

IN THE COURT OF APPEALS OF IOWA

No. 7-755 / 97-0168

000381

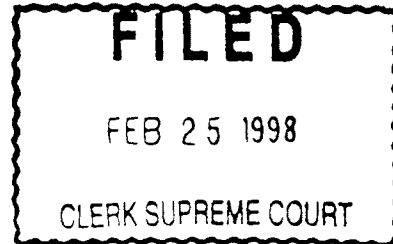
STATE OF IOWA,

Plaintiff-Appellee,

vs.

JOSE ANGEL AGUILERA,

Defendant-Appellant.



Appeal from the Iowa District Court for Wright County, Kurt L. Wilke, Judge.

Jose Aguilera appeals the sentence entered upon his conviction of the offense of second-degree murder in violation of Iowa Code section 707.3 (1995).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Lee E. Poppen, County Attorney, and Jeffrey R. TeKippe, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

MAHAN, J.

Jose Aguilera appeals his conviction for second-degree murder. Aguilera alleges ineffective assistance of counsel. He alleges his counsel was ineffective when he: (1) failed to request an instruction on self-defense; (2) failed to ask the trial court to tailor the instruction allowing an inference of malice; (3) failed to request an instruction on the lesser-included offense of assault; and (4) failed to challenge the search warrant and consent to search Aguilera's residence. We affirm.

Aguilera is charged with shooting Jesus "Jesse" Garcia following an argument at a picnic. Neither Aguilera nor Garcia were invited to the picnic. Aguilera arrived at the picnic first. Garcia showed up later and watched the picnic from his vehicle for a period of approximately two hours. The record is clear Garcia remained in his Blazer, talking to friends, until Aguilera confronted him. Words were exchanged, Garcia exited his Blazer, and a struggle ensued. There was conflicting testimony whether Garcia was shot prior to or during the struggle between the two men. There is no question Aguilera's gun was the gun that shot and killed Garcia.

Aguilera and Garcia were not strangers prior to this incident. Aguilera's wife, Zeidy, had left him and moved in with Garcia. After his wife moved in with Garcia, Aguilera alleges Garcia began following him. Aguilera also alleges he heard Garcia was an accomplished knife fighter. He contends he began carrying a gun because he was afraid of Garcia and because he was afraid Garcia was going to try to take his daughter.

Following the shooting, Aguilera took his daughter and fled the scene. He was later stopped and taken into custody on Interstate 35 near Ames.

I. STANDARD OF REVIEW. Aguilera's claim of ineffective assistance of counsel raises constitutional issues. Our review of constitutional rights is de novo. *State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995). We must look at the totality of the circumstances as shown by the entire record. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995).

II. INEFFECTIVE ASSISTANCE OF COUNSEL. Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.*

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *Kone*, 557 N.W.2d at 102. "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *Kone*, 557 N.W.2d at 102. The court will generally presume counsel is competent, and we will

not second guess a reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered trial strategy."

Id. (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95).

"The benchmark for judging any claim for ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result." *Kone*, 557 N.W.2d at 102. It is not enough to simply claim counsel should have done a better job. *Dunbar*, 515 N.W.2d at 15. The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation would have changed the outcome. *Id.*

The test for prejudice is whether counsel's failure worked to Aguilera's actual and substantial disadvantage so that a reasonable possibility exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *State v. Johnson*, 534 N.W.2d 118, 128 (Iowa App. 1995). "A reasonable probability is one sufficient to undermine confidence in the outcome." *Kone*, 557 N.W.2d at 102.

A. Self-Defense Instruction. Aguilera argues his defense was based on self-defense, and he was prejudiced by his attorney's failure to request a self-defense instruction.

There is not sufficient evidence in the record to support Aguilera's argument his defense was based on self-defense. The evidence instead supports a finding that Aguilera's defense was based on accidental shooting. Defense counsel's opening statement concluded with the following:

There was a struggle. The gun came out of the pocket and the two of them struggled for the gun and it went off. *My client did not pull the trigger. Either Jesus Jesse Garcia pulled the trigger or it went off accidentally.*

Ladies and gentlemen of the jury, I am going to ask you to listen carefully to the evidence. At the end of the case, I will get up and argue to you what the evidence has shown, but I ask you to keep an open mind. Because what happened here was that my client was trying to protect his daughter. There was a confrontation. *The gun went off accidentally and Jesse Garcia is dead. He did not intentionally kill Jesus Garcia or Jesse Garcia.* And at the end of the case I will ask you to let my client go. Thank you. (Emphasis added.)

If counsel had argued self-defense, the burden would have rested on the State to prove, beyond a reasonable doubt, justification did not exist. *State v. Coffman*, 562 N.W.2d 766, 768 (Iowa App. 1997). The State can meet its burden by proving any one of the following:

1. The defendant started or continued the incident which resulted in injury; or
2. An alternative course of action was available to the defendant; or
3. The defendant did not believe he was in immediate danger of death or injury and the use of force was not necessary to save himself; or
4. The defendant did not have reasonable grounds for the belief; or
5. The force used by the defendant was unreasonable.

