

IN THE COURT OF APPEALS OF IOWA

No. 6-1077 / 06-0680
Filed January 31, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MERLYN DALE DRIESEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Robert J. Dull,
District Associate Judge.

The defendant appeals following his conviction for domestic abuse and
assault. **REVERSED AND REMANDED.**

Donna M. Schauer of Schauer Law Office, Adel, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, Melissa O'Rourke, County Attorney, and Loan T. Huynh,
Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Defendant Merlyn Driesen appeals his conviction for domestic abuse assault. The defendant contends that (1) trial counsel was ineffective by failing to ensure there was a valid waiver of a jury trial, (2) there was insufficient evidence to support his conviction, (3) trial counsel was ineffective by failing to bring to the trial court's attention evidence that his spouse had an ulterior motive to falsely accuse the defendant, and (4) the trial court abused its discretion in denying him a deferred judgment.

I. Ineffective Counsel: Waiver of Jury Trial

The defendant first contends that his trial counsel was ineffective by failing to ensure there was a valid waiver of a jury trial. We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001).

Recently, the Iowa Supreme Court held that, for all future jury trial waivers, "a trial court must conduct the proceedings 'on the record,' in the sense that some in-court colloquy with the defendant is required in order to ensure the defendant's waiver is knowing, voluntary, and intelligent." *State v. Liddell*, 672 N.W.2d 805, 814 (Iowa 2003).

To this end, a court should ascertain whether the defendant understands the difference between jury and non-jury trials, through an in-court colloquy. This inquiry may involve informing the defendant:

1. Twelve members of the community compose a jury;
2. The defendant may take part in jury selection;
3. Jury verdicts must be unanimous;
4. The court alone decides guilt or innocence if the defendant waives a jury trial; and
5. Neither the court nor the prosecution will reward the defendant for waiving a jury trial.

Id. at 813-14 (citing *State v. Stallings*, 658 N.W.2d, 106, 111 (Iowa 2003)) (other citations omitted). These five subjects, while not a “checklist” for all waivers of jury trial, “point towards a knowing, voluntary, and intelligent waiver.” *Id.* at 814.

The State concedes that no reported on-the-record colloquy took place with the trial court. It further concedes that if this court is unwilling to revisit the *Stalling* and *Liddell* analysis, then the lack of an on-the-record colloquy would both represent a breach of duty and trigger a presumption of prejudice, resulting in mandatory reversal and remand for a new trial.

A reconsideration of the *Stallings* and *Liddell* holdings would be a function for the Iowa Supreme Court. See *State v. Eichler*, 248 Iowa 1267, 1270, 83 N.W.2d 576, 577-78 (1957) (“It has been said, by the late Mr. Justice Jackson of the United State Supreme Court, that courts of last resort are not final because they are infallible, but rather are infallible because they are final. Criticism of the courts is not new; in a profession in which every case represents a difference of opinion among men, the entity which must resolve these differences is certain to displease someone and it is natural for such displeasure to find expression. Yet it is the prerogative of this court to determine the law, and we think that generally the trial courts are under a duty to follow it as expressed by the courts of last resort, as they understand it, even though they may disagree. If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.”)

Conclusion

Because there was no on-the-record colloquy at the trial court level, counsel was ineffective by failing to ensure there was a valid waiver of a jury trial. The defendant's motion for a new trial is granted. In view of this conclusion, we need not address the defendant's other contentions on appeal.

REVERSED AND REMANDED.