IN THE COURT OF APPEALS OF IOWA

No. 7-853 / 07-0144
Filed December 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK RAYMOND SORTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Carol L. Coppola (trial) and Gregory Brandt (sentencing), Judges.

Defendant appeals his sentence and conviction for forgery as an habitual offender. **REVERSED AND REMANDED FOR ORDER OF DISMISSAL.**

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

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and James P. Ward, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Vaitheswaran and Baker, JJ.

SACKETT, C.J.

Defendant, Mark Raymond Sorter, was convicted of forgery as an habitual offender in violation of Iowa Code sections 715A.2 and 902.8 (2005). The defendant appeals his conviction and sentence claiming, (1) there was insufficient evidence to support the conviction, (2) he received ineffective assistance of counsel, and (3) the court had no authority to impose a fine on the defendant's forgery conviction as an habitual offender. We reverse the conviction and remand for an order of dismissal.

BACKGROUND. In the middle of May 2006 someone stole several boxes of checks from Barbara Ann Smith's home in Des Moines. Smith reported the theft to police and cancelled the checking account. On June 1, 2006, Connie Dobberthein and the defendant went to New Impressions Spa and Salon in Des Moines to receive haircuts. As they waited, they were each asked to complete welcome forms. On the forms Connie identified herself as Barbara Ann Smith and the defendant identified himself as Mark Smith. Connie used one of the checks stolen from Barbara Ann Smith to pay for haircuts and styling products for herself and the defendant. Connie signed the check as Barbara A. Smith. The salon owner learned the check bounced and called the police. The stylists and spa employees identified Connie as the person who wrote the check and the defendant as the man with her in the salon.

After a jury trial, the defendant was convicted of forgery. Defendant's counsel moved for a directed verdict and judgment of acquittal based on insufficient evidence and the court overruled these motions. The defendant stipulated to having two prior felony convictions and thus was sentenced as an

habitual offender. The court sentenced the defendant to an indeterminate term of imprisonment not to exceed fifteen years. The court also imposed but suspended a $750 fine.

STANDARD OF REVIEW. We review a court's ruling on challenges to sufficiency of the evidence, such as motions for judgment of acquittal, for correction of errors at law. Iowa R. App. P. 6.4; *State v. Hutchinson*, 721 N.W.2d 776, 780 (Iowa 2006). Ineffective assistance of counsel claims are analyzed by a de novo review. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

ERROR PRESERVATION. The defendant first argues there was insufficient evidence for the jury to convict him of forgery under the instructions submitted to the jury. "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). Even if a motion for judgment of acquittal is filed, error is not preserved if the specific claim is not included. *Id.* The defendant's trial counsel moved for a directed verdict and filed a motion for a new trial and a motion in arrest of judgment challenging the sufficiency of the evidence. However, defendant's counsel did not state the specific grounds of error that defendant claims here. Therefore, error was not preserved. Defendant claims that if error is not preserved on this claim, he received ineffective assistance of counsel when counsel failed to object on this specific ground. Errors due to ineffective counsel do not need to be preserved for appeal. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006).

FORGERY. Defendant contends he received ineffective assistance of counsel when his attorney did not argue that there was insufficient evidence that the defendant or Connie "altered a writing" to support a forgery conviction. There are several means of committing forgery under the applicable statute. It states in relevant part:

> 1. A person is guilty of forgery if, with intent to defraud or injure anyone, or with knowledge that the person is facilitating a fraud or injury to be perpetrated by anyone, the person does any of the following:
>
> a. *Alters a writing* of another without the other's permission.
>
> b. *Makes, completes, executes, authenticates, issues, or transfers a writing* so that it purports to be the act of another who did not authorize that act, or so that it purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or so that it purports to be a copy of an original when no such original existed.
>
> c. *Utters a writing* which the person knows to be forged in a manner specified in paragraph "a" or "b".
>
> d. *Possesses a writing* which the person knows to be forged in a manner specified in paragraph "a" or "b".

Iowa Code § 715A.2(1) (emphasis added). The jury was not instructed on each method of committing forgery. The forgery instruction the jury received stated only that the State must prove all of the following elements to find the defendant guilty:

> 1. On or about the first day of June, 2006, the defendant or someone he aided and abetted, uttered a check to the New Impressions Spa and Salon.
>
> 2. At the time, the defendant knew the check had been *altered* without the permission of the owner, Barbara Smith.
>
> 3. At the time, the defendant, or someone he aided and abetted
>
> a. Specifically intended to defraud Barbara Smith and/or New Impressions Spa and Salon and/or
>
> b. Knew he or she was committing a fraud.

(Emphasis added). The defendant argues the evidence is insufficient to prove the second element, that defendant knew the check had been altered without the

permission of the owner. The defense claims that "altering" requires changing the writing of another as opposed to just completing a blank check that belongs to someone else. The defendant argues that since there was no evidence presented at trial showing that anyone altered an existing writing by Barbara Ann Smith, the evidence was insufficient to support his conviction.

