IN THE COURT OF APPEALS OF IOWA

No. 0-239 / 99-0910
Filed May 31, 2000

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT ARTHUR ALLEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of interference with official acts in violation of Iowa Code section 719.1 (1997), public intoxication in violation of section 123.46, and disorderly conduct in violation of section 723.4. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Danielle Davis, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

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MAHAN, J.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of interference with official acts in violation of Iowa Code section 719.1 (1997), public intoxication in violation of section 123.46, and disorderly conduct in violation of section 723.4. Allen contends (1) his trial counsel was ineffective in failing to move for mistrial based on judicial misconduct and in failing to object to a jury instruction on disorderly conduct, and (2) the court erred in failing to grant his motion for judgment of acquittal because the evidence was insufficient to support a conviction of disorderly conduct. We affirm.

The defendant Allen is a regular at the Uptown Jazz Bar in Waterloo. In addition, the owner of the bar occasionally hires Allen to work security. His job duties include walking the floor and looking for signs of disturbances. On April 24, 1997, Allen was allegedly working around closing time when Sergeant Larry Thompson and officer Terry Wood were dispatched due to a complaint of underage drinkers in the bar. They did not see any underage drinkers when they arrived at the bar shortly after 2:00 a.m. However, when they saw Allen walking toward the bathroom with a beer in his hand, they ordered him to pour it out. It is Sergeant Thompson's contention Allen did comply with this but went up to the bar and attempted to order another drink.

Sergeant Thompson ordered Allen to leave the bar and Allen responded only Sammy Daniels, the former owner and operator of the bar, could put him out of the bar. Allen was arrested.

During this encounter, officer Wood observed Allen to have red eyes, slurred speech, and he swayed a bit. From these observations, officer Wood believed Allen to be intoxicated. Officer Wood also gave testimony that Allen had clenched his fists and looked like he wanted to fight them.

Allen was uncooperative with the officers at the jail. He resisted being put in the holding cell and placed his hands underneath him when they tried to take his cuffs off. Pepper spray had to be used to restrain Allen who was eventually placed in a chair where he was strapped down and immobilized.

Allen was charged by trial information on June 9, 1997 for interference with official acts, public intoxication, and disorderly conduct. Trial was commenced on May 18, 1999, and one day later, the jury returned with guilty verdicts for all three charges. Allen appeals.

I. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329

(Iowa 1998). We find the record in this case adequate to decide the issue in this direct appeal.

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 606, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Allen's conviction based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

Allen claims he received ineffective assistance of counsel due to counsel's (1) failure to move for a mistrial based on judicial misconduct and (2) failure to object to the jury instruction on disorderly conduct. Error was not preserved on these issues. However, because these claims inhere to Allen's contention of ineffective assistance of counsel, we consider these arguments. *State v. Thai*, 575 N.W.2d 521, 526 (Iowa App. 1997). A claim of ineffectiveness of counsel is an exception to the general rule that in order to preserve error for appeal, an issue must be raised timely and adequately. *State v. Shortridge*, 589 N.W.2d 76, 84 (Iowa App. 1998).

A. Failure to Move for a Mistrial. Allen argues he did not receive a fair and impartial trial because of the court's questioning and admonishing of the defendant's sole witness giving the jury the impression the court sided with the State.

1. Court's Questions. The court asked the witness a string of questions with regards to Allen's job duties and salary at the bar. This exchange between the court and the witness went as follows:

> THE COURT: Mr. Daniels, what were the defendant's specific duties the evening of April 24th, regarding security?
>
> THE WITNESS: Basically just walk the floor, look for signs of disturbances.
>
> THE COURT: Do you permit your security staff to drink alcohol while they're on duty?
>
> THE WITNESS: No, I don't – no, I didn't, rather.
>
> THE COURT: Was the defendant drinking alcohol that evening, as best you know, while he was on duty?
>
> THE WITNESS: No, he wasn't.
>
> THE COURT: Are you saying you saw the defendant with no alcoholic beverage in his possession the entire time that you were there from 10 or 10:30 on?
>
> THE WITNESS: He had a beer after the club closed.
>
> THE COURT: Sir, your direct testimony was that you are not permitted to serve anyone to the point of intoxication. What did you mean by that?
>
> THE WITNESS: Well, if you're – we usually – in the nightclub business, we usually try to determine how long a person has been sitting there and during that time how many drinks has he had, and if he start [sic] to slur or if he start [sic] to say things that isn't appropriate or something like that, then we stop.
>
> THE COURT: And your testimony is that the defendant was there prior to the time you got there?
>
> THE WITNESS: When I got there, I seen [sic] him.
>
> THE COURT: How much are your security staff members paid?
>
> THE WITNESS: I usually pay them – I think I was paying them – was it 35, 40 dollars a night or something like that.
>
> THE COURT: Do you remember whether or not the defendant was paid 35 or 40 dollars that evening, prior to the time he left?

> THE WITNESS: I don't know if I – yes, I think – I don't know if I got him paid or not, because the policemen walked in directly when the crowd had left, and I don't think I had settled up, probably, with no one at that time.

Allen contends the court was eliciting testimony that would be helpful to the State and would give the jury the impression the court sided with the State when it asked these questions. The State argues the tone the court used was impartial and did not reflect bias toward the prosecution.

