IN THE IOWA COURT OF APPEALS

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.

TERRY L. JEFFS,

Defendant-Appellant.)

Filed May 26, 1981

1-4
63727

FILED
MAY 26 1981
CLERK SUPREME COURT

Appeal from Warren District Court. Norman D. Elliott, Judge.

Defendant appeals from his conviction and sentence for criminal mischief in the second degree in violation of section 716.4, The Code Supp. 1977. CONVICTION AFFIRMED; SENTENCED VACATED; CASE REMANDED FOR RESENTENCING.

Gordon K. Darling, of Darling & Chickering, Winterset, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, acting C. J., and Snell, Carter and Johnson, JJ.

Oxberger, C. J., takes no part.

PER CURIAM

Defendant appeals from his conviction and sentence for criminal mischief in the second degree in violation of section 716.4, The Code Supp. 1977. The jury's verdict was based on its finding that on March 9, 1979, defendant intentionally and without right bashed Irvin R. Taylor's Plymouth Valiant with a baseball bat, thereby causing damages in excess of $500. Defendant was sentenced to a period of incarceration not to exceed five years. We affirm the conviction, vacate the sentence, and remand for resentencing.

I. Defendant contends that he did not receive effective assistance of counsel at trial. We are extremely reluctant to adjudicate claims of ineffective assistance on direct appeal. State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979). This reluctance is due to the lack of full development of the facts surrounding the representation complained of. Williams, 285 N.W.2d at 271. We are concerned that the State and the attorneys whose effectiveness is being attacked should have an opportunity to rebut allegations of ineffectiveness. Williams, 285 N.W.2d at 271. Review of defendant's contention on this question requires that we determine whether, considering all the circumstances, trial counsel's performance was within the range of normal competency in the profession. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980); State v. Hicks, 277 N.W.2d 889, 896 (Iowa 1979); State v. Veverka, 271 N.W.2d 744, 750 (Iowa 1978). To make such a determination, however, we must be supplied with an adequate record. State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). Since the record before us does not permit an informed resolution of this issue, the question of trial counsel's competency is more properly presented on an application for post-conviction relief. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980). We therefore reject defendant's ineffective assistance contention yet preserve his right to raise it in post-conviction proceedings pursuant to chapter 663A, The Code 1979. State v. O'Connell, 275 N.W.2d 197, 206 (Iowa 1979).

II. Defendant contends that section 716.4, The Code 1979, under which he was convicted, violates the eighth amendment cruel and unusual punishment clause to the United States Constitution, in that it authorizes up to five years incarceration for someone who inflicts property damage of between $500 and $5,000. Defendant contends that the punishment authorized by section 716.4 is unconstitutional because it makes no measurable contribution to acceptable goals of punishment. Deterrence is a legitimate

goal of deterrence. Defendant contends that the punishment authorized by section 716.4 is unconstitutional because it is grossly out of proportion to the crime. We disagree. We note for comparison rather than for citing a standard that Iowa's criminal mischief statute authorizes punishment less severe than that authorized by similar statutes in neighboring states. See Minn. Stat. §§ 609.595(1) and (3); Neb. Rev. Stat. §§ 28-519(1)(a) and (2), 28-105(1). We therefore reject defendant's contention that section 716.4 authorizes cruel and unusual punishment.

III. Defendant contends that the trial court erred in failing to define "malice" for the jury and in failing to instruct it that malicious action is an essential ingredient of criminal mischief. We do not accept defendant's contention, since nowhere does the word "malicious" or any of its cognates appear in the statutes under which defendant was convicted. Section 716.1 makes intentional action an essential element of the offense of criminal mischief and the jury was accordingly instructed. In the context of criminal mischief defendant admits that "intentional" and "malicious" are substantially synonymous. Given defendant's assumption, and given the fact that the jury was instucted on the element of intent, defendant can hardly complain that the jury was not instructed on the element of malice.

IV. Defendant contends that the trial court erred in admitting into evidence a copy of an auto body repair estimate as probative of the value of damage caused by defendant. Assuming, without deciding, that admission of the copy of the estimate constituted error, it did not constitute reversible error. Where similar testimony is already in the record, admission of cumulative evidence is not reversible error. State v. Galvan, 297 N.W.2d 344, 347-48 (Iowa 1980); State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). The repairman that gave Taylor the written estimate orally testified that he estimated it would cost $676.93 to repair Taylor's car. His oral testimony was clearly admissible. The copy of the estimate reflected that it would cost $676.93 to repair Taylor's car. Since the contents of the copy of the estimate are identical to the oral testimony, it is cumulative evidence, and therefore its admission does not constitute reversible error.

