IN THE COURT OF APPEALS OF IOWA

No. 4-538 / 94-334

FILED
JAN 23 1995
CLERK SUPREME COURT

RICHARD J. McLAUGHLIN,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Edward B. deSilva, Judge.

Richard J. McLaughlin appeals the district court's denial of his application for postconviction relief. **REVERSED.**

Thomas G. Reidel of J. W. Conway Law Offices, Muscatine, for appellant.

Bonnie J. Campbell, Attorney General, Mary Tabor, Assistant Attorney General, Richard R. Phillips, County Attorney, and Ann Terry and Dana Christiansen, Assistant County Attorneys, for appellee.

Considered by Donielson, C.J., and Sackett and Cady, JJ.

DONIELSON, C.J.

The defendant claims he was deprived of effective assistance of trial counsel and seeks appellate review from the denial of his application for postconviction relief. Upon our review of the parties' arguments, the record and the applicable case law, we conclude the defendant was denied effective assistance of counsel and remand this case for a new trial.

I. FACTUAL BACKGROUND

The defendant was a dance instructor charged with nine counts of various sexual offenses involving four of his students.[1] The trial court granted the defendant's motion for judgment of acquittal on one count and the remaining eight counts were submitted to the jury. The jury instructions specifically, and separately, set forth each count, the name of the child to whom the count related, the date of the alleged occurrence encompassed by each count and the elements of each offense charged.

During its deliberations the jury submitted the following written question to the trial judge--

> Counts III, V, VI, concerning [M.A.], we do not understand which incident matches which charge.

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1. The State charged the defendant with four counts of third-degree sexual abuse, two counts of lascivious acts with a child, one count of assault with intent to commit sexual abuse, one count of indecent conduct with a child, and one count of lascivious conduct with a minor.

The court consulted with the prosecution and defense counsel and submitted the following response to the jury--

> Count III, December 1990, alleged shower incident at the defendant's home. Alleged touched breasts and vaginal area.
> Count V, April 28, 1990. Alleged shower incident at the defendant's home. Also alleged measured for costume with no clothing. Alleged touched breasts and vaginal area.
> Count VI, December 1990. Alleged defendant got in shower with her. Alleged touched breasts and vaginal area.
> See instructions for further information regarding each count.

Defense counsel did not object to the response the trial court gave to the jury nor did he object to the court's communication with the jury in the absence of the defendant. The jury found the defendant guilty of all eight counts submitted for its consideration. The district court entered judgment and sentenced the defendant.

In his direct appeal the defendant argued his trial counsel was ineffective in failing to object to the court's communication with the jury in his absence and in failing to object to the supplemental instruction the court gave in response to the jury's question. This court declined to address either of those issues on direct appeal, and they were preserved for consideration at postconviction proceedings at which defense counsel could have the opportunity to explain his conduct. State v. McLaughlin, No. 2-649 / 91-1518 (Feb. 23, 1993).

II. POSTCONVICTION RELIEF--APPLICABLE STANDARDS

The defendant asserts a violation of his constitutional rights and our scope of review is de novo. State v. Ray, 516 N.W.2d 863, 865 (Iowa 1994). To prevail on a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. Id.

This two-pronged test requires, first, that defendant overcome the strong presumption counsel was competent. Id. Second, defendant must prove counsel's error worked to his actual and substantial disadvantage, creating a reasonable probability that but for the error the trial result would have been different. Id. Our ultimate concern in claims of ineffective assistance is with the fundamental fairness of the proceeding whose result is being challenged. State v. Keesey, 519 N.W.2d 836, 837 (Iowa App. 1994).

