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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
HERBERT LIGHTYKE CLARK,)
Defendant-Appellant.)

Filed November 20, 1984

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4-389
84-467

Appeal from the Iowa District Court for Polk County - Ray Hanrahan, Judge.

The defendant appeals from his conviction for burglary in the first degree in violation of sections 713.1 and 713.3 of the Iowa Code. REVERSED.

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.

The defendant appeals from his conviction for burglary in the first degree in violation of sections 713.1 and 713.3 of the Iowa Code. He contends his trial attorney rendered ineffective assistance in two respects: 1) by failing to seek an instruction permitting the jury to find implied consent for his presence on the premises, and 2) by failing to move for a judgment of acquittal on the ground of insufficient evidence to support the verdict. We reverse.

Herbert Lightyke Clark was charged by information with burglary in the first degree. He alleged in his defense that the apparent burglary was actually only a practical joke on friends who were employed at the victimized store. The record lends some plausibility to this somewhat unusual assertion. Clark, an employee of McDonald's for thirteen years, evidently had been involved in several practical jokes, including moving a co-worker's car so he would think it had been stolen. Furthermore, a review of the presentence report reveals he has no prior criminal record.

On October 2, 1983, at approximately 10:00 p.m., Herbert Clark went to a McDonald's store in Altoona to speak with Herbie Smith, an employee of the store. The defendant testified that after speaking with Smith he decided to play a practical joke on Kenny Scott, the night janitor of the store. Clark left the store, drove his car down the street, parked it, and came back to the store on foot at about 10:30 p.m. The store was still open for business at that time and the defendant went to the men's restroom, taking with him a ski mask, black gloves, and an unloaded pistol. He removed one of the tiles from the false ceiling and climbed into the area between the roof and the false ceiling. The defendant then crawled through the ceiling area until he was above the employees' lounge. According to his testimony, he laid back and proceeded to wait for all the employees except Kenny to leave the store, during which time he fell asleep.

At approximately 3:30 a.m., the defendant awoke when he heard a noise

which he believed to be Kenny mopping the floor or straightening stock. Clark decided to come down from the ceiling area, lost his balance, and fell to the floor in the lounge area, wearing the mask and gloves, and brandishing a pistol. Kenny saw the defendant and a struggle ensued during which time Kenny told a fellow employee named Julie to call the police. Defendant then said, "It's me. It's me, Kenny. It's me. It's a joke." He removed his mask and when Kenny saw who it was he released his hold.

Clark remained in the store for forty-five to sixty minutes after the incident and after telephoning someone to pick him up, the defendant left the store at about 4:30 a.m. Kenny did not call or notify anyone until 8:00 a.m. when he informed the manager of the Altoona store.

The State charged the defendant with first-degree burglary for remaining in an occupied structure "after it is closed to the public or after the person's right, license, or privilege to be there has expired," with intent to commit a felony, assault, or theft therein. Iowa Code § 713.1 (1983). A jury found the defendant guilty of burglary in the first degree. The jury also found that the defendant had been armed with a firearm, thereby triggering the mandatory minimum five-year sentence provided in Iowa Code § 902.7 (1983). Clark has appealed from the resulting conviction and sentence.

The primary question before this court is whether the defendant's trial attorney rendered ineffective assistance. The defendant claims trial counsel was ineffective in failing to move for a judgment of acquittal on the grounds of insufficient evidence regarding lack of consent to be on the premises. In the alternative, defendant argues that this case should reversed since trial counsel was ineffective in failing to request a jury instruction on implied consent.

When a defendant relies on a specific act or omission to prove ineffective assistance of counsel, two conditions must be demonstrated: 1) counsel failed to

perform an essential duty, and 2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

In Hinkle v. State, 290 N.W.2d 28 (Iowa 1980), the supreme court elaborated on the duty requirement:

> The petitioner must shoulder the burden of proof to establish by a preponderance of evidence a claim of ineffective assistance of counsel. The test is whether under all the circumstances counsel's performance was within the range of normal competency. Such circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation.

Id. at 30.

With respect to the prejudice requirement, in Miles, the supreme court adopted the standard for prejudice set forth in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982). Essentially, the Frady standard requires the defendant to demonstrate not only "a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (emphasis in original). Id. The Miles court quoted with approval the fifth circuit's application of this standard in Washington v. Strickland:

> The test for prejudice in Frady suggests the proper allocation of the burden of proof on the issue of prejudice. In order to sustain that burden, the petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense. This burden is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance. At the same time, the burden does not require the petitioner to produce evidence to which he is unlikely to have access. It also properly reserves for the state the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt. Thus, even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceedings would not have been altered but for the ineffectiveness of counsel.