V. Defendant contends that he should have been charged under section 321.78, The Code, 1979, instead of under chapter 716. Defendant's argument, that because he

could have been charged under section 321.78 he should have been so charged, is meritless. See State v. Uebberheim, 263 N.W.2d 710, 712 (Iowa 1978). In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Uebberheim, 263 N.W.2d at 712. Assuming, without deciding, that section 321.78 was also violated by defendant, it still remains that the prosecution charged him with violating section 716.4 and secured a conviction thereunder. See Uebberheim, 263 N.W.2d at 712. There was no abuse of prosecutorial discretion in so charging defendant.

VI. Iowa R. Crim. P. 22(3)(d) requires a sentencing court to state on the record its reason for selecting the particular sentence. Defendant contends that the trial court violated this rule by not stating its reason for sentencing defendant to be incarcerated for a period not to exceed five years. We agree. The trial court stated that it would not grant defendant a deferred sentence because of the flagrant and malicious nature of his offense. Although a valid factor, we find the language of the Supreme Court in State v. McKeever, 276 N.W.2d 385, 387-88 (Iowa 1979) particularly instructive on this point.

> Thus it is clear that the "nature of the offense" is one factor to be considered. However, Jackson and Boston established that the punishment must fit the particular person and circumstances under consideration; each decision must be made on an individual basis, and no single factor, including the nature of the offense, will be solely determinative. In State v. Robbins, 257 N.W.2d 63, 70 (Iowa 1977), we said that:
>
> > "The duty of a sentencing judge in every case is to consider available options, to give due consideration to all circumstances in the particular case, and to exercise that option which will best accomplish justice both for society and for the individual defendant. Chapter 789A (now chapter 907) sets out guidelines to assist in this task."

We cannot say that the "nature of the offense" alone forecloses consideration of a deferred sentence in this case. Moreover, there are a number of sentencing alternatives open to a trial court in a case such as this which the record shows were not considered. Therefore, we vacate the sentence and remand for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; CASE REMANDED FOR RESENTENCING.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent from division VI of the majority's opinion.

In refusing the defendant's request for a deferred sentence, the trial court judge made the following comments:

> The Court, having reviewed the presentence investigation, and hearing counsel plea for a deferred sentence, reviewing the facts of the case, the Court feels that under the circumstances and due to the flagrant and obviously malicious attitude of this defendant regarding the facts of this case as clearly borne out by the evidence, indicates that this Court is not in a position and will not grant a deferred sentence.
>
> ....
>
> [It is] the Court's feeling at this time in accordance with the verdict rendered . . . by a jury of your peers, the malicious and flagrant acts committed by you . . . dictates to the Court that a deferred sentence in this matter cannot be granted.

In the face of these comments by the sentencing judge, it is inconceivable how the defendant can prevail on his contention that the trial court violated Iowa R. Crim. P. 22(3)(d) by not stating on the record the reasons for the sentence chosen. While the court's comments may not have been as all-inclusive as they could have been, I do not see this as grounds for violation of the rule. I prefer an interpretation of Rule 22(3)(d) that does not require trial courts to slavishly adhere to particular or precise language in imposing sentences. Such a construction of the rule would ultimately result in defeating the rule's purpose: to encourage judges to consider all the factors and alternatives relevant to the sentencing decision. I am totally satisfied that this purpose was served in the instant case. The reasons given by the trial court for denying a deferred sentence are not objectionable and in my view that is sufficient to satisfy the rule.

The majority seems to feel that the trial court relied solely on the nature of the offense in determining this sentence. That is not the case, however, as is illustrated by the fact that the trial court also referred to the presentence report, the arguments of counsel, and the defendant's attitude as factors relevant to its decision to deny a deferred sentence. Moreover, the seriousness of the crime is clearly a permissible factor to be considered in sentencing. State v. Post, 286 N.W.2d 195, 204 (Iowa 1979). For these reasons, I would affirm both the conviction and the sentence.