IN THE COURT OF APPEALS OF IOWA

No. 5-598 / 95-57

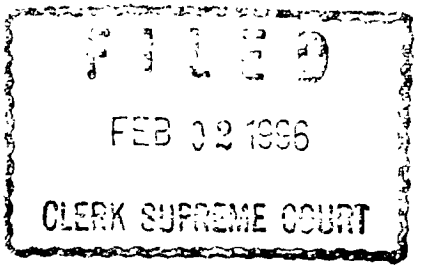
STATE OF IOWA,

Plaintiff-Appellee,

vs.

REGINALD ARLINE,

Defendant-Appellant.



Appeal from the Iowa District Court for Clinton County, David H. Sivright, Judge.

Reginald Arline appeals his convictions and sentences for two counts of willful injury. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Lawrence H. Schultz, County Attorney, and Bruce A. Ingham, Assistant County Attorney, for appellee.

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

PER CURIAM

Defendant Reginald Arline was convicted of two counts of willful injury in violation of Iowa Code section 708.4 (1993). He now appeals, claiming he received ineffective assistance of counsel. We affirm.

On September 4, 1994, at about 8:00 p.m., four teenagers, Michael Dauen, Aaron Sturtz, Desmond Batts, and Sylvia Ruiz, walked from Dauen's house to a local convenience store. Their route took them through the yard of the Clinton High School.

Walking through the school yard, they were confronted by a group of fifteen to twenty people. One of the group, Michael Malone, rushed Sturtz and punched him. Dauen attempted to intercede, but was struck over the head with a forty-ounce beer bottle. Dauen stated he was hit by several people he did not see. At one point, Steve Johnson held Dauen, while defendant struck him three or four times. During the assault, Sturtz was stabbed in the side.

Eventually, Dauen and Sturtz managed to escape. Batts assisted Dauen and called the police. Officer Joseph Raaymakers responded to the call. When questioned by Raaymakers, Dauen stated he had been assaulted by Silk, Baby G, Hector Rodriquez, and Raymond Rodriquez. Raaymakers testified he recognized Silk as defendant's street name, and Baby G as the street name for Johnson.

Both Dauen and Sturtz were treated at a hospital. Dauen received seventy stitches to the back of his head, which left a permanent scar. He also suffered blurred vision for a week. Sturtz was treated for a stab wound.

Officer Raaymakers questioned Dauen again at the hospital. Dauen gave him the same four names. Officer Richard Foley interviewed Dauen separately at the hospital that evening. Foley testified Dauen told him he had been assaulted by defendant, Johnson, Malone, Charles McMasters, and the Rodriquez brothers.

Officer Raaymakers interviewed Sturtz at the hospital. Sturtz told him he only knew two of the people, the Rodriquez brothers. Officer Foley testified when he interviewed Sturtz he was able to identify defendant, Johnson, and the Rodriquez brothers among the assailants. The next day, neither Dauen nor Sturtz was able to pick defendant from a photographic lineup, though each person identified defendant at trial as being among the people who had assaulted them.

Defendant presented an alibi defense. He testified he was in Chicago on September 4, 1994. He played in a basketball game that ended at 4 p.m. that afternoon. Defendant testified he remained in Chicago the remainder of that evening. Patrick A[redacted]nd Marlon Chamberlain testified they were friends of defendant and on the same basketball team. Their testimony supported defendant's claim he was in Chicago playing basketball on September 4, 1994.

Defendant additionally presented the testimony of Johnson, Hector Rodriquez, Raymond Rodriquez, Ruiz, Batts, Jeremy Malone, and Keith Bryant. Each witness testified he or she had not seen defendant in Clinton on September 4, 1994.

The jury found defendant guilty of two counts of willful injury. Defendant filed a motion for new trial claiming there was insufficient evidence to support the jury's verdict. He subsequently filed a second motion for new trial, claiming there was new exculpatory evidence. The new evidence was a videotape of the basketball game on September 4, 1994, an affidavit from the head coach, and an affidavit of the park supervisor. The affidavits stated defendant had been a participant in the basketball game in Chicago on September 4, 1994.

The district court denied the two motions for new trial. Defendant was sentenced to a term of imprisonment not to exceed ten years on each charge, the sentences to be served concurrently. Defendant appeals.

Defendant claims he was denied the effective assistance of counsel due to counsel's failure to move for judgment of acquittal on one of the charges and failure to call credible alibi witnesses. To establish a claim on ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent that it denied defendant a fair trial. *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and a defendant has the burden to prove by a preponderance of the

evidence that counsel was ineffective. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991).

Concerning deficiency of performance, the ultimate test is whether counsel's performance was within the range of normal competency. *Brewer v. State*, 444 N.W.2d 77, 93 (Iowa 1989). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989).

Concerning proof of prejudice, a defendant must show counsel's failure worked to his substantial and actual disadvantage, to the end that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Brewer*, 444 N.W.2d at 83.

During the trial, defense counsel moved for judgment of acquittal on the count involving Sturtz. This motion was denied. Defense counsel did not move for judgment of acquittal on the count involving Dauen. Defendant claims he received ineffective assistance because of counsel's failure to make such a motion. He states the motion would have been successful because the alibi evidence was more reliable than the eyewitness testimony of the victims.

We determine defendant was not prejudiced by defense counsel's failure to file a motion for judgment of acquittal on the count involving Dauen. Dauen testified defendant hit him in the face three or four times. Sturtz testified he saw defendant

strike Dauen. After the incident, Dauen identified defendant by his street name, Silk, as one of the persons who had assaulted him.

We find this is sufficient to generate a jury issue on the issue of whether defendant had struck Dauen, and a motion of acquittal, if one had been made, would have been denied. We are unable to find defendant received ineffective assistance due to his counsel's failure to file a motion for judgment of acquittal as to the count involving Dauen.

Defendant also claims he received ineffective assistance of counsel due to counsel's failure to call additional alibi witnesses. He states the jury must have decided the alibi witnesses who testified were not credible because they were young and had gang associations. Defendant advances his counsel was ineffective because he did not call the basketball coach, Andre Jackson, and the park supervisor, Larry Baldwin, to testify defendant had been playing in a basketball game in Chicago on September 4, 1994. Furthermore, he states if Jackson had been called he would have been able to lay a foundation for the admission of the videotape of the game.

The question is whether defendant has shown whether he was prejudiced by his attorney's failure to call Jackson and Baldwin as witnesses. The record on this issue is insufficient for us to address defendant's claim. We preserve the claim for defendant to raise in a post-conviction proceeding.

AFFIRMED.