

IN THE COURT OF APPEALS OF IOWA

No. 5-318 / 94-262

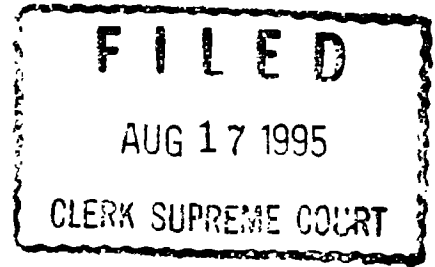
STATE OF IOWA,

Plaintiff-Appellee,

vs.

LAURENCE K. BURGIN,

Defendant-Appellant.



Appeal from the Iowa District Court for Pottawattamie County, J. C. Irvin, Leo F. Connolly, James M. Richardson, and Keith E. Burgett, Judges.

Laurence K. Burgin appeals the judgment and sentence entered upon his conviction, following a jury trial, of first-degree robbery in violation of Iowa Code sections 711.1 and 711.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Laurence K. Burgin, Fort Madison, pro se.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Richard Crowl, County Attorney, and Chris Wilson, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

HABHAB, J.

At approximately 11:00 p.m. on April 14, 1993, Art Jensen was struck in the face and robbed of his wallet as he was walking home from work. On August 18, 1993, Laurence K. Burgin was charged with first-degree robbery in connection with this incident.

At Burgin's jury trial Jensen, a mildly retarded man, testified that while he was walking home from his janitorial job at a school on April 14, a man asked him for his wallet. As Jensen started to hand his wallet over, the man hit him in the face. Jensen was knocked down and lost consciousness. He was not sure how long he was unconscious. When he awoke, he returned home and called the police. Jensen was treated at a hospital for his injuries and was given pain medication. He stated his nose was broken and his face was swollen. Jensen stated he had a Pace card, a Sam's card and a library card, as well as three or four dollars in his wallet when it was stolen. Jensen was also carrying a lunch pail when he was robbed and did not know what became of it. Jensen identified Burgin as his assailant.

Tina Darrington, Burgin's girlfriend, testified she and Burgin were staying at the Starlite Hotel between April 13 and 14, 1993. She stated Burgin and his brother had left one night and came back and told her they had followed a man with a lunch pail, beat him up, and robbed him of his wallet. They said this had taken place by a school. Burgin and his brother laughed about the incident because the wallet only

contained three or four dollars. Darrington saw a Sam's card, a Pace card and a Subway card in the wallet. Darrington stated Burgin kept the wallet.

Ken Budka testified he met Burgin in April 1993. Burgin had told him he followed a man with a lunch pail, walked up behind him, hit him, and took his wallet. Burgin told him the wallet only contained three to five dollars. Burgin told Budka the incident had taken place by a school.

At one point during trial, Burgin's counsel objected to deputy sheriffs "being around" Burgin and "giving the sense that he's a dangerous person and needs immediate security." The court explained the deputy sheriffs were present for courtroom security.

At the close of the State's evidence, Burgin moved for a judgment of acquittal and/or a directed verdict on the basis the State had not shown there was a serious injury or intent to inflict a serious injury. The court overruled the motions.

The jury found Burgin guilty as charged. The court sentenced Burgin to a term of imprisonment not to exceed twenty-five years.

Burgin appeals.

I. *Sufficiency of the Evidence.* Burgin contends there was insufficient evidence to support his conviction of robbery. Specifically, Burgin argues there was insufficient evidence of the infliction or attempted infliction of serious injury. We disagree.

Our review of a challenge to the sufficiency of the evidence is on assigned error. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). We review the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly be deduced from the record. *State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16).

A verdict is to be upheld where there is substantial evidence to support the charge. *State v. Smith*, 508 N.W.2d 101, 102 (Iowa App. 1993). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.*

Burgin was charged with first-degree robbery under Iowa Code section 711.2 (1993). That section states:

A person commits robbery in the first degree when, while perpetrating a robbery, the person purposely inflicts or attempts to inflict serious injury, or is armed with a dangerous weapon.

Iowa Code § 711.2 (1993). Serious injury is defined as:

"Serious injury" means disabling mental illness, or bodily injury which creates a substantial risk or death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Iowa Code § 702.18 (1993). The question is whether there was sufficient evidence Burgin attempted to inflict serious injury as defined in section 702.18.

Officer John Clark, who was dispatched to the victim's residence, testified regarding the condition of the victim after the robbery.

When I went inside the house, I observed the victim, Mr. Jensen. He was holding a white washcloth up to his mouth and his nose which was stained red with all the blood that had come off his face. His nose was swollen and he had some cuts and abrasions on his face.

