FILED
JAN 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-423 / 89-0863

STATE OF IOWA,

Appellee,

397

vs.

LEK MOTT KESAVADHANA,

Appellant.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Defendant appeals his conviction, following a jury trial, for assault while displaying a dangerous weapon. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Mark Joel Zbieroski, Assistant Attorney General, J. Patrick White, Johnson County Attorney, Anne Lahey, Assistant County Attorney, for appellee.

Considered by Schlegel, P.J., and Sackett, J., and Perkins, S.J.*

*Senior Judge from the Polk County District Court serving on this court by order of the Iowa Supreme Court.

PERKINS S.J.

Lek Mott Kesavadhana was accused of engaging in a bar fight while carrying an x-acto knife in his hand. Kesavadhana claimed that he generally kept the x-acto knife in his pocket as a box cutter, that on the day in question he was unable to retract the knife's blade because it was screwed in so tightly, and that he was carrying the knife in his hand only to avoid ripping his clothing with the blade. A police officer testified he needed a pair of pliers to unscrew the blade after Kesavadhana's arrest. Kesavadhana's bar fight opponent testified Kesavadhana made no attempt to use the knife during the fight.

Kesavadhana was charged with two crimes, going armed with intent and assault while displaying a dangerous weapon. A jury acquitted him on the first charge but convicted him of the second. Kesavadhana has appealed from his conviction for assault while displaying a dangerous weapon.

Kesavadhana contends the sufficiency of the evidence to support his conviction for assault while displaying a dangerous weapon. Kesavadhana also contends his trial attorney rendered ineffective assistance by failing to object to alleged improper charging by the prosecutor. Kesavadhana notes he was initially charged with two crimes, assault while displaying a dangerous weapon in violation of Iowa Code section 708.2(3), and going armed with intent in

violation of section 708.8. He next notes section 708.2(3), defining the crime of assault while displaying a dangerous weapon, includes a sentence saying: "This subsection does not apply if section 708.6 or 708.8 applies." In light of this language, Kesavadhana argues it was improper for the prosecutor to charge him under both subsections. He argues further that he was prejudiced by his trial attorney's failure to object to the prosecutor's proper charging decision. We affirm.

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, 404 N.W.2d 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 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 the defendant must show there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 697 (1984). In the present case we need not determine whether trial counsel's performance was deficient because our examination of the record convinces us the defendant has suffered no actual prejudice. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Iowa Code section 708.2(3) provides, in pertinent part, that a person who commits an assault as defined in section 708.1, and uses or displays a dangerous weapon in connection with the assault, is guilty of an aggravated misdemeanor. That section further provides: "this subsection does not apply if section 708.6 or 708.8 applies." Section 708.8 provides that "[a] person who goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of

another commits a class "D" felony." Section 708.1(3), in defining assault, states a person commits an assault when, without justification, the person displays in a threatening manner any dangerous weapon. Kesavadhana contends that pursuant to the language of section 708.2(3), he could not be simultaneously charged with the more serious crime of assault with intent as defined in section 708.8. He argues the legislature intended each section be mutually exclusive, and the prosecution was forced under the statute to make a choice as to which section to prosecute.

Kesavadhana's lone argument in support of his position is that his case was prejudiced due to the fact that "had counsel objected to the mischarging of the defendant, the State would have been forced to select between the two provisions." According to Kesavadhana, under those circumstances, the State would have selected to prosecute him under the more serious charge of going armed with intent. He argues because he was acquitted of that charge, his case was prejudiced. We disagree.

We do not interpret section 708.2(3) as prohibiting the prosecutor from charging a defendant with both sections 708.2(3) and 708.8. It has been generally recognized the prosecutor has discretion to determine what charges are to be filed in a particular case. United States v. Batchelder, 442 U.S. 114, 123-24, 99 S. Ct. 2198, 2204, 60 L.Ed.2d 755, 764 (1979). We interpret the statute as

stating if a defendant is found to have violated section 708.2(3), then he may not also be found to have violated section 708.8. Kesavadhana cites no authority holding that the prosecutor in the present case was under a duty to choose between the two statutes. We find it was within the province of the jury to determine which of the statutes applied given the facts submitted. The jury in the present case found Kesavadhana was guilty of the less serious charge of assault with a dangerous weapon. Thus, section 708.8 would not apply. Even assuming, arguendo, it was error to charge Kesavadhana with both offenses, we find no prejudice since the State would have been within its discretion in charging him under section 708.2(3).

