FILED
JUN 4 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed June 4, 1986

vs.) 346

JOHN ROBERT HOWE,) 6-123
85-1157

Defendant-Appellant.)

Appeal from the Iowa District Court for Polk County (No. 27931) - James P. Denato, Judge.

Defendant appeals his conviction for robbery in the second degree, asserting that he was denied effective assistance by trial counsel's failure to properly object to the trial court's interference in the conduct of the trial. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Catherine Thune, Assistant County Attorney, for plaintiff-appellee.

Heard by Snell, P.J., and Hayden and Sackett, JJ.

SNELL, P.J.

Defendant John Robert Howe was charged with the robbery of the Star-Lite Motel which occurred on February 28, 1985. He waived a jury trial and a bench trial commenced on June 12, 1985.

Clarence Schenkler, the owner of the Star-Lite Motel, testified that he was robbed of $100 on the afternoon of February 28. He described the robber as about six and a half feet tall, 250 to 280 pounds, wearing a work cap, a heavy jacket, and a heavy large work shoe. The man walked into the motel's front office and demanded money. Schenkler handed over approximately sixty dollars from his cash box and forty dollars from his wallet. The robber then told him to lie on the floor behind the front desk and count to one hundred. Schenkler complied with this request. The robber slipped his foot under Schenkler to push him, then left the motel. Schenkler testified that Howe's clothing was similar to that worn by the robber. He stated that the tread of Howe's work boot matched a footprint left in the mud in front of the motel.

An employee of the Dickey-John Corporation, which is located directly across the street from the Star-Lite Motel, also testified. The employee stated that on February 28, Howe entered the office and asked permission to use the telephone to call a taxi. Howe was wearing a blue coat.

Polk County deputies were dispatched to the robbery scene at 2:53 p.m. on February 28. They observed Howe leaning against the building across the street from the motel, believed he fit the description of the robber, and arrested him. Approximately one hundred dollars was discovered in one of Howe's pockets. Schenkler was escorted across the street and identified Howe as the robber.

Howe told the police that he had been working at a construction job for a George Myers Construction Company at Southwest Third and Ankeny in Ankeny that afternoon. The job involved putting in a basement. He got off work at

3:00 p.m., started walking home, and decided to call a cab. A police officer testified that Howe told him that his job was a referral from spot labor of Job Service. The officer also testified that Southwest Third and Ankeny is approximately four miles from Dickey-John Corporation, and a bank, a hardware store, a veterinary office, and a Casey's General Store are located at that intersection.

The assistant manager of Job Service testified that Howe signed up for work on February 28, but Howe was not referred to any spot labor job on that date.

When Howe took the stand, he claimed that he was not referred to the basement job by Job Service but rather phoned Myers about the job on his own initiative. After the State and defense counsel indicated that they had no further questions of Howe, the court commenced the following examination:

BY THE COURT:

Q. Mr. Howe, tell me about this construction job out at Ankeny that you were working on this day. A. Okay. This job I had got from Mr. Myers was helping him put in a basement. He tore out a basement. You know, rebuilding the walls and putting in a concrete floor and drainpipes and different stuff. And we would work like three or four hours and he gave me like eight and a half an hour. It come out to like forty dollars or something like that. And he asked me, he said, "Mr. Howe, do you need a ride to Des Moines?" And I said, "No, I don't. I'll walk," and that's when I started walking from Southwest Third and Ankeny toward Des Moines.

Q. What sort of a place were you working on, a home or a business or what? A. Basement of a house, you know, because the house had been moved up there and he had started putting the basement — you know, how you put basement walls up toward the house and fit them in? He was going to have me come back the next day, but by that time I had been arrested for this suspected armed robbery.

Q. You being acquainted with Ankeny, can you tell me where this location is precisely? A. Okay. Southwest Third and Ankeny is — you come up Highway 69 to Southwest Third, go down three blocks to Southwest Third and Ankeny.

Q. Southwest Third and — A. — Ankeny.

Q. Ankeny is a street also? A. Yes.

Q. Is this a residential area where this is located? A. Yes, it is. It sits right across from the United Church.

Q. And the other corners, is this a house on a corner? A. Okay, Your Honor, on one corner is where I was working. Another corner there is a — like what Detective Shultz said, there's a church and there's another house on another corner.

Q. Two of the corners have houses on them, one has a church and one has a bank? A. Yes, they do. A bank, like Detective Shultz said.

Q. This house, did it have a number on it? Did it have a house number yet? A. No, I don't — I don't remember the house number, sir, Your Honor.

Q. George Myers, have you known him before? A. Oh, a couple times, you know, I have drank with the gentleman at different occasions, bars. You know, he drank beers and stuff and I drank Pepsi because at that time I was on parole. I'm still on parole.

Q. What sort of work does George do? Is he a carpenter? A. Carpenter, masonry, tile setting.

Q. Does he have a company or does he just work with himself? A. He is self-employed.

Q. Just does subwork? A. You know, gets different — any contract jobs out, you know.

Q. Where does he live? A. He lives two blocks down from where we was working.

Q. What would that be, Southwest Fifth, Southwest First, Southwest Third? A. Southwest First and I don't remember the street number.

