IN THE COURT OF APPEALS OF IOWA

No. 3-204 / 12-0361
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN CHARLES BERESFORD,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Kevin Beresford appeals from his conviction of second-degree criminal mischief. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Jason Besler, Assistant County Attorney, for appellee.

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

DANILSON, J.

Kevin Beresford appeals from his conviction of second-degree criminal mischief, alleging trial counsel was ineffective in failing to assert a defense of intoxication. We preserve the claim for possible postconviction relief proceedings and affirm the conviction.

An ineffective-assistance-of-counsel claim raises a constitutional issue, which we review de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

"Two elements must be established to show the ineffectiveness of defense counsel: (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice." *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). "A defendant's inability to prove either element is fatal." *Id.*

The crime of criminal mischief is a specific intent crime because it requires an intent to damage, deface, alter, or destroy property, rather than an intent to do the act which damaged the property. *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998). Accordingly, evidence of Beresford's voluntary intoxication may negate the specific intent required. *See Steinkuehler v. State*, 507 N.W.2d 716, 722 (Iowa Ct. App. 1993).

If a claim of ineffective assistance of counsel is raised on direct appeal from the criminal proceedings, the court may address it if the record is adequate to decide the claim. *See Graves*, 668 N.W.2d at 869. If the record is not adequate, the defendant may raise the claim in a postconviction action. Iowa Code § 814.7(3) (2009); *see State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010).

There was evidence presented that Beresford was intoxicated on November 5, 2009, the date the damage was done in the basement of a building in which Beresford lived. The same witnesses who testified Beresford was intoxicated, however, also testified Beresford was angry and looking for the owner and other tenant of the building in which he lived. Beresford said "he would like to kick each one of their asses."

Beresford testified at trial that on November 5, 2009, he received a letter in the mail that made him "madder and madder" at the owner of the building with whom he had an on-going dispute. He stated, "That was enough. I had a Court order that said they were not supposed to stop me from using my utilities. So I cut a hole in the door. It was my door. . . . I went down . . . and turned my hot water back on." He denied doing the damage in the basement to the extent depicted on photographs shown at trial.

Beresford's defense at trial appears to have been either that he was not responsible for the extent of the damage in the basement or that he had a right to do what he did. There may be reasons why trial counsel did not raise the intoxication defense. We conclude the record is inadequate to address the ineffectiveness claim as trial counsel should be given an opportunity to explain the strategy employed. *See State v. Peck*, 539 N.W.2d 170, 175 (Iowa 1995). We therefore affirm the conviction and preserve the claim for possible postconviction relief proceedings.

AFFIRMED.