IN THE COURT OF APPEALS OF IOWA

FILED
1993
CLERK SUPREME COURT

No. 3-127 / 92-796

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WARREN LARUE WILLIAMS,
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, L.D. Lybbert, Judge.

Williams appeals from his conviction, following a jury trial, of willful injury in violation of Iowa Code section 708.4 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Peter B. Newell, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

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SACKETT, J.

Defendant-appellant Warren Larue Williams appeals from his conviction, following a jury trial, of willful injury in violation of Iowa Code section 708.4 (1991). The victim, Eugene Rucker, was shot in the leg in a house in Waterloo after he closed the door to the house to two men who had come to buy drugs. Defendant contends (1) the trial court should have granted his option for judgment of acquittal because there was not substantial evidence identifying him as the perpetrator of the crime, (2) the trial court abused its discretion in denying his motion for continuance, and (3) he had ineffective assistance of counsel. We affirm.

On November 22, 1991, two men knocked at the door of a home at 928 Mullan in Waterloo. There were about ten people, nearly all teenagers, including Eugene Rucker in the home. Rucker was shot after he closed the door of the house to two men.

Defendant first contends the State failed to introduce substantial evidence to prove beyond a reasonable doubt he fired the shot that injured the victim, Eugene Rucker.

The two men, who apparently were at the house to buy drugs, started to walk away. When Rucker saw a man draw a gun, he closed the door and heard two shots, one of which went in his leg.

Rucker identified a photo picked from a line-up of six as a picture of the person who had pulled the gun. Rucker

was not able to identify the person as positively being the shooter. Rucker was not certain what happened to the second person. Rucker, also, identified defendant at trial.

Fourteen-year-old Trinette Wilson, who went to the door with Rucker, ultimately picked defendant's photo from an array of four photographs; Daniel Wynter, who chased the assailants and was shot, identified defendant as having shot him. Defendant was, also, tried on that charge and acquitted.

Roderick Harrington, identified by one witness as the person delivering the shot, testified he picked defendant up close to the time and place of the shooting and defendant was carrying a sawed-off .22 caliber shotgun. A gun that was recovered had not shot the bullet that hit Rucker.

We view the evidence 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).

There is evidence supporting the verdict. See State v. Barnes, 204 N.W.2d 827, 829 (Iowa 1972). We affirm on this issue.

Defendant next contends the trial court abused its discretion in not allowing him sufficient time to obtain the testimony of officer Brooke Knutson.

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After the close of the evidence, defendant was permitted to reopen his case to recall Trinette Wilson and officer Knutson. Trinette had testified as a witness for the State. Defendant wanted the testimony of these two witnesses to show a discrepancy between Trinette's trial testimony identifying defendant as the perpetrator and her statement identifying as the perpetrator, at the time of the offense, a man called Hawkeye.

When the case was reopened, Trinette testified and denied she originally identified Hawkeye as the perpetrator. The court gave defendant thirty minutes to locate officer Knutson, who had taken Trinette's initial statement identifying Hawkeye as the perpetrator, but denied defendant a one-hour continuation to secure the presence of officer Knutson. Defendant made an offer of proof asserting the officer would testify in accordance with her report and the minutes of testimony concerning Trinette's initial identification of Hawkeye as the perpetrator.

Defendant's defense was identity. The State recognizes there was chaos; there was not unanimity among the witnesses; and some of the witnesses may not have been telling the truth.

A ruling on a motion for continuance is a matter committed to the sound discretion of the trial court and will be reversed only when an abuse of discretion is shown. State v. Slayton, 417 N.W.2d 432, 435 (Iowa 1987); State v. Milam, 447 N.W.2d 415, 417 (Iowa App. 1989).

On Friday, the third day of trial, defendant decided he wanted to recall Wilson, who had testified for the State. She could not be located.

On Monday morning, defendant asked the court to reopen the record to call Wilson to ask her about a prior inconsistent statement and to possibly call officer Knutson. Wilson was recalled and denied she had originally identified Hawkeye as the person who shot Rucker. Defendant asked for permission to call officer Knutson to rebut Wilson's testimony. The trial was recessed for thirty minutes to give defendant time to locate the witness. When officer Knutson could not be located in the thirty-minute time frame, defendant asked for a one-hour continuance. The court denied defendant's motion.

The State argues the trial court did not abuse its discretion and it may have been prejudiced by reopening the case because it emphasized that portion of testimony. The State, also, advances defendant had the opportunity to present his evidence earlier.

There is an importance in assuring defendant has a fair trial, both to preserve the integrity of the system and to avoid, where possible, later claims of ineffective assistance of counsel.

The time frames of a trial are clearly within the trial court's discretion.

Defendant's last contention is he did not receive effective assistance of counsel because his trial attorney failed to request an instruction on justification.

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Ordinarily, ineffective assistance claims are reserved for postconviction proceedings to permit the full development of the record. State v. Bumpus, 459 N.W.2d 619, 627 (Iowa 1990). We may resolve the claims on direct appeal if the record is sufficient. Id. To prevail in a claim of ineffective assistance of counsel, defendant must show that his counsel failed to perform an essential duty and that the failure prejudiced him. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989).

Selection of the theory or theories of defense is a tactical decision for trial counsel, subject to attack only if wholly unreasonable and the cause of prejudice is such that there is a reasonable probability of a different outcome if counsel had made a different choice. See Schrier v. State, 347 N.W.2d 657, 663 (Iowa 1984).

Defendant told the court he had asked his attorneys to plead self-defense or justifiable defense. However, defendant's counsel relied on the defense of mistaken identity. In defense counsel's opening statement, he told the jury the evidence would show defendant was not at the scene, his cross-examination centered on identity, and he tried to implicate another person as the perpetrator. Counsel's selection of a reasonable defense theory will not be found to be incompetent merely because it was not successful. See State v. Wilkens, 346 N.W.2d 16, 18 (Iowa 1984).

AFFIRMED.