Q. Two blocks down which direction? Do you know? A. Going toward the high school up there or grade school.

Q. I'm not acquainted with Ankeny, so if you can pick out a direction for me, if you can remember. A. Okay. You walk from the high school up to Southwest Third. You can stand on the corner and right straight toward the football field of the high school or grade school.

Q. Do you know what direction that would be? A. North.

Q. So you are telling me he lives two blocks north of the place which you were working? A. Yes.

Q. In a regular residential house or an apartment building or do you know? A. Residential.

Q. Is he a married man? A. No, he isn't.

Q. Does he live alone? A. He lives alone. You know, he picks up different women, you know, and buys them drinks and buys them drinks and takes them, you know.

Q. Estimate the age of Mr. Myers for me. A. About fifty, fifty-five.

Q. About fifty? A. He's in good shape. Better than I was.

Q. As far as you know is he still operating up there in this business? A. I really don't know, sir, Your Honor.

Q. Have you been in custody since February 28th, in jail? A. No, I haven't, because he won't collect calls.

Q. Have you been in jail since arrested on February 28th? A. Yes, I have, Your Honor.

Q. Yes? A. Yes, it was.

Q. And you had just called him that morning? A. Yes.

Q. How did you know to call him that morning; was he one of the spot labor jobs? A. Okay. About two or three days before I, you know, went to a bar. You know, like I said, I had been drinking Pepsi and he had been drinking beer and he said, you know, "Come out the 28th of February and work for me," and I said, "Okay." So I just made sure, you know, that he was going to be out there that day, so I called out there and he told me to be out there by one. So I went out there at one and went to work, you know.

Q. Why did you go to the spot labor if you had this employment already? A. I went up to spot labor. They started picking numbers at six-forty to six-fifty that morning. I had the number of sixty. Sixty you ain't going no where. Like the gentleman told you, you bid. Some days you get — like sometimes you see people go out, you know, three and four times a day, you know, sometimes; but, you know, the number I had that day was sixty. I thought I'll just call Mr. Myers, you know, and make sure, you know, he was going to do work that day.

Q. But he had told you that several days earlier in a bar? A. Yes, he did.

Q. Had you worked for him before at any time? A. No, I hadn't.

Q. But your only other contact with Mr. Myers was that you had seen him in a bar occasionally. Was this just once or on several occasions? A. I seen him in a bar a couple, you know, three or four times. The bar was down there at East 30th and State Street. Joe and Betty's bar, East 30th, out by the fairgrounds.

Q. Over how long a period of time had you seen him in bars? A. I seen him —

Q. I mean has it been over a period of five or six years or five or six months? A. No, about two years.

Q. About two years? A. Because for five years I was in the penitentiary.

Q. And since you have been in the Polk County Jail you have not had any contact with Mr. Myers? A. No, I haven't.

THE COURT: Counsel, do either of you have any further questions for this defendant?

MS. THUNE: No, Your Honor.

MR. RIGG: No, Your Honor.

At this point, the court addressed Schenkler, the victim of the robbery:

> THE COURT: Mr. Schenkler, would you mind coming up here, please?
>
> Mr. Schenkler, this man's attorney seems to have some questions about your identification of this man here as a robber. You have now had an opportunity to see him up and about and moving and hearing him talk. Can you tell me now whether or not you have any uncertainty in your mind; do you have any question in your mind about whether this man robbed you or not?
>
> MR. SCHENKLER: I don't have.
>
> THE COURT: You're telling me that this is the robber?
>
> MR. SCHENKLER: Yes.

The following day the State was permitted to reopen the rebuttal record and it offered into evidence a stipulation with defense counsel (exhibit 10). This stipulation consisted of testimony to the effect that a police dispatcher for the Ankeny Police Department made a thorough document search and found no information relating to a George Myers living in the Ankeny area. The stipulation also included the testimony of a lifelong Ankeny resident that only businesses are located at the intersection of Southwest Third and Ankeny.

The trial court found Howe guilty of second-degree robbery. In its findings and verdict, the court stated:

> Schenkler identified the defendant in court as the robber but had some difficulty in articulating the detail and basis of his identification.
>
> Because thereof, the Court asked the county attorney to investigate further on defendant's testimony in court and statement to Detective Shultz as to his construction job in Ankeny. The parties submitted the stipulation Ex. 10 on this matter.

Howe was sentenced to an indeterminate ten-year term of incarceration.

On appeal, Howe asserts that he was denied effective assistance of counsel when his trial attorney failed to timely and properly object to the trial court's interference with the conduct of his trial. Howe contends that the trial court acted improperly by questioning him, recalling Schenkler, and advising the county attorney to further investigate Howe's alibi defense. By so interjecting itself into the case, Howe asserts that the court went beyond clarification, elicited additional evidence against Howe, and became an advocate for the State.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984), the United States Supreme Court enunciated this test for prejudice: "The defendant must show that there is 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." A defendant asserting a claim of ineffective assistance of counsel must prove ineffective assistance by a preponderance of the evidence. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1983). The presumption is that counsel is competent. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). The ultimate test for determining whether a defendant has been denied effective assistance is "whether under the entire record and totality of circumstances counsel's performance was within the normal range of competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

In the case at bar, the question of counsel's failure to perform an essential duty turns upon the propriety of the trial court's actions challenged by Howe.

