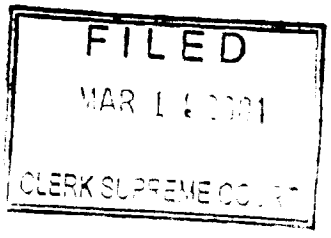
IN THE COURT OF APPEALS OF IOWA

No. 1-101 / 00-604
Filed March 14, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS CLARK,
Defendant-Appellant.



Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Thomas Clark appeals from the district court's judgment and sentence entered following his conviction for second-degree robbery in violation of Iowa Code sections 711.1 and 711.3 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Denver D. Dillard, County Attorney, and Russell G. Keast, Assistant County Attorney, for appellee.

Considered by Hayden, Habhab, and Honsell, Senior Judges.*

*Senior judges assigned by order pursuant to Iowa Code section 602.9206 (2001).

HAYDEN, S.J.

Defendant, Thomas Clark, appeals from a judgment and sentence entered following his conviction by a jury for robbery in the second degree, in violation of Iowa Code sections 711.1 and 711.3 (1997). He claims he was denied his constitutional right to effective assistance of counsel. We affirm.

During the evening of October 23, 1998, Kim Bannister, a woman twenty-seven years young was working at the Kum and Go convenience store at 2743 Mount Vernon Road in Cedar Rapids, Iowa. She worked the second shift, 3 p.m. to 11 p.m., when the store closed. She worked alone. At about 8:55 p.m. on that date, defendant, Thomas Clark came into the store and bought a quart of Miller High Life Beer. This was the first time Kim Bannister had seen him in the five months she had worked at the store. Clark paid for the beer and left. Two or three minutes later he returned with another man. This other man was shorter, with a stocky build and wore a dark coat with red and yellow stripes on it. Kim Bannister had not seen the man with Clark before. After buying gum these two men left, and Kim waited on four other customers. Kim was frightened by these two men and she took money out of the cash register, put it in a bag, and dropped it in the vault. There was approximately $100 left in the cash register drawer.

After the defendant and his companion left the store the second time they came in again about ten minutes later. No other customers were in the store at this time. They told her they were not going to hurt her but wanted money. Clark's companion took the money from the cash register as he kept a look-out for other people. Defendant and his friend left the store after the robbery.

Kim called 911 to report the robbery, locked the door, and waited for the police to arrive. Kim gave the police a surveillance tape of the encounter when they arrived. The video tape showed all three of the defendant's trips into the store.

Identification technicians arrived at the store and processed surfaces for finger prints. They found a latent print on a partially consumed bottle of Miller High Life Beer. This print matched defendant's known left thumb print. Also, two prints were lifted from the plastic bag containing the beer. These prints matched known prints of defendant's right middle and index fingers.

The police compiled and presented a photo line-up to Kim. Almost immediately, she identified defendant's picture as the person who robbed her.

All of these facts were presented to the jury during defendant's trial. In addition the jury viewed the surveillance tape which showed the defendant in the store on all three occasions.

Our ultimate concern in claims of ineffective assistance of counsel 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.

In order to prevail on a claim of ineffective assistance of counsel, the defendant has the burden of proving the following two elements: (1) counsel failed to perform an essential duty; and (2) defendant was prejudiced by

counsel's error. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996); *State v. Terry,* 544 N.W.2d 449, 453 (Iowa 1996).

In order to prove he was prejudiced defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings 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 2069, 80 L. Ed. 2d at 69. When it is more efficient to dispose of an ineffective assistance claim by considering the prejudice prong, an appellate court will do so. *Gering v. State,* 382 N.W.2d 151, 154 (Iowa 1986).

At trial, defendant's attorney did not put on any evidence Kim Bannister was mistaken in identifying Clark as one of the robbers. On appeal defendant has not shown what evidence was available to present before the jury. Further, he has not shown how this evidence, if any exists, would have affected the result of the trial.

We determine defendant's claim can be resolved on direct appeal because defendant has not shown prejudice. *Gering v. State,* 382 N.W.2d 151, 154 (Iowa 1986). To establish prejudice, defendant must show a reasonable probability that if his counsel had presented evidence at trial, the result would have been different. Defendant is unable to do so because of the prosecution's overwhelming evidence against him.

We affirm the trial court.

AFFIRMED.