IN THE COURT OF APPEALS OF IOWA

No. 3-497 / 12-0373
Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY EUGENE CODY,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Defendant appeals his conviction, arguing trial counsel rendered ineffective assistance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

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

EISENHAUER, C.J.

Larry Cody appeals from his conviction for first-degree harassment.[1] He claims his trial attorney rendered ineffective assistance by failing to object to the jury instructions. We affirm.

Cody dated Christa for two years. Amy, Christa's daughter, knew Cody. On May 9, 2011, Amy was at her mother's apartment when Cody started a series of calls to Christa that ended at 1:30 a.m. Amy started recording the calls because Cody was "threatening to kill [Christa]" and "talk[ing]" about killing her with a gun."

Amy and her mother watched out a bedroom window after the calls stopped. Amy observed Cody "walking up next to the abandoned house and threw himself to the ground in the grass." After seeing Cody dive to the ground, Amy crawled into the living room and hid in a closet. Amy hid because "he said he was going to shoot so I didn't want to be standing in front of the window if it were to happen." While Amy was calling the police, she heard a shot. The State introduced a photo exhibit showing a bullet hole penetrating the bedroom window where Amy had looked out at Cody.

Christa testified she observed Cody walking and carrying what she thought was a 2" x 4" piece of wood. Christa joined Amy in the living room and then heard a "big bang . . . a gunshot."

Nicole and her sister, Shashone, lived across the street from Christa's apartment building. Nicole identified Cody as the man who spoke with her about

[1] Cody does not appeal his simultaneous convictions for (1) intimidation with a dangerous weapon, (2) possession of a firearm by a felon, and (3) going armed with intent. In a bifurcated trial, the jury returned a verdict of habitual offender.

a week before May 9. Cody identified himself to Nicole as Larry, an undercover police officer. Cody asked Nicole to watch Christa and Amy's apartment and call him when "she saw people up there." Cody stated Christa and Amy were selling drugs.

On the night of the shooting, Nicole saw Cody twice. First, Cody spoke to her while she was on the front porch. When Cody told Nicole she should have watched "the ladies across the street," she responded by going inside to get her father. When Nicole and her father returned, she saw Cody "walking back down the street."

After midnight, the sisters heard noises as they were watching television. First Nicole and then Shashone went outside. Nicole observed Cody on the ground "doing the army crawl on the side of a nearby house." Cody was crawling in the direction of the apartment building. Nicole saw Cody run across the street and jump "on top of the air conditioner unit and [aim] the gun at the window." After the shot, Cody "jumped off, [ran by Nicole, and said], 'I told you to watch them crazy bitches.'" Shashone testified she saw Cody "on top of the air conditioner, and I heard a loud noise and then he jumped off and ran."

When the police arrived, an officer found a loaded shotgun in a nearby alley with one spent shell casing in the chamber. Stopped by police one block from the apartment, Cody admitted he was coming from the area where the police found the shotgun.

Defense counsel responded to the State's eyewitness evidence by arguing (1) one sister called it a "little gun" and the shotgun is not little, (2) the sisters were 100 feet away and their testimony is not credible, (3) Amy and

Christa did not see Cody shoot a gun, (4) one caller to dispatch stated Cody was in the apartment hallway with a gun and that inconsistency "suggests somebody tried to get [Cody] in trouble," (5) no voice identification procedures were used on the voice recording, and (6) "You got to decide if you think he is stupid enough to run around and put this [gun] in the alley and then go tell the police, well, I walked over here. This is where I was, you know." Finally counsel argued:

> [The prosecutor] has to prove beyond a reasonable doubt that [Cody] was there and identified with a gun and blew that gun off. It didn't happen. What credible witness or evidence gives you that thought . . . by proof beyond a reasonable doubt? . . .
>
> . . . Where is the circumstantial evidence? Not circumstances alone . . . . That associates him with a shotgun and shooting that shotgun. There is no credible direct evidence. There is no credible circumstantial evidence.

The jury found Cody guilty of first-degree harassment. On appeal, Cody argues trial counsel rendered ineffective assistance.

Ineffective-assistance claims are reviewed de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). We will resolve these claims on direct appeal where the record is adequate. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). We conclude the record is adequate.

To prevail, Cody must prove by a preponderance of the evidence his trial attorney failed to perform an essential duty *and* this failure resulted in prejudice. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009).[2] Iowa recognizes "a strong presumption trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002).

[2] We find no merit to Cody's argument prejudice is presumed on his ineffective-assistance claim.

We conclude he cannot prevail on either prong. To be successful on the duty prong, Cody must establish counsel's performance was outside the range of normal competency. *DeVoss*, 648 N.W.2d at 64. Cody argues trial counsel breached an essential duty by failing to object to an incomplete marshaling instruction: "2. The defendant communicated a threat to commit the crime of Willful Injury or Murder." Cody asserts the instruction should have directed the jury to additional instructions defining willful injury or murder. The State acknowledges the jury instructions did not include definitional instructions for willful injury or murder but argues those instructions are not important to the theory of defense.

We recognize "'not every right to insist that a particular instruction be given need be availed of by counsel in order to satisfy the standard of normal competency.'" *State v. Blackford*, 335 N.W.2d 173, 178 (Iowa 1983); *see State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990). "In arguing over what elements should be included in a marshaling instruction, defense counsel's primary concern will necessarily be those elements which are essential to the theory of the defense . . . in the particular case." *Blackford*, 335 N.W.2d at 178. Cody's theory of defense contested the accuracy of the witness identifications and testimony in the context of "it didn't happen." He did not challenge the nature of the crimes of murder and willful injury or challenge what was intended by the man making threats on the telephone. Under the circumstances of this case, defense counsel did not breach an essential duty by failing to object to the jury instructions. *See Broughton*, 450 N.W.2d at 876 (rejecting ineffective-assistance claim where counsel failed to object to omission of malice aforethought in the

marshaling instruction and malice was not critical to or controverted by the defense theory); *Blackford*, 335 N.W.2d at 178 (rejecting ineffective-assistance claim where counsel failed to object to the omission of criminal intent in the marshaling instruction and "an intent element . . . was of little significance in presenting the defense").

We turn to the prejudice prong. Cody must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Therefore, Cody must show there is a reasonable probability he would have been acquitted of first-degree harassment if the instructions at issue had been given. Where the evidence of guilt is overwhelming, we will find no prejudice. *See id.* at 696; *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) ("The most important factor under the test for prejudice is the strength of the State's case.").

The State's case was strong. Cody was identified by four witnesses as the man outside Christa's residence just before a gun was fired. Nearby neighbors observed him firing a weapon. Cody admitted his presence in the area to an officer responding to the incident. It is impossible to conclude trial counsel's failure to object resulted in *Strickland* prejudice. *See State v. Propps*, 376 N.W.2d 619, 623 (Iowa 1985) (ruling counsel's failure to object did not result in prejudice "where practical considerations make it unlikely the inclusion of a particular element in the marshaling instruction would have produced" a different jury verdict).

AFFIRMED.