

IN THE COURT OF APPEALS OF IOWA

No. 1-209 / 10-1318
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES EDWARD BANKS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
Judge.

Defendant appeals his conviction for obstructing prosecution alleging
ineffective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, John P. Sarcone, County Attorney, and Steve Bayens, Assistant County
Attorney, for appellee.

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

EISENHAUER, J.

Following a jury trial, James Banks was convicted of obstructing prosecution. Banks appeals arguing his counsel was ineffective. We affirm.

I. Background Facts and Proceedings.

In May 2010, Banks was charged with obstructing prosecution “on or about April 7, 2010.” This charge resulted from a prosecution of Jarmaine Allen dating back to 1995. In November 1995, sixteen-year-old Nick Jones spoke with an investigator with the Polk County Attorney’s office. Jones indicated Allen was the shooter in a recent homicide. Allen’s February 1998 first-degree murder trial ended in a mistrial. Jones was not called to testify.

When Allen was subsequently tried in August 1998, Jones’s testimony as a witness for the State was consistent with his November 1995 statement. Allen’s 1998 conviction was reversed and he was tried again in May 2006. Jones testified and recanted his identification. Allen’s 2006 conviction was reversed and another trial was scheduled for April 12, 2010. The State subpoenaed Jones for the April 2010 trial.

As of April 6, 2010, defendant Banks and Allen were in the Polk County Jail and could talk with each other. On April 7, 2010, Banks made four separate phone calls to Jones and either left a message or spoke with him. The State recorded the phone calls. Banks initially left messages informing Jones of Allen’s trial date and telling Jones that Allen did want him to be there. Later that day Jones spoke with Banks and told Banks he was already subpoenaed. Banks

then encouraged Jones to plead “the Fifth” and talk to an attorney. On April 8, 2010, Jones met with an attorney with the State Public Defender’s office.

Due to Jones’s failure to attend a pretrial meeting with prosecutors, on April 9 an investigator from the county attorney’s office began looking for Jones, but was unsuccessful. The April 12 trial ended in a mistrial on the first day due to events unrelated to Jones. The prosecutor asked the investigator to locate Jones to subpoena him for the rescheduled July 2010 trial. On April 22, 2010, the investigator located Jones at the apartment of his girlfriend, Katrina. Jones accepted the subpoena for the July 2010 Allen trial.

In May 2010, Banks was charged with obstructing prosecution “on or about April 7, 2010.” The Public Defender’s Office attempted to exclude Jones as a witness for Allen’s July 2010 trial, but was unsuccessful. During Allen’s July 2010 trial, Jones testified and again recanted his identification statement. In August 2010, a jury found Banks guilty of obstructing prosecution and this appeal followed.

II. Merits.

The jury was instructed the State had to prove two elements: (1) “On or about April 7, 2010,” Banks “knowingly induced” Jones “to conceal himself or to fail to appear when subpoenaed”; and (2) Banks’s “act was done with the specific intent to obstruct the prosecution of Jarmaine Allen.” See Iowa Code § 719.3 (2009).

Banks claims trial counsel was ineffective for failing to properly challenge the sufficiency of the evidence—failing to argue the offense required Jones to “in

fact” conceal himself and that “merely attempting to induce [Jones] to conceal himself” is insufficient. The State agrees “attempted inducement” is not prohibited, but argues Banks asked Jones to “disappear” so he could not be “grabbed up.” The jury could then infer from the investigator’s numerous unsuccessful attempts to find Jones that he was in hiding and concealing himself.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). “Yet, in some instances, the appellate record can be adequate to address the claim on direct appeal.” *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). We find the record in this case is sufficient for us to rule upon the issue on direct appeal.

In order to prevail on his claim of ineffective assistance of counsel, Banks must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). His inability to prove either element is fatal. See *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). We evaluate the totality of the relevant circumstances in a de novo review. *Truesdell*, 679 N.W.2d at 615.

To establish the first prong of the test, Banks “must overcome the presumption that counsel was competent and show that counsel’s performance was not within the range of normal competency.” *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). We turn to defense counsel’s motion for acquittal:

The State has charged Mr. Banks with attempting to obstruct the prosecution of Jarmaine Allen based on the jail phone calls that we just listened to. And [the State has] to show that it was his specific intent to obstruct prosecution. They have not shown that in any way.

When you listen to the jail calls, you actually hear him giving legal advice, talking about taking the Fifth Amendment. When [Mr. Banks is] told that Nick Jones has been subpoenaed, he tells him to take the Fifth. [Mr. Banks] does not tell him to leave, he does not tell him to dodge the subpoena, does not try to do anything to obstruct service of the subpoena. He simply tells him: "You need to take the Fifth Amendment."

We have into evidence why Nick Jones should take the Fifth Amendment. He's already given prior statements under oath that are inconsistent, and he's being called by the State to testify, which would put [Jones] in a position of being charged with perjury.

In addition, Your Honor, you actually have Mr. Banks on the jail call telling Nick Jones to call the lawyer . . . that the lawyer has the right to talk to him. Says he's going to have the lawyer call [Katrina's] phone. That is not someone that is demonstrating . . . intent to obstruct the prosecution. In fact, it's facilitating communication between the defense lawyer and the State's witness.

Now, I understand that the State is upset [Nick] Jones didn't show up for a meeting. However, [Nick] Jones had no reason that he had to show up for that meeting. We don't have any evidence that he was told about that meeting. Simply that he didn't show up for a meeting with a legal assistant.

The evidence is that he did actually show up for trial when he was subpoenaed, that he had been subpoenaed once before in—earlier in 2010, and again in April of 2010. Relatively easily found. Found at his girlfriend's house, where he says he doesn't want to testify, but never indicates that he's not going to be subpoenaed.

Your Honor, also listen to the tone of the conversation. Could you hear that Nick Jones wanted to talk to Mr. Banks? That he actually asked him questions about whether or not he could get a lawyer to help him? That if a prior lawyer had been involved in another trial, could the same person actually help him? And Mr. Banks said, yes, you can try. You can go and testify. Say your name, but if you say something incriminating, then that's when the Fifth Amendment comes in, that you need to look up the Fifth Amendment under your right before you go to trial.

That's not someone that's trying to get someone to hide or run from a subpoena. It's someone that is trying to help out his friend who's been called as a State's witness involuntarily. For all those reasons, Your Honor, the State has failed to show that Mr. Banks had any intent to obstruct prosecution.

Additionally, Your Honor, the State has failed to demonstrate that Mr. Banks had said anything to induce [Nick Jones]. There is no talk about providing something. There is no talk about

threatening something. These is simply saying the defendant, Jarmaine Allen is here. He doesn't want you to go to the trial. It doesn't say he wants you to dodge the subpoena. It doesn't say he wants you to . . . get arrested and have to get a material witness warrant, that he wants you to lie, that he wants you to do anything. He just says he doesn't want you at the trial. And that's well within the purview of defense counsel or the defendant to tell a witness whether they do or don't want them as a witness at the trial.

[Counsel argues the State failed to prove Nick Jones] "was actually material to the prosecution." For all those reasons, we would request judgment of acquittal from the Court because the State has not met its burden to produce enough evidence to convict Mr. Banks.

(Emphasis added.) The record shows defense counsel did argue the sufficiency of the "hiding" evidence. We conclude counsel's lengthy and multi-faceted motion for acquittal due to insufficient evidence is well within "the range of normal competency." Accordingly, Banks has failed to meet his burden of proving counsel failed to perform an essential duty.

AFFIRMED.