

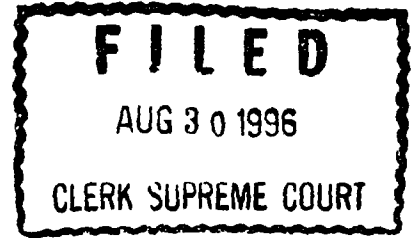
IN THE COURT OF APPEALS OF IOWA

No. 6-417 / 95-1860

STATE OF IOWA,
Appellee,

vs.

CURT A. WEBB,
Appellant.



Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge

Webb challenges his conviction, following a jury trial, of third-degree burglary and possession of burglar tools. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, County Attorney, and Michael J. Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Habhab and Huitink, JJ.

HUITINK, J.

Defendant Curt A. Webb appeals the judgment and sentence for his conviction of third-degree burglary and possession of burglar's tools in violation of Iowa Code sections 713.6A and 713.7 (1995). We affirm.

At Webb's trial an eyewitness testified she saw two men looking into parked cars on her street in Davenport. After this witness called the police, she saw one of the men doing something to the rear window of a car and the hatchback of the car open.

When the police arrived, the two men, later identified as Webb and Jeremy Nelson, tried to flee. Both were apprehended by police who found a vice grip and a screwdriver tucked in Nelson's pants. Police did not discover any similar tools when Webb was searched. Their examination of the automobile indicated its hatchback door had been forced open.

Webb was charged with third-degree burglary and possession of burglary tools. At the conclusion of the evidence, the jury was given the following instructions on joint criminal conduct:

When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. A defendant's guilt is the same as the other person's unless the acts could not reasonably be expected to be done in aiding the commission of the crime. Mere nearness to, or presence at, the scene of the crime, without more, is not "joint criminal conduct." Likewise, mere knowledge of the crime is not enough to prove "joint criminal conduct."

Jury Instruction No. 17. *See* Uniform Criminal Jury Instruction 200.7. Webb's lawyer did not object to the instruction.

On appeal, Webb argues a joint criminal conduct instruction should not have been given in this case and he was denied effective assistance of counsel because of his lawyer's failure to object to this instruction. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). "Our ultimate concern is with the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S.Ct. 2052, 2069, 80 L.Ed.2d. 674, 699 (1984); *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). In evaluating counsel's performance, we presume counsel acted competently. See *Risdal*, 404 N.W.2d at 131; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). We need not determine whether counsel breached an essential duty before considering the prejudice component of an ineffectiveness claim. *Taylor*, 352 N.W.2d at 685.

Defense counsel's failure to "take proper steps regarding jury instructions may under some circumstances not rise to the level of ineffective assistance of counsel." *State v. Goff*, 342 N.W.2d 830, 838 (Iowa 1983). An error instructing the jury does not necessitate reversal unless it was prejudicial. *State v. Gansz*, 376 N.W.2d 887, 891 (Iowa 1985).

Ordinarily, we preserve ineffective assistance of counsel claims for post-conviction

proceedings to allow counsel an opportunity to respond. *See State v. Taylor*, 310 N.W 2d 174, 179 (Iowa 1981). We will, however, depart from this preference because the record in this case is sufficient to dispose of Webb's claim. *See State v. Schoelerman*, 315 N W 2d 192, 195 (Iowa 1982).

Joint criminal conduct is defined as follows:

When two or more persons, acting in concert, knowingly participate in a public offense, each is responsible for the acts of the other done in the furtherance of the commission of the offense or escape therefrom, and his or her guilt will be the same as that of the person so acting, unless the act was one which the person could not reasonably expect to be done in the furtherance of the commission of the offense.

Iowa Code §703.2 (1995). There are four separate elements that must be established in order to prove joint criminal conduct:

1. Defendant must be acting in concert with another.
2. Defendant must knowingly be participating in a public offense.
3. A "different crime" must be committed by another participant in furtherance of defendant's offense.
4. The commission of the different crime must be reasonably foreseen.

State v. Hole, 510 N.W.2d 847, 848 (Iowa 1994); *State v. Irvin*, 334 N.W.2d 312, 314 (Iowa App. 1983) (citing J. Yeager & R. Carlson, *Criminal Law and Procedure* §63 (1979)). Webb argues that his accomplice did not commit a different crime and accordingly this deficiency precluded submission of this instruction. We disagree.

Webb was charged with two offenses, burglary and possession of burglar's tools. The State correctly asserts this instruction was factually supported because Nelson, not Webb, was in possession of burglary tools. Counsel, therefore, did not breach any essential duty by failing

to object to this instruction because there was substantial evidence Nelson committed another offense.

Even if Webb's counsel breached a duty by failing to object to the submission of a joint criminal conduct instruction, he is unable to show the required prejudice. Webb and his accomplice were caught in the act of breaking into an automobile. There is accordingly ample evidence to support Webb's conviction as a principal under either a theory of joint criminal conduct or aiding and abetting. There is no reasonable likelihood that the outcome of the trial would have been different under any circumstance.

The judgment of the district court is affirmed.

AFFIRMED.