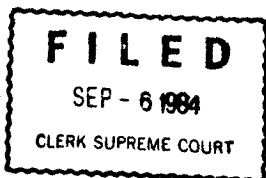


IN THE COURT OF APPEALS OF IOWA



RANDALL JOSEPH BEDWELL,)

Petitioner-Appellant,)

vs.)

STATE OF IOWA,)

Respondent-Appellee.)

Filed September 6, 1984

4-193
83-804

20

Appeal from the Iowa District Court for Warren County--M. C. Herrick,
Judge.

The petitioner appeals from the trial court's denial of postconviction relief. He contends that he received ineffective assistance of counsel in a number of particulars during his 1982 trial for first-degree criminal mischief. He also contends he is entitled to postconviction relief on the additional ground of newly discovered evidence. **AFFIRMED.**

Jill S. Rolek, Des Moines, Iowa, for petitioner-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant
Attorney General, for the respondent-appellee.

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

SACKETT, J.

The defendant, Randall Joseph Bedwell, appeals from trial court's denial of postconviction relief. Defendant was convicted of first-degree criminal mischief on May 3, 1982, in violation of sections 716.1 and 716.3 of the Code of Iowa. We affirm.

On March 3, 1982 Defendant Randall Bedwell, along with Alan Carr were arrested on a railroad right-of-way while rolling up copper wire used by the railroad to transmit signals. They were charged by trial information with first-degree criminal mischief on March 12, 1982. A jury found that Defendant Bedwell and Mr. Carr were guilty of the offense charged. Defendant did not take a direct appeal of his conviction, however, in 1983 he challenged the verdict by applying for postconviction relief. The trial court denied the relief sought and defendant brings this appeal.

On appeal Defendant Bedwell makes a number of contentions. The defendant claims he was denied a fair trial because of ineffective assistance of his trial counsel in the following particulars: 1) when defense counsel referred to prejudicial physical evidence in opening statements; 2) when defense counsel failed to move for a mistrial when the state brought prejudicial physical evidence into open court before such item was admitted into evidence; 3) when defense counsel failed to object and move for a mistrial when prejudicial statements relating to the physical evidence were admitted into evidence; 4) when defense counsel failed to request a jury instruction defining the words "substantial interruption in service" as an element of the crime charged; 5) when defense attorney failed to protect defendant's right to appeal when sufficient grounds for an appeal existed. Further, the defendant contents he was denied a fair trial because the trial court erred in failing to admit into the postconviction relief hearing newly discovered evidence which tended to exculpate defendant and provided a basis for a new trial.

I. Ineffective Assistance Of Counsel.

In reviewing a claim of ineffective assistance of counsel, where the defendant is asserting that his constitutional right to a fair trial was violated we make an independent evaluation of the totality of the circumstances - the equivalent of a de novo review. State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1983). In order to prevail on his claim, a defendant must show the existence of two conditions: "It must be shown that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). As to condition (1) supra, the petitioner must shoulder the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). The test is whether under all the circumstances counsel's performance was within the range of normal competency. Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa 1982); Hinkle v. State, 290 N.W.2d 28, 30-31 (Iowa 1980). Petitioner must overcome a presumption that counsel is competent. Strickland v. Washington, 52 U.S.L.W. 4565, 4571, 104 S.Ct. 2052, 2065-66, 82 L.Ed.2d 674, ____ (1984) ("Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'").

As to condition (2), the recent Supreme Court opinion in State v. Miles, 344 N.W.2d 231 (Iowa 1984) explains the standard for determining whether a petitioner has demonstrated prejudice. Prejudice cannot be found unless error constitutes a denial of the accused's fundamental right to a fair trial, a fundamental

miscarriage of justice or some equivalent constitutional deprivation. Id. at 234. The Iowa Supreme Court has ruled that "[t]he required examination should proceed while resisting, in the light of hindsight, the temptation to Monday morning quarterback the lawyer in the arena. Nor should the inquiry degenerate into a postmortem, microscopic dissection of each desperate effort of counsel to save a terminal case." Hinkel v. State, 290 N.W.2d 28, 30 (Iowa 1980). The Iowa Supreme Court stated in Miles, supra at 234:

The applicable test for prejudice in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982), as requiring the prisoner to demonstrate that the error created not only "a possibility of prejudice, but that [it] worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (emphasis in original.)

