IN THE COURT OF APPEALS OF IOWA

No. 2-1027 / 12-0251
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN BENEDICT KETCHENS JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

John Ketchens Jr. appeals his conviction for public intoxication third offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellee.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Peter W. Blink, Assistant County Attorney, for appellee.

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

TABOR, J.

John Ketchens Jr. appeals his conviction for public intoxication, third offense.[1] He asserts his trial counsel rendered ineffective assistance by failing to object to an alternative legal theory in the marshalling instruction. Because a reasonable juror could infer from circumstantial evidence that Ketchens drank alcohol in a public place, substantial evidence supported submitting that alternative to the jury. Therefore counsel had no duty to challenge the instruction.

I. Background Facts and Proceedings

On February 11, 2011, James Hawk was waiting for his bus at the Greyhound depot in Waterloo when he encountered another rider later identified as Ketchens. Seated facing one another, Hawk and Ketchens had a brief conversation. After Hawk fell silent, Ketchens yelled out, "Hey, I'm talking to you." At that point, Hawk noticed Ketchens slurring his words.

When another woman entered the depot, Ketchens also said to her, "Hey, I'm talking to you." She ignored him and eventually left. Hawk observed Ketchens "wasn't talking as properly as a normal person would . . . his eyes kind of looked like they were down." Hawk did not see Ketchens drink any liquor at the depot. Hawk advised a bus driver that he believed Ketchens was drunk, and the driver called police.

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[1] We describe the crime committed by Ketchens as "public intoxication"—as the district court did in the judgment order. But we understand that Iowa Code section 123.46(2) (2011)criminalizes both consumption of alcohol in any public place (except premises controlled by a liquor license) and intoxication in a public place. These offenses are separate crimes with distinct elements but compose alternative means to violate that code provision.

Officers Enes Mrzljak and Joshua Wessels were dispatched to the depot on the report of a man bothering other patrons. Arriving first on scene, Officer Mrzljak found Ketchens sitting in the waiting room with a half-empty 200 milliliter glass bottle of brandy sticking out of his left sweatshirt pocket. Officer Mrzljak noticed Ketchens smelled like an alcoholic beverage and had bloodshot, watery eyes. Ketchens admitted drinking from the bottle of brandy.

When Officer Wessels poured the remaining contents of the bottle into a drinking fountain, he confirmed the smell of brandy. The second officer also saw that Ketchens's eyes were bloodshot and watery, and smelled alcohol on his breath. Ketchens told Officer Wessels he was waiting for a ride, but not from a bus, that he was meeting a "lady friend" and "if he was not wanted at the bus lobby, he would rather go to the library."

Officer Wessels asked Ketchens to consent to a preliminary breath test to determine his level of intoxication. Ketchens agreed to the test but would not or could not blow hard enough to register his blood alcohol content. Based on their training and experience, both officers believed Ketchens was intoxicated. The officers also verified the Greyhound station did not have a liquor control license.

Officer Wessels arrested Ketchens and transported him to the Black Hawk County jail. When a deputy asked if he possessed any contraband, Ketchens admitted having a marijuana cigarette in his sock. Officers seized the cigarette, which tested positive for marijuana.

On March 25, 2011, the State filed a trial information charging Ketchens with one count of possession of a controlled substance, third offense, in violation of Iowa Code section 124.401(5), and one count of public intoxication, third offense, in violation of sections 123.46 and 123.91. Ketchens pleaded not guilty to both charges, and a trial began on November 15, 2011.[2] The following day, a jury found him guilty on both counts.

After denying Ketchens's motion for a new trial, the court sentenced him to consecutive terms of imprisonment not to exceed two years. Ketchens now appeals the public intoxication conviction, claiming he received ineffective assistance of counsel.

II. Scope and Standard of Review

We review ineffective-assistance-of-counsel claims de novo—looking at the totality of circumstances relating to the attorney's conduct. *State v. Lane*, 743 N.W.2d 178, 180 (Iowa 2007). Ordinarily we preserve these claims for postconviction proceedings. *State v. Kingery*, 774 N.W.2d 309, 312 (Iowa Ct. App. 2009). Where, as here, the record is adequate to address the allegations concerning counsel's performance, we will decided the claim on direct appeal. *See id.*

When determining whether sufficient evidence supported submission of a jury instruction, we view the record in the light most favorable to the requesting party. *State v. Millbrook*, 788 N.W.2d 647, 650 (Iowa 2010). "Evidence is

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[2] The State introduced testimony from Hawk, Officers Wessels and Mrzljak, and a crime lab technician. Ketchens did not testify, but called his friend Chester Bailey, who claimed to have been with Ketchens at the bus station earlier on the day of his arrest.

substantial to support submission of an instruction to the jury when a reasonable mind would accept the evidence as adequate to reach a conclusion." *State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996).

III. Analysis

The State charged Ketchens for either appearing intoxicated in a public place or consuming an alcoholic beverage in a public place other than a premises covered by a liquor control license. *See* Iowa Code § 123.46(2). At the request of the prosecutor, the district court instructed the jury on both the being-intoxicated-in-public alternative and the public-consumption alternative.

