FILED
AUG 27 1986
CLERK SUPREME COURT

342

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 27, 1986
vs.	)	
BENNIE GRAW,	)	6-155 85-1068
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Linn County (No. 15012-1084) - John F. Siebenmann, District Associate Judge.

Defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of assault causing bodily injury in violation of Iowa Code sections 708.1 and 708.2(2) (1983). **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and James Sines, Assistant County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

343

DONIELSON, P.J.

Defendant appeals from judgment and sentence entered on a jury verdict finding him guilty of assault causing bodily injury in violation of Iowa Code section 708.1 and 708.2(2) (1983). On appeal, defendant contends that he was denied effective assistance of counsel by trial counsel's failure to object to the State's use of defendant's recent conviction for tampering with a witness for impeachment purposes. We affirm.

On October 15, 1984, Cedar Rapids police officer Joseph Auchus, while entering the doorway of the Linn County Courthouse, heard loud voices emanating from the open hall on his left. As Auchus looked over to the direction from which the loud voices were coming, he saw the defendant "pick up his arm shoulder level and punch Mrs. [Beverly] Lopez in the eyeglasses." Auchus observed Mrs. Lopez fall to the ground, her glasses falling off her face, and also that her nose appeared to be slightly cut. The defendant turned around, saw Auchus, and said, "You saw her hit me," to which Auchus replied, "Mr. Graw, I didn't see her hit you at all. I saw you punch her in the face." Officer Auchus subsequently arrested the defendant.

Defendant was charged by information with assault causing bodily injury. On April 15, 1985, two weeks before trial on the assault charge, defendant was found guilty on a charge of tampering with a witness. Trial on the assault charge commenced on April 29, 1985. At trial, defendant claimed self-defense, alleging that he and Mrs. Lopez were leaving the courthouse following a small claims action when Lopez chased him and bit his hand. Defendant claimed he did not strike her, but only pushed her away. Prior to trial, the State sought permission to use defendant's prior tampering conviction for impeachment purposes. Defendant stated no objection, the trial court granted permission to use the 1985

tampering conviction for impeachment, and the State in fact did so use the prior conviction.

Defendant's motion for a directed verdict was denied at the close of all the evidence. On April 29, 1985, the jury returned a verdict finding defendant guilty as charged. On May 23, 1985, judgment was entered on the jury verdict from the prior tampering conviction. On May 30, 1985, defendant was sentenced in the present case to ninety days in jail, all but ten days suspended, plus two years probation. Defendant's post-trial request for reconsideration of sentence was denied.

I.

Defendant claims that he was denied effective assistance of counsel due to the fact that his defense counsel did not object to the State's introduction of his prior tampering conviction, even though defendant had not been sentenced as to that offense at the time of trial on the assault charge. We disagree.

When a criminal defendant claims that he was denied a fair trial due to ineffective assistance of counsel, we must make an independent evaluation of the totality of the circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984); State v. Wilkins, 346 N.W.2d 16, 18 (Iowa 1984). A defendant claiming that his trial attorney was ineffective, thus depriving him of his sixth amendment right to counsel, must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. Hall v. State, 360 N.W.2d 836, 838 (Iowa 1985); Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). The petitioner has the burden to prove both elements by a preponderance of the evidence. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

To demonstrate that trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that the case would have somehow been tried differently. Fryer v. State, 325 N.W.2d 400, 413-15 (Iowa

1982); Hinkle v. State, 290 N.W.2d 28, 30-31 (Iowa 1980). The party claiming ineffective assistance must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L. Ed. 2d 674, 694-95 (1984). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Taylor, 352 N.W.2d at 685.

In considering the element of prejudice, we have required the party claiming ineffective assistance to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage, thereby constituting a denial of due process or an equivalent constitutional deprivation. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. We need not first determine whether counsel's performance was deficient before examining the element of prejudice. Taylor, 352 N.W.2d at 685.

Iowa Rule of Evidence 609 governs the procedure by which a prior criminal conviction may be introduced for impeachment purposes. Rule 609 provides, in pertinent part:

> **(a) General rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime involving dishonesty or false statement shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime constituted a felony, aggravated misdemeanor, or other crime punishable by imprisonment in excess of one year pursuant to the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.
>
> * * *

> **(e) Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The defendant in this case was charged and convicted of the crime of tampering with a witness, an aggravated misdemeanor involving a dishonest act under Iowa Code section 720.4 (1985). Because defendant's conviction for tampering with a witness was an aggravated misdemeanor involving dishonesty, it was therefore admissible under rule 609(a) for the purpose of attacking defendant's credibility as a witness. The fact that defendant had filed a notice of appeal from that judgment did not render that conviction inadmissible at the assault trial. Iowa R. Evid. 609(e).

In State v. Spears, 312 N.W.2d 79 (Iowa Ct. App. 1981), we addressed the issue of whether the use, for impeachment purposes, of evidence of a prior jury conviction which had not been reduced to judgment was reversible error. In Spears, the defendant, charged with robbery in the second degree, alleged that the trial court erred in allowing evidence of a prior felony conviction to be admitted for impeachment purposes when that conviction was not yet complete, having been reduced to a verdict but not to judgment or sentence. 312 N.W.2d at 79. We noted in Spears that the federal courts have consistently maintained that use of a jury verdict on a felony charge for impeachment purposes is permissible even in the absence of final judgment. Id. at 82.

In Spears, we distinguished the case of State v. Ege, 274 N.W.2d 350, 355-56 (Iowa 1979), relied upon by defendant, where it was held that a deferred sentence could not be used for impeachment purposes. We stated:

> In Ege, there was no reason to believe that judgment would ever be entered on the particular felony charge involved because a sentencing disposition had been adopted by the trial court which was designed to avoid this result. Conversely, in the present case, prior to the entry of

> final judgment, a judgment had in fact been entered on the burglary conviction used to impeach defendant.

Not all errors require reversal of a criminal conviction, and trial counsel will not be deemed ineffective where a decision not to object is arguably one of trial strategy and tactics. Schertz v. State, 380 N.W.2d 404, 413 (Iowa 1985); State v. Atwood, 342 N.W.2d 477, 477 (Iowa 1984). "An error by counsel, even if unprofessionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104 S. Ct. at 2067, 80 L. Ed. 2d at 696.

Turning to the present case, at the time of trial on the present assault charge, defendant had two weeks previously been convicted on a charge of tampering with a witness, an aggravated misdemeanor involving dishonesty which is admissible for impeachment purposes under Iowa Rule of Evidence 609(a). Between the date of trial on April 29, 1985, and sentencing for the assault charge on May 30, 1985, defendant was sentenced on the tampering charge. A reversal in this case would serve no purpose because the claimed basis for exclusion would no longer exist upon a retrial. Spears, 312 N.W.2d at 82. "At best, the use of the disputed evidence was premature—a fact which in no way affects the probative value of this evidence for impeachment purposes." Id.

In light of all the circumstances, we believe that trial counsel's decision not to object to the introduction of the tampering charge for impeachment purposes was reasonable given the particular overwhelming facts available to counsel at trial. Faced with eyewitness testimony from the police officer and that the prior judgment would be admissible, defendant's trial counsel decided not to object to the admission of the prior judgment into evidence. The defendant has failed to show in any way that prejudice prevented him from receiving a fair trial or that the exclusion of the tampering conviction in any way would

have rendered a different judgment in the assault trial. Upon entry of final judgment for the tampering charge, the sole basis for exclusion of that evidence no longer existed. Accordingly, defendant was not denied effective assistance of counsel.

AFFIRMED.