In support of his argument he was prejudiced by being charged with both offenses, Kesavadhana cites to State v. Schoelerman, 315 N.W.2d 67 (Iowa 1982). We do not find Schoelerman directly on point, however. In Schoelerman, the defendant had been convicted of false use of a financial instrument in violation of Iowa Code section 715.6 (1979). 315 N.W.2d at 70. Trial counsel, however, never raised the issue of whether the defendant was guilty of fifth degree theft pursuant to section 714.1(6), a simple misdemeanor punishable by thirty days imprisonment or a fine of up to $100. Id. at 71. The Iowa Supreme Court held the defendant was denied effective assistance of counsel since trial counsel should have been aware of the

statutes and filed a motion in arrest of judgment. Id. at 74-75. In holding the defendant had been denied effective assistance of counsel, the court noted that the defendant had received a greater sentence (a term not to exceed ten years) rather than the less severe penalty imposed by section 714.1(6). Id. In the present case, Kesavadhana was acquitted of the more serious charge.

Moreover, we find the evidence was sufficient to support the jury's finding that Kesavadhana was guilty of assault while displaying a dangerous weapon. When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). It is necessary to consider all the evidence and not just the evidence supporting the verdict. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty if the crime charged beyond a reasonable doubt. Id. Given that criminal intent is rarely susceptible of direct proof, the fact finder may determine the intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experience and observation. State v. Hilpipre, 395 N.W.2d 899, 903 (Iowa App. 1986).

Upon our examination of the entire record, we find sufficient evidence to find Kesavadhana guilty of the crime charged. Kesavadhana testified he was very angry on the night in question, and he thought Lynne Smith had bumped into him to "excite him to violence." Kesavadhana testified he thought Smith had "wanted me to kill her so I [could] spend the rest of my life in the penitentiary." Kesavadhana additionally testified he knew other people who had stabbed others under similar circumstances because they had not given the other person respect. The jury could conclude from the evidence that after the initial shoving occurred, Kesavadhana stared at the victims in an aggressive and threatening manner, one time within inches of Smith's face. The jury could also have found from the evidence offered at trial that despite efforts to quell the heated situation, Kesavadhana continued to posture himself in a threatening manner. Towards closing time, an unknown person warned Tim Murphy that someone was waiting for him with a knife. Frightened, Smith and Murphy proceeded to enter the raised dance floor in order to be visible and avoid Kesavadhana who was walking towards the dance floor.

At trial Tim Murphy testified that when Kesavadhana stepped onto the elevated dance floor, he saw an orange blade in his right hand. Smith testified she then proceeded to step in front of Murphy, and was shoved by Kesavadhana. Smith then testified Kesavadhana shoved her,

and that Murphy grabbed Kesavadhana's wrists to prevent him from slashing them with the knife.

Kesavadhana admitted he had the x-acto knife in his possession on the night in question. He testified he used the knife for box cutting, and he had no intention of using it against anyone. He testified he tightened the screws on the knife, which fully revealed the blade, in order to control his anger. Kesavadhana also testified he had heard someone warn Murphy about the knife. He further testified that Murphy and Smith misinterpreted his actions as being violent.

From these facts we believe a rational trier of fact could find beyond a reasonable doubt that Kesavadhana had a dangerous weapon on his person during the altercation, displayed the knife, and attempted to use the knife during the altercation. We find sufficient evidence defendant intended to commit an assault with a dangerous weapon as provided in section 708.2(3).

AFFIRMED.

Schlegel, P.J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I would affirm the conviction but reserve the issue of ineffective assistance of counsel for post-conviction proceedings. I do not feel it can be decided on this record, and I do not agree with the majority's analysis of the issue.