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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed October 22, 1986 447
vs.	)	
KELLY ROBERT HILPIPRE,	)	6-232 85-1160
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 27271) - Van Wifvat, Judge.

Defendant appeals from his judgment of conviction and sentence following a bench trial finding him guilty of willful injury and attempt to commit murder, contending that insufficient evidence was presented to support the trial court's finding that he made a knowing and voluntary waiver of his right to a jury trial; insufficient evidence was presented for a rational factfinder to find him guilty beyond a reasonable doubt of the crimes of willful injury and attempted murder; that he was denied effective assistance of counsel when his trial attorney failed to adequately communicate to him a proposed plea agreement; and that he was denied his constitutional right to a fair trial because segregated witnesses may have had access to trial testimony. **AFFIRMED.**

James P. Piazza of Piazza, Holmes & Beery, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Raymond J. Kinley, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM 448

On December 21, 1984, Kelly Robert Hilpipre was charged by trial information with willful injury and attempt to commit murder in connection with the December 11, 1984, beating of Des Moines Police Detective Ralph Woods. Written waivers of the right to a speedy trial and the right to a jury trial were filed on March 4, 1985. Trial commenced on April 10, 1985, and on May 17, 1985, the trial court entered verdicts of guilty on the charges of willful injury and attempted murder. Following a hearing held on June 26, 1985, Hilpipre's motion for a new trial was denied. On June 28, 1985, judgment was entered on the conviction and Hilpipre was sentenced. Notice of appeal was filed on July 17, 1985.

The first issue presented to us by this appeal is Hilpipre's claim that his waiver of a jury trial was not intelligently made. Under Iowa Rule of Criminal Procedure 16(1), a criminal defendant may forego his right to a jury trial if the defendant ". . . voluntarily and intelligently waives a jury trial in writing and on the record within thirty days after arraignment . . . ." In the present case, Hilpipre signed the following statement:

> Comes now the Defendant, Kelly Hilpipre, and voluntarily and intelligently waives his right to a jury trial pursuant to Rule 16(1), Iowa Rules of Criminal Procedure.

Notwithstanding his signing of the waiver, Hilpipre argues that because the full parameters of his right to a jury trial were never sufficiently explained to him, the waiver was not "intelligently" made and was, as a result, constitutionally infirm. Thus, Hilpipre presents us with the issue of whether a criminal defendant must have personal knowledge of the intricate particulars of his or her right to a jury trial before that defendant is able to effect a constitutionally valid waiver of that right. Because Hilpipre claims he was deprived of a constitutional protection, our review consists of an independent evaluation of the circum-

stances. State v. Schubert, 346 N.W.2d 30, 32 (Iowa 1984). This is equivalent to a de novo review. Id.

Trial by jury is fundamental to the American system of criminal justice, and the sixth amendment's guarantee of the right to trial by jury is applicable to the states under the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491, 496 (1968). Similar protection is afforded by Iowa Constitution Article I, Sections 9 and 10. State v. Henderson, 287 N.W.2d 583, 584-85 (Iowa 1980). A defendant, however, may waive his right to a jury trial and instead be tried by the court. Patton v. United States, 281 U.S. 276, 298, 50 S. Ct. 253, 258, 74 L. Ed. 854, 863 (1930); Henderson, 287 N.W.2d at 585. Any bar to such a waiver will be of statutory, and not constitutional, origin. Id.

Current Iowa statutory law provides for a criminal defendant's waiver of his or her right to a jury trial. Iowa Rule of Criminal Procedure 16(1) states that "[c]ases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record . . . ." Although a jury waiver cannot be undertaken lightly, State v. Lawrence, 344 N.W.2d 227, 229 (Iowa 1984), a written jury waiver, taken in compliance with rule 16(1) is prima facie evidence that the waiver was voluntary and intelligent. Id. When a defendant subsequently attacks its validity, that defendant bears the burden of proving otherwise. Id. In the present case, Hilpipre challenges the waiver based upon his alleged lack of understanding concerning the specific procedural safeguards inherent in the jury system. Because of this lack of understanding, Hilpipre argues that his waiver was not "intelligently" made. Although we have never before expressly delineated the quantum of knowledge that must be possessed by a criminal defendant before his or her waiver of the right to

a jury trial is valid, we believe the level of knowledge possessed by Hilpipre was sufficient.

A valid waiver is an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938). Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970) (footnote omitted); State v. Johnson, 318 N.W.2d 417, 426 (Iowa 1982). Whether or not there is an intelligent waiver of jury trial by an accused must be judged on a case-by-case basis. Adams v. United States ex rel. McCann, 317 U.S. 269, 278, 63 S. Ct. 236, 241, 87 L. Ed. 268, 274 (1942). With respect to rights guaranteed to preserve a fair trial, such as the right to trial by jury, the defendant must always understand the right he or she is abandoning, irrespective of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 237-38 and note 25, 93 S. Ct. 2041, 2052-53 and note 25, 36 L. Ed. 2d 854, 869 and note 25 (1973).

