

IN THE COURT OF APPEALS OF IOWA

No. 8-720 / 07-2138
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESUS ROBERTO BUSTAMANTE,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Carl D. Baker,
Judge.

Defendant appeals his guilty plea claiming ineffective assistance of
counsel requires resentencing. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, Stephen Holmes, County Attorney, and Bryan J. Barker,
Assistant County Attorney, for appellee.

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

EISENHAUER, J.

In August 2007, Larry Hopkins and Jesus Bustamante confined Steven Cross in Bustamante's apartment where they hit him in the head with a beer bottle, beat him with dog chains, and pistol-whipped him. At the hospital Cross was diagnosed with a concussion and required stitches. On November 8, 2007, Bustamante pled guilty to third-degree kidnapping and willful injury causing serious injury with the use of a dangerous weapon.

Bustamante appeals arguing ineffective assistance of counsel, a claim we review *de novo*. See *State v. Scalise*, 660 N.W.2d 58, 61 (Iowa 2003). To succeed on his ineffective-assistance-of-counsel claim, Bustamante must show counsel failed to perform an essential duty and he was prejudiced as a result. See *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). We resolve "such claims on direct appeal where the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements." *Id.* We find the record adequate to decide this issue on direct appeal.

Bustamante argues his trial counsel was ineffective for permitting him to plead guilty to the willful injury charge and for failing to file a motion in arrest of judgment. Bustamante asserts the record does not contain a factual basis to support his willful injury guilty plea because there is insufficient evidence Cross suffered a serious injury.

"The record to support a factual basis for a guilty plea includes the minutes of testimony, statements made . . . at the guilty plea proceeding, and the presentence investigation report." *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). "Where a factual basis for a charge does not exist, and trial counsel

allows defendant to plead guilty anyway, counsel has failed to perform an essential duty.” *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). Additionally, prejudice is inherent under the circumstances. *Id.*

The State argues the record shows Cross suffered a serious injury under the statutory definition of a bodily injury causing “serious permanent disfigurement.” See Iowa Code § 702.18(1)(b)(1) (2007). The Iowa Supreme Court has defined this element to include injuries “which leave the victim permanently scarred or twisted . . . [in contrast to] a black eye, a bloody nose, and even a simple broken arm or leg.” *State v. Epps*, 313 N.W.2d 553, 557 (Iowa 1981); see *State v. Phams*, 342 N.W.2d 792, 795-96 (Iowa 1983) (rejecting claim of no “serious permanent disfigurement” because hair would cover victim’s head scar and victim’s ear scar did not make ear twisted or mutilated).

The hospital records state Cross received stitches and had a 1.5 centimeter laceration over his left eye and a one centimeter laceration in the right temporal area. Three months later, Cross completed a victim impact statement stating: “I had to have stitches it left scars and I had a concussion.”

The level of proof necessary to support the factual basis for a guilty plea is not the same as the level of proof required to support a conviction. *Keene*, 630 N.W.2d at 581. “[T]he trial court is not required to extract a confession from the defendant. Instead, it must only be satisfied that the facts support the crime, not necessarily that the defendant is guilty.” *Id.* We are satisfied the facts support the crime. Therefore, a factual basis exists to support Bustamante’s plea of guilty. Accordingly, Bustamante’s counsel was not ineffective for permitting him to plead guilty.

Our conclusion makes it unnecessary for us to decide whether Cross suffered a “protracted loss or impairment of the function of any bodily” organ or member under Iowa Code section 702.18(1)(b)(3). Additionally, trial counsel did not breach a duty owed to Bustamante by not filing a motion in arrest of judgment to challenge the guilty pleas. Bustamante’s ineffective assistance of counsel claim is without merit.

AFFIRMED.