

IN THE COURT OF APPEALS OF IOWA

No. 6-536 / 05-1253
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KAREN KAY BRODSACK,
Defendant-Appellant.

Appeal from the Iowa District Court for Ringgold County, John Lloyd,
Judge.

Karen Kay Brodsack appeals her conviction for third-degree theft.

REVERSED AND REMANDED.

Linda Del Gallo, State Appellate Defender, and James Tomka, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Guddall, Assistant Attorney
General, and Clinton L. Spurrier, County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Karen Kay Brodsack appeals her conviction for third-degree theft. She argues she received ineffective assistance of counsel when her attorney failed to object to the joinder of her criminal mischief and theft charges and failed to object or request a limiting instruction pursuant to Iowa Rules of Evidence 5.401, 5.402, and 5.403. She also argues the “synergy” of her counsel’s mistakes constitute ineffective assistance of counsel. We reverse and remand.

I. Background Facts and Proceedings

In July 2004 Brodsack contacted Randall Gregg of S & G Rentals (S & G) about a possible rental home. S & G is owned by Randall Gregg, Kenneth Stephens, and Cindy Stephens. Gregg conducts the rental side of the business, while Kenneth Stephens performs maintenance. When Brodsack initially contacted Gregg, she told him she needed a place to rent, but did not have money for rent at the time. She also told him she had a large unpaid utility bill at her previous residence. Gregg agreed to work with her situation. He recently had a tenant move out and did not have time to clean the trailer Brodsack wanted to rent. Accordingly, he reduced Brodsack’s rental deposit. Gregg also agreed to put her utilities in his name, with the understanding she would pay him when the bills were due.

Brodsack and her codefendant, Robbie Dohrn, moved into the rental trailer in July 2004. Brodsack began paying her rent late. She also failed to pay Gregg for some of the utility bills. When Gregg visited the trailer in mid-December 2004, he found it vacated, in poor condition, and without a refrigerator. At the time, Brodsack owed Gregg approximately \$800 in rent and \$530 in

utilities. Gregg sent Brodsack a letter at her new residence requesting the money and the refrigerator. Brodsack did not respond.

Gregg contacted the sheriff about the missing refrigerator. He described it as a white Whirlpool refrigerator in relatively good condition. When the deputy investigating Gregg's claim visited Brodsack and Dohrn, he found an "older, very rough looking, white refrigerator" of a different brand. According to Brodsack, the refrigerator from the trailer was old and green and located in a shed behind the trailer. She reported to the deputy that the refrigerator had stopped working, and that she had gotten a replacement from a friend or relative. When the deputy went back to Gregg, they found an old, green, Hotpoint refrigerator in the shed behind the trailer. Gregg told the deputy it was not the refrigerator from the trailer. He denied ownership and claimed he did not know anything about the green refrigerator.

The State charged Brodsack with third-degree theft, an aggravated misdemeanor, in violation of Iowa Code sections 714.1(1) and 714.2(3) (2005). Brodsack was also charged with misdemeanor criminal mischief. The criminal mischief charge was tried to the bench while the theft charge was tried to the jury.¹ Thus, at trial evidence concerning the criminal mischief charge was heard by the jury. Specifically, the jury heard that Brodsack had a "large Alliant bill at a previous location," "Alliant wouldn't put utilities in her name," she had dog in

¹ The record is unclear as to when counsel agreed and the decision was reached to try the criminal mischief charge to the court simultaneously with the theft charge being tried to the jury. However, from the record submitted, the first indication that the defendant was even aware of this arrangement was when the court addressed her personally after the State had presented its case.

violation of S & G's policies, she owed \$800 in back rent to S & G, she owed \$530 in utilities to Gregg, and the trailer:

was trashed pretty bad. There was dog feces everywhere, especially in the back bedroom. There was [sic] pans of food in the bedroom—lasagna it looked like—that had been there several days. Very dirty, very dirty place. The cabinet doors, there was some damage there. One was missing.

