

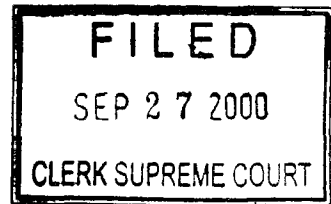
IN THE COURT OF APPEALS OF IOWA

No. 0-385 / 99-739
Filed September 27, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JIMMIE LAVERN MILLER,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Jimmie Lavern Miller appeals the court's judgment and sentence, entered after jury trial, on the charges of terrorism and criminal gang participation.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

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

HUTINK, P.J.

I. Background Facts and Proceedings.

Miller and Detarius Spats were jointly charged with terrorism and criminal gang participation following an altercation at a Waterloo residence. At trial the State presented evidence that Miller, Spats, and other members of the Vice Lords street gang threatened Montrese Wilson and Maurice Sallis with a firearm. Miller denied these allegations claiming someone else threatened and terrorized Sallis and Wilson.

The district court, without objection from counsel, submitted the following jury instructions concerning criminal gang participation:

INSTRUCTION NO. 30

The State must prove all of the following elements of Criminal Gang Participation:

1. On or about the 22nd day of November, 1998, the defendant actively participated in or was a member of a criminal street gang as defined in Instruction No. 31.
2. On that date the defendant willfully aided and abetted a criminal act, that is, Terrorism and/or Going Armed With Intent.
3. The criminal act was committed at the direction of the criminal street gang or was committed in association with a criminal street gang. . . .

INSTRUCTION NO. 31

"A criminal street gang" is any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity, as defined in Instruction No. 36.

INSTRUCTION NO. 33

"Criminal acts" are defined as any single or combination of offenses involving an act of terrorism or going armed with intent.

INSTRUCTION NO. 36

“Pattern of criminal gang activity” means the commission of or attempt to commit two or more criminal acts The criminal acts must have been committed either on separate dates or by two or more persons who are members of or belong to the same criminal street gang.

Miller was convicted on both counts charged and sentenced accordingly.

On appeal Miller contends he was denied effective assistance of trial counsel, citing counsel’s failure to object to the foregoing instructions.

II. Standard of Review.

Because Miller’s claim implicates his Sixth-Amendment right to counsel, our review is de novo. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980).

III. The Merits.

To prevail, Miller must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). The test for the first element is whether the attorney’s performance was outside the range of normal competency. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). The test for the second element is whether there is a reasonable probability that, but for his trial attorney’s unprofessional errors, the resulting conviction and sentence would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 694 (1984). In evaluating counsel’s performance, we presume counsel acted competently. See *Risdal*, 404 N.W.2d at 131.

The gist of Miller's argument is that the foregoing instructions permitted his conviction for criminal gang participation without proof of a pattern of criminal gang activity. We disagree.

Iowa Code section 723A.1(3) states:

"Pattern of criminal gang activity" means the commission, attempt to commit, conspiring to commit, or solicitation of two or more criminal acts, provided the criminal acts were committed on separate dates or by two or more persons who are members of, or belong to, the same criminal street gang.

Under Miller's interpretation of this statute, terrorism, the underlying offense charged, does not count as one of the two or more criminal acts necessary to establish a pattern of criminal gang activity.

We are unable to reconcile Miller's interpretation with the plain language of the statute. The statute is written in the present tense and disjunctively provides alternative means for its violation. Construed in this light, a jury could find Miller engaged in a pattern of criminal gang activity based on evidence that he committed an act of terrorism contemporaneously with another gang member's criminal act of going armed with intent. There is no requirement that Miller engaged in criminal activity above and beyond that necessary to establish the existence of a criminal street gang. Instead, all that was required was sufficient evidence to show both the existence of a criminal street gang and Miller's criminal involvement therewith. See *In re C.T.*, 521 N.W.2d 754, 757 (Iowa 1994). But see *State v. Browne*, 494 N.W.2d 241, 244 (Iowa 1992) (court declines to address this issue). We also note that our conclusion is consistent with the other state court that has addressed this issue. See *People v. Loeun*,

947 P.2d 1313, 1317 (Cal. 1997) (interpreting a similarly worded statute to allow a pattern of criminal gang activity to be shown through evidence of the defendant's commission of the charged offense and a second predicate offense by a fellow gang member). Here, the record discloses that two or more criminal acts were committed by two or more members of a criminal street gang. We find no error in the district court's submission of these instructions.

In cases involving interpretation of criminal statutes, counsel's duty is to determine whether arguments like that raised here were worth raising at trial. See *State v. Westeen*, 591 N.W.2d 203, 210 (Iowa 1999). We, based on the plain language of the statute and persuasive authority from another jurisdiction, conclude it was not. Miller's claim therefore fails because he has failed to prove counsel breached any essential duty.

AFFIRMED.