

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 29 1988

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

BYRON RAYMOND MILLER,)

Defendant-Appellant.)

Filed June 29, 1988

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87-926

Appeal from the Iowa District Court for Clinton County (No. C500-9336) -
Max R. Werling, Judge.

Defendant appeals his convictions, following a jury trial, for burglary in
the second degree and other offenses. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant
Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; Mark J. Zbieroski, Assistant Attorney
General; and Lawrence H. Schultz, County Attorney, for the plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Defendant, Byron Raymond Miller, appeals his convictions, following a jury trial, of burglary in the second degree, possession of burglar's tools, operating a motor vehicle without the owner's consent, and eluding a police officer. Defendant's sole claim on appeal is his trial counsel rendered ineffective assistance by failing to object to a flight instruction given by the trial court to the jury. We affirm.

As defendant is asserting that his sixth amendment right to counsel was violated, we make an independent evaluation of the totality of the relevant circumstances, which is the equivalent of a de novo review. See Heaton v. State, 420 N.W.2d 429, 431 (Iowa 1988). Defendant bears the burden of proving by a preponderance of the evidence his counsel was ineffective and must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Id.

Police Officer Simmons testified he was investigating a possible burglary in response to an early morning call. He drove to the location and observed a brown Oldsmobile, which Simmons later learned was stolen, containing three persons stopped in the middle of the road. The driver of the Oldsmobile drove away when he saw Officer Simmons' squad car approaching and a high-speed chase ensued.

The Oldsmobile ran into a chain link fence and the driver fled on foot. Officer Simmons recognized the driver from having seen him in the past. At trial, Officer Simmons identified defendant as the driver. Officer Simmons arrested the two passengers. One passenger stated the driver was his cousin Byron Miller. Defendant was arrested at his home later that morning.

Defendant's principal defense was alibi. His mother, sister, and aunt testified he was home in bed the night Officer Simmons stopped the Oldsmobile. Defen-

dant's cousin, who was a passenger in the Oldsmobile, testified defendant drove the stolen car but did not know his passengers were committing a burglary when they got out of the car. Defendant's counsel argued the alibi defense and alternatively requested the jury to consider lesser included offenses based on the cousin's testimony.

We may first examine the prejudice component of this ineffectiveness claim. State v. Risdal, 404 N.W.2d 130, 132 (Iowa 1987). Defendant has the burden of proving prejudice by showing that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. State v. Simpson, 349 N.W.2d 783, 785 (Iowa App. 1984).

We find no merit in defendant's claim regarding counsel's failure to object to the flight instruction. Even if we assume, without deciding, the flight instruction was improper, we find that sufficient evidence supported all the charges on which defendant was convicted so as to preclude any resulting prejudice. See White v. State, 380 N.W.2d 1, 5 (Iowa App. 1985). Based on our review of the evidence, we find defendant has not shown there is a reasonable probability the outcome would have been different. See Schertz v. State, 380 N.W.2d 404, 414 (Iowa 1985); Taylor v. State, 352 N.W.2d 683, 687 (Iowa 1984).

Defendant has not shown his trial counsel's performance resulted in prejudice. We find no reason to preserve the issue concerning ineffectiveness of counsel for further postconviction proceedings.

AFFIRMED.