

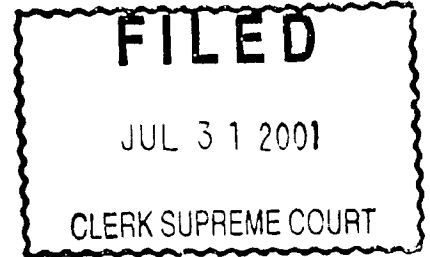
IN THE COURT OF APPEALS OF IOWA

No. 1-286 / 00-1205
Filed July 31, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC WAYNE BANSE,
Defendant-Appellant.



Appeal from the Iowa District Court for Pocahontas County, Allan L. Goode, Judge.

The defendant appeals from his convictions for first-degree burglary, first-degree robbery, willful injury, and third-degree theft. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell and Douglas Hammerand, Assistant Attorney Generals, and Ann Beneke, County Attorney, for appellee.

Considered by Sackett C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Eric Banse appeals his convictions for first-degree robbery, first-degree burglary, willful injury, and third-degree theft. He claims trial counsel was ineffective in: (1) failing to advise him during plea discussions that a first-degree robbery conviction carried a mandatory prison term of twenty-one and a half years and (2) failing to call an untried co-defendant and Banse himself as witnesses. We preserve his first ineffective assistance of counsel claim for postconviction relief and reject his second claim.

I. Background Facts and Proceedings

This case arose from a falling out between Robert Gray and Michael Joslin. There was evidence Gray owed Joslin money. Additionally, Gray admitted to Joslin that he had a brief affair with Joslin's girlfriend.

Several weeks after learning of the affair, Joslin called Gray and asked if he could come over for coffee and cigarettes. Gray agreed. Joslin, his friend Paul Brown, and defendant Banse arrived at Gray's house. Apparently without provocation, Banse struck Gray in the eye and face and kicked him in the back, stating as he did so, "you know you owe him." The others participated in the beating. The three then took some of Gray's things and left.

The State charged Banse with first-degree robbery, first-degree burglary, willful injury and third-degree theft. See Iowa Code §§ 711.1, 711.2, 713.1, 713.3, 708.4, 714.1, 714.2(2) (1999). A jury returned guilty verdicts on all four counts and the district court sentenced him to prison terms not exceeding twenty-five years on the burglary and robbery counts, ten years on the willful injury

count, and two years on the theft count to be served concurrently. This appeal followed.

II. Ineffective Assistance of Counsel Standard

Our standards relating to ineffective assistance of counsel claims are well established. To succeed, a defendant must prove (1) trial counsel failed in an essential duty, and (2) prejudice resulted. *State v. Arne*, 579 N.W.2d 326, 328-9 (Iowa 1998). Ordinarily, we preserve such claims for postconviction relief proceedings, but we may resolve them on direct appeal when the record is adequate to decide the issue. *Id.* Our review of these claims is de novo. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999).

III. Plea Advice

Banse contends his attorney did not tell him a conviction for first-degree robbery carried a mandatory prison term of twenty-one and a half years. He maintains that had his attorney advised him of this fact, he would not have proceeded to trial but would have accepted a favorable plea offer. The record contains no information concerning the nature of the plea offer tendered by the State or the substance of plea discussions between Banse and his attorney. Accordingly, we preserve this claim for postconviction relief.

IV. Failure to Call Witnesses

Banse next contends his attorney rendered ineffective assistance by failing to call him and Joslin to the stand. He asserts he would have testified: (1) Gray's property was taken as collateral for a debt owed to Joslin and (2) he only played a defensive role in the fight. Banse maintains Joslin would have corroborated his version of events.

We reject Banse's first claim on the ground there was already evidence in the record on the issue of the debt. The State called Brown, who, to the prosecutor's surprise, testified that Gray's possessions were taken as collateral for a preexisting debt. Although the State impeached Brown by pointing out he had not made this claim in a pre-trial statement, Brown's assertion was nevertheless in the record for consideration by the jury. Defense counsel had no obligation as part of Banse's case to present the same testimony from additional witnesses. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998).

As for the second claim that Banse's counsel gave Banse no opportunity to testify his acts were in self-defense, we note there is nothing in the record to suggest Banse relied on this defense.¹ Additionally, even assuming counsel had a duty to elicit this testimony from Banse and Joslin, we cannot conclude Banse was prejudiced by his failure to do so. Both Gray and Brown testified the attack was unprovoked. A deputy sheriff who took a pre-trial statement from Brown confirmed this fact. A family physician who examined Gray after the incident testified Gray told him two men beat him up. He also testified to severe injuries sustained by Gray, including a partially collapsed lung, two to four cracked ribs, and a bruised and bleeding face. In light of this evidence, we conclude there was not a reasonable probability of a different outcome had self-defense testimony been introduced. See *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986). Accordingly, we reject this claim.

¹ Banse did not file a notice of intent to raise a justification defense, nor was the jury instructed on this defense. See Iowa Code § 704.3.

V. Disposition

We affirm Banse's convictions and preserve for postconviction relief proceedings his claim that his attorney did not advise him of the mandatory prison term on the robbery charge.

AFFIRMED.

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