The court acquitted Brodsack of criminal mischief. The jury, however, convicted her of third-degree theft in excess of \$500. The court sentenced Brodsack to an indeterminate two-year term, suspended the sentence, and placed Brodsack on probation. Brodsack appeals.

II. Standard of Review

We review ineffective assistance claims de novo. *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006).

III. Merits

Brodsack argues her counsel was ineffective for (1) failing to object to the joinder of the charges at her trial and (2) failing to object to or request a limiting instruction for prejudicial evidence pursuant to Iowa Rules of Evidence 5.401, 5.402, and 5.403. She also argues the combination of her counsel's errors amount to ineffective assistance. We agree counsel was ineffective and therefore reverse and remand.

In order to show her counsel was ineffective, Brodsack must show not only that her counsel breached an essential duty, but that the breach prejudiced her defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Generally, we preserve ineffective assistance of counsel claims for postconviction proceedings. *Tate*, 710 N.W.2d

at 240. However, if the record on direct appeal is adequate, we will address the claim. *Id.*; see *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). The record in this case is sufficient.

According to the jury instruction on theft read to the jury during Brodsack's trial, the State had to prove the following:

1. On or about the 22nd day of December, 2004, the defendant took possession or control of a refrigerator.
2. The defendant did so with the intent to deprive S & G Rentals, LLC, of the refrigerator.
3. The property, at the time of the taking, belonged to S & G Rentals, LLC.

In addition to information about the refrigerator, however, the jury also heard all of the evidence involving the criminal mischief case being tried separately to the judge. That evidence included the facts that Brodsack owed a large amount of money to S & G Rentals, that S & G Rentals had not pursued a civil remedy against her, and that she left the trailer "very dirty." While this information was arguably relevant to the criminal mischief charge, it is questionable whether it was relevant to her theft charge. However, even relevant evidence may be excluded under rule 5.403 "if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. In analyzing evidence under this rule, we weigh the probative value of the evidence against its prejudicial characteristics. *State v. Price*, 692 N.W.2d 1, 4 (Iowa 2005).

Evidence is unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause the jury to base its decision on something other than the established propositions in the case.

Id. at 5. (quotations omitted). Unfair prejudice may occur when there are insufficient efforts taken to limit the effect of the prejudice or when “the theory on which the evidence was offered was designed to elicit a response from the jurors not justified by the evidence.” *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997) (quoting *State v. Plaster*, 424 N.W.2d 226 231-32 (Iowa 1988)).

In this case, evidence that Brodsack “trashed” the trailer before leaving is particularly prejudicial. The evidence against her with respect to the theft charge was relatively weak: it was her word against S & G’s word that there ever was a white refrigerator owned by S & G in the trailer. The evidence concerning the state of the trailer, on the other hand, was detailed and prejudicial. The jury heard she left dirty dishes with rotten food, and that it “wasn’t anything you’d want to see everyday.” It heard she left trash around and that the kitchen cupboard doors were damaged. It also heard she left dog feces “all over” and that, while Gregg and Stephens normally cleaned the rental units, they had to hire someone to clean Brodsack’s trailer. Since the criminal mischief charge was tried to the bench and not listed in the trial information, the jury was not aware Brodsack might otherwise be held accountable for her actions. Counsel did not even request a limiting instruction. The prejudicial effect of the evidence is indicated in the jury’s conviction of theft in excess of \$500. According to Gregg’s testimony, the refrigerator was approximately six to seven years old. He testified that while a new refrigerator would cost between \$550 and \$600, he could probably purchase a used one for \$250.

We therefore conclude Brodsack’s attorney was ineffective both in failing to object to the joinder of the charges and in failing to object to the prejudicial

evidence against her. We also conclude she was prejudiced by this failure. We therefore reverse and remand for retrial of the theft charge.

REVERSED AND REMANDED.