

FILED

OCT 29 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

467

Plaintiff-Appellee,

)

Filed October 29, 1985

vs.

)

DAVID ALLEN WELCH,

)

5-428
84-1965

Defendant-Appellant.

)

Appeal from the Iowa District Court for Pottawattamie County - Leo F. Connolly, Judge.

The defendant appeals from his conviction for second-degree burglary, asserting that the trial court's instruction defining the crime was erroneous.

AFFIRMED.

Gary K. Anderson of Anderson & Wheeler, Council Bluffs, for defendant-appellant.

Thomas J. Miller, Attorney General, Lona Hansen, Assistant Attorney General, and Drew H. Kouris, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM

On September 21, 1984, Robert Vannier was walking home from school. As he approached the alley located behind his house, he saw an orange pickup parked in the alley between his house and rental property that his father owned. Continuing up the alley, he noticed three people around the pickup. One person was in the pickup, one person was standing next to it, and the third person was coming out of a shed located on the rental property. The shed was used by Vannier's father, Everett, to store items he sold for salvage. Vannier identified Welch and Negrete as the people he saw that day outside the orange pickup. Vannier noticed the two people start to work on the pickup engine as he walked up the alley. Vannier went into his house and watched the people around the pickup from a window. He observed Welch go into the shed, come out with a bundle of wire, and throw it in the pickup. The pickup then drove away. Vannier called the police and described the incident and the pickup. Shortly thereafter, the police called back and directed Vannier to go to 23rd Street between B and C Avenues. Upon arriving, Vannier identified the pickup and wire as well as Welch and Negrete. Welch and Negrete were then placed under arrest. At police request, Vannier went to get his father so he could identify the wire. Everett Vannier identified the wire as his.

Welch and Negrete were jointly tried. Negrete testified in his own behalf. He said that he owned the pickup and used it to collect junk to sell for salvage. On September 21, 1984, Welch, Negrete, and a third person, unknown to Negrete, were driving around in the pickup looking for junk. He admitted being in the alley by Everett Vannier's shed that day but stated they were there because the pickup engine needed adjustments. He testified that after adjusting the engine he walked up the alley looking for junk. As he was doing this, Welch drove up in the pickup and told him to get in. Negrete said he first noticed

the wire in the back of the pickup when the police stopped them. Negrete was cross-examined by the State, but not cross-examined by Welch's counsel. Welch did not testify at the trial. Welch and Negrete were found guilty of second-degree burglary.

On appeal, Welch contends that the trial court erred by instructing the jury that burglary could be committed by entering "an area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft or criminal mischief." Welch notes that the quoted phrase was stricken from Iowa Code section 713.1 on July 1, 1984. Section 713.1 now provides that burglary can be committed only by entering or remaining in an "occupied structure."

Welch also asserts his trial attorney rendered ineffective assistance in several respects. He complains that his attorney failed to request that he be tried separately from Negrete. He also complains that his attorney failed to cross-examine Negrete and failed to object when the prosecutor asked Negrete on cross-examination about Welch's criminal record.

I. Jury Instruction. Welch first contends that the trial court erred when it instructed the jury on the elements of burglary using language that had been deleted from the statutory definition of burglary before the present crime occurred.

The marshaling instruction which Welch protests is the following:

You must find the defendants not guilty of burglary in the second degree as charged in the Trial Information unless the State proves by the evidence beyond a reasonable doubt each of the following elements:

1. That on or about the 21st day of September, 1984, the defendants did break or enter into the property of Everett Vannier.
2. That said property was an area enclosed in such a manner as to provide a place for the

keeping of valuable property secure from theft as described in the following instruction.

3. That the defendants had no right, license, or privilege to enter the above-described property.
4. That they did so with the intent to commit a theft.
5. That said property was not open to the public.

If you find the State has proved beyond a reasonable doubt each and all of the elements, then the defendants are guilty of burglary in the second degree; but if you find the State has failed to prove beyond a reasonable doubt any one or more of the elements, then you shall find the defendants not guilty of burglary in the second degree. (emphasis added)

The underscored language appeared in the burglary statute until July 1, 1984, when Iowa Code section 713.1 was amended. Before July 1, 1984, the statute defined the act of burglary as follows:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure or area enclosed in such a manner as to provide a place for the keeping of valuable property secure from theft or criminal mischief, such occupied structure or place not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure or other place where anything of value is kept, commits burglary. (emphasis added)

Iowa Code § 713.1 (1983). The amended section 713.1 now reads:

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary. (emphasis added)

Welch argues that because the offense charged occurred on September 21, 1984, the amended section 713.1 contains the applicable law.

The State denies error, relying in part on the rule that objections may not be raised for the first time on appeal. See State v. Burkett, 357 N.W.2d 632, 634 (Iowa 1984). The basis for the State's contention is that the State objected to the language of the burglary instruction and requested that the instruction be changed to reflect the amendment. Welch's counsel did not join in the State's objection and, in fact, stated that he offered no resistance to the instructions. The State argues that because Welch did not object to the instruction, he acquiesced in it and did not preserve any objection for appellate review.

