IN THE COURT OF APPEALS OF IOWA

No. 5-008 / 93-1706

FILED
MAY 30 1995
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RICKY LEE WHITE,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Robert C. Clem, Judge.

Ricky Lee White appeals the judgment and sentence entered upon his conviction, following a jury trial, of first degree burglary in violation of Iowa Code sections 713.1 and 713.3 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Angelina Smith and Sheryl A. Soich, Assistant Attorneys General, Thomas S. Mullin, County Attorney, and Jill R. Pitsenbarger, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Sackett and Habhab, JJ.

DONIELSON, C.J.

The defendant, Ricky White, was convicted of burglary in the first degree. In this direct appeal he raises several claims of ineffective assistance of trial counsel, and he challenges the sufficiency of the evidence to support his conviction. We affirm.

I. LESSER INCLUDED OFFENSES.

The defendant contends his trial counsel was ineffective in failing to object to the criminal trespass instruction which was given to the jury. Generally, ineffective assistance of counsel claims are preserved for postconviction proceedings. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). However, they may be resolved on direct appeal where the record adequately addresses the issues. *Id.* We conclude the record in this case is adequate to determine if the failure to object to the criminal trespass instruction rose to the level of ineffective assistance.

Since the defendant asserts a violation of a constitutional right, our review is de novo. *Id.* To prevail on a claim of ineffective assistance of counsel a defendant must prove by a preponderance of the evidence: 1) counsel failed to perform an essential duty; and 2) prejudice resulted. *Id.* "This two-pronged test requires, first, a defendant overcome the strong presumption that counsel was competent. Second, defendant must prove that counsel's error worked to the defendant's actual and substantial disadvantage, creating a reasonable probability that but for the error the trial's result would have been different." *Id.* (citation omitted).

The defendant was charged with first-degree burglary. The jury was instructed on the elements of burglary in the first degree and seven lesser included offenses.[1] The defendant correctly argues criminal trespass as defined in sections 716.7(2)(a) and (c) are lesser included offenses of the entering alternative of the offense of burglary. *See State v. Waller*, 450 N.W.2d 864, 865-66 (Iowa 1990).

The defendant argues his trial counsel was ineffective in failing to object to the incomplete criminal trespass instruction given by the court. The State concedes the criminal trespass instruction as given was incomplete. However, the State argues the defendant's conviction on the charge of first-degree burglary indicates he was not prejudiced by the incomplete instruction.

The trial court gave the jury the following instruction on criminal trespass.

> The State must prove all of the following elements of Criminal Trespass:
>
> 1. On or about the 2nd day of July, 1993, the defendant entered the residence at 1301 Court Street, Sioux City, Iowa.
>
> 2. The defendant did not have the express permission of Diana Dallen.
>
> If the State has proved all of the elements, the defendant is guilty of Criminal Trespass. If the State has failed to prove any one of the elements, the defendant is not guilty of Criminal Trespass.

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[1]The seven lesser included offenses included: second degree burglary, attempted first-degree burglary, attempted second-degree burglary, assault while participating in a felony, assault causing bodily injury, simple assault, and criminal trespass.

This instruction fails to incorporate the intent to commit a public offense element of section 716.7(2)(a), the undue interference element of section 716.7(2)(c), and the injury element which would elevate the offense to a serious misdemeanor. Iowa Code § 716.8(2) (1993).

It has been recognized where "one or more lesser included offenses are submitted to the jury and a conviction of the greater offense is returned, there is no prejudice in the failure to submit additional included offenses." *See State v. Carberry*, 501 N.W.2d 473, 476 (Iowa 1993); *see also State v. Negrete*, 486 N.W.2d 297, 299 (Iowa 1992) ("jury's rejection of a greater-included offense negates a defendant's claim of prejudice due to a trial court's failure to submit an instruction on a lesser-included offense"). However, the omission of a lesser included offense is harmless only where it is sufficiently similar to other lesser included offenses upon which the jury was instructed and coincides with the defendant's theory of defense. *See Carberry*, 501 N.W.2d at 476-77; *State v. Mikesell*, 479 N.W.2d 591, 592 (Iowa 1991).

The jury was specifically instructed on the lesser included offense of assault while participating in a felony. That offense includes entering and specific intent elements similar to those of the entering alternative of criminal trespass. Iowa Code § 716.7(2)(a) (1993). Trial counsel's failure to object to the incomplete criminal trespass instruction was not prejudicial as a sufficiently similar lesser included

offense was given and the defendant was ultimately convicted of the greater offense of burglary in the first degree.

