IN THE COURT OF APPEALS OF IOWA

No. 1999-502 (9-759) / 99-498
Filed January 26, 2000

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL CRAIG WHITE,

Defendant-Appellant.

FILED
JAN 2 6 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, L.D. Lybbert, Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of second-degree robbery and possession of a controlled substance, cocaine base. **AFFIRMED.**

James H. Pickner, Hawarden, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and John L. Lammers, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

White was charged with robbery in the second degree following an altercation with a department store employee who attempted to detain him for shoplifting. The possession charge resulted from discovery of crack cocaine in White's coat pocket during a search incident to his arrest for robbery.

The State's evidence indicated White swung at and attempted to kick the store employee when confronted with the employee's shoplifting suspicion. White claimed his actions were justified because the employee assaulted him.

The jury was instructed as follows:

> Instruction No. 14.
> The state must prove all of the following elements of Robbery in the Second Degree:
> 1. On or about the 24th day of November, 1998, the defendant had the specific intent to commit a theft.
> 2. In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant committed an assault on Paul Hansen
> If the state has proved all of the elements, the defendant is guilty of Robbery in the Second Degree. If the state has failed to prove any of the elements, the defendant is not guilty of Robbery in the Second Degree, and you will consider the charge of Assault, as explained in Instruction No. 17.
>
> Instruction No. 17.
> Concerning Element No. 2 of Instruction No. 14, an Assault is committed when a person does an act which is meant to cause pain or injury to another person.
>
> Instruction No. 20.
> The state must prove both of the following elements of crime of Assault:
> 1. On or about the 24th day of November, 1998, the defendant did an act which was meant to cause pain or injury to Paul Hansen.
> 2. The defendant had the *apparent ability to do the act.*
> If the state has failed to prove either of the elements, the defendant is guilty of Assault. If the State has failed to prove either of the elements, the defendant is not guilty.

The record made on counsel's objections to these instructions provides:

> THE COURT: Are both counsel prepared to have a hearing on the instructions, or do you want a little more time? I can tell you now that I have included in the instructions the one concerning impeachment by evidence of other prior offenses. I have included specific intent, the definition of theft and so forth. I've also included a lesser included offense of assault, and then I've included the standard ones on possession of a controlled substance. I also included, at defendant's request – and I believe the state had no objection – the standard instructions on the defense of justification.
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> MR LAMMERS: I do have objection to that, judge.
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> THE COURT: All right. That appears as –
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> MR. CALLAHAN: Your Honor, can I inquire, the only question I have on these is whether there's a definition of serious injury.
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> THE COURT: Well, the assault charge is just a simple assault.
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> MR. CALLAHAN: Right, but the state, in the second element of robbery, has to prove either that an assault occurred or that the defendant put Mr. Hansen in fear of immediate serious injury, and my concern is that serious injury should be defined so that we can see what it is that Mr. White supposedly threatened to do.
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> THE COURT: Well, would the jury be less confused if we simply took that alternative out of the –
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> MR CALLAHAN: I don't think there's any evidence that Mr. White threatened Mr. Hansen.
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> THE COURT: Mr. Lammers?
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> MR. LAMMERS: I think that's correct. I don't think there's evidence that he threatened him. I don't think there's anything in the record that supports that.
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> THE COURT: Instruction No. 14 will be changed by eliminating Paragraph 2(b).
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> * * *
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> MR. CALLAHAN: Your Honor, I only have one more issue on instructions.
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> THE COURT: All right.
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> MR. CALLAHAN: I think that both Instruction No. 14 and Instruction NO. 20 – 14 being the elements of robbery –
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> THE COURT: Which has been changed.
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> MR. CALLAHAN: Which has been changed, and Instruction No. 20, which is the elements instruction for assault, need to have a third element in each of them, that the defendant acted without justification.
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> * * *
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> THE COURT: In view of the fact that I am giving an instruction on the defense of self-defense, I'm going to deny your request that the word "unlawful" be injected into Instructions No. 14 and 20. Anything else?

> MR. CALLAHAN: I think that's all I have. I want to maintain for the record that we request that there be a third element, that the defendant acted without justification, in 14 and 20. I understand the court's ruling.

The jury returned guilty verdicts on both offenses charged, and White was sentenced accordingly.

On appeal White contends the court erroneously instructed the jury on the crime of robbery. He also claims he was denied effective assistance of trial counsel.

II. Jury Instructions.

Our review of alleged errors in jury instructions is for corrections of errors at law. Iowa R. App. P. 4. *State v. Simpson*, 528 N.W.2d 627, 630 (Iowa 1995).

White's argument on appeal is:

> The marshaling instructions submitted to the jury with respect to second-degree robbery charge were erroneous because they did not require the State to establish all the elements of an assault.

Iowa Rule of Civil Procedure 196 provides:

> Before jury arguments, the court shall give to each counsel a copy of its instructions in their final form, noting this fact of record and granting reasonable time for counsel to make objections, which shall be made and ruled on before arguments to the jury. Within such time, all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

Iowa R. Civ. Proc. 196. "The rules relating to the instruction of juries in civil cases shall apply to the trial of criminal cases." Iowa R. Crim. P. 18(5)(f). Careful examination of the instruction record indicates the grounds upon which White now relies are not those cited at trial. White has accordingly failed to preserve error on this issue, and we will not consider his challenge to the robbery

instruction. *See Shepherd Components v. Brice Petrides—Donohue & Assocs.*, 473 N.W.2d 612, 618 (Iowa 1991).

III. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel□s conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In order to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm White's convictions on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

White's ineffective assistance of counsel claim is derivative of the jury instruction issue resolved in division II of this opinion. White argues counsel breached an essential duty by failing to object to instructions fourteen and seventeen based on omission of an element of simple assault that was included in instruction twenty. Specifically, White cites the omission of the "when coupled with the apparent ability to do the act" element of simple assault.

Even if we were to find counsel breached an essential duty, White cannot show the requisite prejudice supporting his ineffective assistance of counsel claim. As the State correctly notes:

> It was undisputed that there was a struggle between the defendant and Hansen [the store employee]. The fighting issue in this case, given the defendant's and Hansen's versions of the events, was whether defendant meant to cause pain or injury and the jury was accordingly instructed.

We conclude that omission of the "apparent ability" element of assault was of no legal or factual consequence to the jury's verdict. No reasonable jury could have concluded White lacked the apparent ability to cause pain or injury to the store employee who attempted to detain him. Because there is no reasonable probability of a different result, White has not met his burden to show he was denied effective assistance of trial counsel. The judgment of the district court is affirmed in its entirety.

AFFIRMED.