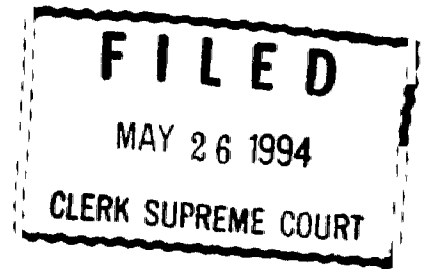


IN THE COURT OF APPEALS OF IOWA

No. 4-105 / 93-472



STATE OF IOWA,

Appellee,

vs.

NICACIO AVILA,

Appellant.

Appeal from the Iowa District Court for Muscatine
County, James E. Kelley, Judge.

Nicacio Avila appeals his convictions, following a jury
trial, of second-degree burglary and first-degree
harassment. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and
Patricia Reynolds Lapointe, Assistant State Appellate
Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber,
Assistant Attorney General, and Richard R. Phillips, County
Attorney, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HAYDEN, P.J.

Nicacio Avila was charged and subsequently convicted of burglary in the second degree, in violation of Iowa Code sections 713.1 and 713.5, and harassment in the first degree in violation of Iowa Code section 708.7. Mr. Avila was sentenced for a period not to exceed ten years on the burglary in the second degree charge and sentenced for a period not to exceed two years on the harassment in the first degree charge. The sentences were ordered to run concurrently.

The incident leading to the above charges occurred on November 24, 1992. Carol Cohn testified she was at home with her children and a friend, Lee Rogers, when she began receiving phone calls from the defendant. Cohn testified she had formerly lived with Avila but had broken off the relationship due to his jealous and possessive attitude. At the time of the incident a no-contact order was in effect. Cohn and Rogers both testified Avila made numerous phone calls to the Cohn residence threatening to kill Cohn or kill Rogers if she did not put Cohn on the phone. At the time the phone calls were being placed Sheriff Burmeister was present in the Cohn home. He left the premises hoping to find Avila after Avila disclosed his location.

Approximately ten minutes after the sheriff left, Avila arrived at the Cohn residence. Cohn testified Avila attempted to enter through the front door to her home and

she, Rogers, and Cohn's son pushed on the door to prevent him from entering. Unable to enter through the door, Avila continued to yell for Cohn and moved to the windows. At this time he put his hand through the window. Cohn testified Avila pulled some of the glass out of the window and reached for her dog. At this time Avila was yelling obscenities and said he had a gun and was going to kill everyone. He then retrieved something from his car and returned to the house. Neither Cohn nor Rogers could identify the object in his hand. Avila then returned to his car and drove away.

Deputy Burmeister stopped Avila a short distance from Cohn's house. No weapons were found on Avila's person; however, an inventory search revealed a butcher's knife found on the floor on the passenger side.

The evidence revealed Avila was apparently upset with Cohn because he had heard she was seeing someone else. Avila had lived with Cohn in the house where the incident occurred for approximately five months prior to their break-up. Avila testified he called Cohn to discuss a possible reconciliation and denied making any threats. He admitted breaking the window but denied he intended to enter the home. He claimed he used the butcher knife as a tool.

Avila claims trial counsel rendered ineffective assistance by failing to object to the first-degree harassment marshaling instruction. He argues the

instruction did not inform the jury it must find the telephone call was made "without legitimate purpose," an essential element of the offense charged. See Iowa Code §§ 708.7(1)(a) and 707.7(2) (1993). He asserts his whole defense was based on showing his call was made for the legitimate purpose of inquiring about Cohn's children and mending their relationship. He also claims counsel was ineffective for failing to move for judgment of acquittal on the harassment count. Avila also contends the record contains insufficient evidence to support Avila's second-degree burglary conviction. He finally claims the trial court erred in allowing the butcher knife into evidence because the prejudice outweighed any probative value. We affirm the trial court.

Avila first claims ineffective assistance of counsel for failure by his attorney to object to the harassment instruction and further for failing to move for judgment of acquittal on the harassment charge. Established principles govern our review of appellant's Sixth-Amendment claim his counsel was ineffective. When considering this 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). Because a defendant must prove both incompetent representation and prejudice before succeeding on a claim of ineffective assistance of counsel, a reviewing court can affirm a conviction on direct appeal if the defendant has failed to prove prejudice, without deciding whether counsel's representation was incompetent. State v. McKettrick, 480 N.W.2d 52, 56 (Iowa 1992). Claims of ineffective assistance of counsel usually are not adjudicated on direct appeal because the attorney charged

with ineffectiveness has never had an opportunity to respond to the allegations. Id. However, such claims may be adjudicated on direct appeal if there is a sufficient record available for a reviewing court to make a determination. Id.