In concluding there was no prejudice we also note that the factual basis test, largely abandoned as a predicate for instructing on lesser included offenses, continues to play an essential role in a harmless error analysis. *Carberry*, 501 N.W.2d at 476. Application of the factual basis test persuades us the defendant was not prejudiced by the omission of an instruction incorporating the elements of the interference with use alternative of the offense of criminal trespass. Iowa Code § 716.7(2)(c) (1993).

II. FAILURE TO CALL WITNESSES.

The defendant contends his trial counsel was ineffective in failing to call two witnesses to testify at trial. After the trial the defendant informed the court he had expected two witnesses to be called on his behalf and only learned midway through the trial that his attorney would not be calling any witnesses. No record was made as to defense counsel's reasons for not calling any witnesses.

Where a record is inadequate to allow us to review a trial counsel's trial strategies, tactics and decisions, we decline to address a claim of ineffective assistance on direct appeal. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Defense counsel may have interviewed the prospective witnesses and found their testimony to be of no benefit, or even possibly harmful, to the defendant's case. Sound strategic reasons may have existed for the decision not to call witnesses. We

reserve this matter for postconviction proceedings in which an adequate factual record may be developed.

III. FAILURE TO MOVE FOR A NEW JURY PANEL.

The defendant contends his trial counsel was ineffective in failing to move for a new jury panel after the panel members heard the comments of three prospective jurors who expressed criticism of the criminal justice system. Defense counsel did move to strike for cause the three individuals who had made the critical statements, and his request was granted.

On appeal the defendant argues it is likely the comments affected other jury members in their deliberations. There is no evidence to support this contention. It is pure supposition on the defendant's part as to whether the voir dire comments of three members stricken from the jury panel affected the deliberations and ultimate outcome of the case.

Defense counsel acted prudently in moving to strike the three panel members who had expressed concerns about the legal system. However, he was under no duty to move for an entirely new jury panel. This claim of ineffective assistance of counsel is denied.

IV. FAILURE TO OBJECT TO PROSECUTOR'S REMARKS.

The defendant contends his defense counsel was ineffective in failing to object to allegedly improper remarks the prosecution made during closing arguments. The closing arguments were not recorded. At his sentencing hearing the defendant claimed the prosecutor had commented on the defendant's failure to call witnesses on his behalf.

A prosecutor may properly comment upon a defendant's failure to present exculpatory evidence so long as it is not phrased to call attention to the defendant's own failure to testify. *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986). Assuming the prosecution did make a comment about the defendant's failure to call witnesses who could offer exculpatory evidence, the defendant does not demonstrate the prosecutor intended to refer to his silence or that the jury so interpreted the prosecutor's comments. The defendant has demonstrated nothing inappropriate about the prosecutor's closing argument and as a result can establish no prejudice. This claim of ineffective assistance of counsel is denied.

V. SUFFICIENCY OF THE EVIDENCE.

The defendant contends there was insufficient evidence to support two elements of the burglary offense. He argues there was insufficient evidence to establish: 1) he entered the residence without permission or authority or remained

after permission or authority had expired; and 2) he entered or remained with the specific intent to commit an assault.

When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.*

The record reflects that the Defendant entered Dallen's household even though Dallen had not opened the screen door and was attempting to hold it shut by holding onto its handle. Dallen had not invited the defendant into the home and tried to block his entry but the defendant "walked right on through." After the defendant entered the home he remained there despite the fact he was repeatedly asked to leave the occupants alone. There was substantial evidence from which the jury could find the defendant entered and/or remained in the residence without permission or authority from its occupants.

There was also sufficient evidence from which the jury could find the defendant entered or remained in the residence with the specific intent to commit an assault. The defendant had visited the home earlier in the evening and had been very

confrontational with Dallen's boyfriend. His behavior had been so aggressive and threatening that Dallen's boyfriend had locked the front and back doors of the home. Upon his second visit to the home the defendant engaged in similarly aggressive behavior.

The defendant contends the State's evidence was insufficient to negate his intoxication defense. While witnesses confirmed the defendant appeared to have been drinking, the State presented sufficient evidence to establish that the defendant's intoxication did not negate his ability to form the requisite specific intent to commit an assault. There was sufficient evidence to support the defendant's conviction for burglary in the first degree and we affirm the conviction.

AFFIRMED.