IN THE COURT OF APPEALS OF IOWA

No. 6-719 / 96-0108

FILED
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CLERK SUPREME COURT
000395

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CURTIS LAVERNE DeMICHELIS,

Defendant-Appellant.

Appeal from the Iowa District Court for Ringgold County, Dale B. Hagen, Judge.

Defendant appeals from judgment and sentence entered, following a jury trial, of burglary in the second degree, in violation of Iowa Code section 713.5 (1995).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Christopher A. Cooklin and Sharon R. Stevens, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Arlen F. Hughes, County Attorney, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ.

STREIT, J.

Defendant appeals from judgment and sentence entered, following a jury trial, of burglary in the second degree, in violation of Iowa Code section 713.5 (1995). He contends there was insufficient evidence to support a finding of second-degree burglary because he armed himself after the "breaking" was completed, and contends his trial counsel was ineffective for failing to raise this issue in the motion for judgment of acquittal at trial rather than later in the motion in arrest of judgment.

Curtis DeMichelis was charged with second-degree burglary after allegedly entering Arlene Hansell's home and taking a .22 caliber rifle on July 19, 1995. DeMichelis and Ed Larsen were stopped in a vehicle by law enforcement after a neighbor reported his suspicions because the men were near the house. A .22 caliber rifle was seized from the backseat of DeMichelis' vehicle, as well as a shotgun and BB-gun from the trunk.

At trial, Hansell testified she locked the door before leaving her home on July 19. When she arrived home, the door knob to the kitchen door and the kitchen window were broken. She identified the rifle seized from DeMichelis' car as the one stolen from her home.

After the State rested, defense counsel moved for judgment of acquittal, arguing that there was no evidence in the record that would identify Mr. DeMichelis as either of the persons who might have committed the crime. DeMichelis then testified Larson committed the burglary, and Larson picked him up after the burglary

just before their arrests. Larson invoked his fifth amendment rights, and refused to testify. At the close of all the evidence, defense counsel renewed the motion for judgment of acquittal on the same grounds as before.

Jury instructions were submitted, including Instruction fifteen which set forth the elements, and read in part: "On or about the 19th of July, 1995, the Defendant broke into the residence of Arlene Hansell, located in Diagonal, Iowa." (emphasis added). Jury instruction 20 defined, in part, "breaks" or "broke" means "removing or putting aside any obstruction to enter a structure. . . . For example, the pushing open of an unlatched or partially-opened door to gain entry would be "breaking" within the meaning of the law."

The jury returned a guilty verdict. Defense counsel then filed a motion in arrest of judgment alleging "upon the whole record in this matter no legal judgment can be pronounced." At the sentencing hearing, counsel argued the motion stating there was insufficient evidence to prove DeMichelis was armed with a dangerous weapon at the time of the breaking. This issue was not raised in a motion for judgment of acquittal. The motion was overruled, and DeMichelis was sentenced to an indeterminate ten-year sentence.

DeMichelis appeals. He argues counsel was ineffective by not including in the motion for judgment of acquittal at trial that evidence was insufficient to elevate a burglary conviction from third-degree to second-degree because there was no

evidence presented in the case he possessed the dangerous weapon at the time of the breaking.

In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick*, 480 N.W.2d at 56. Such claims may be decided on direct appeal, however, if the defendant fails to show one

of the two prongs. *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995); *State v. O'Donnell*, 533 N.W.2d 576, 579 (Iowa App. 1995).

At the sentencing hearing, defense counsel made the argument now at issue on appeal that "there was no evidence presented in the case with relevance to whether or not the defendant was in possession of a firearm at the time of the breaking and entering, which is an element of this charge and an element that makes this a burglary--would have made this burglary in the second degree. . . . And as I recall the instructions in this matter, this was instructed as a breaking rather than an entry and there was--the record is just completely devoid of any evidence of possession of a firearm by anyone at the time of the breaking."

Defendant contends his counsel was ineffective for failing to make this argument earlier in the motion for judgment of acquittal. DeMichelis's real argument lies with the fact he was charged with entering in the trial information, but he was convicted of breaking under Instruction fifteen.

The complaint filed by police alleged DeMichelis did "enter & break into an occupied structure." The trial information alleged DeMichelis entered the home of Arlene Hansell and committed a theft therein while possessing a dangerous weapon

stolen from the house.[1] Breaking into the home of Arlene Hansell did not become the State's theory until the jury instruction was issued.

