FILED
MAR 31 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	236
Plaintiff-Appellee,	)	Filed March 31, 1986
vs.	)	5-700 85-294
JOHN THOMAS BAKER, JR.,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Woodbury County (No. 41430) - Dewie J. Gaul, Judge.

Defendant appeals his conviction of first degree burglary, willful injury, and assault with intent to inflict serious injury. **AFFIRMED.**

Charles Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellee.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, and Mary Jane Sokolovse, Assistant County Attorney, for plaintiff-appellee.

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

On direct appeal of his conviction of first-degree burglary, willful injury, and assault with intent to inflict serious injury, defendant Baker contends he was denied effective assistance of counsel when his trial counsel failed to object to the erroneous definition of the lesser included offense of criminal trespass.

The alleged erroneous jury instruction not objected to by trial counsel stated:

> If you do not find the defendant is guilty of Burglary in the Second Degree, then you will determine from the evidence whether he is guilty of the crime of Criminal Trespass with Injury.
>
> The law provides that a person commits Criminal Trespass with Injury when he enters upon or in property without justification or without the actual permission of the owner, lessee or person in lawful possession, with the intent to commit a public offense.
>
> You must find the defendant not guilty of Criminal Trespass unless the State proves by evidence beyond a reasonable doubt each of the following elements:
>
> 1. That on or about May 27, 1984, the defendant entered upon the property of another.
>
> 2. That the defendant did so without the actual permission of Fern Johnson, who was the person in lawful possession.
>
> 3. That at the time he entered, the defendant had the intent to commit a public offense, to wit: an assault.
>
> 4. That while doing so, the defendant injured Brent Buddi.
>
> If you find the State has proved beyond a reasonable doubt each and all of the above elements, then you will find the defendant guilty. . . . [emphasis added].

Baker argues the element that distinguishes criminal trespass from burglary by entering is the intent with which the person enters the property. See State v. Sangster, 299 N.W.2d 661, 664 (Iowa 1980). If one enters with the intent to commit a "felony, assault or theft," the crime is burglary; if one enters with the intent to commit some other public offense, the crime is trespass. Id.

To establish the claim of ineffective assistance of counsel, defendant must establish that his counsel's performance did not fall within the range of

normal competency by showing: (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. Kyle v. State, 364 N.W.2d 558, 562 (Iowa 1985)(citing Strickland v. Washington, 466 U.S. 668, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). To show prejudice, 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. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Although the instruction may be erroneous, we find Baker has failed to show the requisite prejudice. The jury found sufficient evidence in the record to conclude beyond a reasonable doubt Baker committed willful injury and assault with intent to inflict serious injury. There is no indication that the jury would have found Baker guilty of criminal mischief had the additional assault language been omitted. We cannot find the outcome of Baker's trial would have been any different had trial counsel objected to the instruction. See State v. Miles, 344 N.W.2d 231, 235 (Iowa 1984); State v. Blackford, 335 N.W.2d 173, 178 (Iowa 1983).

We affirm the trial court.

AFFIRMED.