

IN THE COURT OF APPEALS OF IOWA

FILED

APR 20 1988

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 20, 1988

217

vs.

)

FRED HANSEN,

)

8-81
87-622

Defendant-Appellant.

)

Appeal from the Iowa District Court for Clinton County (No. CS8981),
L. D. Carstensen, Judge.

Defendant appeals from his conviction, following a jury trial, for the crime
of burglary in the second degree. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney
General; and William G. Bradley, Assistant Clinton County Attorney, for plain-
tiff-appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

PER CURIAM

213

The defendant appeals from his conviction, following a jury trial, for the crime of burglary in the second degree. We affirm.

The defendant was one of three persons found inside a school building after police officers responded to a silent burglar alarm. Stolen property was found on the persons of the defendant's two companions, but not on the defendant's person.

The defendant was charged with burglary in the second degree. At his jury trial, he took the position that the State might have proved the elements of criminal trespass but not the elements of burglary.

The district court instructed the jury on the crime charged and also on the lesser offense of criminal trespass. The court's instruction submitting the lesser offense of criminal trespass read as follows:

The law provides that a person commits Criminal Trespass when he enters upon or in property without justification or without the implied or actual permission of the owner, lessee, or person in lawful possession, with the intent to commit a public offense, namely theft. (emphasis supplied)

The jury found the defendant guilty of second-degree burglary, and the defendant has appealed from the resulting conviction. The defendant contends the lesser offense of criminal trespass, quoted above, was deficient because it suggested that criminal trespass occurred only when entry onto property was accompanied by the intent to commit a theft, rather than some lesser public offense such as vandalism. He argues that this instruction could have confused the jury into thinking that there was no difference between criminal trespass and burglary. In support of this argument, he notes that the jury in his case did send the judge a note inquiring about the distinction between burglary and criminal trespass.

The defendant concedes that his trial attorney did not object to the criminal trespass instruction on this ground. He argues that his trial attorney thereby rendered ineffective assistance.

Our review is de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). We make an independent evaluation of the totality of the circumstances. State v. Hansen, 344 N.W.2d 725, 728 (Iowa App. 1983). Ordinarily, we are hesitant to address ineffective assistance claims on direct appeal. State v. Hildebrant, 405 N.W.2d 839, 840 (Iowa 1987). However, if the issue can be fairly resolved without the expense of an additional hearing and appeal, we prefer to resolve it expeditiously. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). The record in this case is adequate to permit resolution of the issue.

In order to establish ineffective assistance of counsel, defendant must show counsel failed to perform an essential duty and prejudice resulted. State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987). In proving the first prong of this test, defendant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. Hildebrant, 405 N.W.2d at 841. To demonstrate prejudice, defendant must prove there is 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." Id. (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

We hold defendant has not shown his counsel to be ineffective. We find his decision to forego any request for an instruction submitting the offense of criminal trespass based on the offense of vandalism was a reasonable strategic decision which was not outside the range of normal competency. Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982).

We also find defendant has not shown any prejudice from his counsel's actions. Defendant has failed to show the result of his trial would have been any different if the instruction had been given. Yaw, 398 N.W.2d at 807. There is sufficient evidence in the record to support the jury's verdict finding defendant guilty of burglary in the second degree.

We reject defendant's claim of ineffective assistance of counsel. We affirm defendant's conviction.

AFFIRMED.