

**IN THE COURT OF APPEALS OF IOWA**

No. 2-091 / 11-0671  
Filed March 14, 2012

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**FREDRICK HAMP REID,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Defendant appeals from his conviction for first-degree robbery claiming the district court should have instructed the jury on the definition of serious injury.

**AFFIRMED.**

Fred Stiefel, Victor, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Des Moines, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney for appellee.

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

**BOWER, J.**

Defendant, Fredrick Reid, appeals from his conviction for robbery in the first degree, in violation of Iowa Code sections 711.1(2), 711.2, and 703.1 (2007), claiming the district court erred in not instructing the jury on the definition of serious injury where one of the elements of robbery was to threaten another with, or purposely put another in fear of, immediate serious injury. Because we find Reid was not prejudiced by the court's omission of the definition of serious injury, we affirm.

**I. BACKGROUND AND PROCEEDINGS.** On November 9, 2008, Reid and an accomplice entered a convenience store in Iowa City and demanded money from the store employee, Timothy Rusch. Reid's accomplice walked around the counter as Rusch opened the cash register drawer. The accomplice grabbed the money out of the drawer and placed it in a bag Reid was holding on the other side of the counter. The men demanded Rusch open the second cash register, but Rusch stated he could not open the drawer. The accomplice then pulled a knife out of his sweatshirt and told Rusch if he did not open the register the accomplice would cut or stab him. Rusch stated the knife was an eight- to ten-inch kitchen knife with a smooth single-edged blade and black handle. Rusch backed up toward the wall to create as much space as possible between him and the accomplice, but continued to tell the men he could not open the second register.

The accomplice then spotted the safe located behind the registers and demanded Rusch get money out of the safe. Rusch explained he could not get

money out of the safe because the safe was on a timer, and he had just gotten money out before the men walked in. As a result, the safe would not dispense money again for five or ten minutes. The accomplice again threatened to stab or cut Rusch, and also stated his partner, Reid, would shoot him if he did not get money out of the safe. Reid at that time was still on the opposite side of the counter with the bag of money in one hand and his other hand in his pocket.

When it became clear that they would not be able to get any more money, the accomplice asked Reid if there was anything else they wanted. Reid responded that they should get some cigarettes. After Rusch handed over the cigarettes to the men, a police officer<sup>1</sup> entered the store and ordered both men to the ground. Reid froze, but his accomplice ran out the door, and was apprehended after a short chase.

Reid was charged with robbery in the first degree and possession of a controlled substance<sup>2</sup> on November 19, 2009. The case proceeded to trial on March 28, 2011, and the jury found Reid guilty of first degree robbery. Reid waived his rights to a presentence investigation and proceeded to sentencing on April 1, 2011, where he was ordered to be incarcerated for a term not to exceed twenty-five years, and ordered to serve at least seventy percent of the sentence.<sup>3</sup> He was also ordered to pay court costs and court-appointed attorney fees.

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<sup>1</sup> The officer had been dispatched to the location on a report from two undercover officers, who spotted a suspicious car, which they believed could be involved in an armed robbery.

<sup>2</sup> This charge was later dismissed by the State and is not a subject of this appeal.

<sup>3</sup> See Iowa Code § 902.12(5) (providing a person convicted of first or second degree robbery must serve seven-tenths of his or her sentence before being considered for parole or work release).

Reid appeals, contending the district court erred in not submitting to the jury an instruction defining the term serious injury.<sup>4</sup> One of the elements of robbery required the jury to find Reid aided and abetted another who threatened Rusch with or purposefully put Rusch in fear of immediate serious injury. Because the jury was not given the definition of serious injury, Reid contends his conviction should be reversed and his case remanded for a new trial.

**II. ERROR PRESERVATION.** The State contends, and we agree, Reid failed to preserve error on his claim. All objections to jury instructions must be made before closing arguments, or the objection is waived. See Iowa R. Civ. P. 1.924; *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). In this case, the district court provided counsel with its proposed jury instructions, and asked whether they had any objections. Reid's attorney did not object to the lack of an instruction defining serious injury, and thus, the claim is waived on appeal.