Iowa R. Evid. 614 expressly allows the trial court authority to examine

witnesses: "When necessary in the interest of justice, the court may interrogate witnesses, whether called by itself or by a party." See C. McCormick, Law of Evidence §§ 8 at 12-13 (E. Cleary 2d Ed. 1972) (trial court's authority to question witnesses is well established). The Iowa Supreme Court in State v. Cuevas, 288 N.W.2d 528, 533 (Iowa 1980), explained that "a trial court may take reasonable measures to insure that the evidence is intelligibly presented to the jury. We hold that this includes the power to clarify evidence through the questioning of witnesses when in the exercise of sound discretion it is reasonably deemed necessary." Most recently the court analyzed a judge's power to intervene in a trial in State v. Mills, No. 83-1656 (Iowa Sup. Ct. March 19, 1986):

> Under the Anglo-American adversary trial system, the parties and their counsel have the primary responsibility for finding, selecting, and presenting the evidence. However, our system of party-investigation and party-presentation has some limitations. It is a means to the end of disclosing truth and administering justice; and for reaching this end the judge may exercise various powers.
>
> Prominent among these powers is his power to call and question witnesses.
>
> The judge in his discretion may examine any witness to bring out needed facts which have not been elicited by the parties. Also, it is sometimes said that the judge may have a duty to question witnesses, although the exercise of such a duty does not appear to have been enforced by any appellate court decisions.
>
> In those states—the great majority—in which the judge does not have power to comment on the weight of the evidence, the judge's questioning in jury cases must be cautiously guarded so as not to constitute an implied comment. Thus, if the judge uses leading questions, suggesting the desired answer, the questions may often strongly imply that the desired answer is the truth, and thus may offend the rule against comment. Subject to the limitation that a leading question may constitute prohibited comment, it has been held that the policy against leading questions by counsel, namely, that of avoiding false testimony elicited by partisan suggestion, has no application in general to judges, whose office

> is to be impartial. This reasoning seems somewhat questionable. Also, questions which are aimed at discrediting or impeaching the witness, though allowable for counsel, when asked by the judge may often—not always—intimate the judge's belief that the witness has been lying, and thus be an implied comment on the weight of his testimony.

slip op. at 7 (quoting McCormick on Evidence § 8 at 12-13 (2d ed. 1972)).

The primary concern, then, with judicial interjection in the trial is its effect upon the jury.

> By engaging in the examination of witnesses the court becomes vulnerable to a multiplicity of criticisms; bias, prejudice or advocacy are some of those. Even facial expressions, gestures, and voice modulation can be construed to evince an attitude or feeling toward a witness or party. See State v. Larmond, 244 N.W.2d at 236. It must always be borne in mind that jurors are particularly sensitive to the presiding judge's views, State v. Kimball, 176 N.W.2d 864, 867 (Iowa 1970), and may be unduly influenced by what they perceive those views to be.

Cuevas, 288 N.W.2d at 533.

In the present case, we find that the trial court acted within its power and without abuse of its discretion. Initially, we note that there was no jury. Therefore, there was no danger that the court's conduct would unduly influence the jury's determination of credibility or weighing of the evidence.

Furthermore, the judge's actions were impartial. The questions addressed to the complaining witness and Howe consisted of clarification of matters insufficiently developed by counsel. The essence of Howe's complaint appears to be that the trial court became an advocate for the State because the response to its questions revealed unfavorable information. This contention ignores the fact that the court's questions themselves were evenhanded. The court was seeking the truth regarding Howe's guilt or innocence. Clearly, if Howe had been telling the truth about his employer and the construction site, the court's questions and the county attorney's further investigation would have bolstered Howe's defense.

One of the primary goals associated with judicial interrogation is the search for truth and a defendant has no right to prevent the truth from being told. "A trial is not a game; it is a serious quest for the truth." Mills, slip op. at 8; see also United States v. Cheatwood, 575 F.2d 821, 826 (10th Cir.), cert. denied, 439 U.S. 853, 99 S. Ct. 162, 58 L. Ed. 2d 158 (1978) (one of the primary purposes of criminal justice system is that of seeking out the truth and trial court has the power to interrogate witnesses in a manner reasonably thought to bring about a just result); United States v. Harris, 488 F.2d 867, 868-69 (8th Cir. 1973) (trial judge has power to put to witness "such additional questions as seem to him desirable to elicit the truth more fully"); United States v. Ostendorff, 371 F.2d 729, 732 (4th Cir.), cert. denied, 386 U.S. 982, 87 S. Ct. 1286, 18 L. Ed. 2d 229 (1967) (trial court has the duty to participate in the examination of witnesses when necessary to bring out matters insufficiently developed by counsel).

Because the trial court's participation in the trial was proper, Howe has failed to demonstrate a breach of an essential duty in trial counsel's failure to properly object to the court's conduct.

AFFIRMED.