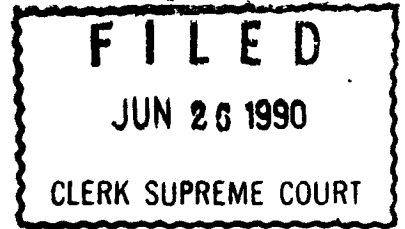


IN THE COURT OF APPEALS OF IOWA

No. 0-216 / 89-865



STATE OF IOWA,

Appellee,

vs.

KENNETH RAY CAMPBELL,

Appellant.

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Appeal from the Iowa District Court for Scott County,
Margaret S. Briles, Judge.

The defendant appeals his conviction, following a jury
trial, for first-degree robbery. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and
Brian K. Sissel, Assistant State Appellate Defender, for
appellant.

Thomas J. Miller, Attorney General; Mark Joel
Zbieroski, Assistant Attorney General; William E. Davis,
County Attorney; and James D. Hoffman, Assistant County
Attorney; for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, J.

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Defendant appeals his conviction of robbery in the first degree. He contends his attorney rendered ineffective assistance of counsel. He also challenges the sufficiency of the evidence to convict him. We affirm.

Kenneth Campbell was accused of robbing a video store. The store clerk identified a picture of Campbell from a photo array.

A jury found Campbell guilty of robbery in the first degree. He has appealed the resulting conviction.

Campbell contends his trial attorney rendered ineffective assistance by failing to object to evidence concerning the photo array shown to the store clerk, and evidence of her subsequent identifications of Campbell as the robber. He argues that the photo array was impermissibly suggestive, and that there was a substantial likelihood the photo array would taint the store clerk's later identifications because she had a limited opportunity to view the robber during the robbery.

Campbell also challenges the sufficiency of the evidence to identify him as the perpetrator of the robbery.

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, 2069, 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. Risdal, 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.

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require the defendant to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is that the defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Yaw, 398 N.W.2d 803, 807 (Iowa 1987).

Ordinarily we do not decide an ineffective assistance of counsel question on direct appeal, preferring to reserve it for postconviction proceedings when counsel can defend

against such a charge. State v. Poyner, 306 N.W.2d 716, 719 (Iowa 1981). However, in this case there is a sufficient record for us to adjudicate the defense claim. See State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). Counsel's failure to object to the identification evidence is only a breach of duty if those identification procedures were impermissibly suggestive and would have been suppressed. See State v. Neal, 353 N.W.2d 83, 86 (Iowa 1984). The totality of the circumstances are examined to determine whether the procedure gave rise to a very substantial likelihood of irreparable misidentification. State v. Rawlings, 402 N.W.2d 406, 407 (Iowa 1987).

The identification procedures were not perfect. However, it is apparent from the record that the witness was not susceptible to making a false identification. The witness did not identify anyone with certainty until she saw the defendant. She did identify one other suspect as a possible choice, but refused to make a positive identification of him. This makes her later identification of the defendant more, not less, credible. This partial identification shows that she was sure enough of her identification to know the difference between someone who merely looked like the perpetrator and the actual robber.

Defendant's counsel made his credibility argument to the jury. While it may have been prudent for him to object in addition to his argument, his failure to do so did not

violate any duty owed to the defendant. Defendant's attorney did not render ineffective assistance of counsel.

Defendant also claims the evidence was insufficient to warrant a conviction. Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). 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. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Not only did the witness make a positive identification of the defendant at trial, but there was also evidence placing some of the stolen merchandise, and possibly the gun, in the defendant's possession or at his home. Even without this other evidence the jury was certainly entitled to believe the witness' identification. There was clearly sufficient evidence to convict the defendant.

AFFIRMED.