IN THE COURT OF APPEALS OF IOWA

No. 6-789 / 96-344

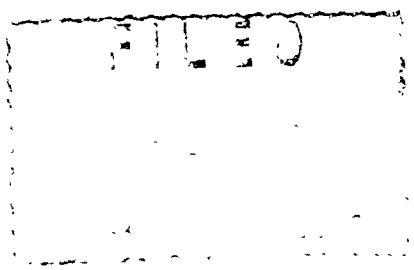
STATE OF IOWA,

Appellee,

vs.

ERIC LUIS GONZALES,

Appellant.



Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

Eric Gonzales appeals his conviction and sentence, following a jury trial, for willful injury in violation of Iowa Code section 708.4 (1995). **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, J. Patrick White, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee.

Heard by Cady, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, P.J.

Eric Gonzales appeals his conviction and sentence, following a jury trial, for willful injury in violation of Iowa Code section 708.4 (1995). We reverse and remand for a new trial.

On the evening of July 22, 1995, Gonzales was a patron at a bar in Iowa City. An altercation between several women erupted late in the evening. At some point, Gonzales became involved in the altercation. Paul Arndorfer, the bar manager, eventually intervened. He began to physically remove Gonzales from the bar. In the process, Gonzales struck Arndorfer in the head with a beer bottle causing the bottle to break. Gonzales then cut Arndorfer's face and neck with the broken bottle as the two were struggling against a wall.

Arndorfer's wounds bled extensively. They required eight hours of surgery and about 100 sutures. Arndorfer experienced significant loss of mobility in his neck and permanent scarring to his face.

Gonzales was arrested and charged with willful injury. At trial, Gonzales offered an intoxication defense. There was conflicting evidence about Gonzales's level of intoxication.

The district court instructed the jury on the intoxication defense. The instructions stated:

INSTRUCTION NO. 23

> The defendant claims he was under the influence of intoxicants at the time of the alleged crime. The fact that a person is under the influence of intoxicants does not excuse or aggravate his guilt.
>
> Even if a person is under the influence of an intoxicant, he is responsible for his act if he had sufficient mental capacity to form the specific intent necessary to the crime charged or had the specific intent before he fell under the influence of the intoxicant and then committed the act. Intoxication is a defense only when it causes a mental disability which makes the person incapable of forming the specific intent. *This defense may be proved by a preponderance of the evidence.* (Emphasis added).

INSTRUCTION NO. 24

> Concerning the defense explained in Instruction No. 23, preponderance of the evidence is evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

The jury found Gonzales guilty of willful injury. He was sentenced to serve an indeterminate term of imprisonment not to exceed ten years.

Gonzales appeals. He maintains his trial counsel was ineffective for failing to object to the intoxication instructions. When a defendant asserts a violation of a constitutional right, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Generally, claims of ineffective assistance of counsel are preserved for postconviction proceeding. *State v. Capper*, 539 N.W.2d 361, 367 (Iowa 1995). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.*

A defendant bears the burden of proving by a preponderance of the evidence he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel failed to perform an essential duty; and (2) he was prejudiced by counsel's omission. *Id.* at 561-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a reasonable probability that but for the trial attorney's unprofessional errors, the resulting convictions would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Gonzales contends his trial counsel failed to perform an essential duty when counsel failed object to instructions 23 and 24 because the instructions shifted the burden of proving the specific intent element from the State to Gonzales. Instruction 23 instructed the jury regarding intoxication as a defense. It is identical to Iowa Criminal Jury Instruction 200.14, *Intoxication as a Defense,* except for the last sentence which states "[t]his defense may be proved by a preponderance of the evidence." Instruction 24 defines preponderance of the evidence. It is identical to Iowa Criminal Jury Instruction 100.12.

The defense of intoxication may be shown where "it is relevant in proving the person's specific intent . . . at the time of the person's alleged criminal act." Iowa

Code § 701.5 (1997). Thus, when a defendant asserts the defense of intoxication which is supported by substantial evidence,

> such evidence is to be considered by the jury on the material issue in the State's case upon which it bears in determining whether the State has met its burden to prove the element involved beyond a reasonable doubt. This does not mean the State must prove as an additional element that the defendant was not prevented from forming specific intent by reason of intoxication; it means only that the burden of proving specific intent does not leave the State even when the defendant relies on an intoxication defense.

State v Templeton, 258 N.W.2d 380, 383 (Iowa 1977). Clearly, a jury instruction which places the burden of proof upon a defendant who asserts an intoxication defense is incorrect.

When examining the jury instructions in the present case in the context of an ineffective assistance of counsel claim we must consider whether counsel's failure to object was outside of the normal range of competency. In doing so we consider whether the challenged instructions shifted the burden of proof to Gonzales both by the words used and in the framework of the instructions as a whole. *See Templeton*, 258 N.W.2d at 383.

We find Gonzales's trial counsel did not perform within the normal range of competency. The last sentence in instruction 23 shifted the burden of proof to Gonzales. Although another instruction indicates the State must prove Gonzales specifically intended to cause a serious injury to Paul Arndorfer, counsel should have objected to instructions 23 and 24. The instruction, even if understood not to place

the burden of proof on Gonzales, could be understood to only require this specific intent element be established by a preponderance of evidence.

We observe this is not a case where postconviction proceedings are necessary to develop additional circumstances on the failure of defense counsel to object to the instructions. Counsel's actions cannot be attributed to improvident trial strategy, miscalculated tactics, or mistake in judgment. *See State v. Hrbek*, 336 N.W.2d 431, 436 (Iowa 1983). The record before us is adequate to determine whether Gonzales received ineffective assistance of counsel. *See id.*

Trial counsel's failure to object to the instructions also prejudiced Gonzales. Although the jury received instructions indicating the State had to prove specific intent beyond a reasonable doubt, as well as an instruction setting forth the presumption of innocence, these instructions do not eliminate the extreme prejudice caused by the burden shifting instruction. The jury was not only given the burden shifting instruction, but also an additional instruction defining the incorrect burden. The second instruction only exacerbated the egregiousness of the initial error. These instructions became a haven for jury confusion.

Our confidence in the outcome of the trial is sufficiently undermined. We therefore conclude trial counsel's failure to object to the instructions denied Gonzales his constitutional right to effective representation. The decision of the trial court is reversed, and the case is remanded for a new trial.

REVERSED AND REMANDED.