

IN THE COURT OF APPEALS OF IOWA

No. 3-290 / 12-0535
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRAJENDRA CHANDRA DAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Appeal from a conviction of fraudulent practice. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant
Appellate Defender, for appellant.

Brajendra Das, Des Moines, pro se.

Thomas J. Miller, Attorney General, Benjamin Parrott, Assistant Attorney
General, John P. Sarcone, County Attorney, and Jaki Livingston, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Brajendra Das appeals from his conviction of fraudulent practices in the second degree, contending the trial court erred in refusing a requested jury instruction on reasonable doubt and his trial attorney was ineffective in not objecting to the marshaling instruction to the jury. We affirm.

Das was charged with fraudulent practice in the second degree, in violation of Iowa Code sections 96.16(1); 714.8(3), (10); and 714.10 (2011), for obtaining unemployment benefits illegally based on false statements on his unemployment reports. Over a period of several months, he reported lower wages than his employer reported, resulting in overpayment of benefits in excess of \$2000.

Das requested an alternate jury instruction on reasonable doubt containing this paragraph:

A “reasonable doubt” is such a doubt as fairly and naturally arises in your mind and by reason of which you cannot say that you have a full and abiding conviction of the guilt of the defendant; and if, after considering all of the circumstances as disclosed by the evidence, you find your mind wavering or vacillating, then you have a reasonable doubt, and the defendant is entitled to the benefit of such doubt and you must acquit him. A reasonable doubt may arise from the evidence in the case or it may arise from a lack or failure of evidence produced by the State, and it must be such a doubt as would cause a reasonable, prudent and considerate person to pause and hesitate before acting in the graver and more important affairs of life. But you should not ignore credible evidence to hunt for doubt, and you should not entertain such doubt as is purely imaginary or fanciful or based on groundless conjecture. If, after a careful and impartial consideration of all the evidence in the case, you have a full and abiding conviction of the guilt of the defendant, then you are satisfied beyond a reasonable doubt, otherwise you are not satisfied beyond a reasonable doubt.

The court denied the request and provided the jury this instruction on reasonable doubt:

A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State.

If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the Defendant guilty.

But if, after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the Defendant's guilt, then you have a reasonable doubt and you should find the Defendant not guilty.

In the marshaling instruction, the court instructed the jury the State had to prove Das (1) made false statements to the agency over a certain period by failing to report his income accurately and (2) knew the statements were false. Das's attorney did not object to the instruction. The jury found Das guilty as charged.

We review challenges to jury instructions for correction of errors at law. *State v. Becker*, 818 N.W.2d 135, 140 (Iowa 2012). We review the related claim the trial court should have given a defendant's requested instruction for an abuse of discretion. *Id.*

We review ineffective-assistance-of-counsel claims de novo. *State v. Bryant*, 819 N.W.2d 564, 569 (Iowa Ct. App. 2012). To succeed on an ineffective-assistance claim, a defendant must show by a preponderance of the evidence the attorney failed to perform an essential duty and prejudice resulted. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). We can affirm on appeal if a defendant fails to prove either element. *Id.*

Jury Instruction on Reasonable Doubt. Das contends the trial court erred in refusing to give his requested instruction on reasonable doubt. The trial court

refused Das's requested instruction and also did not include the following paragraph of the current uniform instruction:

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Iowa Crim. Jury Instruction 100.10 (2012). This paragraph was added in the March 2009 revision of the uniform instructions. See Iowa Crim. Jury Instruction 100.10 (2009). Das argues the instruction without this paragraph "contained no extended definition of reasonable doubt."

The trial court explained its choice of instruction.

Well, [defense attorney], without comparing it line by line with the court model instruction, I'm not sure it's the same or different. But I'll tell you, I don't like it for the same reason I don't like the current model instruction, and that is because of this "hesitate to act" language that appears in your Exhibit A. I think it's contrary to the—also to the model instruction of what we have included as No. 19. No. 19 includes the following language: "During your deliberations, do not hesitate to reexamine your view and change your opinion."

So I think it's contradictory to tell the jury in one instruction if they hesitate, that's reasonable doubt. And then in another instruction tell them [not] to hesitate. I just think that's fundamentally confusing and contradictory to the jury. So for that reason, I'm going to overrule your offered instruction

The court's instruction was the same as the uniform instruction prior to the addition of the paragraph in 2009. It also was nearly the same as the instruction approved in *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980). The instruction given was adequate because it "set out an objective standard for measuring the jurors' doubts. It was not deficient for failing to provide more than

one standard.” *Id.* Although the newer version of the uniform instruction provides two standards: (1) a doubt that fails to leave one “firmly convinced of the defendant’s guilt” (the old standard) and (2) “the kind of doubt that would make a reasonable person hesitate to act” (the new, additional standard), we are not in a position to say two standards are better than one, let alone that two standards are required to convey an accurate statement of the law.

We conclude the trial court’s chosen instruction “correctly states the applicable law . . . even though an alternative wording is possible.” See *State v. Morrison*, 368 N.W.2d 173, 175 (Iowa 1985). Trial courts have “a rather broad discretion” in choosing the language to convey a particular idea to the jury. *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994). We find no abuse of discretion in the court’s refusal to give the instruction Das requested.

Ineffective Assistance. Das contends his attorney was ineffective in failing to object to the marshaling instruction because it failed to contain all the elements the State must prove. The marshaling instruction for fraudulent practice required the State to prove (1) Das made false statements to Iowa Workforce Development by failing to report his income accurately and (2) Das knew the statements were false. He argues the instruction lacked an essential element—making the false statements “to obtain or increase any benefit.”¹ He asserts he

¹ Iowa Code section 96.16(1) provides, in relevant part:

An individual who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, *to obtain or increase any benefit or other payment under this chapter*, either for the individual or for any other individual, is guilty of a fraudulent practice as defined in sections 714.8 to 714.14.

(Emphasis added.)

was prejudiced because the jury did not have to find he acted with intent to obtain a benefit.

Our analysis of an ineffective-assistance claim based on failure to object to jury instructions must be assessed in light of the theory of defense employed by the trial attorney. *State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983). In this case, the defense focused entirely on the knowledge element, suggesting the difference between the income Das reported and the income his employer reported was because Das was confused or made a mistake based on the difference in reporting periods in the unemployment benefits form. Das was paid bi-weekly. The form required him to report his wages on a weekly basis. Das's attorney sought to show Das was confused or mistaken in how he reported his income but did not knowingly make false statements. This theory of defense appears both in the attorney's opening statement and closing argument. Neither the State nor the defense focused on the intent element Das claims is missing from the marshaling instruction.

The instruction the court gave follows the uniform criminal marshaling instruction for fraudulent practice. See Iowa Crim. Jury Instruction 1400.25. The instruction as given accurately describes the elements of fraudulent practice as defined in section 714.8(3), one of the sections cited in the trial information. That subsection provides a person who “[k]nowingly executes or tenders a false certification under penalty of perjury, false affidavit, or false certificate, if the certification, affidavit, or certificate is required by law or given in support of a claim for compensation, indemnification, restitution, or other payment” is guilty of a fraudulent practice. Iowa Code § 714.8(3) (emphasis added).

We conclude the instruction given was not defective; therefore, Das's trial attorney was not ineffective in not challenging the marshaling instruction. See *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011) (noting an attorney has "no duty to pursue a meritless issue"). Because the jury properly could find Das guilty of a fraudulent practice under section 714.8(3) based on a "knowing" false report of wages to Iowa Workforce Development (a statement given in support of a claim), Das was not prejudiced by the instruction.

AFFIRMED.