To accept the State's contention, we would have to ignore the purpose for the requirement that objections be made of record in order for error to be preserved on appellate review. By making the objection of record, the appellate court knows that the matter was brought to the trial court's attention, and a ruling was secured thereon. Therefore, on appeal, review of the issue presented is possible. In this case, this purpose was served by the State's objection, as the following colloquy between the State's counsel and the court demonstrates:

THE COURT: Does the State have any objections to the instructions?

MR. KOURIS: Yes, Your Honor. I believe the Court has failed to take into consideration the fact that this marshaling instruction mentions along the lines of an area enclosed in such a manner as to provide a place for keeping of valuable property secure from theft or criminal mischief.

That provision has been stricken from the Code effective July 1, 1984. It's now incumbent upon the State to prove that these individuals jointly were involved in not the breaking but entering of an occupied structure which is defined as an building, structure or similar place adapted for the storage or safe keeping anything of value. Such a structure is an occupied structure whether or not a person is actually present.

I ask that the marshaling instruction be deleted and a new one drafted along the lines set out by Stock Instruction 1312 in the marshaling instruction 1302, the stock instruction.

I feel it's incumbent upon the Court to correctly charge the jury with the particular case. Without our change in regard to the instruction, the jury cannot possibly have an accurate idea of what the current state of the law is.

* * *

THE COURT: I have the feeling I've been mouse-trapped. And it's a quarter to 4 and we're trying to get a case concluded by 4:30.

MR. KOURIS: It certainly isn't a mousetrap. I received the instructions, I believe, at the end of the noon hour.

THE COURT: That's three hours ago. Plus the fact is that there are provisions where you can request instructions in substance.

MR. KOURIS: That's correct. I can request. But it's the Court's duty to properly instruct the jury on the appropriate law. What I'm saying is that those particular comments concerning an area enclosed is no longer the law in the State of Iowa. I have to object.

THE COURT: At this point they're overruled.

The issue which Welch presents for review was clearly raised to the trial court and the court ruled thereon. Given the court's impatience, no further purpose would have been served by defense counsel's reiteration of the State's objection. We, therefore, find that any error based on failure to instruct using the language of Iowa Code section 713.1 (1985), was preserved for review.

Iowa R. Crim. P. 18(5)(f) provides that "upon the conclusion of the arguments, the Court shall charge the jury in writing, without oral explanation or qualification, stating the law of the case." It is the duty of the trial court to fairly present all material issues and instruct the jury on the applicable legal principles. State v. Thomas, 262 N.W.2d 607, 612 (Iowa 1978); State v. Wiese, 182 N.W.2d 918, 921 (Iowa 1971); State v. Brown, 172 N.W.2d 152, 157 (Iowa

1969). Trial courts may use their own words in framing jury instructions, although careful attention to the wording of the relevant statutes minimizes the chances of appeal and reversal. State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983). "Error in instructing the jury is presumed prejudicial unless the contrary appears beyond a reasonable doubt from a review of the whole case." State v. Davis, 228 N.W.2d 67, 73 (Iowa 1975).

Although the trial court charged the jury to determine Welch's guilt or innocence under the law as it was worded prior to the 1984 amendment, rather than under the statute's language as it appeared on the date of the offense, Welch was not prejudiced thereby.

Because the place burgled in this incident was a shed, the Code's definition of "occupied structure" subsumes the language which the trial court used. Iowa Code section 702.12 (1985), defines "occupied structure" as:

[A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present. However, for purposes of chapter 713, a box, chest, safe, changer, or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an "occupied structure". (emphasis added)

A shed clearly is an occupied structure under this definition, but it is also "an area enclosed in such a manner as to provide a place for the keeping of valuable property." In other words, the court charged the jury with the correct law but used language that was supplanted by the amended statute.

Our finding is strengthened by the reason for the amendment to section 713.1. The Iowa Supreme Court determined that the legislature deleted the "area enclosed" language in response to an Iowa case which held that an object

such as a parking meter fell within the scope of the burglary statute. State v. Dean, 357 N.W.2d 307, 309 (Iowa 1984). The amendment narrowed the statute's scope to include only "occupied structures," excluding "devices too small or not designed to allow a person to physically occupy." Iowa Code § 702.12 (1985). Id. A defendant could be prejudiced by an instruction such as the court gave here if the place burgled could be found by a jury to be an enclosed area but not an occupied structure. Since a shed is obviously covered by both definitions, Welch was not prejudiced by the jury instruction as it was given.

Furthermore, no reversible error will be found for imperfect jury instructions if the instruction relates to an issue that is not disputed. State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983) (instruction which eliminated an element of felony-murder held not reversible error when jury could not have failed to find element existed from the evidence). A finding of lack of prejudice can also be justified in the present situation because the jury could not have failed to find that the shed was a place for the keeping of valuable property. Therefore, we conclude that the jury instruction did not constitute reversible error.

