

IN THE COURT OF APPEALS OF IOWA

No. 2-059 / 11-0610
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LINDA SUE MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, Peter B. Newell,
District Associate Judge.

Defendant appeals her conviction for providing alcohol to a person under
the legal drinking age resulting in serious injury. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Kasey E. Wadding, County Attorney, and Jill S. Dashner, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Thirteen-year-old Bethanie suffered a serious injury after drinking alcoholic beverages at Linda Sue Miller's house. Miller appeals her conviction for supplying alcohol to an underage person resulting in serious injury. She argues the court did not adequately instruct the jury on the nexus required between the act of supplying alcohol and the resulting serious injury. Although Miller did not object to the jury instructions or to the court's instruction in response to a jury question, she contends instructional error was preserved by her motion for new trial. Alternatively, Miller argues trial counsel was ineffective. We conclude trial counsel waived instructional error, but further conclude trial counsel was ineffective. We reverse and remand.¹

I. Background Facts and Proceedings.

The jury was faced with sorting out multiple accounts by teenage attendees of a party where alcohol was consumed and Bethanie became seriously ill and had to be airlifted to a hospital. On April 2, 2010, nineteen-year-old Josh Klink drove twins Baylie and Bethanie, along with Ashley Gildard and Kevin Forman, both eighteen, to Miller's house. Baylie and Bethanie were friends of Miller's thirteen-year-old daughter, Jasmine. Jasmine's fourteen-year-old friend, Hannah, was also at Miller's house. Hannah testified the gathering

¹ Because we reverse Miller's conviction based on trial counsel's ineffectiveness regarding jury instructions, we need not address her arguments claiming trial counsel was ineffective in failing to seek a new trial based on the weight of the evidence and in failing to object to alleged prior bad acts evidence.

turned into a “boozier.” At some point, Kathleen Short, age eighteen, arrived at Miller’s house. Miller’s boyfriend is Brian Buhr.²

Ashley testified Miller was at the house, along with Hannah, Jasmine, Austin, and Abby, when her group arrived. Ashley stated upon arrival, she, Bethanie, and Baylie got pop, vodka, and Busch Light out of Josh’s trunk and carried it into Miller’s house. Ashley stated Miller was there when the alcohol was brought into the house, but she was not present during the time the teenagers were drinking.

In contrast, Baylie testified Miller got in the car before the car’s occupants entered the Miller home and they took Miller to a store where Miller bought beer. Baylie stated they dropped Miller off at a different house with all the newly-purchased beer and then returned to Miller’s house. Baylie explained there was beer other than Josh’s beer already in the refrigerator and Bethanie drank the “other” beer. Baylie testified Bethanie drank two cans of beer, vodka, and a type of alcohol called Hot Sex.

Bethanie testified that upon arrival at Miller’s house, they went inside and waited for Kathleen. Bethanie also stated Josh took Miller “to buy the beer,” but Bethanie stayed at the house. Bethanie remembered Kathleen had alcohol called Hot Sex, but Bethanie didn’t remember drinking it. Bethanie testified everyone was drinking, she drank, and several days later she “woke up” in the hospital in Iowa City.

² Buhr and Miller married after the incident and prior to the trial.

Hannah testified to an interaction she observed among Kathleen, Jasmine, and Miller in Miller's living room: Hannah saw Kathleen give Miller twenty dollars and Jasmine give Miller five dollars. Further:

Q. [Hannah], what did Linda Miller do with the money? I mean, did she take the money from them? A. Yes.

Q. Did she leave the house? A. Yes.

Q. . . . Did she come back to the house? A. Yes.

Q. Okay. Did you see her bring anything into the house?
A. I saw beer and Hot Sex and vodka.

Q. Okay. And who did you see bring this into the house?

A. Linda [Miller], Josh, Kathleen and Jasmine and Brian.

In contrast, Kathleen testified:

Q. Okay. Was there alcohol there when you got there?

A. Yes.

Q. And what kind of alcohol was there? A. Beer and vodka.

Q. Did you want some other type of alcohol? A. Yes.

Q. What did you want? A. I wanted to drink—it's called Hot Sex.

. . . .