We find counsel was not ineffective for failing to move for judgment of acquittal on this theory. We do not expect counsel to be able to foresee the future. *See State v. Hepperle*, 530, N.W.2d 735, 740 (Iowa 1995) (denying ineffective assistance of counsel claim based on failing to predict the proper ground for the objection to the trial court's proposed jury instructions); *see also State v. Ogilvie*, 310 N.W.2d 192, 197 (Iowa 1981). Counsel could not have known at the time he made his motion for judgment of acquittal that the jury would be instructed on breaking instead of entering. Therefore, there would be no reason to include such an argument that defendant was not armed at the time of the breaking.

Even if counsel had argued defendant was not armed at the breaking in its motion for judgment of acquittal, defendant would still have been convicted of second-degree burglary. The Iowa Supreme Court has determined a person's possession of a dangerous weapon after entering is sufficient to raise it to first-degree

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[1] The trial information read in part:
Said Defendant, . . . did lawfully and willfully, with intent to commit a theft therein, . . . entered the occupied structure . . . belonging to Arlene Hansell, and did in fact commit a theft therein; that while so doing, the said Defendant did have in his possession a dangerous weapon, said weapon having been earlier stolen in Taylor County, Iowa, and also having in his possession a dangerous weapon stolen from the dwelling house of Arlene Hansell, ...
(emphasis added).

burglary under section 713.3 although the individual was unarmed at the time of the entry. *See State v. Franklin*, 368 N.W.2d 716, 719-20 (Iowa 1985).

There is little distinction today between breaking and entering. Iowa Code section 713.5 (1995) states that a person commits second-degree burglary "while perpetrating a burglary in or upon an occupied structure in which no persons are present, the person has possession of . . . a dangerous weapon." Iowa Code § 713.5(1) (1995). We believe the Supreme Court would apply the same analysis in *Franklin* to this situation to find defendant guilty of second-degree burglary even though he became armed after breaking into the house. "Matters that occur after [breaking] are of moment in elevating a burglary to first-degree: physical injury, possession of a weapon at any point while participating in the burglary. In another context (felony murder) we have included an act occurring an hour later as "in perpetration" of a felony." *State v. Franklin* 368 N.W.2d 716, 720 (Iowa 1985) (quoting *State v. Conner*, 241 N.W.2d 447, 464 (Iowa 1976)).

DeMichelis does not argue ineffective assistance of counsel for failing to object to the jury instructions.[2] Again, even if he had, it would not have resulted in reversal of the conviction. The Supreme Court in *State v. Hill*, 449 N.W.2d 626, 628

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[2] When a crime may be committed in different ways, and the State specifies one way, the offense must be proved to have been committed in the way charged. Defendant did not object on these grounds and the same is deemed waived. *State v. Willet*, 305 N.W.2d 454, 457 (Iowa 1981).

(Iowa 1989) addressed the claim of ineffective assistance of counsel and failure to timely object to a jury instruction.

> The court need not make a ruling on the essential duty element of a claim of ineffective assistance of counsel before examining the prejudice requirement. *State v. Hill*, 449 N.W.2d 626, 628 (Iowa 1989). In *Strickland v. Washington*, the Supreme Court stated that even a professionally unreasonable error made by counsel does not warrant setting aside a judgment if the error had no effect on the judgment. *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 696.
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> This court has defined an error causing prejudice as one that the defendant proves has resulted in actual and substantial disadvantage to the defendant, "'infecting his entire trial with error of constitutional dimensions.'" *State v. Miles*, 344 N.W.2d 231, 234 (quoting *United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1595, 71 L. Ed. 2d 816 (1982)).
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> In *Frady*, the applicant for habeas corpus relief claimed error in a single instruction, to which his counsel did not object. The Court noted the situation (failure to object to a jury instruction) and cited *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Court. 1730, 1736, 52 L. Ed. 2d 203 (1977), for the proposition that a prisoner must show that the instruction complained of was of such nature that the resulting conviction violated due process. *Frady*, 456 at 169, 102 S. Ct. At 1595, 71 L. Ed. 2d at 831 (1982).

Hill, 449 N.W.2d at 628-29.

Instruction number fifteen did not prejudice DeMichelis. Instruction twenty adequately defined "broke" meant to gain entry as required under the definition of burglary. *See* Iowa Code § 713.1 (1995). The rest of the required elements of burglary in the second-degree under section 713.5 were proven by the state.

We find counsel was not ineffective. DeMichelis's possession of the rifle after entering Hansell's residence is sufficient to find second-degree burglary although he was unarmed at the time of breaking or entry. Counsel acted reasonably in making its motion on judgment of acquittal and motion in arrest of judgment. There was no prejudice.

AFFIRMED.