Miles, 344 N.W.2d at 234 (quoting Washington v. Strickland, 693 F.2d 1243, 1262

(5th Cir. 1982), rev'd, ____ U.S. ____, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

On review of the fifth circuit's decision, the United States Supreme Court enunciated this test for prejudice which is more stringent than the standard employed in the lower court decision: "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 v. Washington, ____ U.S. ____, ____, 104 S. Ct. 2052, ____, 80 L. Ed. 2d 674, 698 (1984).

Defendant's first claim of ineffective assistance of counsel is based on trial counsel's failure to move for a judgment of acquittal. Defendant asserts that there was insufficient evidence to show that no consent existed for him to be in the store. He further asserts that he was prejudiced by counsel's conduct since failing to make such a motion waives his right to challenge sufficiency of the evidence on appeal.

Analyzing the defendant's claim in light of the aforementioned principles regarding ineffective assistance, we conclude that his trial counsel was not ineffective in failing to move for a judgment of acquittal.

We believe that trial counsel had a duty to preserve error on appeal. Considering the totality of the circumstances, a normally competent attorney would have concluded that such a motion was necessary to preserve the issue of consent. The supreme court has stated that "[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972). However, we agree with defendant that the failure to preserve error cannot be characterized as trial strategy. Nor can it be characterized as carelessness. In fact, at the close of the State's evidence, the trial court specifically asked the

defendant's attorney if he was going to make any motions. Trial counsel responded that he was not.

Even though trial counsel may have had a duty to preserve error, we do not believe that the defendant has demonstrated the requisite prejudice. Viewing the record as a whole, this court cannot conclude that there is reasonable probability that but for counsel's errors the result of the proceedings would have been different. Generally, a trial court will not grant a motion for judgment of acquittal if there is any substantial evidence in the record reasonably tending to support the charge. State v. Rich, 305 N.W.2d 739, 741 (Iowa 1981). It cannot be said that in the instant case there was no substantial evidence that would reasonably support the charge. As the defendant pointed out, he had been on the premises after closing hours several times in the past. Moreover, Kerry and Julie allowed him to stay on the premises approximately 45 to 60 minutes after the alleged burglary was committed. However, it is entirely possible that the defendant exceeded any limited privilege to be on the premises. The evidence reflects that no one knew of his presence when he entered the store and climbed through the ceiling tiles. In fact, he was in the building for approximately four hours before anyone knew of his presence. Thus, we cannot conclude that a motion for judgment of acquittal would have been granted. Nor can we conclude that had error been preserved, the result would have been different on appeal. Due to the lack of prejudice, we conclude that trial counsel was not ineffective in failing to move for a judgment of acquittal.

Defendant also claims that trial counsel was ineffective in failing to request a jury instruction on implied consent. We are inclined to agree with the defendant in this respect. This court believes that an attorney within the normal range of competency would have requested such a jury instruction. Moreover, prejudice is apparent because without an instruction on implied consent, "the jury could not know consent need not be given in express terms nor, in any event, what conduct

would amount to consent or would justify defendant in a bona fide belief it had been given." State v. Carey, 165 N.W.2d 27, 34 (Iowa 1969).

In State v. Goff, 342 N.W.2d 830, 837 (Iowa 1983), the supreme court held that trial counsel's failure to object to the district court's omission of the specific intent element of kidnapping in the submitted instructions constituted ineffective assistance. In Goff, the court noted that there were circumstances where defense counsel's failure to take proper steps regarding instructions did not rise to the level of ineffective assistance of counsel. Id. at 838. However, the court reasoned that in Goff the element of specific intent was vital to the defense and, therefore, did not satisfy the constitutional right to effective assistance.

Like the situation in Goff, we believe that an instruction on implied consent was vital in this particular case. Counsel's failure to request a jury instruction on implied consent was especially prejudicial in light of the instruction that was given by the court. The court informed the jury that if the person remains in the store and "it closes to the general public, then his right, license or privilege expires at that time." We agree with the defendant that such an instruction precluded the jurors' consideration of implied consent.

Finally, it cannot be ignored that there was sufficient evidence to generate a jury question on implied consent. As previously noted, the record reflects that the defendant had been allowed in the Altoona store after it closed on other occasions. Furthermore, Kenny and Julie allowed the defendant to remain on the premises for a considerable length of time after the alleged burglary had occurred. We believe it was trial counsel's duty to ensure that these facts in the record were considered by the jury in light of an instruction on implied consent. Failure to do so resulted in prejudice because there is reasonable probability that but for counsel's errors the result would have been different.

Accordingly, we hold that Clark did not have effective representation by counsel.

REVERSED.