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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

311

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RODERICK GLENN HOWARD,

Defendant-Appellant.

Filed November 30, 1987

7-347
86-1830

Appeal from the Iowa District Court for Scott County (124401-01), David J. Sohr, Judge.

Defendant appeals his convcition on two counts of burglary in the second degree for breaking into two cars. **AFFIRMED.**

Gary D. McKenrick of Gomez, May, McKenrick & Kelly, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J. 312

The defendant appeals his conviction on two counts of burglary in the second degree for breaking into two cars. The defendant contends that: (1) his right to be present at all stages of his trial was violated in that the record is silent as to his presence when the court responded to inquiries from the jury; and (2) he was denied effective assistance of counsel based on the prior complaint as well as the failure of his trial attorney to exclude references to the defendant's having been seen partially inside another car in the area. We affirm.

The defendant was convicted of two counts of burglary in the second degree. During the evening of February 22, 1986, two vehicles parked near each other were burglarized. Later that night the defendant was spotted halfway into another car with its dome lights on by one of the victims and a friend. After giving chase, the defendant was cornered and later arrested.

At trial, reference was made by both sides to this third vehicle. On appeal, the defendant argues that all references to this vehicle should have been prevented by defense counsel as violative of Iowa Rule of Evidence 404(b) and that this failure violated the defendant's right to effective assistance of counsel. During jury deliberations, the jury requested a map of the crime scene as well as a transcript of one of the victim's testimony. This request was denied, with the judge noting that both parties agreed to this denial. The defendant argues, however, that since nothing indicates whether the defendant was present, his absence should be assumed which thereby violated his rights. Also, the defendant argues that this is additional evidence of trial counsel's ineffectiveness.

I. Right to be Present at Trial. During deliberation, the jury in this case requested additional information (a map of the crime scene and another look at a witness's testimony) from the judge. The court responded in both instances by denying the requests, noting that the jury already had all of the

exhibits which were admitted into evidence and they should use their collective recollections as to the witness's testimony. Both attorneys agreed to these responses by the court. The defendant claims that under Rule of Criminal Procedure 25(1) his presence was required at every stage of the trial. Furthermore, the defendant argues, his right to be present derives from Iowa Rule of Criminal Procedure 18(5)(g) which provides in pertinent part:

> After the jury has retired for deliberation, . . . if it desires to be informed on any point of law, arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information may be given, in discretion of trial court. . . . Where the court gives the jury additional instructions, this shall appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

The Iowa Supreme Court has held that all communications between court and jury are required to be given in the presence of the defendant and counsel. State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). The defendant therefore did have the right to be present. The error, however, was harmless and therefore, we find no violation of the defendant's right to be present at all stages of the trial. In Williams, the supreme court stated that even if the defendant was not present during communications between the jury and the trial court, error was harmless beyond reasonable doubt where the communication sent by the court to the jury was not an instruction on the law and had no bearing on the evidence the jurors were to consider. Id. Further, the court noted, the trial court's innocuous response merely told the jurors that they should review the instructions and that their verdict must be unanimous. Id. at 752. In the instant case, we believe that the trial court's responses to the jury's requests were not instructions. See State v. Dreesen, 305 N.W.2d 438, 440 (Iowa 1981) (stating that "general directions to the jurors as to their duty, not having any bearing upon the evidence which they are to consider and the law applicable thereto,

are not instructions"). Rather, the trial court's responses were merely innocuous answers, refusing the jury's requests. Therefore, we hold that no harm resulted from the defendant's alleged absence during the court-jury communications and consequently, we decline to remand on this basis.

II. Ineffectiveness of Counsel. The defendant claims that he was denied effective assistance of counsel of his trial attorney's failure to object to the defendant's absence from the court-jury communications set forth in part I and because the trial attorney failed to object to testimony regarding the discovery of the defendant in a third car. In order to succeed on a claim that he was denied effective assistance of counsel, the defendant must show that his counsel failed to perform an essential duty and that prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The defendant has the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoads, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). The defendant must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 693-94, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). The defendant must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen, 308 N.W.2d at 14. The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

In order to prove prejudice, the defendant must show that counsel's failure to perform an essential duty worked to his actual and substantial disadvantage. State v. Miles, 344 N.W.2d 231, 234-35 (Iowa 1984). Specifically, he

> must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). In analyzing claims of ineffective assistance, we need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim. Taylor, 352 N.W.2d at 685.

In the instant case, we hold that there was no prejudice to the defendant and therefore, the ineffective assistance of counsel claim fails. Defense counsel, in his closing statement at trial, cautioned the jury to not consider the testimony regarding the discovery of the defendant in a third car as evidence inferring that a third burglary took place. This "cautionary" tactic served to erase any possible prejudice which might have resulted from the evidence being allowed in. Furthermore, in light of our holding in part I that there was no resulting harm from the defendant's absence during the court-jury communications, we find no prejudicial effect on that allegation here as well. We decline to find ineffective assistance of counsel.

AFFIRMED.