

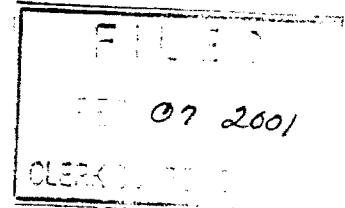
IN THE COURT OF APPEALS OF IOWA

No. 0-781 / 99-1791
Filed February 7, 2001

STATE OF IOWA,
Appellee,

vs.

SHALEN EDWARD HOUSE,
Appellant.



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

On appeal from his convictions for second-degree robbery and interference with official acts, the defendant argues his trial counsel was ineffective. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Douglas Eichholz, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

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VOGEL, J.

On appeal from his convictions for second-degree robbery and interference with official acts, Shalen Edward House argues his trial counsel was ineffective. We find his trial attorney did not fail to perform a necessary duty and, therefore, was not ineffective. We affirm.

Background facts. House was found guilty of robbery in the second degree in violation of Iowa Code section 711.3 (1999) and interference with official acts in violation of Iowa Code section 719.1 (1999). On February 22, 1999, four men attacked Timothy Adams and stole his wallet. From the facts adduced at trial, the jury could have found House threw the initial blow by punching Adams in the eye, was one of the two men who threatened to kill Adams and then kicked him as he lay on the ground. Two of the three remaining defendants identified House as the one who initially hit Adams. House now appeals.

Scope of review. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Carillo, 597 N.W.2d 497, 500 (Iowa 1999). In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Preserving the matter for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. See *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Nebinger*, 412 N.W.2d at 191-92.

Challenge for cause. House claims his trial counsel was ineffective because he did not move to remove an allegedly biased juror. The juror in question claimed he maintained a high profile in the community as he was a part-time professor at a local university and was also a familiar face on local television broadcasts, presumably providing occasional news commentaries. The juror requested to speak to the court to express a concern regarding his participation in the trial. He made the following statement to the court:

JUROR: Mr. Rodriguez kindly said who I was, you know, talked about my position at the university, and I was kind of surprised by that. I appreciated the kind words and all that, but I was kind of surprised by that simply because of I'm not a celebrity or anything like that but I am - - in town here I am on the TV quite often. I do travel a lot and, you know, I was just kind of concerned about the fact that I wanted to keep a low profile and didn't feel like I got - - I didn't - - I didn't get that sense. . . .

* * *

JUROR: That - - that really isn't my concern as much as it is, you know, quite frankly, just, you know, the result of what might happen as far as, you know, the course of the - - the end result of the trial and just the fact being that I was on the jury, you know, so, you know, that's - - that's not my concern about, you know, what's in the hallway or anything like that. I can professionally do my job. It's just the consequences of the - - of the - - you know, of what happens here and the fact being that I was on the jury and I was identified, you know, with a little bit more extra than some of the others and the fact being that, you know, somewhere down the line I'm - - my face pops up on the TV or whatever and I'm - - you know, it's just - - it's just, you know, it might be insignificant and I'm here to say, you know, if you think it's insignificant, I'm okay with it, but it's just something that I - - that I wanted to present to you so that you just knew my feelings. I thought about it when I thought about it last night.

THE COURT: Okay. Well, I'm sure that during the jury selection process you had told me and the attorneys that you felt that you could be a fair and impartial juror here and is that still your feeling today?

JUROR: Well, absolutely, I think I can do that.

THE COURT: Okay.

JUROR: You know, like I said, I'm - - you know, that was my concern of the fact that I will make the right decision and, you know, according to what I think is right, absolutely. It's just the result after that, you know.

House claims this juror demonstrated bias by inferring that he had formed an opinion of House's guilt. House must meet two requirements to prevail on this claim: (1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the defendant's use of all of the peremptory challenges. *State v. Tillman*, 514 N.W.2d 105, 108 (Iowa 1994). Iowa Rule of Criminal Procedure 17(5) states:

Challenges for cause. A challenge for cause may be made by the state or defendant, and must distinctly specify the facts constituting the causes thereof. It may be made for any of the following causes:

* * *

k. Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial.

