IN THE COURT OF APPEALS OF IOWA

No. 1-713 / 11-0266
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD DAMON SEBERN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Richard Sebern appeals from his convictions for first-degree burglary and first-degree robbery. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Michael T. Hunter, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On September 3, 2010, Pamela Riley and her daughter Cherelle Hayes were in the kitchen of their house when a man entered the kitchen through an unlocked door. In the past, Riley had sold drugs on a regular basis to an individual named Rob Barsetti Jr. Riley testified the intruder held a grilling fork in front of him and stated that Barsetti had told him Riley had drugs and money. The intruder stated he wanted everything Riley had. Riley testified the intruder stated that Barsetti owed him money and that "he was going to get it one way or another." Riley told the intruder she did not have anything and asked him to leave. She testified the man "said that he would kill us. He said that he didn't want to hurt us. He just wanted the drugs and money and that he would leave." The man led the women through the house looking for drugs or money. He took the women's cell phones, house keys, jewelry, loose change, and medicine he found in the house, and then he left.

Riley called the police and told officers that the suspect mentioned Barsetti owed him money. Riley also contacted Barsetti and gave him a description of the suspect. Riley testified Barsetti immediately gave her the name of Richard Sebern. Riley relayed this information to police. Barsetti informed Riley that he owed Sebern money. Barsetti also told Riley that Sebern had gone to Barsetti's parents' house earlier on the day of the robbery and asked where Barsetti was and stated Barsetti owed him money. Barsetti testified he called Sebern to ask him about going over to his parents' house and about the incident at Riley's. Barsetti stated he asked Sebern "why he did it," and Sebern responded, "I

wanted my money." No grilling fork was found and none was admitted into evidence.

On October 8, 2010, the State filed a trial information charging Sebern with first-degree burglary and first-degree robbery. At trial, the women testified the intruder threatened them with a grilling fork they each described differently. The State presented no testimony informing the jury about the characteristics of a grilling fork as a dangerous weapon. A jury found Sebern guilty as charged.

Sebern now appeals, asserting his trial counsel was ineffective in: (1) failing to challenge the sufficiency of the evidence to prove the "dangerous weapon" element of the charges, and (2) failing to object to a jury instruction that erroneously defined "dangerous weapon."

II. Ineffective Assistance of Counsel

We review Sebern's claims of ineffective assistance of counsel de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). Although we ordinarily preserve ineffective-assistance-of-counsel claims for postconviction proceedings, we find that in the present case the record is adequate to decide the claim on direct appeal. *See State v. Stewart*, 691 N.W.2d 747, 751 (Iowa 2004).

In order to prove his counsel was ineffective, Sebern must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id*. In order to establish the first prong of the test, Sebern must show that his counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To satisfy the second prong, Sebern "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Taylor*, 352 N.W.2d at 684.

Iowa Code section 702.7 (2009) provides three paths under which a weapon may be deemed dangerous. The parties agree that two of the three alternatives do not apply. The third alternative defines a dangerous weapon to include

> any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is *capable of inflicting death* upon a human being.

Iowa Code § 702.7 (emphasis added). However, the jury in Sebern's case was instructed that a dangerous weapon included "any sort of instrument or device which is actually used in such a way as to indicate the user intended to inflict death or serious injury, and when so used is *capable of inflicting death or serious injury*." Sebern asserts the jury instruction incorrectly lowered the State's burden of proof by allowing the jury to find the grilling fork to be dangerous if it was capable of inflicting death or serious injury, as opposed to just death. Sebern asserts his counsel was ineffective for failing to object to this erroneous instruction.

We first consider whether Sebern's counsel breached an essential duty. Courts generally presume counsel is competent and a "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995) (citation and internal quotations omitted). The jury instruction misstates the law as given in section 702.7. A failure to recognize an

erroneous instruction and preserve error breaches an essential duty. *State v. Hopkins,* 576 N.W.2d 374, 379–80 (Iowa 1998). We further conclude this error could not have been a strategic decision. No possible advantage could have flown to Sebern from trial counsel not pointing out the flawed nature of the instruction, which expanded the definition of "dangerous weapon," an essential element of both crimes for which Sebern was convicted. Thus, we conclude counsel breached an essential duty.

Next, we consider whether Sebern can show he was prejudiced by counsel's error. *See Foster v. State*, 378 N.W.2d 713, 721 (Iowa Ct. App. 1985) (noting that even when a jury instruction incorrectly states the law, the defendant must still prove prejudice to prevail on a claim of ineffective assistance of counsel). We believe counsel's failure to object to the erroneous jury instruction undermines confidence in the outcome of the case. The State offered minimal evidence regarding the grilling fork used in this case. Hayes testified the weapon a was "high-end grilling fork" about ten to twelve inches long, with stainless steel prongs about three to four inches in length and a red, plastic handle. Riley simply testified the fork was "very large" and had a wooden handle. We cannot agree with the State that the jury, relying on this conflicting testimony and common sense alone, would have inevitably concluded the grilling fork was capable of inflicting death on a human being. *See State v. Manning*, 224 N.W.2d 232, 236 (Iowa 1974) ("Matters of common knowledge and experience may be used by jurors in arriving at their verdict and in drawing inferences and reaching conclusions from the evidence.").

In *State v. Tusing*, 344 N.W.2d 253, 254–55 (Iowa 1984), the supreme court declined to find that brass knuckles were capable of inflicting death as a matter of law, though the court acknowledged that a fact finder could conclude a particular set of brass knuckles, based on their construction and the materials used to make them, was capable of inflicting death. Similarly, because some grilling forks are arguably capable of causing death and others are not, we believe it is essential that the jury have an opportunity to consider the fact question of whether the particular grilling fork used by Sebern was capable of inflicting death. *See Tusing*, 344 N.W.2d at 254 (noting that because some brass knuckles have the capability to kill a person while others "could conceivably be so flimsily constructed so as to have little more impact on the victim than bare knuckles," it is an issue for the fact finder). Unlike in *State v. Jones*, another case filed today, the jury in this case received an improper instruction regarding the definition of a dangerous weapon and was not given the opportunity to consider whether the grilling fork was capable of causing death using the proper definition. The failure of the jury to determine, after properly instructed, whether the grilling fork used by Sebern was capable of inflicting death undermines our confidence in the outcome of the trial.

We conclude Sebern was prejudiced by counsel's failure to object to the instruction that erroneously expanded the definition of "dangerous weapon" as an element of first-degree burglary and first-degree robbery. We reverse and remand for a new trial with the jury properly instructed on the definition of "dangerous weapon."

REVERSED AND REMANDED.