

IN THE COURT OF APPEALS OF IOWA

No. 8-657 / 07-1483
Filed September 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY MORA,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Lawrence E. Jahn,
District Associate Judge.

Defendant appeals his conviction of forgery contending he received
ineffective assistance of counsel. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Stephen Holmes, County Attorney, and Keisha Cretsinger, Assistant
County Attorney, for appellee.

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

SACKETT, C.J.

Defendant, Tony Mora, appeals from his conviction of forgery in violation of Iowa Code sections 715A.2(1)(b) and 715A.2(2)(a)(3) (2007) contending he received ineffective assistance of counsel when his attorney failed to object to a jury instruction. We affirm.

I. BACKGROUND.

In early 2007 Mora was dating and living with Tammy Sharp-Becker. Mora moved out of the residence on March 27, 2007, taking a bag of items with him. Two days after Mora moved out, Sharp-Becker began learning from various businesses that someone was writing checks from her bank account. She testified at trial that a series of checks and two prescription medicine bottles were missing after Mora moved out and she did not give anyone permission to use the checks or take the medication. Sharp-Becker reported the unauthorized use of her checks and the missing items to law enforcement and officer Jennifer Segall began an investigation, focusing on Mora. Segall recovered the medication bottles from Mora but did not recover any of Sharp-Becker's checks.

Mora was charged with three counts of forgery and one count of theft. At trial, Mora stipulated that he executed three checks but claimed he had permission from Sharp-Becker to do so. He claimed the pill bottles were mistakenly in his bag. He was convicted on all counts and now appeals the forgery convictions contending the jury received improper instructions on intent and his attorney's failure to object to these instructions resulted in ineffective assistance of counsel.

II. STANDARD OF REVIEW.

We generally preserve ineffective assistance of counsel claims for postconviction relief but will address the claim if the record is sufficient. *State v. Lane*, 726 N.W.2d 371, 392-93 (Iowa 2007). We find the record adequate to evaluate Mora's claim. Ineffective assistance of counsel claims are grounded in the Sixth Amendment and as such, we review Mora's claim de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

III. ANALYSIS.

Mora contends he received ineffective assistance of counsel because his attorney should have objected to a jury instruction describing intent. The jury received two instructions on intent. Instruction twenty-two is the uniform jury instruction on general intent and instruction twenty-three defines specific intent.¹ The crimes of forgery and theft require a finding of specific intent. See Iowa

¹ Instruction 22 provides:

To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude a person intends the natural results of his acts.

Instruction 23 provides:

"Specific intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.

Because determining the defendant's specific intent requires you to decide what he was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine Mr. Mora's specific intent. You may, but are not required to, conclude a person intends the natural results of his acts.

Code § 715A.2(1) (listing “intent to defraud or injure” a person as an element of forgery); *State v. Calhoun*, 559 N.W.2d 4, 6 (Iowa 1997) (listing an element of forgery as the defendant acting “with the specific intent to defraud or injure another person or financial institution or [knowing] his act would facilitate a fraud or financial injury.”); Iowa Code § 714.1(1) (defining theft as taking control or possession of another’s property “with the intent to deprive the other thereof.”); *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999) (explaining that theft by taking another’s property requires proof the “defendant acted with the specific purpose of depriving the owner of his property.”). Mora claims error occurred when the jury was instructed on general intent. He argues counsel should have objected to the general intent instruction and he was prejudiced by this failure because the jury may have convicted him only on a finding of general intent. The State argues Mora was not prejudiced by the instruction since the jury was also given the specific intent instruction.

To succeed on this claim, Mora must prove by a preponderance, (1) his counsel failed to perform an essential duty, and (2) this error caused Mora prejudice. *Maxwell*, 743 N.W.2d at 195 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)); *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001); *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). We may affirm if either element is not satisfied. *Brooks*, 555 N.W.2d at 448.

To establish the prejudice element, Mora must prove “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of

the proceeding would have been different.” *Ledezma*, 626 N.W.2d at 143 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). In determining the prejudice element, we consider the totality of the evidence, the factual findings affected by counsel’s potential error, and whether the error was pervasive or isolated and trivial. *Maxwell*, 743 N.W.2d at 196.

When a defendant makes an ineffective assistance of counsel claim alleging the attorney should have objected to a specific instruction, “the instruction complained of [must be] of such a nature that the resulting conviction violate[s] due process.” *Id.* (quoting *State v. Hill*, 449 N.W.2d 626, 629 (Iowa 1989)). No prejudice occurs when a superfluous instruction does not create a reasonable probability the result would be different absent counsel’s error. *Id.* at 197; *State v. Tejada*, 677 N.W.2d 744, 755 (Iowa 2004). If the instruction does not misstate the law or contradict other instructions, there is no prejudice. *Maxwell*, 743 N.W.2d at 197; *Tejada*, 677 N.W.2d at 755. Further, when presented with challenges to jury instructions, we evaluate the instructions as a whole rather than in isolation. *State v. Shanahan*, 712 N.W.2d 121, 140 (Iowa 2006).

In viewing the instructions as a whole, we conclude Mora has failed to prove there is a reasonable probability that the result of the trial would have been different had his counsel objected to the instruction explaining general intent. The instructions for each count of forgery required the jury to find, among other

things, “[t]he defendant specifically intended to defraud or injure Ms. Sharp-Becker.” The instruction on general intent advised that an intentional act must be one done “voluntarily, not by mistake or accident” and advised the jury it could “conclude that a person intends the natural results of his acts.” The second instruction defining specific intent goes further, noting this type of intent requires one’s acts to be not only voluntary, but “in addition, [done] with a specific purpose in mind.” This instruction also advised the jury to consider the circumstances surrounding the act to determine Mora’s specific intent and repeated that the jury could “conclude that a person intends the natural results of his acts.”

The instructions on intent are both correct statements of the law and do not contradict one another. Both instructions were relevant and helpful to the jury given Mora’s defense. Mora claimed the prescription bottles were in the bag by accident and he believed he had permission to write the checks. The general intent instruction advised the jury that he could not be found guilty of the crimes if his actions were by mistake or by accident. Also, the jury was clearly advised that a finding of specific intent or purpose was required for the jury to convict Mora of forgery. Specific intent was referenced in the forgery instructions and the jury was given a separate instruction explaining the legal definition of specific intent. Finding Mora suffered no prejudice from the inclusion of instructions on both general and specific intent, we affirm.

AFFIRMED.