Viewed in a light most favorable to the State, a legitimate inference from this testimony is that the victim suffered more than one blow to the head. This inference is supported by the following testimony given by Ken Budka.

Q: Did the defendant -- Did Larry Burgin ever tell you that he assaulted an individual in Council Bluffs? A: Yes, he did.

Q: What -- what was the circumstances surrounding him telling you this? A: Basically -- What was going on at the time when he told me this?

Q: Yes. A: We were just all sittin' in my sister's house. My wife, kids. I was over visiting my sister and just we all started talking and that just came up in the conversation.

Q: Do you remember specifically what he said? A: He stated that he followed a guy who was carrying a lunch pail. To him it looked like he was either coming or going to work. He said he walked up behind him and hit him and continued to hit the guy -- He was bragging about it quite a bit -- 'till the guy fell. He then took his wallet. When he found that he only had I believe he said 3 to \$5 in it, he was angry and beat him some more and he laughed about it when he said that he broke his nose and smashed his face. He thought it was funny.

Pictures of the victim taken after the robbery reveal swollen and bloody upper and lower lips, swollen left jaw, swollen left cheek and cheek bone, a swollen and broken nose, puffiness and discoloration around the left eye, and abrasions on the neck and face.

We believe the evidence supports the inference that the victim suffered more than one blow to the head. We find this inference, along with the testimony given at trial, supports the finding Burgin attempted to inflict serious bodily injury during the robbery.

II. Courtroom Security. Burgin next contends the district court abused its discretion in permitting uniformed deputy sheriffs to sit near the defendant during trial. We find no abuse of discretion.

The standard of review on a question of courtroom security is abuse of discretion. *State v. Wilson*, 406 N.W.2d 442, 449 (Iowa 1987). The discretion of the district court will not be disturbed absent a clear showing of abuse of discretion. *Id.*

An inherently prejudicial security measure is permitted only when it is justified by an essential state interest specific to the trial. *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346-48, 89 L. Ed. 2d 525, 534 (1986). A practice is inherently prejudicial if it "gives rise to an unmistakable brand of guilt or creates an unacceptable risk the jury may consciously or subconsciously be influenced in their deliberations." *Wilson*, 406 N.W.2d at 449. The United States Supreme Court noted that while the presence of security officers may be prejudicial in some circumstances, having uniformed officers present in a courtroom is a permissible practice which has a lower potential for prejudice than shackling and prison clothes. *Holbrook*, 475 U.S. at 569, 106 S. Ct. at 1346, 89 L. Ed. 2d at 534. Cases involving the officers in the

courtroom are to be decided on a case-by-case basis. *Id.* at 569, 106 S. Ct. at 1346, 89 L. Ed. 2d at 535.

Neither the defendant's brief nor the record make it clear how many officers were in the courtroom or where they were located. The record is particularly vague. Defense counsel described the officers as "being just, you know, right around him." The defendant himself described the officers as being "in the vicinity of me." We conclude there is nothing in the record which supports the defendant's claim of an inherently prejudicial security measure.¹ We find no abuse of discretion on the part of the district court.

III. False Testimony. The final two issues on appeal were submitted by the defendant pro se. Burgin first contends he was denied a fair trial due to allegedly perjured testimony given by Tina Darrington regarding her knowledge of the stolen wallet. Although it is not entirely clear in his brief, Burgin appears to be making a prosecutorial misconduct argument since he contends the State allegedly knew Darrington's testimony was false.

Iowa Rule of Appellate Procedure 14(a)(5) requires the appellant to state how error was preserved for appeal. No claim of preservation was made by Burgin. In a

¹ Burgin erroneously claims the district court had the obligation to place in the record the reasons for employing a courtroom security measure. Burgin asserts *State v. Bartnick*, 436 N.W.2d 647 (Iowa App. 1988) supports this proposition. We find *Bartnick* was specifically limited to situations involving shackling. *Bartnick*, 436 N.W.2d 647, 649 (Iowa App. 1988).

motion for new trial, Burgin contended Darrington committed perjury in denying she had identified herself in letters to Burgin as "Mrs. Burgin." We do not believe this was sufficient to preserve error on the question of prosecutorial misconduct and the alleged perjury regarding the stolen wallet. Issues which are not presented to the trial court may not ordinarily be raised for the first time on appeal. *Connor v. State*, 362 N.W.2d 449, 457 (Iowa 1985). The issue is deemed waived and we decline to consider it.

IV. *Ineffective Assistance of Counsel.* Burgin also raises five allegations of ineffective assistance of counsel. Our ultimate concern in claims of ineffective assistance is with "the fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 5069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Id.* at 131. 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. *Id.* at 131-32 (citation omitted).

