

IN THE COURT OF APPEALS OF IOWA

No. 7-073 / 06-575
Filed March 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHUJUN YANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Sylvia A. Lewis,
Judge.

The defendant appeals from his conviction of domestic abuse assault
while displaying a dangerous weapon. **REVERSED AND REMANDED.**

Patricia Reynolds, Acting State Appellate Defender, and Robert P.
Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, J. Patrick White, County Attorney, and Victoria Cole, Assistant County
Attorney, for appellee.

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

EISENHAUER, J.

Defendant-appellant Shujun Yang appeals his conviction, following a trial to the court, for domestic abuse assault while displaying a dangerous weapon. Yang contends his trial counsel was ineffective for failing to ensure that his waiver of jury trial was knowing, voluntary and intelligent. He also claims that there is not sufficient evidence to support his conviction.

BACKGROUND FACTS AND PROCEEDINGS.

On December 12, 2005, Yang was charged with domestic abuse assault while displaying a dangerous weapon, in violation of Iowa Code sections 708.1, 708.2(3), 708.2A(2)(c), and 236.2 (2005). On March 3, 2006, Yang signed a written waiver of jury trial. The waiver indicated he understood that by waiving the jury trial: (1) he gave up the right to be tried by a jury of twelve members of the community; (2) he would no longer help in the jury selection, since there would be no jury; (3) the conviction would not be based on a unanimous verdict of twelve persons; (4) his case would be decided solely by the court; and (5) he would not be rewarded either by the court or the prosecution for waiving his right to a jury trial.

The trial to the court was held on March 6, 2006. At the beginning of the trial, the court noted in passing, “[l]ast Friday Mr. Yang did waive his right to a jury trial.” The court then proceeded to take the victim’s testimony. There is no record of any in-court colloquy or other personal contact between the trial court and Yang regarding Yang’s waiver of jury trial. At the end of the trial, the court

found Yang guilty as charged. Yang was sentenced to a prison term not to exceed two years and assessed a fine of \$500 plus surcharge.

Yang appeals. He contends his counsel was ineffective for failing to ensure the trial court following the procedures for waiver of a jury trial as set forth in Iowa Rule of Criminal Procedure 2.17(1).

STANDARD OF REVIEW.

We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). Generally, ineffective claims are preserved for post-conviction relief. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). However, claims can be resolved on direct appeal when the record adequately presents the issue. *Id.* The record in this case is adequate to decide this issue on direct appeal.

ANALYSIS.

To succeed with a claim of ineffective assistance of counsel, a defendant typically must prove the following two elements: (1) counsel failed to perform an essential duty, and (2) defendant was prejudiced by counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).

Iowa Rule of Criminal Procedure 2.17(1) states, “[c]ases required to be tried by jury shall be so tried unless the defendant voluntarily and intelligently waives a jury trial in writing and on the record.”

The Iowa Supreme Court construed this provision in *State v. Liddell*, 672 N.W.2d 805 (Iowa 2003). It held the “on the record” language in this provision

required some in-court colloquy or personal contact between the court and the defendant in order to ensure the defendant's waiver is knowing, voluntary, and intelligent. *Id.* at 812. Liddell also suggested a five-part inquiry the in-court colloquy may involve. *Id.* at 814. The court clarified that this five-part inquiry is not "black-letter rules nor a 'checklist' by which all jury-trial waivers must be strictly judged." *Id.* Substantial compliance with this five-part inquiry is acceptable. *Id.*

From the record we can see that the district court did not conduct an in-court colloquy regarding his waiver of jury trial. It did not address to Yang what rights he was giving up by waiving his right to a jury trial. Neither did it ask whether Yang truly understood the content of the waiver he had signed. Measuring by the standard set forth in *Liddell*, the record does not demonstrate a voluntary and intelligent waiver. Trial counsel's failure to ensure compliance with the requirement of rule 2.17(1) is a breach of an essential duty.

The Iowa Supreme Court has held that when a counsel fails to ensure compliance with Iowa Rule of Criminal Procedure 2.17(1), prejudice is presumed. *State v. Stallings*, 658 N.W.2d 106, 112 (Iowa 2003). The Iowa Supreme Court reasoned that, "[b]ecause the right to a jury trial is so fundamental to our justice system, we conclude this is one of those rare cases of a 'structural' defect in which prejudice is presumed." *Id.*

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. We therefore reverse Yang's conviction and remand for trial to a jury unless

Yang properly waives his right to a jury trial. In view of this conclusion, we need not address the issue of insufficient evidence.

RESERVED AND REMANDED.