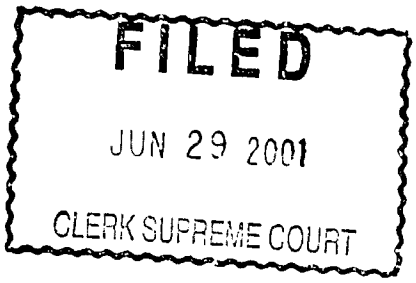
IN THE COURT OF APPEALS OF IOWA

No. 1-249 / 00-307
Filed June 29, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALBERT F. WINFREY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen Judge.

Defendant appeals from the judgment and sentence entered following his conviction of second-degree murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and Jim Ward, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Huitink and Zimmer, JJ.

ZIMMER, J.

Albert F. Winfrey appeals from the judgment and sentence entered following his conviction of second-degree murder, in violation of Iowa Code sections 707.1 and 707.3 (1999). Winfrey contends his trial counsel was ineffective in failing to challenge the jury instructions marshalling the elements of his claim of self-defense. We affirm.

I. Background Facts and Proceedings. Defendant Albert Winfrey shot and killed Castine "Mo" Moore during a card game at a local Des Moines body and repair shop known as "Pete's Garage." According to various witnesses, Winfrey abruptly left the garage after Moore criticized Winfrey about a side bet defendant placed with another player during the game.

Winfrey drove away in his car, but returned about twenty minutes later. Prosecution witnesses generally agreed that defendant entered the garage upon his return and at least twice stated, "now speak on my money," an apparent comment about Moore's previous interference with his side bet. At least two witnesses testified Winfrey had a gun pulled when he reentered the garage and confronted Moore. In response to defendant's comment, Moore got up from his chair and took several steps toward Winfrey. While he was doing this, Moore placed his hand in his pocket. Witnesses disagreed on whether Moore was putting money away or whether his hand was empty. At this point, defendant shot Moore in the abdomen and killed him. He then walked out of the garage. At trial, Winfrey claimed he shot Moore in self-defense, fearing Moore was reaching for a gun. All who witnessed the shooting agreed Moore said nothing to Winfrey before he was shot. It is undisputed that Moore was not armed.

Winfrey was charged with first-degree murder. Following a jury trial, he was convicted of the lesser-included offense of second-degree murder. Winfrey appeals, contending his trial counsel was ineffective in failing to object to the manner in which the jury was instructed on the self-defense issue.

II. Scope of Review. We review claims of ineffective assistance of counsel de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley,* 564 N.W.2d 817, 833 (Iowa 1997). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil,* 264 N.W.2d 293, 296 (Iowa 1978); *State v. Kirchner,* 600 N.W.2d 330, 335 (Iowa Ct. App. 1999).

III. Ineffective Assistance of Counsel. To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996). First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* We can affirm on appeal if either element is lacking. *Id.* A presumption exists that counsel is competent and that counsel's conduct falls within a wide range of reasonable professional assistance. *State v. Hepperle,* 530 N.W.2d 735, 739 (Iowa 1995). We will not second-guess reasonable trial strategy. *State v. Wissing,* 528 N.W.2d 561, 564 (Iowa 1995). The second prong of the test is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have

been different." *Davis v. State,* 520 N.W.2d 319, 321 (Iowa Ct. App. 1994) (citing *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1994)).

Winfrey argues that his counsel was ineffective in failing to object to the jury instructions marshalling the elements of self-defense. He points out that Iowa law recognizes two types of aggressors; those who provoke the use of force through an unlawful act and those who provoke the use of force with the intent to use such force as an excuse to inflict injury on the assailant. Iowa Code §§ 704.6(2) – (3). Under the facts of this case, it is obvious that defendant started or provoked the incident resulting in the victim's death. To the extent that he did so by the unlawful act of pulling and displaying a gun upon entering the garage, he forfeited any claim to self-defense. Defendant acknowledges that neither of the two circumstances that can cleanse "unlawful act" provocation is present in this case. Winfrey did not withdraw and the victim did not use disproportionate force.

The facts of this case, at least arguably, allowed for a finding that he engaged in mere "lawful act" provocation by starting the incident without pulling a gun. Therefore, the trial court instructed the jury regarding the intent element of lawful act provocation. Winfrey contends the jury instructions regarding this issue were inadequate because they never required the State to prove as an *element* that self-defense for such provocation is barred only upon showing of an intent to use the provoked force as an excuse to inflict injury. Iowa Code § 704.6(2). He claims the jury instructions allowed the jury to convict him by finding that he provoked the use of force without the requisite intent to use it as an excuse to injure Castine Moore. We disagree.

In response to defendant's claim of self-defense at trial, the court submitted ten instructions on justification (Nos. 20 – 29). In the marshalling instruction on self-defense (No. 20), the trial court instructed the jury that the defense of justification was unavailable to Winfrey if the State proved he started or continued the incident that resulted in Moore's death. Instruction 29 informed the jury "[a] person is not justified when he provokes or causes force to be used against himself, intending to use it as an excuse to injure another." It went on to conclude, "If you find the State has proved the defendant provoked the use of force intending to use it as an excuse to injure Castine Moore, he was not justified." Additional instructions informed the jury that (1) they were to consider all of the instructions together and that no one instruction included all of the applicable law, (2) that the burden was on the State to prove Winfrey's guilt beyond a reasonable doubt, and (3) that this burden existed whenever the jury was instructed the State must prove something.

We do not find that counsel breached an essential duty in failing to object to the court's instructions. As the State notes, Instruction 29 is a verbatim recitation of Uniform Criminal Jury Instruction 400.26. The marshalling instruction is also identical to Uniform Criminal Jury Instruction 400.2. This court is reluctant to disapprove of the uniform jury instructions. *State v. Johnson,* 534 N.W.2d 118, 127 (Iowa Ct. App. 1995). Furthermore, instructions are to be read as whole. *State v. Simpson,* 528 N.W.2d 627, 632 (Iowa 1995). When a single jury instruction is challenged on appeal, it will be judged in context with all the other instructions. *State v. Stallings,* 541 N.W.2d 855, 857 (Iowa 1995). In reading the trial court's jury instructions as a whole, we find they adequately state

the law. *See State v, Uthe,* 542 N.W.2d 810, 815 (Iowa 1996) ("It is well settled that a trial court need not instruct in a particular way so long as the subject of the applicable law is correctly covered when all the instructions are read together."). Because Winfey's trial counsel had no duty to object to proper instructions, we dismiss Winfrey's claim of ineffective assistance of counsel on direct appeal. *See State v. Farnum,* 554 N.W.2d 716, 720-21 (Iowa Ct. App. 1996).

AFFIRMED.

Huitink, J., concurs; Sackett, C.J., concurs specially without opinion.