III. IOWA R. CRIM. P. 18(5)(g) -- SUPPLEMENTARY INSTRUCTION

The defendant claims his counsel was ineffective in failing to object to the trial court's communication with the jury in his absence and in failing to object to the supplemental instruction the court gave in response to the jury's question. Iowa R. Crim. P. 18(5)(g) provides--

> After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required may be given, in the discretion of the trial court. Where further information as to the testimony which was given at trial is taken by the jury, this shall be accomplished by the court reporter or other appropriate official reading from the reporter's notes. Where the court gives the jury additional instructions, this shall appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

Rule 18(5)(g) requires the defendant's presence when the jury submits a question to the court and the court gives an additional instruction in response. See State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983) (all communications between court and jury are required to be given in the presence of the defendant and counsel). The Iowa Supreme Court has held the absence of the accused when additional jury instructions are given "gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows the instruction had no influence on the jury's verdict prejudicial to the defendant." State v. Snyder, 223 N.W.2d 217, 221-22 (Iowa 1974).

There have been cases in which the Iowa Supreme Court has held noncompliance with Rule 18(5)(g) was nonprejudicial or harmless beyond a reasonable doubt. Those cases have involved communications deemed not to rise to the level of instructions on the law, Williams, 341 N.W.2d at 751; State v. Dreessen, 305 N.W.2d 438, 440 (Iowa

1981), communications which instruct a jury to rely on their own recollections regarding the factual evidence, Kane v. State, 436 N.W.2d 624, 628 (Iowa 1989), communications which constitute the only possible answer a court could give in response to a jury question, State v. Gardner, 490 N.W.2d 838, 843 (Iowa 1992), and communications which are consistent with the original jury instructions and the governing law. State v. McKee, 312 N.W.2d 907, 915 (Iowa 1981).

When questioned, defense counsel admitted the defendant was entitled to be present pursuant to Rule 18(5)(g) and he made a mistake if the defendant was absent when the jury's question was considered by the court. In its brief the State suggests the defendant implicitly waived his right to be present. Nothing in the record or defense counsel's testimony supports this argument.

Defense counsel opined he believed the defendant's presence would not have made any difference because the defendant would have relied on his counsel's recommendation regarding how the court should respond to the jury's question. A defendant's unexcused absence from any phase of a criminal trial cannot be rendered per se harmless merely because his counsel was present to protect his interest. Snyder, 223 N.W.2d at 222. That a defendant himself be at least afforded the opportunity to be present at all stages of his trial is an elemental corollary of the constitutional right of due process. Id.

This case is distinguishable from those in which a violation of Rule 18(5)(g) was held to be nonprejudicial. In this case the jury was given a supplemental instruction which tied specific evidentiary facts to the offenses charged. Jury instructions should state the applicable law. State v. Massick, 511 N.W.2d 384, 386 (Iowa 1994). They are not intended to marshal the evidence or give undue prominence to certain evidence involved in a case. Id.

In fashioning jury instructions a trial judge should avoid drawing attention to specific evidence. Id. Instead, the judge should "walk a middle course and avoid arguing the case for either side in the instructions." Id. (quoting State v. Marsh, 392 N.W.2d 132, 133 (Iowa 1986)). "One harm in singling out a piece of evidence and commenting on it is that the trial judge may be invading the province of the jury." Massick, 511 N.W.2d at 386.

A trial court has the discretion to give supplementary jury instructions. See State v. Watkins, 463 N.W.2d 15, 18 (Iowa 1990). However, it is the jury's function to sort out the evidence. State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984). In giving supplementary instructions a court must be careful to ensure it does not usurp the functions of the jury.

> As long as the supplemental charge is "scrupulously fair to the defendant and to the state" and does "not infringe upon the fact-finding province of the jury by coercion or improper suggestion," the giving of a supplemental charge is not improper.

Watkins, 463 N.W.2d at 18 (quoting State v. Pignolet, 465 A.2d 176, 184 (R.I. 1983)).

"In criminal trials, the State is required to prove beyond a reasonable doubt all elements of the offense." State v. Allen, 293 N.W.2d 16, 20 (Iowa 1980). This case involved the prosecution of multiple offenses and the testimony of 25 witnesses. It was the State's responsibility to present and link its evidence with each of the offenses charged. The fact the jury felt compelled to send a question to the judge regarding its confusion in matching the evidence with the charges indicates the State did not do a persuasive job in carrying its burden.

