FILED
SEP 27 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed September 27, 1983

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.) 3-131
) 68134
FRANK FLORES TREVINO,)
Defendant-Appellant.)

Appeal from Muscatine District Court, J. L. Burns, Judge.

Defendant appeals his conviction for voluntary manslaughter, Iowa Code § 707.4, challenging: (1) sufficiency of evidence; (2) effectiveness of counsel; and (3) exclusion of a justification instruction to the jury. AFFIRMED.

Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ. Sackett, J., takes no part.

PER CURIAM

Defendant, Frank Trevino, was charged with first-degree murder following an incident in which he fatally stabbed the victim during a fight in a tavern. The victim's nephew testified that defendant was the aggressor in the fight which led to the stabbing and that he had pulled his knife before the victim picked up a pool cue and began hitting defendant with it. Defendant and three other eyewitnesses testified that the victim began hitting defendant with the pool cue as defendant was trying to leave prior to the time that he pulled a knife and stabbed the victim. A jury found defendant guilty of voluntary manslaughter. Defendant appeals the conviction. We affirm.

I. Sufficiency of the Evidence

Defendant asserts that there was insufficient evidence for a jury to find that the State had met its burden of proving beyond a reasonable doubt that defendant's stabbing of the victim was without justification. The standard of review in challenging the sufficiency of the evidence is well established. See State v. Welton, 300 N.W.2d 157, 159-60 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). We will uphold a verdict if there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

Keeping in mind the principle that the credibility of witnesses and the weight to be given their testimony is a function of the factfinder, Robinson at 341, we find "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." Robinson at 339. The Iowa Supreme Court, in State v. Elam, stated:

> To establish there was no justification, the State had to prove only one of the following:
> (1) the defendant was the provocator in initiating or continuing the difficulty which resulted in the shooting; or

(2) the defendant did not believe he was in imminent danger of death or injury and that use of force was not necessary to save him; or

(3) he did not have reasonable grounds for such belief; or

(4) the force used was unreasonable.

328 N.W.2d 314, 319 (Iowa 1982). In the instant case, the jury could have concluded that an alternative course of action was available to defendant or that the force used was unreasonable and, thus, that there was no justification for defendant's actions.

II. Ineffective Assistance of Counsel

Defendant claims his counsel's failure to object to an instruction given to the jury constituted performance below the range of a normally competent attorney. Instruction 39 explained to the jury that if defendant was confronted with the use of unlawful force against himself, he was required to take an alternative course of action, if one was available, before he would have been justified in using force in return. The instruction did not include the exception available in Iowa Code § 704.1 (1981), excusing defendant from the requirement of taking an alternative course of action if doing so would have involved a risk to his life or safety. Defendant asserts that his counsel should have objected to the omission of the excuse from the instruction. Apparently, defendant is arguing that counsel's failure to object resulted in nonpreservation of the error, which error, on appeal, would have resulted in reversal, according to State v. Rupp, 282 N.W.2d 125, 129-30 (Iowa 1979).

Ineffective assistance of counsel would be a violation of a basic constitutional safeguard. Consequently, we make our own evaluation of the claim under the totality of the circumstances. State v. Lemburg, 257 N.W.2d 39, 46

(Iowa 1977). In reviewing an attorney's performance, the defendant has the burden of proof to establish by a preponderance of the evidence a claim of ineffective assistance of counsel. We presume counsel was competent. When the claim is premised on failure of counsel to take some action, the defendant must show that counsel failed to perform an essential duty and that prejudice resulted. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). The question is whether the attorney's challenged performance was within the range of normal competency. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980).

Effective assistance of counsel does not mean successful assistance. Miscalculated trial tactics, mistake, carelessness, or inexperience do not necessarily amount to ineffective counsel. Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972). Although defense counsel might have made a legitimate objection to Instruction 39 under the appropriate circumstances, failure to do so does not constitute ineffective assistance of counsel warranting a new trial in this case because defense counsel may have felt the evidence did not sufficiently indicate that defendant's use of an alternative course of action would have involved a safety risk to himself. We find defendant was represented by competent and dedicated counsel whose performance was well within the range of normal competency.

III. Jury Instructions

The jury was instructed on self-defense, but the court refused defendant's request that the jury be instructed with regard to Iowa Code § 704.7, which states: "A person who knows that a forcible felony is being perpetrated is justified in using, against the perpetrator, reasonable force to prevent completion

of that felony." Forcible felonies include felonious assault and murder. Iowa Code § 702.11. Defendant contends that there was sufficient evidence to show that he knew a felonious assault was being perpetrated, so the trial court should have instructed the jury about the "resisting forcible felony" justification.

The Iowa Supreme Court summarized the review for challenges made to jury instructions as follows:

> It is necessary to read the court's instructions as a whole when determining whether there has been error. State v. Jones, 193 N.W.2d 509, 513 (Iowa 1972); State v. Morelock, 164 N.W.2d 819 (Iowa 1969). "The object of requesting an instruction is to see that the subject is covered. . . ." Jones, 193 N.W.2d at 514-15. "A trial court is not required to instruct in the language of requested instructions if the subject is covered in the court's own instructions." Id. at 514; See State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974) (citing Jones with approval). "A party cannot complain if instructions fail to emphasize circumstances favorable to him. This is precisely what instructions should avoid." State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974); See State v. Seehan, 258 N.W.2d 374, 379 (Iowa 1977).

State v. Horn, 282 N.W.2d 717, 730 (Iowa 1979).

Instructions 35, 36, 40 and 41 explain to the jury that a person may lawfully use reasonable force to prevent an injury to his person, when he feels it is necessary to defend himself from any imminent use of unlawful force. The jury was to look at the fear of injury from defendant's standpoint, but reasonable force was to be viewed as the force which a reasonable person would find necessary, under the facts and circumstances, to use to prevent death or injury to himself. If the jury had been convinced that defendant was trying to prevent death or injury to himself, it necessarily would have found he was preventing the completion of the forcible felonies of murder or assault. Therefore, we find that the substance of the instruction requested by defendant was included in the other given instructions. Defendant's assignment of error fails.

AFFIRMED.