IN THE COURT OF APPEALS OF IOWA

No. 6-152 / 95-0416

FILED
MAY 31 1996
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

KEVIN JENKINS,

Appellant.

Appeal from the Iowa District Court for Polk County, George W. Bergeson, Judge.

Jenkins challenges his convictions, following a jury trial, of two counts of assault causing bodily injury. **REVERSED AND REMANDED FOR NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Sarah Hennesy, Assistant State Appellate Defender, for appellant

Thomas J Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, John P Sarcone, County Attorney, and Frank Severino, Assistant County Attorney, for appellee

Heard by Sackett, P J , and Cady and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

Kevin Jenkins accompanied Serita Temple to pick Temple's son up from school. Temple's son had called Temple and told her one of his teachers, David Ripperger, strangled him. Upon arrival, Temple and Jenkins began yelling at people in the office. Jenkins struck Ripperger in the mouth. Another teacher, Greg Messerschmidt, grabbed Jenkins from behind and attempted to pull him away from Ripperger. As Jenkins fought to get away, Messerschmidt sustained injuries.

The State charged Jenkins by trial information with two counts of assault causing bodily injury, one count for assault on Ripperger and the other count for assault on Messerschmidt. The jury found Jenkins guilty of both counts. The court entered judgment on the jury's verdict and sentenced Jenkins to a term not to exceed one year on each count to be served consecutively.

Jenkins appeals the conviction for assault on Messerschmidt. Jenkins alleges his trial counsel was ineffective in failing to alert the court of an error in the marshaling instruction. The instruction read as follows:

> [T]he State must prove all of the following elements of assault causing bodily injury.
>
> 1. On or about the 23rd of September, 1994, the defendant did an act which was meant to cause pain or injury or resulting in physical contact which was insulting or offensive to Greg Messerschmidt
>
> 2. The defendant had the apparent ability to do the act.
>
> 3 The defendant's act caused bodily injury to Greg Messerschmidt.

Jenkins argues the second alternative contained in paragraph one of the instruction improperly allowed the jury to find him guilty without the requisite intent. He claims the instruction should have indicated the jury must find he did an act which was *meant* to result in physical contact which was insulting or offensive, not an act merely resulting in physical contact.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93 "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839,

841 (Iowa 1987). To prove the second prong of this test appellant must show 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 confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

First, we must determine whether the marshaling instruction was erroneous. "When an instruction marshals the elements of a crime and mandates conviction upon the State's proof of those elements beyond a reasonable doubt, all essential elements of the crime must be included in the instruction." *State v. Billings*, 242 N.W.2d 736, 737 (Iowa 1976); *see also State v. Goff*, 342 N.W.2d 830, 837 (Iowa 1983). Assault has been classified as a general intent crime. *State v. Brown*, 376 N.W.2d 910 (Iowa App. 1985). The State argues the instruction is not erroneous because the phrase "which was meant to" modifies both alternatives We reject this argument and find the instruction as presented at trial excludes the general intent element from the second alternative of paragraph one The instruction suggests the first element can be met if the defendant did an act which (1) "was meant to cause pain or injury . . . , or (2) resulted in physical contact . . ." As the defendant points out, if the phrase modified both alternatives, the second alternative would read, "was meant to resulted in physical contact . . ." This sentence does not make sense. The only logical reading of the second alternative is that the defendant could be found guilty of assault if he "did

an act . . . resulting in physical contact . . . ." At no place in the instruction did the court state the second alternative for assault also required intent. This is a fundamental proposition the State had to establish, and the trial court was obligated to instruct on it. *See State v. Goff*, 342 N.W.2d 830, 837 (Iowa 1983). Because the instruction is inconsistent with the law, *See* Iowa Code § 708.1(1), the instruction was erroneous.

We next must determine whether trial counsel was ineffective in failing to object to the erroneous instruction. Failure of defense counsel to take proper steps regarding instructions may under some circumstances not rise to the level of ineffective assistance of counsel. *State v. Goff*, 342 N.W.2d 830, 838 (Iowa 1983) (citing *Sherrill v. Wyrick*, 524 F.2d 186 (8th Cir. 1975). Under other circumstances, defense counsel's failure can be so egregious that counsel's performance does not satisfy the constitutional right to effective assistance of counsel. *Id.* The latter is the situation here. *See id.*

"In considering the breach-of-essential duty element with respect to jury instructions, we have said that 'not every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency'" *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990). "In determining this issue, we have recognized that whether or not counsel objects to a particular instruction must be determined with regard to the theory of defense which is being employed in the case." *Id.* In *Broughton*, a marshaling instruction in a felony-murder case failed to require the State establish malice aforethought. The court found

malice was not essential to the defense theories of innocence or intoxication, and it was unlikely the inclusion of malice as an element would have produced a different result. In *Blackford*, the general intent element of sexual abuse was omitted and the "fighting issue" was whether the sex act was consensual. *State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983). In refusing postconviction relief, the *Blackford* court stated, "It is quite unlikely that a jury would find that an accused who forced a victim to engage in a sex act would not have acted knowingly and intentionally in perpetrating such an act . . . defendant's counsel could have justifiably concluded that the inclusion of an intent element in the marshaling instruction was of little significance in presenting the defense."

The case at bar can be distinguished from *Blackford* and *Broughton*. This is not a situation where, because of the facts of the case, the jury would likely find defendant's actions were perpetrated with the requisite intent. *See Blackford*, 335 N W 2d at 178 (with respect to sexual abuse, the act itself is one which is seldom if ever done unintentionally) This is not a situation where defense counsel would probably not consider inclusion of the intent element in the marshaling instruction essential to the theories of defense. *See Broughton*, 450 N.W.2d at 876. This is not a situation where practical considerations make it unlikely that the inclusion of the intent element in the marshaling instruction would have produced a different result in the verdict. *See Blackford*, 335 N.W.2d at 178. In this case, Jenkins contends that Mr. Messerschmidt

was injured when he was rescuing Mr. Riperger and that Jenkins did not mean to have physical contact with Messerschmidt. While the jury may disbelieve this factual contention, the instruction eliminating the intent requirement may have affected the jury's verdict. Defense counsel breached an essential duty in failing to object to this instruction. Defense counsel's action did not fall within the normal range of competency.

Jenkins was prejudiced by counsel's failure to point out the error in the instructions. If the jury had been properly instructed, there is a reasonable probability the outcome of the case would have been different. There was substantial evidence in the record the defendant did not *intend* his act to result in physical contact with Messerschmidt. Messerschmidt testified it was his own attempt to immobilize Jenkins which caused them to slam into a wall and a desk resulting in Messerschmidt's injuries. Messerschmidt stated Jenkins did not "make any movements against [him]" and did not intend to harm him Jenkins was prejudiced by counsel's failure to alert the court of the erroneous instruction

In summary, we determine defense counsel was ineffective. Counsel's failure to object to the erroneous jury instruction "so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692-93 (1984).

REVERSED AND REMANDED FOR NEW TRIAL.