Anticipating his error preservation problem, Reid asks us to consider his appeal in the context of an ineffective-assistance-of-counsel claim. Because "[i]neffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules," we proceed to address Reid's claim. *Fountain*, 786 N.W.2d at 263.

**III. INEFFECTIVE ASSISTANCE OF COUNSEL.** We review ineffective-assistance-of-counsel claims de novo, because the claims are based on a defendant's constitutional right to counsel. *State v. Lyman*, 776 N.W.2d

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<sup>4</sup> Serious Injury is defined in Iowa Code section 702.18 to include bodily injury that creates a substantial risk of death, causes serious permanent disfigurement, or causes protracted loss or impairment of the function of any bodily member or organ.

865, 877 (Iowa 2010). To prove his counsel was ineffective, Reid must show counsel 1) failed to perform an essential duty, and 2) prejudice resulted. *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). Failure to prove either element is fatal, so we may resolve the defendant's claim on either prong. *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011). There is a presumption that counsel provided competent representation, so Reid must show his counsel's performance "was not within the range of normal competency." *State v. Jorgensen*, 785 N.W.2d 708, 712 (Iowa Ct. App. 2009). To establish prejudice, Reid must prove, but for counsel's unprofessional error, the result of the trial would have been different. *Lyman*, 776 N.W.2d at 878.

Normally, ineffective-assistance-of-counsel claims are preserved for postconviction relief actions in order to allow the defendant an opportunity to develop the record, and also to allow counsel an opportunity to explain the actions taken. See *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003); *State v. Slayton*, 417 N.W.2d 432, 436 (Iowa 1987). However, if we find the record adequate on direct appeal, we may address the claim, as we do here. *Fountain*, 786 N.W.2d at 263.

Reid claims counsel was ineffective for failing to object to the court's lack of a jury instruction defining serious injury. The district court has a duty to ensure the jury understands the issues and the law applicable to the case. *State v. McCall*, 754 N.W.2d 868, 872 (Iowa Ct. App. 2008). The court must define the crime, but need not define every word in an instruction if the words are of ordinary usage and generally understood. *State v. Hoffer*, 383 N.W.2d 543, 548

(Iowa 1986). “[H]owever, technical terms or legal terms of art must be explained.” *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

Just because defense counsel did not request an instruction defining serious injury, does not automatically mean counsel failed to perform an essential duty as required under an ineffective-assistance-of-counsel claim. “[W]e have recognized that 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). Defense counsel’s primary concern in arguing jury instructions will be focused on those elements that are essential to the theory of the defense. *State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983). In this case, defense counsel’s theory of defense was to negate the specific intent element of robbery by focusing on Reid’s intoxication. We find that defense counsel could have reasonably concluded including a jury instruction defining serious injury was of little significance in establishing this defense. *See id.*

In addition, we find Reid failed to demonstrate he suffered prejudice as a result of the lack of the instruction. *See State v. Oetken*, 613 N.W.2d 679, 686 (Iowa 2000). “If there is a real hazard or danger of death, serious injury is established.” *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981). The marshalling instruction at issue in this case required the jury to find Reid aided and abetted another who threatened Rusch with or purposefully put Rusch in fear of immediate serious injury. It was not required that Rusch sustain a serious injury or that he even be placed in fear by the threats, just that he was threatened

with serious injury. See *State v. Birch*, 479 N.W.2d 284, 286 (Iowa 1991). It is undisputed Reid's accomplice threatened to cut or stab Rusch with an eight to ten inch kitchen knife on two separate occasions, and also threatened Rusch he would be shot if Rusch did not comply with their demands. Rusch testified he was worried the accomplice may come at him with the knife, and so he tried to create as much space as possible between himself and the accomplice. Even if an instruction defining serious injury had been given, based on the evidence presented, we do not find there is a reasonable probability the result of the trial would have been different. See *State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). Because Reid failed to establish counsel breached an essential duty, or he suffered prejudice as a result, his claim must fail.

**AFFIRMED.**