Q. How did you get the Hot Sex? A. I gave the money to Brian Buhr.

Q. . . . Now, originally, you told Chief Cain you gave the money to Linda Miller. Is that correct? A. Yeah.

Q. . . . Brian Buhr and Linda Miller were together when you gave it to them? A. Yeah.

. . . .

Q. . . . And which one did you hand the money to?
A. Brian.

. . . .

Q. . . . Who brought it to you? A. I think Brian.

Q. . . . Why, when you initially spoke to Chief Cain, did you just say Linda Miller? Why didn't you say Brian Buhr? A. Because I don't remember—I wasn't with him—who brought the drinks. I just gave the money to them and told them what I wanted, but I don't know who bought it because I didn't go with them. I stayed at the house while they left and then came back.

Q. So, Brian Buhr and Linda Miller left the house, and they came back, and with them they brought this alcoholic beverage called Hot Sex? A. Yes.

Q. Okay. And they gave it to you? A. Yes.

Q. . . . Do you remember how much money you would have given them for it? A. [Twenty] bucks.

....
Q. Did the Defendant, Linda Miller, and Brian Buhr stay at the house? A. No.

Q. . . . Do you know where they went? A. To a guy's house . . . in the country.

Q. . . . When she brought the Hot Sex back in the house to you, do you recall if people were drinking at that point? A. Yes.

Q. People were drinking? A. Un-huh.

Q. Is that a yes? A. Yes. Yes.

Q. And what were they drinking? A. Beer and vodka.

....
Q. . . . Fair to say that Linda Miller and Brian Buhr knew that you were not of legal drinking age to buy alcohol since you were giving them money to buy your alcohol? A. Yes.

During the evening, Bailey and others became concerned about Bethanie and called the twins' older sister, Jessica. Jessica and Zach Moran took Bethanie to Zach's house. Eventually, the police were called. Around 5:00 a.m., Officer McGee arrived at Zach's house. Bethanie was taken to a local hospital. Subsequently, Bethanie was taken by air ambulance to Iowa City's pediatric intensive care unit.

Around 6:30 a.m., Officer McGee and Chief Cain arrived at Miller's home and found eight or nine teenagers inside. Jasmine was the only resident of the house present when the police arrived. Officer McGee testified the police were not able to make contact with Miller that morning, but Jasmine knew where her mother was—she was out in the country at a party.

Chief Cain testified he spoke with Hannah and Abby during his early-morning visit to Miller's house and their stories were consistent. He learned the drinks at the party were Busch Light, vodka, "and some kind of alcohol called Hot Sex." Chief Cain testified:

Q. Did you learn whether or not anyone had given [Miller] money for alcohol or—? A. Yes.

Q. Okay. And who was that? A. Kathleen Short.

Q. Kathleen Short was the individual who gave [Miller] the money for the alcohol? A. Correct.

....

Q. Did any of the witnesses ever mention Brian Buhr?

A. Yes.

Q. Okay. Was that on the morning of April 3 or was that later? A. That was later on.

Q. And how was Brian Buhr's name—what was his connection? A. It was from the last part of a statement from Kathleen Short. She just wrote that she gave him the money.

Officer Cain testified Josh Klink, Kevin Formen, and Ashley Gildard all stated Josh had vodka and beer in his car and Bethanie and Baylie took the beer and vodka out of Josh's trunk and carried it into Miller's house. They also all stated Linda Miller was not at home when they were consuming alcohol. Officer Cain testified:

Q. . . . Now, you've made reference to using the statement . . . of Kathleen Short as a basis for charging Ms. Miller. Is that right? A. Kathleen Short, her statement, and Hannah's.

....

Q. Okay. And later, Ms. Short prepared a written statement for you . . . where she indicated that Ms. Miller was not the source of the alcohol? A. In her written statement, correct.

Q. Okay. A. She didn't say it wasn't the source of the alcohol. She said she gave the money to Brian.

Q. Okay. But not to Linda, correct? A. She said Brian at the end of her statement.

Miller did not testify at trial. The court prepared jury instructions and gave copies to trial counsel. Before the instructions were read to the jury, the court had an on-the-record discussion with counsel and stated: "And then Instruction No. 12 was modified on some discussions we had off-the-record to change . . . [element] 3 of No. 12 to say that Linda Sue Miller's actions resulted in a serious injury to Bethanie" The court asked if either party had any objection to Instruction 12 and neither party objected. The jury was instructed:

INSTRUCTION NO. 12

The State must prove the following elements of Supplying Alcohol to a Person under the Legal Drinking Age Resulting in Serious Injury.

