IN THE COURT OF APPEALS OF IOWA

No. 4-377 / 93-1395

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

LAWRENCE FRANKLIN CARLTON,

Appellant.

Appeal from the Iowa District Court for Poweshiek County, James P. Reilly, Judge.

The defendant appeals from his convictions, following a jury trial, of first-degree burglary and felon in possession of a firearm. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr., and James Kivi, Assistant Attorneys General, and Michael W. Mahaffey, County Attorney, for appellee.

Considered by Habhab, P.J., Huitink, J., and Perkins, S.J.*

*Senior judge from the Fifth Judicial District serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

By an amended trial information, the State charged Lawrence Franklin Carlton with first-degree burglary and felon in possession of a firearm. Carlton responded by filing a notice of alibi defense. The matter proceeded to a jury trial.

The victim testified Carlton entered her bedroom during the early morning hours. She recognized him as her brother-in-law. While wearing a glove smelling of dirt and oil, he placed his hand over the victim's mouth and threatened her and her family. Additional testimony indicated an El Camino, similar to the car driven by Carlton, was parked outside the victim's apartment at the time of the assault.

Carlton presented testimony from Rick and Sue Versendall indicating Carlton slept on their couch on the morning of the assault after becoming intoxicated. They testified they were in the process of moving at the time and would have noticed if he had left the house. Sue also testified she took the keys to his El Camino because he became too intoxicated to drive. The victim had previously testified she did not smell alcohol on Carlton's breath.

The jury returned a verdict of guilty on both counts. The trial court sentenced Carlton to concurrent terms of up to twenty-five years on the burglary charge and five years on the felon in possession of a firearm charge. Carlton appeals.

Carlton claims there was insufficient evidence to support his convictions. He also claims his trial counsel rendered ineffective assistance by failing to object to the court's failure to instruct on his alibi defense or otherwise ensure he obtained it. We will discuss each issue in turn.

I. **Sufficiency of the Evidence.**

Defendant first argues his conviction is not supported by substantial evidence. We disagree.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed 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).

Defendant's primary complaint appears to be he was found guilty despite the fact he presented alibi witnesses who "accounted" for defendant's whereabouts all night. Two friends of defendant testified defendant was drunk and passed out at their house. One friend testified defendant

would have been in sight the entire night, and the other testified she took defendant's car keys away.

Defendant wrongly assumes the jury must believe these friends. "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984) (citations omitted). "The jury could believe all, some, or none of the testimony of the witnesses." State v. Phanhsouvanh, 494 N.W.2d 219, 223 (Iowa 1992) (citation omitted). On cross-examination, one alibi witness hedged his story. According to his modified version, defendant could have left the house without his knowledge. Despite the other alibi witness's testimony regarding the car keys, defendant could have reclaimed the keys because she testified only she put the keys in her purse. Defendant also could have kept another set of keys. Either inference from this evidence would be reasonable.

Defendant also attacks the victim's credibility. Once again, the State's evidence in support of the verdict was not rendered insufficient by the existence of evidence which, if believed, would have supported a contrary verdict. State v. Frake, 450 N.W.2d 817, 818-19 (Iowa 1990). A victim is not required to perfectly identify the clothing worn by her attacker, especially when she is awakened in her own apartment during the early morning hours by an attacker. Additionally, defendant could have become intoxicated after the robbery. The jury was in the

best position to weigh the credibility of the victim's testimony.

We determine substantial evidence supports the jury's verdict. We affirm the trial court on this issue.

II. Ineffective Assistance of Counsel Claim.

Defendant further argues he received ineffective assistance of counsel. Defendant's claim is based on the fact trial counsel failed to object to the trial court's failure to instruct on defendant's alibi defense or otherwise ensure he obtained it.

Established principles govern our review of defendant's Sixth-Amendment claim that trial counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, (1984). Ineffective assistance is measured by 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; see Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). In examining counsel's conduct, we review de novo the totality of relevant circumstances, State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987), mindful of the presumption counsel performed competently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). 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.

State v. Kraus, 397 N.W.2d 671, 673 (Iowa 1986) (citation omitted). "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Strickland, 446 U.S. at 688.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

Judgment of the trial court affirmed.

AFFIRMED.