The Seventh Circuit Court of Appeals was faced with a situation similar to the present case in United States ex rel. Williams v. DeRobertis, 715 F.2d 1174 (7th Cir.), cert. denied, 464 U.S. 1072, 104 S. Ct. 982, 79 L. Ed. 2d 219 (1983). At issue in DeRobertis was a defendant's claim that because he was aware of neither his right to participate in jury selection nor his right to a substantial majority jury verdict, both attributes of the larger right to trial by jury, his jury waiver was invalid. The court in DeRobertis first noted that the purpose of a jury trial "'is to prevent oppression by the government.'" Id. at 1180 (quoting Duncan, 391 U.S. at 156, 88 S. Ct. at 1451, 20 L. Ed. 2d at 499). Given this purpose

> the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence.

Id. (quoting Williams v. Florida, 399 U.S. 78, 100, 90 S. Ct. 1893, 1905-06, 26 L. Ed. 2d 446, 460 (1970). The seventh circuit proceeded from these observations to its holding in DeRobertis:

> In this case, we think the concrete understanding of a jury trial which the record discloses that petitioner Williams possessed was sufficient for a knowing and intelligent waiver. He understood that the choice confronting him was, on the one hand, to be judged by a group of people from the community, and on the other hand, to have his guilt or innocence determined by a judge. Since he had a concrete understanding of that choice, he was in a position to determine whether an invocation of his right to a jury trial was necessary to effectuate its purpose.

Id. (footnotes omitted).

Similarly, the record in the present case discloses that Hilpipre possessed at least this minimal understanding of the nature of his right to a jury trial. He concedes that discussions with his counsel included the fact that jury would constitute a number of people and the court would be one judge. Although Hilpipre may not have been made aware of all of the specific attributes of the right to trial by jury, he decided that, given the amount of pretrial publicity that accompanied his case, it would be to his advantage if his case was tried to the court and not a jury. We agree with the reasoning of the Seventh Circuit Court of Appeals and hold that this level of knowledge is sufficient to render his waiver "intelligent" as that term is used in Iowa Rule of Criminal Procedure 16(1).

Hilpipre next argues that the evidence presented to the court was insufficient to sustain the trial court's finding of guilty on either the willful injury

or the attempted murder charge. In determining whether a conviction is supported by substantial evidence, we view the evidence in the light most favorable to the State without regard to contradiction or inconsistencies and assisted by all reasonable inferences. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. Id. at 339. The ultimate burden is on the State to prove every fact necessary to constitute the crime with which a defendant is charged. State v. Gibbs, 239 N.W.2d 866. 867 (Iowa 1976). Direct and circumstantial evidence are equally probative. State v. Schrier, 300 N.W.2d 305, 308 (Iowa 1981). The same standard of review applies whether the trial is by jury or to the court. State v. Price, 365 N.W.2d 632, 633 (Iowa 1985). Where the verdict is clearly against the weight of the evidence or contrary to the law, a new trial should be granted. Robinson, 288 N.W.2d at 338.

The essential elements of attempt to commit murder are: (1) intent to cause the death of another person, and (2) the commission of any act calculated to cause or result in the death of such person. State v. Sunclades, 305 N.W.2d 491, 496 (Iowa 1981); Iowa Code section 707.11 (1985); see also Iowa Uniform Criminal Jury Instruction 730.

We note that the element of intent is rarely capable of direct proof and may be shown by circumstantial evidence. State v. Delay, 320 N.W.2d 831, 835 (Iowa 1982). The fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experience and observation. State v. Serr, 322 N.W.2d 96, 101 (Iowa Ct. App. 1982).

In the present case, there exists both direct and circumstantial evidence in support of the trial court's determination that the intent element had been

satisfied beyond a reasonable doubt. Detective Woods testified that during the assault his assailants, Hilpipre and his brother, threatened that "[w]hen we get him out of the car we are going to kill him." In addition, evidence illustrating the manner in which the assault was carried out provides circumstantial evidence in support of the trial court's determination on the issue of intent. There is evidence in the record that Detective Woods was repeatedly struck in the head and face and then dragged from his vehicle by the defendant. Similarly, there is evidence that while Detective Woods lay on the pavement, he was repeatedly kicked with a heavy boot in the head and chest by Hilpipre, who took three or four steps prior to each kick. Hilpipre was heard to grunt after each kick, indicative of the velocity of the blows. Hilpipre did not cease kicking the victim by his own volition, but had to be stopped by a witness. In short, there exists substantial evidence in support of the trial court's determination on the element of intent.

