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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

548

STATE OF IOWA,)

Plaintiff-Appellee,) Filed May 28, 1985

vs.)

MITCHELL ZAPATA, a/k/a MICHAEL R. ZAPATA,) 5-87 / 84-535

Defendant-Appellant.

Appeal from the Iowa District Court for Iowa County - L. Vern Robinson, Judge.

Defendant appeals from conviction and sentence for first-degree theft, in violation of Iowa Code sections 714.1(1) and 714.2(1) (1983), asserting that he was denied effective assistance of counsel by trial counsel's failure to secure the presence of two defense witnesses. REVERSED AND REMANDED FOR NEW TRIAL.

Charles L. Harrington, Appellate Defender, and Fern S. Shupeck, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

SNELL, J.

The defendant, Michael Zapata, was accused of taking $6,500.00 in cash from his mother-in-law.

At trial, defendant's mother-in-law, Harriet Biermann, testified that on May 26, 1983, she discovered a large sum of cash missing from an envelope that she kept in a bedroom dresser drawer. Mrs. Biermann said that the envelope contained $6,500.00 in fifty dollar and one hundred dollar bills.

Bradley Hahn testified that on the afternoon of May 26, 1983, he saw Michael Zapata enter Mrs. Biermann's home in Middle Amana, Iowa, and then exit a short time later. Hahn used to date Zapata's wife, Linda Biermann Zapata. The record indicates that Hahn did not know Zapata well. Hahn had spoken with Zapata at a wedding because he felt "uncomfortable" around him and he wanted to make sure there were no "hard feelings." The record indicates they may have met on one other occasion. Other evidence indicated that Zapata paid two grocery bills totaling under $200 with a fifty and hundred dollar bill and that he deposited $1,000 in cash in a Texas bank using fifty dollar and one hundred dollar bills.

Zapata maintained that he was in Texas when the theft took place. This alibi was corroborated by Zapata's wife, his brother, and a friend. Zapata testified that the money for the grocery bills and bank deposits came from his mother and a sister-in-law. The record indicated that Mrs. Biermann's other daughter, Diane, knew where the $6,500 was kept and that shortly before the theft she had taken $200 without asking her mother and sent it to Zapatas in Texas.

Zapata's trial counsel had intended to call Josephine Zapata, the defendant's mother, and Charles Tinner, an employee of a dry cleaning business in Texas. Josephine Zapata was unable to testify because of serious illness. She was to testify that she borrowed $1,500 from a credit union and gave the amount to her son. Charles Tinner was to testify that he picked up and delivered dry cleaning to a man whom he believed to be Michael Zapata in Hubbard, Texas, on the day of

the alleged theft. Tinner did not know Zapata and had never seen him prior to the time of the theft. Tinner failed to appear because of a work-related emergency. Defense counsel did not subpoena either witness and did not move for a continuance.

The court found Zapata guilty. Defense counsel then moved for arrest of judgment and new trial on the ground that Zapata was denied due process of law by the absence of the two witnesses. The motions were overruled.

On appeal, Zapata claims he was denied effective assistance of counsel because of the failure to seek a continuance and the failure to secure the two witnesses under the Uniform Act to Secure Witnesses from out of state, Iowa Code chapter 819.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test for ineffective assistance was most recently set forth in Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In that case, the Court stated: "The defendant must show that 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. at ____, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). The court further stated that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at ____, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

In this case, we find that the failure to secure the witnesses, particularly Tinner, or to ask for a continuance when it was apparent that they were not going to be able to testify constituted ineffective assistance.

Tinner was the only disinterested witness who could have definitely testified that the defendant was in Texas at 4:00 p.m. on the afternoon of May 26 when the theft allegedly occurred. The other witnesses who testified were friends and relatives. His testimony was crucial to rebutting the State's case. The importance of this man's testimony is apparent from the trial court's statements when granting an adjournment over the weekend to allow time for Tinner to travel from Texas. The court stated:

> Let the record show we're back in court in State vs. Zapata. I had a conversation with Mr. Wertz in chambers. There's an additional witness who has been unable to have come up from Texas, I don't know the man's name. He's on the list of alibi witnesses, and I indicated to Mr. Wertz yesterday and again today that I would allow him additional time to have this man come because of the seriousness of the charge. As I understand it, this man can be up here by Sunday night, and so he would be able to testify Monday morning, is that correct, Mr. Wertz?

Had this witness been secured under chapter 819 or a continuance requested, the trial would not have concluded without his testimony.

Iowa Code section 819.2 provides:

> If a person, in any state whose law makes provision for commanding persons within that state to attend and testify in criminal actions pending or grand jury investigations commenced in this state, is a material witness in a district court action pending or a grand jury investigation commenced in this state, a judg of such court shall, in order to obtain the presence of such witness, issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required.

Texas has also adopted this uniform act. Tex. Crim. Proc. Code Ann. S 24.28 (Vernon 19__).

We conclude that the failure to secure Tinner or to seek a continuance when he could not be there constituted ineffective assistance of counsel.

The conviction and sentence are vacated and the case is remanded for new trial.

REVERSED AND REMANDED FOR NEW TRIAL.