At issue is the following marshalling instruction:

> The State must prove both of the following elements of Public Intoxication:
> 1. On or about the 11th day of February, 2011, the defendant was in a public place.
> 2. (a) The defendant was intoxicated or acting in an intoxicated manner.
>
> or
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> (b) The defendant consumed alcoholic liquor in a public place on a premise not covered by a liquor control license.
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> (It is not necessary for all jurors to agree to just (a) or just (b). It is only necessary that all jurors agree to at least one of these two alternatives.)
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> If the State has proven both of the elements, the defendant is guilty of Public Intoxication. If the State has failed to prove either of the elements, the defendant is not guilty.

The jury found Ketchens guilty by general verdict, leaving no way to tell which theory each juror embraced.

On appeal, Ketchens argues his attorney was ineffective by not objecting to submission of the public-consumption instruction. He asserts the State's evidence was insufficient to support inclusion of that alternative. He notes none

of the witnesses saw him drink from the bottle, no evidence shows how long he was at the bus station, and his admission to drinking from the bottle did not pinpoint where his consumption occurred. Ketchens contends: "The instructions in this case permitted the jury to find defendant guilty if it believed he had consumed alcohol on the premises of the bus station even when there was no evidence to establish that he had done so."

The State counters that counsel had no cause to object because sufficient circumstantial evidence supported the alternative theory of consumption. The State highlights the fact that officers found the half-empty brandy bottle in a "very accessible place"—Ketchens's front sweatshirt pocket. The State also notes Ketchens's admission to officers that he had been drinking from the bottle. The State urges: "Given the context of his admission, and his state of intoxication, it is a fair inference that Ketchens drank from the bottle very recently."

To establish a claim for ineffective assistance of counsel, a defendant must prove trial counsel failed to perform an essential duty, and the failure resulted in prejudice. *State v. Madsen*, 813 N.W.2d 714, 723 (Iowa 2012). Both elements must be shown by a preponderance of the evidence. *Id.* If either element is absent, the claim fails. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011).

To prove the breach-of-duty prong of the analysis, the defendant must show counsel performed below the standard of a "reasonably competent attorney," measuring counsel's performance against "prevailing professional norms." *Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012) (quoting

Strickland v. Washington, 466 U.S. 668, 687–88 (1984)). We begin with the presumption that the attorney rendered competent representation and proceed to an individualized fact-based analysis. *Id.* Because an attorney has no duty to lodge a meritless objection, we first examine the validity of Ketchens's appellate challenge to the consumption alternative. *See State v. Bryant*, 819 N.W.2d 564, 568 (Iowa 2012).

The State pursued two theories at trial. In summation, the prosecutor listed the evidence that Ketchens "smelled of booze," "was slurring his speech," and had bloodshot eyes. The prosecutor then argued to the jurors:

> Even if you don't find he was intoxicated, even if you don't find he was acting intoxicated, all right, we go to . . . letter (b). "The defendant consumed alcoholic liquor in a public place on a premise not covered by a liquor control license."
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> He had half a bottle of brandy on him; he'd been sitting there, and admits drinking to the cop. Who carries a half bottle of brandy in their pocket if they're not drinking it? It doesn't make sense. You don't carry a half bottle of booze, tell someone you've been drinking it, if you haven't been drinking it.

In Iowa, parties to a lawsuit are entitled to have their legal theories submitted to the jury if the theories are backed by substantial evidence in the record. *Hogrefe*, 557 N.W.2d at 876. In assessing substantial evidence, we consider circumstantial evidence equally probative as direct evidence. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). Our courts long ago eliminated any distinctions between direct and circumstantial evidence in testing evidential sufficiency. *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979) (disapproving jury instruction that required circumstantial evidence to "exclude every reasonable hypothesis of his innocence"). Our courts have defined

circumstantial evidence as proof of a fact or a set of facts "from which the existence of the fact to be determined may reasonably be inferred." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998). It must be "based upon the evidence given, together with a sufficient background of human experience to justify the conclusion." *Id*.

Ketchens asserts on appeal that he "could well have drunk half the bottle at home before going to the station." While that assertion may be a reasonable hypothesis of his innocence on the public consumption alternative, we can find circumstantial evidence to be substantial without ruling out every hypothesis inconsistent with guilt. *See State v. Bentley*, 757 N.W.2d 257, 263 (Iowa 2008).

It was possible for the State to prove Ketchens's public consumption of liquor even when witnesses testified they did not see him drink. *Cf*. *State v. Boleyn*, 547 N.W.2d 202, 205–06 (Iowa 1996) (finding substantial evidence of operating while intoxicated even when vehicle was parked). A reasonable fact finder could have concluded Ketchens consumed brandy while in the bus depot—considering the time he spent there harassing other patrons, his visible state of intoxication, the noticeable odor of alcohol on his breath, his ready access to the half-drank liquor bottle, and his admission to drinking from the bottle. We find the inference to be drawn from this set of facts exceeds mere speculation or conjecture.

Because the evidence was sufficient to present both alternatives to the jury, Ketchens's counsel had no duty to object to the public consumption theory.

See State v. Soboroff, 798 N.W.2d 1, 9 (Iowa 2011) (holding counsel had no duty to pursue a meritless issue). Accordingly, his claim fails.

AFFIRMED.