FILED
AUG 30 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed August 30, 1983

vs.)

LARRY EUGENE BURTON,) 3-164
67762

Defendant-Appellant.)

Appeal from Polk District Court - Van Wifvat, Judge.

Defendant appeals from his conviction for robbery in the first degree in violation of Iowa Code section 711.2, asserting that he was denied effective assistance of counsel by various acts and omissions of his trial attorney. AFFIRMED.

William A. Price, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

HAYDEN, J.

Defendant appeals from his conviction for robbery in the first degree in violation of Iowa Code § 711.2, asserting that he was denied effective assistance of counsel by various acts and omissions of his trial attorney. He alleges that trial counsel was ineffective in failing to present an alibi defense, in dissuading him from testifying on his own behalf, in permitting a police officer to testify concerning hearsay statements, and in failing to object to the introduction of an allegedly tainted out of court identification.

Normally we are hesitant to review claims of ineffective assistance of counsel on direct appeal because ordinarily the record is insufficient to permit a fair adjudication of the claim. See State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979). In the present case, however, defendant filed an Application for New Trial in the court below, and an adequate record was made during the hearing on that application.

A presumption exists, which must be overcome by defendant, that counsel was competent. See Fryer v. State, 325 N.W.2d 400, 412 (Iowa 1982). To prevail, defendant must bear the burden of proving that counsel's performance fell beneath the range of normal competency. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). In order to meet this burden, he must show that counsel failed to perform an essential duty and that actual prejudice to him resulted. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981). Defendant has failed to meet his burden here.

Defendant alleges that counsel was ineffective for failing to raise an alibi defense and subpoena potential alibi witnesses. His trial counsel testified that an alibi defense was not viable because none of the witnesses could account for defendant's whereabouts continuously during the time period in question. More important, however, is the fact that the potential alibi witnesses were hostile witnesses, some of whom expressed the opinion that defendant had indeed committed the offense. Counsel opined that such witnesses would hurt

defendant's case more than they could help him. Counsel is under no duty to present a defense which is not viable. "Even if the defense had been a viable one, the decision whether it should be asserted was a strategic one which should not furnish grounds for reversal." State v. Rand, 268 N.W.2d 642, 649 (Iowa 1978). Furthermore, counsel has no obligation to use alibi witnesses if she has determined that they will not help her client. Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. 1981).

Counsel advised defendant not to take the stand in his own behalf because she felt that the State's case was very weak, and she did not want to present the State with an opportunity to inform the jury about two prior impeachable felonies committed by defendant. This was a strategic decision on her part. She determined that it was better to base a defense on the weakness of the State's case than to risk the probability that defendant would be impeached. Indeed, as part of her trial strategy, counsel elicited certain hearsay statements made by the victim to police officers. The victim's testimony had been inconsistent, and in certain particulars, was at variance with what he had told the police, and counsel testified that her intent was to attack the credibility of the victim. Her strategy was unsuccessful.

Trial counsel's choice of trial strategy, even when hindsight shows it to have been incorrect, does not amount to ineffective assistance. See U.S. v. Weir, 657 F.2d 1005, 1008 (8th Cir. 1981). Effective assistance does not mean successful assistance, and as we have frequently pointed out, "[i]mprovident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance." Sims v. State, 295 N.W.2d at 423.

Defendant finally alleges that counsel was ineffective for failing to object to the introduction of an allegedly tainted identification, in which a single photograph was produced for the victim by police for suspect identification. The

single photograph identification procedure has been held not to be impermissibly suggestive. State v. Mark, 286 N.W.2d 396, 403-05 (Iowa 1979). Therefore, counsel was not ineffective for failing to object to its introduction.

Defendant has failed to meet his burden of proving that counsel was ineffective. His conviction is therefore affirmed.

AFFIRMED.