Id.

The evidence showed Garcia stayed in his Blazer and Aguilera approached him. Garcia did not get out of his Blazer until Aguilera threw a beer can at him. When Garcia got out of his vehicle, Aguilera drew his gun and pointed it at Garcia. Counsel attempted to prove Aguilera had heard Garcia was an accomplished knife fighter, but no witness at trial would support this contention. In fact, most said Garcia was a peaceful man. No witness said they saw a knife, nor was a knife found during the investigation. Further, the altercation took place outside; Aguilera could have left the scene without danger.

We find Aguilera's defense was based on accidental shooting and not self-defense. Counsel's decision not to argue self-defense or seek a self-defense instruction was a reasonable trial strategy, especially in light of *Coffman*. Therefore, we affirm on this issue.

B. Change in Instruction on Inference of Malice. Aguilera argues his counsel should have objected to the instruction on inferring malice and requested it be tailored to fit his case. The instruction stated:

If a person has the opportunity to deliberate and uses a dangerous weapon against another resulting in death, you may, but are not required to, infer that the weapon was used with malice, malice aforethought, premeditation and specific intent to kill.

Aguilera contends counsel should have requested the court add a sentence: "If you find the use of the weapon was a reasonable use of force in self-defense, then you cannot infer malice." He contends failure to request this sentence resulted in

prejudice. Aguilera cites Iowa Rule of Criminal Procedure 18(5)(g) to support his argument the trial judge had the discretion to give this instruction. However, this rule deals with instructions given after the jury has retired for deliberations.

The trial court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction. *Foggia v. Des Moines Bowl-O-Matic, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996).

The instruction given by the trial court was better for Aguilera than the uniform criminal instruction on the inference of malice: “Malice aforethought may be inferred from the defendant’s use of a dangerous weapon.” Iowa Crim. Jury Instruction 700.10 (1993). The instruction given by the trial court informed the jury it was not required to infer malice. Given the weight of the evidence against Aguilera and the information provided in the instruction given by the trial court, we find Aguilera suffered no prejudice.

C. Lesser-Included Offense. Aguilera contends he was prejudiced by his counsel’s failure to request an instruction on assault as a lesser-included offense. Assault is a lesser-included offense of first-degree murder. *State v. Negrete*, 486 N.W.2d 297, 298 (Iowa 1992). However, no prejudice results where one or more lesser-included offenses are submitted to the jury and a conviction on a greater

offense is returned. *State v. Carberry*, 501 N.W.2d 473, 476 (Iowa 1993). An exception to this harmless-error principle exists where the omitted lesser-included offense embraces the defendant's primary theory of defense and "the differences between the offenses that were submitted and the included offense that was not submitted are such that it may not be reasonably concluded that the rejection of the former is also a rejection of the latter." *Id.*

In this instance, the trial court submitted lesser-included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The jury selected second-degree murder and rejected the lesser-included offenses of voluntary and involuntary manslaughter. Further, Aguilera did not base his defense on assault. We find Aguilera was not prejudiced by the absence of an instruction on the lesser-included offense of assault.

D. Search Warrant. Aguilera contends his counsel was ineffective when he failed to challenge the search warrant for Aguilera's residence and the consent form signed by Luis Rey Romero L. He argues the warrant is invalid because it does not state a date or time when the acts complained of were alleged to have occurred and also because the magistrate failed to make a specific finding the informant was credible. Aguilera also argues it is impossible to determine whether the person who signed the consent form had the authority to grant permission. The State contends, even if all of this is true, Aguilera was not prejudiced by a failure to challenge the warrant because the conviction would have been the same if the trial court would

have suppressed all of the evidence found at Aguilera's apartment. The State argues the dispositive issue at trial was what happened between Aguilera and Garcia during the brief time prior to the shooting, and the gun and ammunition found in the search were superfluous. Aguilera asks us to preserve this issue for postconviction hearings.

We think it is important to note *Aguilera does not deny his gun was used to shoot Garcia*. If ever there is a case when the weapon or ammunition is not needed, it is certainly when several witnesses saw the defendant use a gun and the defendant admits he had a gun and used it to shoot the deceased victim. The jury did not need to see the gun and the ammunition to decide this case. Without determining whether or not the evidence seized from Aguilera's residence should have been excluded, we find the jury's verdict would not have changed if the evidence had been excluded. Thus, we find Aguilera was not prejudiced by counsel's failure to challenge the search warrant or the consent form.

We have carefully considered each of Aguilera's contentions and have determined, for the reasons discussed above, they are without merit. Aguilera's contentions do not amount to ineffective assistance of counsel. For these reasons we affirm his conviction.

AFFIRMED.