With respect to the second element of attempted murder, the commission of any act calculated to cause or result in the death of another person, we also believe the State has produced substantial evidence. Iowa law is clear that an individual is presumed to intend the natural consequences of his intentional acts. State v. Chatterson, 259 N.W.2d 766, 770 (Iowa 1977). The use of a shoe in kicking a victim may under some circumstances make it a dangerous weapon. State v. Bradley, 254 Iowa 212, 222, 116 N.W.2d 439, 445 (Iowa 1962); see Iowa Code section 702.7 (1985). Intent to kill may be inferred from the use of a deadly weapon. State v. Hunter, 243 Iowa 361, 51 N.W.2d 409 (1952). We believe that the vicious kicking of Detective Woods by Hilpipre constituted substantial evidence in support of the trial court's finding on this element.

As to the charge of willful injury, the constituting elements are: (1) an assault; (2) intent to cause serious injury; and (3) a resulting serious injury.

See Iowa Code section 708.4 (1985). Iowa Code section 702.18 (1985) defines "serious injury" as follows:

> 'Serious injury' means disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

There exists substantial evidence in the record that Hilpipre committed an assault on Detective Woods when Hilpipre struck him, dragged him from his car, and repeatedly kicked him while he lay on the ground. As we have decided above that substantial evidence exists in support of the trial court's determination that Hilpipre acted with the intent to kill Detective Woods, it follows that Hilpipre also acted with the intent to cause Detective Woods serious injury. The trial court determined that Detective Woods sustained serious injury in that his injuries created a protracted loss or impairment of the function of any bodily member or organ, created a substantial risk of death, and caused serious permanent disfigurement. As we find substantial evidence in support of the first of these three statutory definitions of serious injury, we do not inquire into the remaining two.

In State v. McKee, 312 N.W.2d 907 (Iowa 1981), the Iowa Supreme Court stated with respect to the issue of what harm constitutes an impairment of the function of a bodily organ within section 702.18 that ". . . a harm which substantially interferes with an organ's function meets the statutory test." Id. at 913. The court went on to say that ". . . a harm which makes the function of an organ intensely painful or irregular is an impairment." Id. That court also has noted that "protracted," as used in section 702.18, means "to draw out or lengthen in time or space." State v. Welton, 300 N.W.2d 157, 160 (Iowa 1981). In the present case, record evidence supports a finding that Detective Woods suffered a protracted impairment of the function of a bodily member

or organ in at least two ways. First of all, as a result of the assault, Detective Woods developed a condition known as atelectasis, a collapse of portions of lung tissue, during his hospitalization. Secondly, the considerable pain which resulted from two broken ribs over a period of several months impaired the functioning of Detective Woods' lungs during that period. As the evidence is sufficient for a rational factfinder to find that Detective Woods suffered protracted loss or impairment of a bodily organ, the trial court's decision in this regard must be upheld. In sum, the present record contains substantial evidence in support of the trial court's determination of guilt with respect to both the attempted murder and willful injury charges.

Hilpipre next contends that he was denied effective assistance of trial counsel by virtue of counsel's failure to adequately communicate a proposed plea bargain to him. Ordinarily, this court will not decide an ineffective assistance of counsel claim on direct appeal, preferring instead to reserve it for postconviction proceedings when counsel can defend against the charge. State v. Poyner, 306 N.W.2d 716, 719 (Iowa 1980). An exception exists when questions concerning the adequacy of counsel have already been considered and ruled on as part of a defendant's motion for new trial. Id. The facts of the present case invoke this exception.

As Hilpipre is asserting that his constitutional right to counsel was violated, we make an independent evaluation of the totality of the circumstances, the equivalent of a de novo review. Schubert, 346 N.W.2d at 32. In order to succeed on a claim that he was denied effective assistance of counsel, Hilpipre 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). He has the burden to prove both of these elements by a preponderance of the evidence. Sallis v. Rhoades, 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). Hilpipre 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 (1984). He must show an affirmative factual basis demonstrating counsel's inadequacy of representation. Snethen 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).

Our review of the testimony given at the hearing on the motion for a new trial persuades us that Hilpipre has failed to meet his burden on this issue. His trial counsel testified that he communicated the State's plea offer to Hilpipre and that Hilpipre rejected it. Although Hilpipre now argues that he lacked a full and complete understanding of the offer, he has not directed our attention to any record evidence in support of that claim. Consequently, his allegations of ineffective assistance must fail.

Finally, Hilpipre contends that he was denied a fair trial because segregated witnesses may have had access to trial testimony. This allegation stems from the fact that on the first day of trial an in-court spectator had tape-recorded portions of the trial testimony. Hilpipre argues these recordings may have circumvented sequestration. No evidence was presented at either the hearing on Hilpipre's motion for new trial or on this appeal that any of the witnesses actually listened to the tapes or that a witness's testimony was distorted by hearing the tapes so as to deny Hilpipre a fair trial. Only upon a clear showing that the trial court's denial of a new trial motion resulted in a miscarriage of

justice will we overturn the trial court's ruling. State v. Harrington, 284 N.W.2d 244, 251 (Iowa 1979). Hilpipre has failed to make such a showing here.

AFFIRMED.