IN THE COURT OF APPEALS OF IOWA

No. 5-392 / 94-1356

STATE OF IOWA,

Plaintiff-Appellee,

vs.

GARY HARRELL BRUSH,

Defendant-Appellant.

FILED
SEP 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Gary Brush appeals the judgment and sentence entered upon his convictions, following a jury trial, of second-degree robbery and second-degree burglary in violation of Iowa Code sections 711.1(1), 711.1(2), 711.3, 703.2, 713.1, 703.1, and 713.5 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill Pitsenbarger, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

On March 28, 1994, Gary Brush and Ronald Depass entered the back door of the Dairy Queen in Leeds, Iowa. Depass remained in the back of the store. Brush walked to the front of the store and asked Dairy Queen employee Jennifer Verzal to open the cash register. Verzal refused. Brush then told Verzal that if she did not cooperate, Depass would hurt her. Brush opened the store's two cash registers, took approximately $525, and left with Depass.

Verzal was familiar with Brush and identified him as one of the men who had burglarized the Dairy Queen. Brush was charged with second-degree robbery and second-degree burglary.

At Brush's jury trial, Brush testified he was acquainted with Depass because they did drugs together. He stated he only went along with the Dairy Queen burglary because Depass threatened to cut him if he did not. Depass also threatened to cut Brush's girlfriend if Brush did not cooperate.

Officer Lefler testified at trial that after Brush's arrest, Brush invoked his right to remain silent and his right to counsel.

> Q: When you went to speak with Gary Brush, did he indicate to you why he wanted to speak with you? A: We had originally talked right after he was picked out of the photo lineups and he did not want to speak with me, he wanted to talk to his lawyer. I told him if he wanted to talk to me he could get back to me. And it was a couple weeks later his girlfriend called and he changed his mind and wanted to talk to us, so I went over and talked to him.
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> Q: At that point did he say why he had changed his mind? A: No.

Later, during the State's cross-examination of Brush, the prosecutor elicited the following testimony regarding Brush's post-arrest silence.

> Q: And then, of course, Officer Lefler testified that he came to see you sometime after your arrest, and again at this point you say, "I don't want to talk to you right now." And then Officer Lefler said that about a month after the March 28 robbery, that he came to see you at your request. Is that all true? A: Officer Lefler came to the jail over here and asked me a few questions. And I told him I hadn't seen my counsel yet and I said I'd rather wait. He said, "Okay." He came back again and I said, "I still haven't seen my counsel." It took 28 to 30 days before I could see my counsel. Then immediately after that, and the fact that I found out that Mr. Depass was arrested, that's when I notified my girlfriend to get Mr. Lefler down so I could tell him what happened.
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> Q: Are you trying to tell us, Mr. Brush, that you were arrested and a month passed and you never talked to your attorney? A: I talked to him for a brief second and he made me sign papers for the -- when they take the paperwork across the street to have you arraigned. It was very short. He said he didn't have time to talk to me, he was in a hurry and said he'd get back to me. It took a while -- a long while, yes.

There were no objections to any of the testimony.

The jury found Brush guilty as charged.

Brush appeals.

On appeal, Brush contends his trial counsel provided ineffective assistance of counsel by failing to object to the admission of testimony regarding Brush's invocation of his right to remain silent and his right to counsel.

When considering an ineffective assistance claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d

674, 699 (1984). In deciding this, we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test, appellant must show 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 2068, 80 L. Ed. 2d at 698 (1984).

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Such claims may be decided on direct appeal if the defendant fails to show one of the two prongs. *See State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993).

Brush's claim must fail on direct appeal since the prejudice prong of the test cannot be met.

The evidence presented at trial of Brush's guilt was strong and clear. The identification of Brush as the man who entered the Dairy Queen and demanded money was positive. The manager, Jennifer Verzal, recognized Brush because they both attended Briar Cliff College at the same time and both played on the Briar Cliff women's and men's basketball teams. Verzal's testimony regarding the robbery was detailed. Verzal testified she did not hear Depass speak to or give directions to Brush. Verzal also testified Brush did not appear to be under stress, nor did he appear nervous. Verzal was able to pick Brush's photograph out of a photo line-up.

The two other people working at the Dairy Queen at the time of the robbery were able to also identify Brush in a photo line-up, as well as in court. Both also testified Brush did not appear nervous during the robbery.

There were only two customers at the Dairy Queen at the time of the robbery. One customer was facing the counter area and the other was not. The customer facing the counter made an in-court identification of Brush as the man who robbed the Dairy Queen. This customer also testified Brush appeared calm at the time she saw him at the cash register.

After deciding to talk to police officers, Brush admitted to robbing the Dairy Queen with Depass. Brush claimed Depass forced him to participate in the robbery. Brush did not elaborate on how he was forced to participate until trial where he again

admitted to the robbery and contended he was coerced into participating. At trial, Brush claimed Depass threatened to cut Brush or Brush's girlfriend if Brush did not participate. Brush admitted Depass never displayed a gun or knife at any time.

In light of the strong evidence against Brush, we conclude counsel's failure to object to the testimony did not affect the outcome of the case. Accordingly, we affirm the conviction and find Brush's claim of ineffective assistance of counsel must fail on direct appeal.

AFFIRMED.

Hayden, P.J., concurs; Sackett, J., specially concurs without opinion.