The test for prejudice suggests the proper allocation of the burden of proof on the issue of prejudice. In order to sustain that burden, the petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. This burden is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance. At the same time, the burden does not require the petitioner to produce evidence to which he is unlikely to have access. It also properly reserves for the state the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt. Thus, even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel. (emphasis in original.) Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982), cert granted, U.S. 103 S. Ct. 2451, 77 L.Ed. 1332 2d (1983)(Iowa has adopted the Washington expression of The U.S. Supreme Court's prejudice test found in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 71 L.Ed.2d 816, 832 (1982).

Finally, we need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim. Taylor v. State, No. 83-223, slip op. at 4 (D. Iowa July 18, 1984).

The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result. 52 U.S.L.W. at 4571, 104 S.Ct. at 2070, 82 L.Ed.2d at _____. In the light of these principles which govern our review, we now address each of petitioner's assignments of error.

A. Reference To The Ladder In Opening Statements By Defense Counsel

Defendant Bedwell contends, as one of the grounds for this appeal, that he was given ineffective assistance of counsel in that his attorney referred to a ladder in his opening statement which provided a basis for its admission into evidence. The defendant alleges that during opening statements his court appointed attorney, Mr. Pennington, specifically referred to a ladder, identified as an instrumentality of the crime, and where it was found. The defendant's attorney subsequently moved for exclusion of the ladder based on its discovery nine (9) days after Bedwell's arrest, and also because of the distance it was found from the arrest site. The trial court denied the motion. The denial was grounded, in part, upon defendant counsel's reference to the ladder in his opening statements as can be seen by the following record made at trial:

"THE COURT: In connection with the ladder the Court also remembers that defense counsel mentioned it during opening statement, and the Court is going to overrule the defendant's motion in limine concerning the ladder and also overrule the motion in connection with the proposed testimony of Mr., Bottoms.

MR. PENNINGTON: (Defendant's attorney.) Just for clarification purposes, are you overruling the motion on the ladder on the grounds because I mentioned it in my opening statement or for other reasons?

THE COURT: Primarily because you mentioned it in your opening statement.

MR. CRISWELL: (State's attorney.) Doesn't the Court feel it is relevant and material to this case?

THE COURT: Of course, and primarily I would not allow it if it weren't but also because it has already been mentioned in this case."

The defendant alleges that the attorney's statements are so prejudicial so as to amount to ineffective assistance of counsel. We disagree.

An "opening statement" is precisely what the term implies. It may or may not be made by an attorney as there is no provision in the law which compells him to make a statement. The right, however, has never been questioned. Peoples v. Arnold, 199 Co. 471, ___, 250 P. 168, 174 (1926). Its purpose is to prepare the minds of the jurors to follow the evidence and to more readily discern its materiality, force and effect. The statement is not evidence. Id. Attorneys, therefore, have wide discretion in what content is contained in their opening statement. The defendant's attorney does not recall making any mention of the ladder during opening statement and the defendant does not recall precisely what he alleges he heard. The defendant grounds this aspect of his ineffective assistance of counsel claim on the fact that his attorney's opening remarks allowed otherwise inadmissible evidence into evidence. This is not so. The ladder found by railroad officials at the scene of the crime was both relevant and material to issues presented for consideration at trial. Likewise, there was no rule of evidence which would operate to keep this relevant matter out of evidence. It was neither remote in time or place with regard to the crime charged. Nine (9) days had elapsed before the ladder was discovered, but given the fact that a blizzard was in progress when the defendant was arrested it is within reason to understand how it would take this long to locate it. We cannot say as a matter of law that nine (9) days between the date of defendant's arrest and the locating of the ladder made this evidence inadmissible. Hence, the defendant has not been prejudiced by any remarks concerning the ladder which his attorney, Mr. Pennington, may have made during opening statement.

B. Absence of a Pretrial Motion in Limine Concerning the Ladder

As we have already discussed in section A of this opinion, the ladder in question was properly admitted into evidence. Given this fact, we cannot say that defendant's counsel's actions have fallen outside the range of normal competency. See Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977). Counsel has no duty to present meritless motions to the court, and hence cannot be said to have committed an overt act or omission which would prejudice his client. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

Though we have chosen to address and discuss this issue, we are not required to. Appellant has failed to state, argue, or cite authority for the proposition that failure to file pre-trial motions in limine can result in a finding of ineffective assistance of counsel. We could deem this omission to be waiver of the issue. Iowa R. of App. P. 14(a)(3) (1983).

C. Motion for Mistrial Because Ladder Appeared Before the Jury Prior to its Admission into Evidence

Admissibility of this ladder has already been established. While it is true that a motion for a mistrial is well-taken where prejudicial error occurs in front of the jury and is incapable of cure by any other method, see Agave v. General Mills, Inc., 242 Iowa 978, 984, 48 N.W.2d 242, 246 (1951), this proposition is inapplicable in the case at bar. There has been no prejudicial error, as the ladder was in fact admissible and therefore it was not improperly before the jury. There was no error to cure by the admission of admissible evidence, and as a matter of course no reason for a new trial.

