IN THE COURT OF APPEALS OF IOWA

No. 6-311 / 05-0973
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

REUBEN ANTHONY STIGLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Reuben Stigler appeals his conviction and sentence for robbery in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

HUITINK, J.

Reuben Stigler appeals his conviction and sentence for robbery in the second degree in violation of Iowa Code sections 711.1(1)(2) and 711.3 (2003).

I. Background Facts and Proceedings.

On August 21, 2004, Frederick Amstuz, the owner of Food Pride grocery store, observed Stigler acting suspiciously in the grocery store. Amstuz suspected that Stigler was shoplifting steaks by putting them in the waistband of his pants and under his sweatshirt. Stigler proceeded to the check-out lane where Amanda Patten was the cashier. Stigler told Patten he left his checkbook in the car and left the store to retrieve his checkbook. As Stigler was leaving, Amstuz confronted Stigler in the store's vestibule about the missing steaks. Amstuz took hold of Stigler's waistband, and the steaks began falling to the floor. Stigler tried to hit Amstuz with his fist. As the two struggled, Stigler's sweatshirt came off and a "Wall Innovators" badge fell to the ground. Stigler broke away and began running down the street. Amstuz yelled "Give me my steaks back. You can have your sweatshirt." Stigler returned and pulled more steaks from his waistband. Amstuz took the steaks and handed Stigler the sweatshirt. Stigler got into a car and left. Amstuz noted the license plate number of the car and called police.

Amstuz identified Stigler from a photo-array and testified at trial that he was certain it was Stigler who attempted to steal the steaks and assaulted him. Patten also picked Stigler from the photo-array. Initially she stated that she was not one hundred percent sure, but at the time of trial she testified there was no doubt in her mind Stigler was the person she saw in her check-out lane. She

testified that her testimony was not influenced by the officer's statement that she picked the "right person." Denise Nielsen, a Food Pride employee, also testified that she saw Stigler and Amstuz struggle in the vestibule. Although she was not asked to look at a photo-array, she identified Stigler as the perpetrator.

On May 26, 2005, Stigler was convicted of second-degree robbery. Stigler was sentenced to prison for a term not to exceed ten years.

On appeal, Stigler argues the following:

I. The district court erred in excluding a late noticed defense witness.
II. Trial counsel was ineffective for failing to call an expert witness on the subject of the unreliability of cross-racial eyewitness identification.

II. Exclusion of Testimony.

Iowa Rule of Criminal Procedure 2.13(4) dictates that if the defendant has taken depositions of the state's witnesses and fails to disclose to the prosecuting attorney all of the defense witnesses at least nine days before trial, "the court may order the defendant to permit discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances." The court may also order the exclusion of the witness the defendant failed to disclose, if the court finds that a less severe remedy is not adequate to protect the State from undue prejudice. Iowa R. App. P. 2.13(4).

"The sanctions under [rule 2.13(4)] are discretionary and will be reversed only if the trial court abuses its discretion." *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994); *State v. Garrett,* 516 N.W.2d 892, 894 (Iowa 1994); *State v. Ware,* 338 N.W.2d 707, 714 (Iowa 1983); *State v. Schluter*, 548 N.W.2d 591, 593 (Iowa Ct. App. 1996). "An abuse of discretion will not generally be found unless the

party whose rights have been violated suffered prejudice." *Babers*, 514 N.W.2d at 82 (citing *State v. Thompkins*, 318 N.W.2d 194, 198 (Iowa 1982)).

Stigler argues that the judge erred in excluding a potential defense witness's testimony and that he suffered prejudice by the exclusion of the witness's testimony. After jury selection and before the trial was to begin, defense counsel informed the court that he wanted a witness to testify that had not been disclosed to the State pursuant to Iowa Rule of Criminal Procedure 2.13(4). The potential witness was Stigler's former girlfriend, and she was to testify that in June 2004, two months prior to the incident, Stigler had a silver tooth and tattoos on his arms. The purpose of this testimony was to show that Stigler was misidentified as the perpetrator. Both Amstuz and Patten testified that they did not recall anything unusual about the perpetrator's teeth. Amstuz testified that he did not see any tattoos on the arms of the perpetrator. Defense counsel further informed the court that he only became aware that the witness existed during the lunch break.

The trial was set to conclude that afternoon, and the close of evidence occurred at 3:20 p.m. Closing arguments and jury instructions were scheduled for the next morning. Stigler maintains that the witness's testimony was going to be brief and thus, continuing the trial for a brief time would have given the State adequate time to depose the witness. Stigler argues that had the court continued the trial Stigler would not have suffered prejudice.

Stigler relies on *Schluter,* arguing that the district court similarly erred by not considering other factors in excluding the testimony of undisclosed witnesses. *Schluter*, 548 N.W.2d at 593. We agree with the State that Stigler's

reliance is misplaced. *Id*. *Schlute*r is distinguishable in that in *Schluter* defense counsel gave notice of additional witnesses four days before trial. In *Schluter,* the court essentially determined that the trial court erred in excluding all of the witnesses that were not timely disclosed. *Id*. The supreme court concluded that had the district court considered other factors, it would have found that the State could have contacted some of the witnesses prior to trial because the witnesses had already been interviewed by State agents, named in police reports and mentioned in depositions. *Id*.

Here, Stigler did not make the request to call the witness until immediately before the presentation of evidence. There is no evidence Stigler made efforts to find a person willing to testify that he had a silver tooth or tattoos. Stigler obviously knew his former girlfriend before the day of trial. Additionally, Stigler could have cross-examined the State's witnesses regarding whether he had a tattoo or a silver tooth. Accordingly, we find that the trial court did not abuse its discretion in excluding defense witness's testimony.

III. Ineffective Assistance of Counsel.

To establish a claim of ineffective assistance of counsel, Stigler has the burden to prove: (1) counsel failed in an essential duty and (2) prejudice resulted therefrom. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma*, 626 N.W.2d 134, 142 (Iowa 2001); *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). There is a strong presumption that the performance of counsel falls within a wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). Looking at the totality of the circumstances, Stigler must overcome this presumption. *Irving v.*

State, 533 N.W.2d 538, 540 (Iowa 1995). We will not second guess trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

To satisfy the second element, Stigler must show there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994). A defendant must establish that "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." *Irving*, 533 N.W.2d at 541 (quoting *Hill v. Lockhart*, 474 U.S. 52, 57-59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985)). A conclusory claim of prejudice that a defendant would have insisted on going to trial is insufficient. *State v. Myers*, 653 N.W.2d 574, 579 (Iowa 2002).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State. v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We preserve other claims for postconviction proceedings "where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle,* 652 N.W.2d at 203.

Stigler contends his counsel failed to perform an essential duty by not calling an expert witness on the issue of eyewitness identification. Two of the witnesses identified photos of Stigler before they identified him in person. Patton was told by an officer that she had picked the "right person." Stigler maintains if an expert witness could have testified to the science of eyewitness identification, its reliability, the effect of viewing a photo-array, the effect of positive

reinforcement from an officer and cross-racial identification the outcome would have been different. The State not only argues that Stigler's counsel did not fail to perform an essentially duty, but it speculates that Stigler's counsel pursued reasonable trial strategy in electing to forego calling an expert in eyewitness identification.

Here, we find the record incomplete. Although Stigler's counsel stressed factors throughout the trial that attempted to weaken the strength of the witness's identification of Stigler as the perpetrator, we cannot speculate whether counsel investigated the possibility of using testimony of an eyewitness identification expert. Therefore, we preserve Stigler's claim for postconviction relief proceedings.

AFFIRMED.