The defense cites *State v. White*, 563 N.W.2d 615 (Iowa 1997) for the definition of "alter" in the forgery statute. In *White*, the defendant attempted to cash a check made payable to himself and drawn from the account of another that had been closed. *White*, 563 N.W.2d at 616. At the jury trial, the State focused on prosecuting White on the theory he "uttered an altered check" and the jury was instructed accordingly. *Id.* On appeal, the Iowa Supreme Court explained that "in the context of forgery, an alteration occurs when an existing document is changed or modified." *Id.* at 617. The court clarified what the State is required to show for a conviction of forgery by alteration:

> Clearly, the legislature envisioned that a writing *of another* already exists, which is then changed or altered by the defendant. The mere fact a check has preprinted information on it does not make it "the writing of another." If it were otherwise, the fabrication of a document on stationary containing someone else's letterhead would be the alteration of a writing. This interpretation of the statute is not consistent with the common meaning of the words used in section 715A.2(1)(a).

Id. (emphasis in original).

The State urges *White* is not controlling because the record as a whole shows the prosecution was not focused solely on the "alteration" means of forgery. The problem with this argument is that the jury was not instructed on the other methods of committing forgery in the statute. As instructed, the jury could have only found the defendant guilty if there was an "alteration." The *White* case

makes explicit that there can be no alteration as a matter of law when someone merely fills out a blank check. *Id.* at 617-18. The record shows no evidence that Connie or the defendant altered the check. We are left to conclude the jury was erroneously instructed on the law applicable to this case. However, we must determine whether the defendant received ineffective assistance of counsel when his attorney failed to challenge the conviction on the ground there was insufficient evidence of alteration.

Ineffective assistance of counsel claims are generally not considered on direct appeal so the attorney can respond to the claim. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1994). However, "we do consider such claims when the record is clear and plausible strategy and tactical considerations do not explain counsel's actions." *Id.* Claims involving counsel's failure to challenge sufficiency of the evidence can often be addressed on direct appeal. *See State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). "To prove a claim of ineffective assistance of counsel, [the defendant] must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted." *Ondayog*, 722 N.W.2d at 784.

Counsel breaches an essential duty if his representation falls below the normal range of competency. *Hopkins*, 576 N.W.2d at 379. Normal competency "includes being familiar with the current state of the law." *Id.* at 379-80. In *Hopkins*, the Supreme Court considered on direct appeal whether counsel breached an essential duty by failing to object to an instruction that improperly defined "operating" for purposes of an operating while intoxicated charge. *Id.* at 378-80. The court concluded that the record showed counsel did not know that

the definition of "operating" under the applicable statute had been changed by case law. *Id.* at 380. The court held counsel's failure to object to the instruction and preserve error was due to being unfamiliar with current law and was a breach of an essential duty to his client. *Id.* Similarly, in this case, obviously both the State and defense counsel were unaware of how the Supreme Court has defined "alter" for purposes of forgery. While the evidence may have supported a conviction for forgery under Iowa Code section 715A.2(1)(b) for making or executing a writing so that it purports to be the act of another who did not authorize that act, the State chose to proceed under section 715A.2(1)(a) for *altering* a writing of another. The jury instruction mimicked one of the Iowa uniform instructions on forgery, but did not conform to the evidence. As a result of counsel's lack of knowledge about how the definition of "alter" had been changed by case law, the jury was instructed on an element that was not supported by any evidence presented at trial. Since counsel did not challenge the sufficiency of the evidence on this ground at any stage, he failed to perform an essential duty.

The defendant also must prove prejudice by showing that there is "a reasonable probability the outcome of the proceeding would have been different had counsel not erred." *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). "[A]n instruction submitting an issue unsubstantiated by evidence is generally prejudicial." *Id.* at 754-55 (Iowa 2004) (citing *State v. Mays*, 204 N.W.2d 862, 865 (Iowa 1973); *State v. Smith*, 129 Iowa 709, 717, 106 N.W. 187, 190 (1906)). Material misstatements of the law in jury instructions also constitutes prejudicial error. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v.*

Shell Oil Co., 606 N.W.2d 376, 379 (Iowa 2000). We find prejudice occurred due to counsel's error. The instruction required the jury to find an "alteration" occurred in order to convict the defendant of forgery. There was no evidence presented to support such a finding and yet the defendant was convicted. Had counsel objected to the sufficiency of the evidence based on the State's lack of evidence that any "alteration" occurred, the instructions would have been properly revised prior to trial or the court would have granted the motion for judgment of acquittal. Defendant was prejudiced by counsel's failure and we reverse his conviction and remand for an order of dismissal.

REVERSED AND REMANDED FOR ORDER OF DISMISSAL.