D. Motion for Mistrial When Alleged Hearsay Statements are Admitted into Evidence

Defendant contends that statements made by one of the railroad officials, who appeared as a witness for the State, were hearsay and, therefore, inadmissible. Officer Gibson of the Chicago and Northwestern Railway testified as follows: " * * * The next day when I returned, the lines had been replaced.

[Another officer and myself] were mainly in the area looking for a ladder which was reported laying out there." (Emphasis added). The ladder was "reported" in a confession given to police by Mr. Alan Carr, who was arrested at the same time and charged with similar crimes as Mr. Bedwell. Defendant claims that this is inadmissible hearsay as it is alleged to be an out-of-court statement, offered to prove the matters which it asserts. We disagree. Statements offered, not to prove the matters asserted, but for the limited purpose of showing their effect on the listener are not kept out by a hearsay objection. See State v. Williams, 256 N.W.2d 207, 208 (1977). When offered for this purpose, the statement is not kept out of evidence in the face of an objection based on hearsay. Evidence concerning the report was admitted for the purpose of showing how Officer Gibson came to look in the area for a ladder. Generally, an investigating officer may explain his actions by testifying as to what information he had and its source regarding the crime. McCormick's Handbook of the Law of Evidence § 248 at 587 (E. Cleary 2nd ed. 1972). As the ladder was admissible evidence in its own right, no prejudice resulted from the statement made by Officer Gibson so as to outweigh the probative value of the statements. But cf. U.S. v. Burton, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (limiting instruction may not be sufficient to overcome prejudice created by otherwise admissible statements).

Therefore, the statement by Officer Gibson was not inadmissible hearsay. The statement was likewise not kept out by the proviso to this hearsay exception grounded in the prejudicial effect of this type of statement. Defense attorney's actions in not objecting to Officer Gibson's statement on hearsay grounds were not outside the range of normal competency.

E. Alleged Ineffective Assistance Due to Failure to Request Instruction Defining An Element of the Crime

Defendant Bedwell, in addition, contends on appeal that he received ineffective assistance from his defense counsel because there was no instruction

to the jury defining the term "substantial interruption or impairment." The trial court adopted the following language as its definition of the crime charged, in jury instruction 12:

a person commits criminal mischief in the first degree when he intentionally damages, defaces, alters or destroys tangible property which causes a substantial interruption or impairment of services rendered to the public by a common carrier. (emphasis added).

In instruction 14, the court directed that defendant Randall Joseph Bedwell be found not guilty of criminal mischief in the first degree unless the State proved each element of the charge beyond a reasonable doubt including:

... 3. That the damage, altering or destruction of the signal and/or communication wires did in fact cause a substantial interruption or impairment of the service provided by the Chicago-Northwestern Railroad. (emphasis added).

While a trial court has an affirmative duty to instruct the jury on all issues, and the law involved in a given case, this duty does not include the requirement of defining all elements of a crime. See Henderson v. Scurr, 313 N.W.2d 522, 525 (Iowa 1981). Terms used in instructions should be defined when they may confuse the jury. However, when the terms have common usage and are readily understandable by persons of ordinary intelligence they need not be defined. State v. Kelly, 224 N.W.2d 456, 458 (Iowa 1974). The Iowa Supreme Court has looked to Webster's dictionary for the definition of allegedly confusing words. See State v. Rinehart, 283 N.W.2d 319, 322 (Iowa 1979), cert. denied, 444 U.S. 1088, 100 S. Ct. 1049, 62 L. Ed. 775 (1980). Likewise, in this case, we find that the dictionary affords an adequate and reasonably clear explanation of the meaning of

"substantial." See Webster's New Collegiate Dictionary, at 1153 (1981). No instruction defining this phrase was required.

There is also substantial evidence contained in the record to support a conviction under the instructions given to the jury. Trains are forced to stop at every crossing when signal lines are cut, as in this case. Unreliable and limited range radio transmissions need to be used when communication wires are severed. There was evidence pointing to at least three train delays, so that the jury could conclude that a "substantial interruption or impairment of service" had occurred. There was no ineffective assistance of counsel merely because no instruction was requested on the phrase in question.

