IN THE COURT OF APPEALS OF IOWA

No. 9-583 / 08-1231
Filed August 19, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT LOUIS HANES,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Defendant appeals his conviction for willful injury causing serious injury. **AFFIRMED.**

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

Robert L. Hanes, Clarinda, appellant pro se.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.

I. Background Facts & Proceedings

On April 28, 2007, at about 11:00 a.m., Nathaniel Taylor was walking near his home in Waterloo on his way to return some cans and bottles. He noticed Robert Hanes coming from the opposite direction down the sidewalk. Taylor testified that about a week earlier Hanes had given him $2.25 to go to a nearby store to buy gizzards for him. Taylor stated that he did not buy the gizzards for Hanes, or return the $2.25.

Taylor testified that as Hanes came closer he yelled out, "Hey you. Do you remember me?" Taylor offered his cans to Hanes. Hanes pulled out a knife and said, "I'm going to kill you." He grabbed Taylor and stabbed him in the face. Taylor fought back, striking Hanes with a bag of cans and bottles, and then striking him with his hand. Finally, Hanes said stop and walked away. A woman came up, saw Taylor was injured and called 911.

Taylor was taken to the hospital. He had a cut on each side of his lower lip, about three centimeters long. One side of his lip was cut through, and the other side was nearly cut through. A plastic surgeon operated on Taylor to fix the cuts to his face. Taylor received scars to his face, and he remains numb in his lower lip and into the area of his upper chin.

Officers found Hanes a few blocks away. Hanes had a knife on his person, but it was not the knife used to attack Taylor. Hanes had some swelling and bruising by his left eye and temple, and a laceration by the base of his ear. A drop of blood on Hanes's boot matched the DNA of Taylor. Hanes was

charged with willful injury causing serious injury, in violation of Iowa Code section 708.4(1) (2007).

Hanes presented a defense of self-defense. At the criminal trial Hanes testified he had no prior contact with Taylor, and Taylor attacked him unprovoked. He stated he fought with Taylor because he feared for his life. Hanes denied using a knife during the fight. Hanes stated that after the fight he continued to walk home.

The jury returned a verdict finding Hanes guilty of willful injury causing serious injury. Hanes was sentenced to a term of imprisonment not to exceed ten years. He appeals his conviction.

II. Ineffective Assistance

Hanes raises several issues alleging he received ineffective assistance from his trial counsel. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. Hanes contends he received ineffective assistance because his trial attorney did not object to the instruction defining "serious injury." The jury was instructed:

> A "serious injury" is a bodily injury which, if left untreated, creates a substantial risk of death or which causes serious permanent disfigurement, including scarring, or extended loss or impairment of the function of any bodily part or organ.

Hanes asserts that instruction is misleading because the phrase, "if left untreated" could refer to a substantial risk of death or serious permanent disfigurement. He claims the jury could have found a serious injury if Thompson's injury would have resulted in scarring if it had been left untreated.

The term "serious injury," as applicable in this case, is defined in section 702.18(1)(b), as a bodily injury which (1) creates a substantial risk of death, (2) causes serious permanent disfigurement, or (3) causes protracted loss or impairment of the function of any bodily member or organ. The risk of death may be assessed before the victim receives treatment for the injuries. *State v. Hilpipre*, 395 N.W.2d 899, 904 (Iowa Ct. App. 1986) (citing *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981)). The State asserts the phrase "if left untreated" refers only to the adjacent portion of the instruction—"creates a substantial risk of death."

We determine that the jury instruction would have been more clear if the phrase, "if left untreated" was included after the word death, so that it would read: "A 'serious injury' is a bodily injury which creates a substantial risk of death, if left untreated . . . ." On the other hand, we determine Hanes has not shown he was prejudiced by counsel's failure to object to the jury instruction on this ground. There was clear evidence that Taylor received a serious injury because he was scarred and was permanently numb between his bottom lip and his chin.

Hanes also claims that his trial counsel should have objected to the instruction defining "serious injury" because scarring is not a serious permanent disfigurement per se. Serious permanent disfigurement may include permanent scarring. *See State v. Epps*, 313 N.W.2d 553, 557 (Iowa 1981) (noting a serious injury is one that leaves the victim permanently scarred or twisted); *see also State v. Phams*, 342 N.W.2d 792, 796 (Iowa 1983) (finding victim's scars could be considered serious permanent disfigurement). We determine Hanes has not shown he received ineffective assistance of counsel on this ground.

B. Hanes claims he received ineffective assistance because his defense counsel did not object to the instruction on "specific intent." The last paragraph of this instruction provides, "Specific intent does not have to exist for any particular length of time. It is sufficient if it exists any time before the act." Hanes asserts that under this instruction there was no requirement that he have the specific intent at the time of the act; he claims the jury could have found him guilty if he had the specific intent to harm Taylor long before he acted, but not at the time he acted.

The instruction also provided, "determining the defendant's specific intent requires you to decide what the defendant was thinking when an act was done . . . ." We conclude the instruction was not misleading on the issue of when specific intent was required. We conclude Hanes has not shown he received ineffective assistance due to counsel's failure to object to the jury instruction on "specific intent."

