IN THE COURT OF APPEALS OF IOWA

No. 1-195 / 10-0791
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT EUGENE TRUESDELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister, Judge.

A defendant contends trial counsel was ineffective in (1) failing to request that the trial court determine two state witnesses to be accomplices as a matter of law and (2) failing to request "an interrogatory for a jury determination that their testimony required corroboration." **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

The State charged Robert Truesdell with several drug-related crimes, including conspiracy to manufacture methamphetamine. At trial, two State witnesses identified Truesdell as the person who was with them when an attempt was made to obtain anhydrous ammonia from a farm cooperative. They stated Truesdell fled the scene before police could apprehend him. The witnesses admitted they were also charged with and pleaded guilty to conspiracy to manufacture methamphetamine based on the same incident. This raised the question of whether they were accomplices to the crime. *See State v. Barnes*, 791 N.W.2d 817, 823 (Iowa 2010) (defining an accomplice as "a person who willfully unites in, or is in some way concerned in the commission of a crime" (citation omitted)).

The accomplice question may either be decided by the court or the jury, depending on the nature of the record. "When the facts are not in dispute or susceptible to different inferences," the court decides the issue as a matter of law. *Id.* When the facts are disputed or susceptible to different inferences, the question is one of fact for the jury. *Id*. Once a witness is found to be an accomplice, the testimony of that witness will not support a conviction unless it is corroborated by other evidence. Iowa R. Crim. P. 2.21(3).

At the jury instruction conference, Truesdell's trial attorney did not ask the district court to decide the accomplice question as a matter of law. Accordingly, the court did not instruct the jury that the witnesses were deemed accomplices whose testimony would have to be corroborated. Instead, a jury instruction was proffered which left it to the jury to decide whether the witnesses were

accomplices and which required corroborating evidence only if the jury found they were. Truesdell's attorney voiced "[n]o objection" to this instruction.

The jury found Truesdell guilty of conspiracy to manufacture methamphetamine, possession of ephedrine and/or pseudoephedrine with intent to manufacture, possession of anhydrous ammonia with intent to manufacture, and tampering with anhydrous ammonia.

On appeal, Truesdell contends his trial attorney was ineffective in (1) failing to request that the trial court determine two state witnesses to be accomplices as a matter of law and (2) failing to request "an interrogatory for a jury determination that their testimony required corroboration." He asserts "[i]t was possible for the jury to have determined that [the two witnesses] were not accomplices" based on the jury instruction that was given, thereby dispensing with the corroboration requirement.

To prevail on his ineffective-assistance-of-counsel claim, Truesdell must show that counsel (1) breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Ordinarily, ineffective-assistance-of-counsel claims are best resolved by preserving them for postconviction proceedings "to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004).

We believe this matter must be preserved for postconviction relief. First, on the breach-of-duty prong, we cannot discern from counsel's statements whether he had strategic reasons for declining to request a finding and instruction that the witnesses were accomplices as a matter of law. *See State v.*

Reyes, 744 N.W.2d 95, 103–04 (Iowa 2008) (stating the record was not sufficiently developed to allow disposition on direct appeal as to whether a particular limiting instruction should have been given, as "[c]ounsel may have had strategic concerns for not seeking the instruction that [were] not illuminated in the record on appeal"); *Brewer v. State*, 444 N.W.2d 77, 85 (Iowa 1989) (finding on postconviction relief that decision not to request an accomplice instruction was a reasonable trial strategy). Second, we cannot find an absence of *Strickland* prejudice based on the trial record. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992) ("[A] reviewing court can affirm a conviction on direct appeal if the defendant has failed to prove prejudice, without deciding whether counsel's representation was incompetent."); *cf. Barnes*, 791 N.W.2d at 824 n.2 (finding no need to preserve a claim that a trial attorney was ineffective in failing to request an accomplice corroboration instruction because, after reviewing "the evidence introduced at trial," it could determine there was no *Strickland* prejudice).

We affirm Truesdell's judgment and sentence and preserve his ineffective-assistance-of-counsel claims for postconviction relief.

AFFIRMED.