F. Alleged Ineffective Assistance of Counsel for Failure to Pursue a Direct Appeal

We recognize that it may be a deprivation of due process for an attorney to fail to timely file a notice of appeal to protect a defendant's appeal rights. Snyder v. State, 262 N.W.2d 574, 579 (Iowa 1978). However, the evidence is in conflict as to what the defendant and his attorney believed was to happen concerning a possible appeal of Defendant Bedwell's conviction.

The defendant claims that he contacted his attorney and requested that an appeal be filed. Defendant claims cost was discussed, and that Mr. Pennington was to help the defendant find an attorney to handle the appeal. Defendant's attorney, Mr. Pennington, testified at the post-conviction relief trial that he did not recall defendant requesting an appeal. Mr. Pennington also testified that he advised the defendant that appeals were hard to win and that the trial court had committed no errors during trial so as to amount to reversible error.

We do not, therefore, find that defendant has established that Mr. Pennington rendered ineffective assistance in not pursuing a direct appeal of the defendant's conviction.

II. Alleged Newly Discovered Evidence Should Have Been Introduced at the Postconviction Relief Hearing So As To Provide a Basis for a New Trial.

The standards governing newly discovered evidence are set out in State v. Sims, 239 N.W.2d 550 (Iowa 1976). They are 1) the evidence was discovered after judgment; 2) that it was not such as could have been discovered earlier in the exercise of due diligence; 3) that it must be material to the issue not merely cumulative or impeaching; and 4) that such evidence will probably change the result if postconviction relief is granted. Id. at 554.

The alleged newly discovered evidence comes in the form of an offer of proof by a Mr. Merlin Hilgersen, an inmate at Clarinda, who was assigned to a work detail with defendant's co-defendant, Ray Carr. Mr. Hilgersen testified as follows:

Q. For the offer-of-proof here, Mr. Hilgersen, would you please tell the Court what was said to you by Mr. Carr and if you would, please, outline for the Court when approximately the conversation was, if anyone was present, who was present and if you had more than one conversation how many conversations you had. A. We spoke about the matter more than one time, probably three or four different occasions while we were on job sites, and when we got to talking about the trial he was saying -- I asked him how it all went down and he was telling me that he needed some bucks to buy this and that and that he figured copper was a pretty good scam to get some free-lance money, or whatever, so, he went out and said that he cut some wire down and I guess he evidently cut down a bunch of wire and then he went back into town in Des Moines and he somehow -- time passed and he needed to get a truck or something to haul it with, so he contacted Mr. Bedwell, because Mr. Bedwell had a pickup truck which he could use to haul the wire with. So he got Mr. Bedwell and took him out there and the weather was kind of bad, I guess. While Mr. Bedwell was parking the truck, he went over and finished cutting some down, because he said he had some that was still hanging. So he finished cutting that down and when Mr. Bedwell came back I guess havoc broke loose and police showed up and all that. And I went on to ask him, I said, "How did you cut all that wire down?" How did you get up there and do that?" He said, "It's so easy anybody can do it. Either you put on some spike boots and climb up the thing or use a long ladder and climb up the pole and clip it down." This is basically it.

Q. Did he indicate to you what he had told Mr. Bedwell about the condition of the wire at the time they proceeded to go out to the scene? A. What now? Oh, okay. He said most of it was all cut down except he had a couple strands that was still hanging he thought he could cut down real quick before Randy got back.

Q. So when he met Mr. Bedwell at his home before they went out to the scene of the action, did he tell him he had wires to cut down or what did he tell him? A. He told Randy he had some wire to pick up. He didn't tell him there was no cutting to do. All he had to do was go out and pick up the wire and haul it to the junk yard.

Defendant claims that Hilgerson's testimony was offered, not to prove the truth of what was said, but simply to show that there was evidence of material facts discovered after judgment. This is apparently done to sidestep a serious hearsay problem. However, in offering Hilgerson's testimony in this manner, the proffered evidence fails to satisfy the last two criterion espoused in Sims. If the testimony is limited so as to keep the substance of the statements out of evidence, then it cannot be material to the issue of defendant's innocence and in turn it would not be able to change the result of the trial court.

In any event, the offered testimony is inconsistent with the evidence produced at trial. Our review of this action at law is on assigned error. Iowa R. App. P. 4. The trial court's findings of fact have the effect of a special verdict and are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The record is reviewed in the light most favorable to the judgment; ambiguities are construed to uphold rather than defeat the judgment. Moody v. Bogue, 310 N.W.2d 655, 658 (Iowa Ct. App. 1981). There was substantial evidence to justify the verdict of the trial court and we will not alter that judgment on appeal. The trial court properly denied the defendant's request for a new trial based on a claim of newly discovered evidence.

AFFIRMED.