The juror appeared to be concerned about keeping a low profile. However, after our de novo review of the juror's statement, we cannot discern such bias as would negate the juror's ability to be fair and impartial. In fact, the court specifically questioned this juror as to whether he could be fair and impartial and was apparently sufficiently satisfied with the juror's response to proceed with the trial. For this reason, we find House's trial attorney did not fail to perform a necessary duty by failing to move for the removal of this juror.

Failure to object to improper redirect. A letter allegedly written by and implicating House in the robbery was admitted into evidence. After conducting a handwriting comparison, the State's expert, Officer Greg Engel, testified that, in his opinion, House wrote the letter. Defense counsel cross-examined Officer Engel and attempted to discredit his conclusions. House's attorney suggested Officer Engel's opinion was not reliable as he was working for the prosecution and, therefore, was a biased witness. On redirect, the following exchange took place:

The State: Have you been in control of the letter since you received it from Ms. Petersen?

Officer Engel: Except for a couple-week time period.

The State: And where was the letter at that time?

Officer Engel: It was mailed to another examiner in Des Moines.

The State: Whose request was that?

Officer Engel: The defense.

The State: Did that person know what your opinion was of the letter?

Defense counsel: Objection, Your Honor, beyond the scope of cross.

The Court: Sustained.

House now argues his counsel was ineffective for failing to object sooner to the improper nature of this redirect examination. The State, however, contends the questioning was within the proper scope of redirect as House challenged Officer Engel's testimony and analysis on cross-examination. "Rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by the accused or which is brought out on his or her cross-examination." *State v. Nicholson*, 402 N.W.2d 463, 466 (Iowa App. 1987). A witness may rebut an inference raised in cross-examination during redirect examination. *State v. Munro*, 295 N.W.2d 437, 445 (Iowa 1980). Because defense counsel created an inference that Officer Engel's opinion was not reliable, we find the State, by eliciting that House could have, or perhaps did have, his own expert analyze the handwriting, conducted proper rebuttal questioning. Therefore, House's attorney did not breach a duty by failing to object sooner.

Prosecutorial misconduct. House claims the State used the information gained on redirect examination of Officer Engel during closing arguments to raise

a belief to the jury that House was unable to find an expert to refute Officer Engel's analysis. The State claims the prosecutor made the objectionable comments properly in response to defense counsel's closing argument.

During closing argument, House's attorney again questioned Officer Engel's ability to render an impartial analysis. Defense counsel's argument included in part:

[a]nd we're dealing only with the question of credibility - - is Officer Engel. . . We're not talking about somebody who is independent. We're talking essentially about somebody who is a party to this case because they all are a party to the case, police officers who investigate the case to prosecute someone, they are a part of the State's - - of the prosecutor's case so he has an interest certainly in maintaining his position within the police department. Would they continue to use him as a writing exemplar expert if he said no, consistently, no, that's not the person that wrote the letter? So he has something to protect, his salary. There is some bias there that you have to consider in terms of deciding whether his testimony is credible. . .

In rebuttal, the State argued:

[A]nd you'll remember too that Investigator Engel said that that letter was out of his custody for a couple weeks, and where did it go? It went to a handwriting person in Des Moines. And who requested that? The Defendant. Where is that person?

We find the statements by the State were made to rebut an additional challenge lodged against the State's handwriting expert. The supreme court has held the State may respond to new or contrary theories introduced by the defendant during closing arguments. *State v. Thornton*, 498 N.W.2d 670, 676-77 (Iowa 1993). "A prosecutor is not required to sit mute and let the defendant's interpretation of evidence go unchallenged." *Id.* We find House's attorney did

not breach a necessary duty by failing to move for a mistrial based on prosecutorial misconduct.

Accordingly, we affirm.

AFFIRMED.