1. On or about the 2nd day of April, 2010, to the 3rd day of April 2010, Linda Sue Miller was 21 years of age or older.
2. Linda Sue Miller did supply alcohol to a person under the legal drinking age.
3. Linda Sue Miller's actions resulted in a serious injury to Bethanie

At defense counsel's request, the court defined the word "supply" for the jurors:

INSTRUCTION 12-B

To supply means to affirmatively deliver or transfer liquor, wine, or beer to an underage person. It means more than merely permitting or allowing liquor, wine or beer to be consumed.

During closing arguments, the State did not dispute some of the alcohol came from Josh, but argued Bethanie drank some of the Hot Sex, as well as the beer already in the house, and was seriously injured. Additionally:

[The police officers] testified there were eight or nine people in the house, staying in the house, and of these eight or nine people, there was nobody that was twenty-one years or older. It was a household full of teenagers. And among those teenagers are Hannah . . . fourteen at the time; Jasmine Miller, fourteen—and Jasmine is the defendant's child. She'd been left in this house with all these teenagers overnight; no supervision; nobody taking care.

. . . .
Linda Miller and Brian Buhr are the only people over the age of twenty-one . . . and the rest of the people in this house, including the defendant's thirteen or fourteen-year-old daughter . . . and she leaves her with people that are not only, you know, fourteen, thirteen, but with some eighteen and nineteen-year-olds, unattended, in this house overnight, all night.

Defense counsel argued Bethanie did not drink Hot Sex and it was not the cause of her injury. Defense counsel also argued Kathleen's, not Hannah's, testimony is credible. Additionally:

The State is trying to get you to be angry with Linda for not being there that night; leaving her thirteen or fourteen-year-old child alone; but that is not the charge. The charge is supplying alcohol to a minor, serious injury.

During deliberations, the jury sent a note to the court asking: “Under Instruction No. 12 Item 3 ‘Linda Sue Miller’s actions’ [H]ow broad is the definition of actions[?] [O]nly action of supplying alcohol or any other actions of Linda Miller[?]”

The Court asked the parties for input on its response to the jury’s question. The prosecutor stated the jurors should be told to refer back to their jury instructions. Defense counsel stated:

Your Honor, I think it would be reasonable to answer their question; that it is supplying alcohol that we’re after, but I will agree that we’re—pointing them to the jury instructions would also be reasonable; that that should give them the answer they need.

The court instructed the jury: “You must consider the instructions as they have been given to you.” The jury found Miller guilty.

Miller moved for a new trial arguing “according to the statute . . . the provision of alcohol must lead to the serious injury, and it seems very likely that the jury did not understand the necessity of that connection.” Further, the court should have answered the jury’s question by giving them a specific instruction “the jury could find the defendant guilty of supplying alcohol causing a serious injury only if the act of supplying caused [Bethanie’s] injury”

The court denied Miller’s motion for a new trial finding Miller had consented to the supplemental instruction in response to the jury’s question and Miller’s only act at issue was the supplying of alcohol. This appeal followed.

II. Error Preservation.

Miller initially waived error by not objecting to Instruction 12 and/or the court's response to the jury's question. Miller did not propose specific alternative language in either instance. "When an instruction is correct as given but is not as complete or explicit as a party would like, he must request an additional instruction designed to remedy the defect" *State v. Smith*, 240 N.W.2d 693, 695 (Iowa 1976).

Miller argues, however, error was preserved by her motion for new trial. We disagree. A motion for a new trial is not a substitute for an objection at the time of the offending conduct. *State v. Massick*, 511 N.W.2d 384, 388 (Iowa 1994) (holding defense counsel's failure to object or move for mistrial before jury returned verdict amounted to waiver of error). Otherwise, appellate courts "would be 'permit[ting] an accused to forgo making an objection in the hope of receiving a favorable verdict.'" *Id.* (quoting *State v. Epps*, 313 N.W.2d 553, 555 (Iowa 1981)). Accordingly, Miller's failure to object before the jury received the challenged instructions prevents us from considering the issue on direct appeal. See *State v. Jewett*, 219 N.W.2d 559, 560 (Iowa 1974) ("[I]t is sound law and logic that a party may not sit by and permit the court to commit inadvertent error without protest, and then complain for the first time in his motion for a new trial or in the appellate court.").