This was not a case in which the jury sought to review testimony offered at trial or exhibits admitted into evidence. The jury was seeking assistance in carrying out its fact finding function of sorting the evidence and determining if the State had offered sufficient proof in support of each charge. The trial court's supplementary instruction improperly invaded the province of the jury by setting forth specific factual incidents which purportedly supported each offense. The more appropriate response would have been for the trial court to instruct the jurors to rely on their own recollections of the evidence. See, e.g., Kane, 436 N.W.2d at 626 (jurors told to rely on their own recollections of the testimony when they asked court three factually specific questions related to the evidence).

When questioned during the postconviction proceedings, defense counsel admitted the supplementary instruction took the legal charges in the trial information and linked them with specific factual incidents which had been elicited from the testimony of one of the witnesses. Defense counsel stated, "The jury was obviously confused on how to link up the counts with what incidents." Defense counsel testified he did not think the defendant was prejudiced by the supplementary instruction because the trial judge "didn't tell them anything more than they had already heard and was simply trying to straighten out their obvious confusion."

We cannot agree the failure to object to the improper supplemental instruction was nonprejudicial. Defense counsel testified his trial strategy was to convince the jury the victims were angry at the defendant and, in the nature of a "witch hunt," conspired to to make false allegations against him. Nothing inherent in this strategy justifies defense counsel's failure to object to the supplemental instruction.

The jury was instructed it was required to find the defendant's guilt or innocence from the evidence and it was to make a separate determination of guilt with respect to each offense. The jury's question to the judge indicates it was having difficulty doing so. The supplemental instruction could easily have influenced the outcome of the trial. Not only did it set forth specific evidentiary

facts in support of three of the offenses, but it also effectively removed those facts from being confused with evidence relating to the remaining charges.

Defense counsel's failure to object to the defendant's absence and to the supplemental instruction placed the defendant at an actual and substantial disadvantage. But for the error there is a reasonable probability the trial result would have been different. The defendant has proven counsel failed to perform an essential duty and prejudice resulted. We reverse the denial of postconviction relief and remand this case for retrial.

REVERSED.

Sackett, J., concurs; Cady, J., dissents.

CADY, J. (dissenting)

I respectfully dissent. I agree with the majority that the defendant should have been present during the court's consideration of the note from the jury. Trial counsel was ineffective when he allowed the court to address the jury inquiry in defendant's absence. The dispositive issue, however, is whether the result of the trial would have been different without the error. I do not believe the result of the trial would have been altered.

The issue of jury communication's outside the presence of the defendant is sensitive and involved. At the heart lies the confrontation clause of the Sixth Amendment. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486, 490 (1985); State v. Meyers, 426 N.W.2d 614, 616 (Iowa 1988). The right to counsel and to an impartial jury are also implicated.

The strength of the right of a defendant to be present at all stages of the trial is evident in the presumption of prejudice which arises if the defendant is absent. Meyers, 426 N.W.2d at 616. The right must be carefully guarded by defense counsel.

The presumption of prejudice which results when an instruction is given in the absence of the defendant may be overcome if the record affirmatively shows the instruction had no prejudicial influence on the jury's verdict. I believe the record in this case surmounts the presumption of prejudice.

The majority concludes the supplemental instruction given in this case invaded the province of the jury by drawing undue influence to specific factual incidents. I would agree with their conclusion if the trial involved a single count. In a multi-count trial, however, the trial court often must rely on some limited factual claims to properly identify the essential legal claims.

A trial court has a fundamental obligation to give clear and accurate instructions to the jury. United States v. Thomas, 895 F. 2d 1198, 1200 (8th Cir. 1990). If the jury is unable to understand and properly apply the law, the entire trial process breaks down and justice becomes a game of chance.

The inquiry by the jury in this case did not relate to the fact-finding mission of the jury. The trial involved eight separate incidents. The jury asked for help in identifying which charging instruction simply applied to which incident. They did not understand how to apply the law to the facts in three of the eight counts. Application of the law is a basic function of the jury, and the trial judge was obligated to separately identify the eight

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charges so the jury could consider each separately. The vague facts mentioned by the trial court in its supplemental instruction did not provide unfair comment or emphasis on the evidence, but allowed the jury to understand their basic role. This cannot amount to prejudice.

I would affirm the trial court.