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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | Filed January 24, 1983 |
| vs. | ) | |
| **MARK R. HANSON,** | ) | 3-366 / 68748 |
| Defendant-Appellant. | ) | |

Appeal from the Iowa District Court for Black Hawk County - Carroll E. Engelkes, Judge.

Defendant appeals his conviction of willful injury in violation of Iowa Code section 708.4 (1981). AFFIRMED.

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

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.



Defendant, Mark R. Hanson, appeals his conviction of willful injury in violation of Iowa Code section 708.4 (1981). Defendant asserts that he was denied effective assistance of trial counsel due to counsel's failure to preserve error on the issue of sufficiency of the evidence in his motion for judgment of acquittal. Defendant contends that he suffered prejudice as a result of counsel's failure to preserve error because there was insufficient evidence to support his conviction. The State asserts that defendant suffered no prejudice because there was sufficient evidence to support defendant's conviction. We affirm.

Between May and October of 1981, defendant and his wife sought emergency medical attention for their seven-month-old son, Eric, on four separate occasions. On October 31, 1981, defendant and his wife again took Eric to the hospital. Examination revealed that Eric had a broken arm. X-rays subsequently taken of the child also revealed several other fractures at various stages of healing. Eric remained in the hospital until November 10, 1981, for treatment of his injuries. When questioned by the examining physician and law enforcement authorities, defendant and his wife denied any knowledge of how the injuries occurred. Several days later, however, defendant allegedly admitted to his wife that he was responsible for Eric's injuries. Defendant was subsequently arrested and charged by information with willful injury.

The matter was tried to a jury. Defendant's wife and a babysitter testified that on several occasions they had observed Eric's three-year-old brother, Michael, treating Eric very roughly, including standing on Eric, kneeling on his arm, and pushing on his knee. Medical testimony indicated, however, that Michael was not strong enough to have caused the various fractures to Eric's bones, particularly twist fractures in the right femur and humerus. A social worker testified that Michael may have been merely imitating defendant's abuse of Eric. Defendant's wife testified about the various times Eric had been injured while she

was in the home. Neither she nor anyone else had ever actually observed defendant mistreating Eric. Finally, defendant's wife testified that defendant had made statements to her which she interpreted as admissions that defendant had caused Eric's injuries.

Medical testimony indicated that the fractured left arm and the fracture of the upper part of the right leg were spiral fractures caused by a twisting motion. Dr. Gerald Solomons testified that "these injuries could produce a tearing of an artery which could cause a lowered blood pressure and lead to shock and possible death." Dr. Solomons also testified that there could be a possibility of infection leading to death and that because of the displacement of bone fragments, there could be a future shortening of a limb. Finally, although he indicated that he did not believe there would be a gross deformity or impairment of the bone in this case, Dr. Solomons testified that these types of injury "might" affect a child as far as its ability and development in walking.

I. At the close of the State's case, defense counsel moved for a judgment of acquittal asserting that the evidence failed to show that Eric's injuries were sufficiently grievous as to constitute "serious injury" within the meaning of the willful injury statute. The motion was denied. Defense counsel did not move for a judgment of acquittal as to the sufficiency of the evidence on the other elements of willful injury or any lesser included offenses.

The defendant has the burden of proof to establish ineffectiveness of counsel. State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). Even though there is a presumption that counsel is competent which must be overcome by the defendant, the ultimate test is whether, under the entire record and totality of circumstances, counsel's performance was within the range of normal competency. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). A failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel. State v. Hrbek, 336 N.W.2d 431, 435-36 (Iowa 1983). When a

defendant relies on a specific act or omission to establish ineffective assistance, two conditions must be satisfied: "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 at 14.

When a defendant alleges violation of constitutional rights, as here, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Our review of defendant's claim of insufficient evidence is governed by well-established principles and need not be repeated here. See State v. Freie, 335 N.W.2d 169, 171 (Iowa 1983); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980).

II. Viewing the evidence in the light most favorable to the State, the jury could have reasonably inferred that defendant caused the injuries based on the testimony of defendant's wife that defendant was alone with their son each time the injuries occurred and upon defendant's "confession" to his wife. The jury could have also reasonably inferred, based upon the severity of the injuries as established by the medical testimony, that whoever caused the injuries did so with an intent to seriously injure the victim. The medical testimony indicated that the injuries could have resulted only from use of excessive force and that the spiral fractures of the arm and leg were caused by turning or twisting. There is a presumption that a person intends the natural consequences of his intentional acts. State v. Chatterson, 259 N.W.2d 766, 770 (Iowa 1977). The nature of the acts proved provided a basis upon which the jury could determine whether requisite intent existed.

Defendant argues even if the jury could reasonably have inferred that the battery was committed by defendant, to allow the jury to subsequently infer the defendant's intent at the time of the battery improperly permits one inference to serve as the basis for another. See State v. Hamilton, 309 N.W.2d 471, 479 (Iowa

1981); State v. Lieb, 198 Iowa 1315, 1322, 201 N.W. 29, 32 (1924). It is clear from these facts that defendant's identity and intent were each inferred from different foundational facts. The intent to commit "serious injury" was not inferred from defendant's identity but from the nature and extent of the victim's injuries.

Defendant also argues that the evidence failed to establish a "serious injury" as required by Iowa Code section 708.4 (1981). "Serious injury" is defined in Iowa Code section 702.18 (1981). See State v. Coburn, 315 N.W.2d 742, 747-48 (Iowa 1982); State v. McKee, 312 N.W.2d 907, 912 (Iowa 1981); State v. Anderson, 308 N.W.2d 42, 47 (Iowa 1981); State v. Welton, 300 N.W.2d 157, 160-61 (Iowa 1981). In this case the possible kinds of serious injury at issue are bodily injury which creates a substantial risk of death, bodily injury which causes protracted loss or impairment of the function of any bodily member or organ, or bodily injury which causes serious permanent disfigurement. Viewing the evidence in the light most favorable to the State, the jury could have reasonably found that the victim suffered a substantial risk of death. A substantial risk of death means more than just any risk of death, but does not mean that death was likely. State v. Anderson, 308 N.W.2d at 47. The evidence demonstrates that in the instant case the seven-month-old victim suffered two spiral fractures which medical testimony indicated could lead to death. Moreover, the medical testimony and the testimony of the defendant's wife are sufficient to generate a jury question on the issue of whether the victim suffered a protracted loss of use of his leg. See State v. Welton, 300 N.W.2d at 160. There was, therefore, sufficient evidence to support defendant's conviction of willful injury.

Accordingly, we hold that the defendant has suffered no prejudice as a result of trial counsel's failure to preserve the issue of sufficiency of the evidence to support his conviction. Defendant has failed, on this record, to meet his burden to show ineffective assistance of counsel.

AFFIRMED.