IN THE COURT OF APPEALS OF IOWA

No. 6-217 / 05-0205
Filed May 10, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANNY RAY ROBINSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Danny Robinson appeals his judgment and sentence for first-degree arson, alleging ineffective assistance of counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, John P. Sarcone, County Attorney, and George Karnas, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Danny Robinson and his wife Lydia were married but separated. Lydia lived in a Des Moines apartment with her aunt. One spring evening, a fire broke out in the apartment. Earlier that afternoon, neighbors witnessed Robinson assault his wife outside the apartment.

The State charged Robinson with first-degree arson, and a jury found him guilty as charged. *See* Iowa Code § 712.1, 712.2 (2003). On appeal, Robinson argues that trial counsel provided ineffective assistance in (1) failing to object to certain statements made by the prosecutor during the rebuttal portion of his closing argument and (2) failing to object to hearsay statements contained in a deposition transcript admitted at trial.

It is well established that a person claiming ineffective assistance of counsel must show both a failure to perform an essential duty and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984). When such a claim is made, our review of the record is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

I. Closing Argument

During rebuttal, the prosecutor made the following comments:

> In order to find the defendant not guilty, you've got to believe that Lydia lied; that Detective Kamerick lied; that everybody lied. That Lydia got all her neighbors to lie about what happened at three in the afternoon; that Greg Signs, the neighbor's son – Catherine Signs' son who cares for her – said that was the defendant out there, standing over her and she laid in the parking lot screaming.

Robinson contends defense counsel should have objected to these comments on the ground they distorted the burden of proof and set forth an inaccurate

statement of the law. *State v. Graves*, 668 N.W.2d 668, 680 (Iowa 2003). We need not reach the question of whether counsel breached an essential duty by failing to object because we conclude Robinson cannot establish *Strickland* prejudice. *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Our de novo review of the record reveals the following facts. Robinson told her husband several times that she wanted to divorce him. Robinson suspected her of infidelity but said he did not want to end the marriage. Two days before the fire, he stated he would kill Lydia and her new boyfriend if he saw them together.

Early on the day of the fire, Lydia saw Robinson at a nearby convenience store. She again asked him for a divorce. He acted "hurt and angry" and left in tears. At some point, he told her she "would never be able to be with another man," if she divorced him.

Later that afternoon, Robinson went to Lydia's apartment. He entered the apartment uninvited and armed with brass knuckles and a stick. Suspecting that Lydia had a boyfriend inside, he began yelling and knocking over items. He also shoved Lydia into the stove. Lydia managed to get out of the apartment. Robinson followed her, chased her into the street, grabbed her by the throat, and threw her to the ground. He left before police arrived.

After this confrontation, Robinson returned to the downtown hotel where he was living. He told another hotel resident that "he had gone up to his aunt's and wife's apartment," and his wife would not let him in. According to the resident, Robinson stated "the bitch was going to pay."

That evening, after Lydia and her aunt were in bed, Lydia saw a "bright light" coming through her window and heard the sound of breaking glass. She immediately realized the apartment was on fire. She and her aunt left the apartment safely, although there was significant damage to the structure.

Investigators determined that the fire was set with a Molotov cocktail, described as a broken bottle stuffed with gasoline-soaked newspaper. The neck of a beer bottle and a newspaper wick were found between one of the window panes of the apartment. The odor of gasoline was "unmistakable."

Investigators retrieved a videotape from a nearby convenience store which showed a jacketed individual resembling Robinson pre-paying for gasoline. The amount he prepaid was fifty cents, which drew the manager's attention. Transaction records revealed that the man only pumped thirty-four cents of gasoline. Officers later determined that forty-nine cents of gasoline could be placed into an empty thirty-two ounce beer bottle.

Police stopped and questioned Robinson about the fire shortly after it was reported to them. Robinson's account did not include any statements about the domestic disturbance earlier that day or a purchase of gasoline earlier that evening.

When Robinson was stopped, he had a cigarette lighter with him. The questioning officer noticed a burn on the back of Robinson's jacket. There was an odor of gasoline on the jacket. The jacket appeared to be the same one worn by the man who purchased fifty cents of gasoline at the convenience store.

Based on this overwhelming evidence of guilt, we conclude there is not a reasonable probability that the outcome would have changed, even if counsel

had succeeded in excluding the prosecutor's comments quoted above. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

II. Hearsay Evidence

Robinson next argues that trial counsel should have objected to certain hearsay statements contained in a police officer's deposition transcript, introduced in lieu of trial testimony. He contends the statements "were damaging to [his] case because they contradicted his statements to police regarding his whereabouts at the time of the fire." Again, we need not decide whether trial counsel breached an essential duty by failing to object to this testimony because, even if such a breach were established, Robinson cannot establish *Strickland* prejudice.

III. Disposition

We affirm Robinson's judgment and sentence for first-degree arson.

AFFIRMED.