The role of a trial judge in a criminal trial is more than a "mere moderator" of the trial. *State v. Dixon*, 534 N.W.2d 435, 441 (Iowa 1995) (citing *United States v. Scott*, 26 F.3d 1458, 1464 (8th Cir. 1994)). Our supreme court in the *Dixon* case stated:

> A trial judge may ask questions of witnesses in an attempt to clarify testimony and to elicit facts necessary to a clear presentation of the issues. However, the court must "preserve an attitude of impartiality and [guard] against giving the jury an impression that the court believes the defendant is guilty." When a criminal defendant asserts that a trial judge's comments prevented a fair trial, we will engage in a balancing of the potential prejudice caused by the trial judge's comments and the overall fairness of the trial. Where the judge appears to have lost his or her appearance of neutrality, or appears to have accentuated and emphasized the prosecution's position, we will find the balance tipped adversely against the fairness of the trial.

Id. (citations omitted). Therefore, we must balance any potential prejudice with the overall fairness of the trial. *Id.*

We agree with the State. In the case at bar, the record does not indicate the judge's questions emphasized the prosecution's case nor does it show a jury could reasonably have interpreted the questions to mean the judge was siding with the State. In addition, this record does not reflect the trial court directly

commented, gestured, or displayed any nonverbal expressions in response to evidence presented by either party. *State v. Hardy*, 492 N.W.2d 230, 235 (Iowa App. 1992). The questions were appropriate.

2. Admonishment of the Witness. Before the witness was excused, the court admonished him in front of the jury for being late:

> THE COURT: Mr. Daniels, my name is Judge Harris. Before I release you, I also want to appreciate you being here, but I want to tell you that my policy is that I start my hearings on time; I finish them on time. I expect my attorneys to be here on time. I expect the jury to be here on time. You were told to be here at 10:00. You were not here at 10:00. I don't know why you weren't here. I just know you weren't here. In the future, if you are told to be here for a court appearance, I expect you to be here at that time. Do you understand?
>
> THE WITNESS: Yes.
>
> THE COURT: Is there anything you don't understand about what I just told you?
>
> THE WITNESS: No.
>
> THE COURT: You're excused.

Allen contends the admonishment of the witness constitutes judicial misconduct in which his counsel should have moved for a mistrial. As a result of defense counsel's failure to do so, Allen claims he received ineffective assistance of counsel.

We find it unfortunate the court handled the witness's failure to appear on time this way. The admonishment of the witness took place in front of the jury. It would have been more prudent to discuss the matter with the witness outside the presence of the jury. However, after carefully reviewing the record on this issue, we find no prejudice resulted. The statement included a reference to the attorneys and the jury also being on time. The test for prejudice is whether trial counsel's failure worked to the defendant's actual and substantial disadvantage

so a reasonable possibility exists that but for the trial attorney's unprofessional errors, the resulting conviction would have been different. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa App. 1998). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* (citing *Kone*, 557 N.W.2d at 102). We conclude trial counsel did not fail in an essential duty. In addition, Allen has failed to show prejudice.

B. Failure to Object to Jury Instruction. Allen contends the jury instruction on the disorderly conduct charge was unclear and confusing on the issue of when the disorderly conduct was to have occurred. Because of this, Allen claims the jury could have considered his conduct at the jail rather than at the bar to constitute the disorderly conduct. Allen therefore argues defense counsel's failure to object to this instruction and make a record of the discussion surrounding the instruction prejudices his right to appellate review and constitutes ineffective assistance of counsel.

The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 18(5)(f); *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. *Id.* When a single instruction is challenged, it will be judged in context with other instructions relating to the criminal charge, not in isolation. *Id.* Any error in jury instructions must be prejudicial to warrant reversal. *State v. Countryman*, 572 N.W.2d 553, 561 (Iowa 1997).

The prosecution advised in their opening statement that Allen was placed under arrest for disorderly conduct in the bar. Sergeant Thompson's testimony was Allen was placed under arrest for disorderly conduct when he tried to buy another beer. Further testimony from both Thompson and officer Wood made it clear to the jury Allen was arrested for disorderly conduct based on his conduct at the bar.

We have reviewed the record and find the district court properly instructed the jury on disorderly conduct. Therefore, we conclude trial counsel did not fail in an essential duty. In addition, Allen has failed to show prejudice.

II. Judgment of Acquittal. Initially, we note Allen appeals only the sufficiency of the evidence on his conviction of disorderly conduct. Allen does not have a right of direct appeal from this conviction. Iowa Code § 814.6(2)(d). However, we will treat this matter as an application for discretionary review. Iowa R. Crim. P. 304.

Our review for sufficiency of evidence challenges is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We will uphold the trial court's denial of a motion for judgment of acquittal if there is substantial evidence in the record to support the defendant's conviction. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). The jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998); *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). Substantial evidence is such evidence as could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Allen*, 348 N.W.2d at 247.

In deciding whether there is substantial evidence, we view the record evidence in the light most favorable to the State. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). A verdict can rest on circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993). However, "[t]he evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992) (citations omitted).

Allen makes only one claim of error by the district court. He contends the court erred when it denied his motion for judgment of acquittal on the charge of disorderly conduct. He alleges there was insufficient evidence to convict him on that charge. We agree with the district court and find the evidence was sufficient.

Allen argues there was insufficient evidence to prove the elements of disorderly conduct. The relevant portions of section 723.4(3) require the State to prove the defendant did any of the following:

> Direct abusive epithets or makes any threatening gesture which the person knows or reasonably should know is likely to provoke a violent reaction by another.

Iowa Code § 723.4(3) (1997). The State contends there was sufficient evidence to prove disorderly conduct. The State points to the following evidence: Sergeant Thompson observed Allen to be belligerent; Allen was believed to be intoxicated; Allen refused to leave the closed bar after officers asked him to; officer Wood believed Allen was going to fight them because he had clenched his

fist and made a face and told them the only person who could tell him he could not have a drink was Sammy. When viewed in the light most favorable to the State, we find there was substantial evidence to support a jury's finding of guilt on the disorderly conduct charge.

AFFIRMED.