Avila first alleges his attorney provided ineffective assistance in failing to object to the instruction on harassment because the instruction failed to include the element of legitimate purpose. The instruction provided to the jury is as follows:

With regard to Count II, the State must prove all of the following elements of Harassment in the First Degree:

1. On or about the 24th day of November, 1992, the Defendant telephoned Carol Cohn and threatened to kill her, or telephoned Lee Ann Rogers and threatened to kill her.
2. This was done with the specific intent to intimidate, annoy, or alarm either Carol Cohn or Lee Ann Rogers.

The relevant definition of harassment as set out in the Iowa Code is as follows:

1. A person commits harassment when, with intent to intimidate, annoy or alarm another person, the person does any of the following:
 - a. communicates with another by telephone, telegraph, or writing without legitimate purpose and in a manner likely to cause the other person annoyance or harm.

* * *

2. A person commits harassment in the first degree when the person commits harassment involving a threat to commit a forcible felony

Iowa Code § 708.7(1)(a), (2) (1993).

Avila argues the omission of lack of legitimate purpose from the instruction was erroneous. He argues the existence of legitimate purpose in the instruction was "vital to the case," and counsel's failure to object to the erroneous instruction was ineffective assistance of counsel. The State agreed legitimate purpose is an element of harassment and further agreed the instruction was subject to objection. However, the question is whether counsel's conduct prejudiced Avila. We find it did not.

In the context of an ineffective assistance of counsel claim, when "there is no reasonable probability the jury would have reached a different verdict" under a different instruction, failure to object to an erroneous instruction is not prejudicial. State v. Hill, 449 N.W.2d 626, 629 (Iowa 1989).

In this case, it is highly unlikely the jury's verdict would have been any different had the instruction included lack of legitimate purpose as an element of the crime. Avila claimed he had a legitimate purpose in placing the calls to Cohn because he intended to ask Cohn about her children and inquire about a possible reconciliation. These reasons alone were not legitimate because at the time the call was made Avila was under a no-contact order. He was prohibited from making any calls. Additionally, the evidence shows Avila threatened to kill both Cohn and Rogers and made other threats during the course of the phone calls. There is no legitimate purpose for making

such threats. Absent a showing of a reasonable probability that a different instruction would have produced a different verdict, Avila can prove no prejudice and his claim must fail.

Avila next claims his counsel was ineffective in failing to submit a motion for acquittal with respect to the harassment claim. Avila argues the State did not prove he acted without a legitimate purpose and therefore his counsel had a duty to submit a motion for acquittal of judgment on that basis. However, there is no reason for Avila's counsel to submit such a motion. Testimony by Cohn, Rogers, and Deputy Burmeister was sufficient to create a jury question. As noted above, communication involving a threat to kill an individual is rarely made with a legitimate purpose. Avila's counsel had no duty to perform the futile act of submitting a motion which could not properly be granted. State v. Hidebrant, 405 N.W.2d 839, 841 (Iowa 1987).

Avila has failed to show failure of a professional duty or resulting prejudice with regard to the failure to object to the jury instruction and the failure to submit a motion for acquittal. His conviction of first-degree harassment is affirmed.

Avila next argues the evidence was insufficient to support a conviction of second-degree burglary. We disagree. Avila specifically contends there was not sufficient evidence he committed a breaking, and there was

not sufficient evidence he intended an assault. We review all evidence in the light most favorable to the verdict and, because of the verdict, give the State benefit of all reasonable inferences which arise from the evidence. A verdict is binding on us if there is substantial evidence to support it. Substantial evidence means evidence which could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Barrett, 445 N.W.2d 749, 753-54 (Iowa 1989).

The district court instructed the jury on the breaking alternative of burglary, with assault as the underlying intended crime. There was sufficient evidence to support both breaking and assault. As has been discussed, Avila made continual phone calls to Rogers and Cohn threatening to kill them. He also traveled to Cohn's home and proceeded to punch his fist through a window and attempted to pull the glass out. Additionally, he attempted to grab Cohn's dog as he reached through the window. Avila then yelled obscenities through the window and said he had a gun and was going to kill everyone. He then ran to his car and returned carrying an unidentified object. The evidence is sufficient to support the conviction on this charge.

Finally, Avila contends the trial court erred in admitting the butcher knife into evidence because the probative value was outweighed by its prejudice. The knife was probative with regard to Avila's intent to assault Cohn and Rogers. Additionally, testimony as to the discovery of

Avila's conviction is affirmed.

AFFIRMED.