II. Ineffective Assistance. When a defendant relies on a specific omission to prove ineffective assistance of counsel, two conditions must be demonstrated:

- (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and
- (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984) (citing Strickland v. Washington, ___ U.S. ___, ___, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the range of normal competency. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980).

The test for ineffective assistance was most recently set forth in Strickland, where the Court stated: "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 the confidence in the outcome." Id. at ____, 104 S. Ct. 2068, 80 L. Ed. 2d at 698 (1984). The defendant must satisfy this burden by a preponderance of the evidence and rebut the presumption of counsel's competence. Meier, 337 N.W.2d at 206. Ordinarily, the accused is bound by the tactical or strategic decisions made by counsel, even those rising to constitutional dimensions. Sims v. State, 295 N.W.2d 420, 424 (Iowa 1980).

A. Cross-Examination of Negrete. Negrete, Welch's codefendant, testified on his own behalf. After his direct examination, the State asked if Welch's counsel wanted to cross-examine Negrete. Welch's counsel responded, "I don't have the option." Welch contends that the trial counsel's failure to cross-examine Negrete constituted ineffective assistance of counsel.

"Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance." Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). Welch does not suggest that evidence was in his attorney's possession which could have been used to impeach Negrete. During direct examination, Negrete testified that he did not see Welch go in or out of the shed and did not see who put the wire in his pickup. Furthermore, Negrete was subjected to a rigorous cross-examination by the State during which Negrete repeated that he did not see Welch have anything to do with the wire and he refused to implicate Welch. Negrete did not point the finger at Welch in an attempt to exculpate himself.

Trial counsel's failure to cross-examine Negrete could easily have been a tactical decision that Negrete's testimony did not actually harm Welch's case.

Welch has pointed to no prejudice which resulted from his attorney's failure to cross-examine Negrete and we find none.

B. Severance. Welch argues that his trial counsel's failure to move for a severance constituted ineffective assistance of counsel. Welch and Negrete were charged and tried jointly.

Iowa R. Crim. P. 6(4)(b) provides:

When an indictment or information jointly charges two or more defendants, those defendants may be tried jointly if in the discretion of the court a joint trial will not result in prejudice to one or more of the parties. Otherwise, defendants shall be tried separately.

An accused is entitled to a separate trial as a matter of right if a joint trial would result in prejudice. State v. Belieu, 288 N.W.2d 895, 897 (Iowa 1980). In order to show prejudice, the codefendant defenses must conflict to the point of being mutually exclusive and irreconcilable. State v. Snodgrass, 346 N.W.2d 472, 475 (Iowa 1984). "It is well-established, however, that the mere presence of conflict, antagonism or hostility among defendants or the desire of one to exculpate himself by inculcating another are insufficient grounds to require separate trials." Id. The test for irreconcilability of defenses is "if the jury, in order to believe the core of testimony offered on behalf of that defendant, must necessarily disbelieve the testimony offered on behalf of his codefendant." Id., citing United States v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir. 1981).

Here, the codefendants' defenses were not antagonistic at their core. Negrete testified that he did not enter the shed and take the wire, nor did he see Welch do so. Welch's defense was also that he did not take the wire. These defenses were not irreconcilable or mutually exclusive.

Because a severance would not have been appropriate in this situation, trial counsel's failure to move for a severance does not constitute ineffective assistance of counsel.

C. Cross-Examination of Negrete Regarding Welch's Prior Conviction.

During the State's cross-examination of Negrete, the following colloquy occurred:

Q. Mr. Welch ever been convicted of theft in the third degree?

NEGRETE'S COUNSEL: Objection. Irrelevant.

THE COURT: Sustained.

STATE'S COUNSEL: May I approach the bench, Your Honor, with counsel?

* * *

STATE'S COUNSEL: May I ask the Court to reconsider the last ruling?

THE COURT: Reconsidered. Same ruling.

Welch argues that his attorney's failure to object to the State's question and move to have the question stricken from the record or move a mistrial constituted ineffective assistance of counsel.

The State's obvious purpose in asking a question about Negrete's knowledge of Welch's prior convictions was to influence the jury to believe that Welch was predisposed to committing theft and burglary. Welch did not even take the stand so the question had absolutely no basis for impeachment purposes.

We strongly disapprove of the State's deliberate attempt to introduce irrelevant and potentially prejudicial evidence. By asking such a question, the State skates dangerously close to unethical conduct.

However, timely protest by Negrete's counsel prevented that line of questioning from proceeding. No answer entered the record. It was a reasonable exercise of professional judgment for Welch's counsel to decide that any further objection would only serve to bring the matter to the attention of the jury. We conclude that counsel's failure to repeat a successful objection or further emphasize the subject matter of the question was not a breach of an essential duty or prejudicial.

AFFIRMED.