Anticipating this result, Miller alternatively argues trial counsel's failure to raise objections regarding the jury instructions resulted in a conviction violating due process. Our appellate review is not precluded if failure to preserve error

results from a denial of effective assistance of counsel. See *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983).

III. Ineffective Assistance of Counsel.

We review the totality of relevant circumstances de novo on constitutionally-based ineffective-assistance-of-counsel claims. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). Miller must establish two elements “to show the ineffectiveness of defense counsel”: (1) counsel “failed to perform an essential duty; and (2) this omission resulted in prejudice. [Her] inability to prove either element is fatal.” *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (citations omitted). If the record on appeal establishes both elements of an ineffective-assistance claim and an evidentiary hearing would not alter this conclusion, we will reverse the defendant’s conviction and remand for a new trial. *Id.*

IV. Essential Duty.

Under the essential duty element, we measure trial counsel’s “performance against the standard of a reasonably competent practitioner.” *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

Miller argues trial counsel breached an essential duty in failing to object to a marshalling instruction that did not adequately inform the jury on the nexus required between the act of supplying alcohol and the resulting injury. Counsel’s error involved the essential element of causation. Miller asserts the jury’s note shows the jury was confused as to whether the serious injury had to be caused by Miller supplying alcohol or if it could be caused by “any other actions of Linda Miller.” Miller argues “[t]his is an important distinction, given that the evidence

could support a finding that Miller had beer in her refrigerator prior to any party or that she left the underage persons in her home unattended.” Miller contends trial counsel’s failure to object to the marshalling instruction or to the instruction given in response to the jury’s question constitutes a breach of duty.

We first consider the Iowa Code, which provides a person of legal age³ (twenty-one years) commits an aggravated misdemeanor if the person “sells, gives or otherwise *supplies* alcoholic liquor, wine, or beer to a *person* who is under legal age . . . which results in serious injury to *any person*.” Iowa Code § 123.47(5) (2009) (emphasis added). The act of supplying “requires a person to affirmatively deliver or transfer liquor, wine, or beer to the underage person.” *State v. Rohm*, 609 N.W.2d 504, 512 (Iowa 2000). “This means that a violator must do more than merely permit or allow liquor, wine, or beer to be consumed on the violator’s premises.” *Id.*

In considering the breach-of-an-essential-duty element, we have recognized whether or not counsel objects to a particular instruction must be determined with regard to the theory of defense which is being employed in the case. *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990). Miller’s defense theory focused on “supplying” alcohol. We are unable to conclude Element 3 of Instruction 12 informed the jury Bethanie’s injury had to be caused by Miller’s “supplying” of alcohol rather than caused by Miller’s other, general actions. The jury’s specific question dovetailed with defense counsel’s closing argument asserting the State was trying to convict Miller based on her actions of leaving her young child alone overnight in a house with teenagers and alcohol. Given

³ Miller did not dispute she was of legal age.

the jury's question during deliberations and the causation issue raised in defense counsel's closing arguments, we conclude trial counsel breached an essential duty by failing to object to the court's instructions on either of his two opportunities.

V. Prejudice.

We now consider whether Miller has proved the prejudice element of her ineffective-assistance claim. Miller must prove by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Maxwell*, 743 N.W.2d at 196. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* To establish prejudice, any error in the challenged instruction must be such that the resulting conviction violated due process. *Id.*

Due process entitles a defendant to the procedural safeguard of the prosecution proving every element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368, 375 (1970). Here, Instruction 12 permitted the jury to find Miller guilty for any act causing serious injury to Bethanie, not specifically the act of supplying alcohol to an underage person. The jury's note clearly demonstrates confusion on this very issue. Accordingly, Miller has proved prejudice.

For the reasons expressed above, we conclude Miller has proved her claim of ineffective assistance of counsel and her conviction is reversed and the case is remanded to the district court.

REVERSED AND REMANDED.