsel on this ground fails.

Defendant contends his trial attorney should have challenged the sufficiency of the evidence to prove the kidnapping charge. There was substantial evidence defendant held Schwaegler as a hostage and the confinement or removal increased the risk to her. *See State v. Hardin*, 359 N.W.2d 187, 190 (Iowa 1984). Defendant's trial attorney had no duty to make futile challenges to the sufficiency of the evidence.

Defendant next contends his trial attorney was ineffective in not raising a citizen's arrest defense to the kidnapping charge.

Iowa Code chapter 704 sets forth a number of defenses to the otherwise unlawful use of force. Among these are the "citizen's arrest": "[a] peace officer or other person making an arrest or securing an arrested person may use such force as is permitted by sections 804.8, 804.10, 804.13 and 804.15." Iowa Code § 704.12. The inclusion of this provision in chapter 704 signifies its status as an affirmative defense. *State v. Lawler*, 571 N.W.2d 486 (Iowa 1997); *see also State v. Delay*, 320 N.W.2d 831, 834 (Iowa 1982); *State v. Moorhead*, 308 N.W.2d 60, 62-63 (Iowa 1981).

Because it is an affirmative defense under Iowa Code section 704.12, the defendant has the burden of going forward with sufficient evidence to show that the defense applies. *State v. Lawler*, 571 N.W2d 486. Once the defendant has produced evidence sufficient to invoke the defense, the burden shifts to the State to disprove the citizen's arrest defense beyond a reasonable doubt, so that the ultimate burden of proof remains on the State. *Id.*

The elements of the citizen's arrest defense are set forth in several statutory provisions. Iowa Code section 804.9 provides in part that a private person may make an arrest "[w]hen a felony has been committed, and the person has reasonable ground for believing that the person to be arrested has committed it." An arrest is "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission to custody." Iowa Code § 804.5. Other provisions contained in Iowa

Code chapter 804 also govern arrests by private persons. Under section 804.14, a person making an arrest "must inform the person to be arrested of the intention to arrest the person [and] the reason for arrest. . . ." Section 804.24 requires that "[a] private citizen who has arrested another for the commission of an offense must, without unnecessary delay, take the arrested person before a magistrate, or deliver the arrested person to a peace officer. . . ." A private person making an arrest is justified in the use of such force as the person reasonably believes to be necessary to make the arrest, prevent serious injury to any person, or prevent the escape of the arrested person from custody. Iowa Code §§ 804.10, .13. "An arrest to be effective does not require formal words of arrest. . . ." *State v. Harvey*, 242 N.W.2d 330, 339 (Iowa 1976) (quoting *United States v. Hensley*, 374 F.2d 341, 348 (6th Cir. 1967)).

Defendant contends the following evidence presented at trial is sufficient to raise a citizen's arrest defense. Schwaegler started the car of defendant's girl friend without contacting defendant personally or by telephone. She had no police assistance and she attempted to drive the car away from the front of his home.

The question is whether this evidence created a fact question for the jury as to whether defendant's actions were justified. See Iowa R. Crim. P. 20(2) (questions of fact are to be tried by the jury). In determining this question the court views the evidence in a light most favorable to the requesting party. *State v. Lawler*, 571 N.W.2d 486 (Iowa 1997); *see also State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996). Justification was not the theory of defendant's defense. Rather, defendant contended he did not commit the acts. There was not

evidence of the elements necessary to prove defendant's conduct was a citizen's arrest. Defendant has not shown the required prejudice to succeed on this claim.

Defendant received a twenty-five year sentence on the kidnapping conviction. Defendant contends that his sentence was disproportionately harsh and in violation of the Eighth Amendment. We have reviewed defendant's arguments and disagree. We consider defendant's other claims and find them to be without merit.

AFFIRMED.