

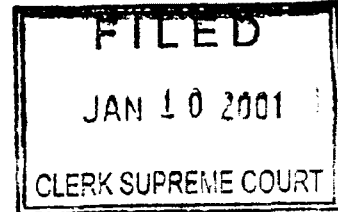
IN THE COURT OF APPEALS OF IOWA

No. 0-599 / 99-1468
Filed January 10, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PARIS MARSHALL WHEELER,
Defendant-Appellant.



Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Wheeler appeals his convictions for assault and first-degree robbery.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney
General, William E. Davis, County Attorney, and Julie A. Walton, Assistant
County Attorney, for appellee.

Heard by Sackett, C.J., Mahan, J., and Habhab, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206
(1999).

HABHAB, S.J.

Paris Marshall Wheeler appeals the judgment and sentence entered upon his conviction of first-degree robbery in violation of Iowa Code section 711.2 (1997). We affirm.

I. Background Facts and Proceedings.

Wheeler was arrested and charged with first-degree robbery, second-degree sexual abuse, and going armed with intent following a confrontation between him and Suzanne Blasdel. Both Wheeler and Blasdel testified at trial, providing two very different accounts. Blasdel testified that in the early morning hours of July 27, 1998, she encountered Wheeler as she was leaving a tavern. He first tried to persuade her to get into his car and then, upon her refusal, assaulted her. She maintained the attack was so violent she lost consciousness several times and that as she regained consciousness, she found Wheeler to either be sexually assaulting her or searching through her purse. Eventually she was able to break free and run to safety, but without her purse because he had taken it when she passed out. Blasdel contended she had never met Wheeler prior to the day in question.

Conversely, Wheeler provided testimony to the effect that he and Blasdel were dating. He asserted that Blasdel had taken money from him, which she promised to repay at the end of the evening after she "turned a date." Wheeler stated he had taken Blasdel to the tavern that evening and was waiting there for her while she was on her "date." He did not see her return to the bar, but found her in the parking lot preparing to leave. Upon confrontation, Blasdel stated she

did not have the money to repay him and he admitted physically assaulting her. Wheeler maintained his motivation stemmed from jealousy and a belief that she had used him. He claimed he did not intend to take her purse, but that she fled his attack leaving it in the parking lot and he picked it up believing she would call him to request its return.

The jury returned a verdict of guilty on the charges of first-degree robbery and the lesser-included offense of assault.

On appeal Wheeler argues trial counsel was ineffective based on his failure to object to the omission of a jury instruction on the claim of right defense and that there was insufficient evidence to support his conviction of first-degree robbery.

II. Ineffective Assistance of Counsel.

Wheeler brings an ineffective assistance of counsel claim based on trial counsel's failure to object to the lack of a jury instruction on the claim of right defense to robbery. Iowa Code section 714.4 provides the following claim of right defense:

No person who takes, obtains, disposes of, or otherwise uses or acquires property, is guilty of theft by reason of such act if the person reasonably believes that the person has a right, privilege or license to do so, or if the person does in fact have such right, privilege or license.

Wheeler contends the jury believed he attacked Blasdel with the intent to reclaim the money she had taken from him. Thus, he argues he was materially prejudiced by counsel's failure because this defense would have negated the necessary intent to commit a theft element of robbery.

Our review of ineffective assistance of counsel claims is de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. See *Hinkle v. State*, 290 N.W.2d 28, 34 (Iowa 1980).

We find Wheeler's claim to be without merit. A defendant is only entitled to a theory of defense instruction if he or she makes a timely request, the request is supported by substantial evidence, and the request sets out a correct declaration of the law. *State v. Johnson*, 604 N.W.2d 669, 672 (Iowa App. 1999). Evidence is substantial enough to support a requested instruction when a reasonable mind would accept it as adequate to reach a conclusion. *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996). Wheeler's own testimony was that the attack on Blasdell was not motivated by a desire to steal from her and that he

did not intend to keep her purse once he did take it. In accord with this testimony, trial counsel did not attempt to defend on a claim of right theory, but instead attempted to show the assault was not motivated by an intent to commit a theft.

Trial counsel's performance is judged by his primary theory of defense. See *Schrier v. State*, 347 N.W.2d 657, 663 (Iowa 1984); *State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983). Selection of a primary theory of defense is a tactical matter that we will not disturb if it appears to have been a conscientious, principled decision within the normal range of competency. *Hall v. State*, 360 N.W.2d 836, 839 (Iowa 1985). Under these circumstances, we cannot find trial counsel's theory of defense was outside the normal range of competency. Counsel was therefore not ineffective.

III. Sufficiency of the Evidence.

Wheeler also argues there was insufficient evidence to support a finding that the assault committed was done in furtherance of an intended theft. Iowa Code section 711.1 defines robbery, in pertinent part, as follows:

A person commits a robbery when, having the intent to commit a theft, the person does any of the following acts to assist or further the commission of the intended theft or the person's escape from the scene therefore with or without the stolen property:

1. Commits an assault upon another. . . .

To fall within this definition of robbery, the assault must have been committed for the purpose of furthering an intended theft. Wheeler asserts that even under Blasdell's version of the facts the motive behind the attack was to sexually assault her, not to steal her purse. Moreover, he contends that even if the jury

believed he was motivated by a desire to take her purse, his purpose would have been to reclaim the money she had taken from him and, thus, the claim of right defense negates the intent to commit a theft element of robbery.

In considering a sufficiency-of-the-evidence challenge, we review all the evidence to determine whether a rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Our review of the evidence is made in a light most favorable to the jury's verdict. *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *Anderson*, 517 N.W.2d at 211.

While we agree with Wheeler that a rational trier of fact could have believed he was not motivated by the intent to commit a theft, we disagree that that is the only conclusion that could be drawn. In reaching its verdict in this case, the jury could rationally have disbelieved Wheeler but believed enough of Blasdel's testimony to find that the attack was motivated at least in part by the intent to steal her purse. See *Arne*, 579 N.W.2d at 328 ("The credibility of witnesses, in particular, is for the jury: the jury is free to believe or disbelieve any testimony as it chooses."). We accordingly affirm on this issue.

The decision of the district court is affirmed in full.

AFFIRMED.