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405

N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test, appellant must show 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.

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. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Such claims may be decided on direct appeal if the appellant fails to show one of the two prongs. *See State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993).

Burgin's first claim is his defense counsel failed to effectively cross-examine Darrington regarding the wallet. The record, however, reveals Burgin's defense counsel did vigorously cross-examine Darrington regarding her identification of the wallet. Counsel also attempted to impeach the testimony of Darrington using prior inconsistent statements regarding the wallet. Simply because counsel's cross-examination did not prove to be effective in acquitting Burgin does not mean there was a failure to perform an essential duty. Counsel did, in fact, employ the strategy about which Burgin is complaining. This claim is without merit.

Burgin's second claim is his defense counsel failed to impeach three witnesses who testified consistently as to the amount of cash in the stolen wallet. Darrington,

the victim, and Budka all testified the victim's wallet contained three to five dollars. The record reveals defense counsel competently cross-examined each of the three witnesses regarding the amount of money in the wallet. Once again, Burgin is complaining about the failure to employ a trial strategy which defense counsel did, in fact, adequately employ. We conclude this claim is without merit due to the failure to show a breach of an essential duty.

Burgin's third claim is his defense counsel failed to use prior inconsistent statements to impeach Darrington's testimony regarding the time and place of the robbery. Defense counsel did, in fact, use Darrington's prior statements regarding time in cross-examination. We conclude this claim is without merit due to the failure to show a breach of an essential duty.

Burgin's fourth claim is his defense counsel failed to object to in-court identification of the defendant by the victim. Burgin alleges impermissibly suggestive identification procedures were used to assist the victim in identifying the defendant in court. The record does not support Burgin's contention that a photographic array was used to aid the victim in making an in-court identification. In fact, the photographic array was not admitted into evidence until Burgin's testimony was given which was long after the victim made an in-court identification. We conclude this claim is also without merit due to the failure to show a breach of an essential duty.

Burgin's final claim is his defense counsel failed to perform an adequate pre-trial investigation. To support this claim, Burgin contends his counsel failed to call Walter Hughes as a witness, failed to call a juror from the defendant's brother's trial as a witness, and failed to bring a motion to suppress the wallet which Burgin contends was seized without probable cause.

Regarding the potential testimony of Walter Hughes, Burgin argues Hughes would have testified Corey Budka stole the wallet from Mr. Hughes and gave it to Burgin. Darrington, however, made a statement prior to trial that indicated Burgin may have stolen Hughes's wallet. In choosing not to call Hughes as a witness, counsel may have been exercising the trial strategy of foregoing testimony of possibly minimal value in order to prevent the potential of testimony on cross-examination which could implicate Burgin in additional criminal acts.

Complaints about failure to call witnesses should be accompanied by a showing their testimony would have been beneficial. The reviewing court will not second guess counsel's decision as a matter of trial strategy to forego potentially beneficial testimony of a witness rather than risk introduction of potentially damaging testimony on cross-examination or rebuttal.

Nims v. State, 401 N.W.2d 231, 235 (Iowa App. 1986) (citations omitted). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Thompson v. State*, 492 N.W.2d 410, 413 (Iowa 1992); *McKettrick*, 480 N.W.2d at 55. We will not second

guess trial counsel's trial strategy, particularly given the possible strong reasons evident for not calling Hughes as a witness. This claim is without merit due to the failure to show a breach of an essential duty.

Burgin also claims trial counsel should have called as a witness a juror who sat for his brother Eddy's trial for the same robbery. Burgin alleges Eddy's trial resulted in a hung jury and argues the juror's testimony would explain the reason for the hung jury which would exculpate Burgin. Trial counsel did not seek this testimony as it is inadmissible under Iowa Rule of Evidence 606(b). This claim is without merit due to the failure to show a breach of an essential duty.

Burgin claims trial counsel should have attempted to suppress the wallet on grounds the wallet was improperly seized. To preserve a claim of ineffective assistance of counsel, a defendant must make some minimal showing from which this court can assess the potential viability of his or her claim. *State v. Wagner*, 410 N.W.2d 207, 215 (Iowa 1987); *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983). Burgin has failed to provide a specific basis for making his claim. Burgin has only made the bald assertion there was no probable cause. There is no mention of whether or not there was a search warrant or why there was no probable cause. This claim is without merit as Burgin has failed to meet his minimal burden in making the claim.

Upon consideration of all issues presented to this court, we affirm Burgin's conviction for first degree robbery.

AFFIRMED.