C. During the trial the emergency room physician who attended Taylor, Dr. Geoffrey Miller, testified as follows:

> Q. And do you have an opinion within a reasonable degree of medical certainty whether or not in your opinion this was a serious injury? A. Definitely a serious injury and definitely long-term disfiguring injury.

Hanes contends he received ineffective assistance because trial counsel did not object to this question on the ground that Dr. Miller was permitted to give an opinion on a legal conclusion.

"[A] witness cannot opine on a legal conclusion or whether the facts of the case meet a given legal standard." *In re Detention of Palmer*, 691 N.W.2d 413, 419 (Iowa 2005). A court may determine a witness's opinion is not admissible if there is a danger of the jury misunderstanding the legal terms used by the witness. *Id.* at 420. The court considers "whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular." *Id.* (citation omitted).

Even if we found defense counsel should have objected to Dr. Miller's testimony that Taylor suffered a serious injury, we conclude Hanes was not prejudiced by his counsel's performance. As noted above, there was clear evidence Taylor had a serious injury. He received permanent scars from the cuts on his face, and he was permanently numb from his bottom lip down to his chin. Hanes has not shown the result of his trial would have been different if defense counsel had objected to Dr. Miller's testimony.

D. During opening statements the prosecutor outlined anticipated testimony from Paul McGonigle. McGonigle gave a voluntary written statement

that he had seen police officers looking for someone on the morning of April 28, 2007, and he had pointed the defendant out to them. The statement continued:

> The cop turned left and caught up to the guy on the other side of the railroad tracks. I saw the cop catch up to him and saw the cop pull out his gun and tell the guy to get down. The guy put his hands up and got down on his knees. When he did this, I saw something fall from his right hand.

The State tried to serve McGonigle with a subpoena, but he could not be found at the time of trial. Hanes asserts that his attorney was ineffective by failing to move for a mistrial because the prosecutor's opening statement did not match the evidence presented at the trial.

We conclude Hanes has not shown he received ineffective assistance due to his counsel's failure to move for a mistrial. At the time of the opening statements, the defendant had no grounds to object to the prosecutor's statements because the State anticipated that McGonigle would be available as a witness. Later, when it was apparent McGonigle would not be testifying, defense counsel pointed out this lack of evidence in the State's case during closing arguments. Defense counsel made a tactical decision to use the prosecutor's statements to his advantage in closing argument. *See State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) (noting improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel).

E. Hanes raises several different claims of ineffective assistance of counsel in a pro se brief on the following issues: (1) a cell video was not produced; (2) the State knew McGonigle was not a credible witness; (3) the

plastic surgeon was not called to testify; (4) Dr. Miller testified to the plastic surgeon's area of expertise; (5) certain tapes were not presented to the jury; (6) depositions were not presented to the jury; (7) a nurse was not called as a witness; (8) an unclear issue about jury selection; (9) the 911 tape was not submitted as evidence; and (10) the defense attorney did not call certain undisclosed witnesses.

"When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). "The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome." *Id.*

Hanes has not stated how counsel's alleged inadequacies changed the outcome of the trial. For instance, in stating that certain witnesses should have been called, or other evidence presented, he does not state what additional information would have been presented, and how this would have changed the jury's verdict. We conclude Hanes has failed to show he received ineffective assistance of counsel based on his pro se complaints.

III. Hearsay Evidence

The following exchange took place during the testimony of Paula Anderson, a nurse practitioner who treated Hanes:

> Q. Okay. And when Mr. Hanes presented himself, your hospital – to your hospital, what was his complaints? A. Mr. Hanes's complaint is that he had been hit –
>
> Ms. Griffith: Objection, Your Honor, to the hearsay.
>
> Mr. Hoffey: Purposes of medical treatment, Your Honor.

> The Court: It's still – If it's – it's subject to that exception, but it's not admissible because it would be exculpatory.

Hanes asserts the district court erred in it's ruling on the State's hearsay objection. He claims his statements to Anderson should have been admissible.

Hanes failed to preserve error on this issue. An offer of proof is required to preserve a claim the district court improperly excluded evidence. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). Hanes did not make an offer of proof, and therefore there is no evidence of what Anderson would have testified if the district court had ruled differently. Because he has failed to preserve error, we do not further address this issue.

IV. Jury Instruction

Jury Instruction No. 1 provided:

> The duty of the jury is to determine if the defendant is guilty or not guilty.
>
> In the event of a guilty verdict, you have nothing to do with punishment.
>
> Criminal offenses may be punished by fines or community service; by supervised or unsupervised probation; by placement in a residential, correctional or violator facility; or by confinement in a county jail or prison; depending on the circumstances of the case. Accordingly, you may neither speculate on what any punishment in this case might be nor let it influence your verdict.

Hanes objected on the ground that the last paragraph of the instruction invited the jury to speculate as to what the defendant's possible punishment might be. The district court overruled the objection, stating the court did not believe the last paragraph was a misstatement of the law. The court also disagreed that the instruction would cause speculation because "[i]t would be fruitless to speculate in cases like that."

A district court should not instruct a jury on the applicable penalties in a case. *State v. Hatter*, 381 N.W.2d 370, 375 (Iowa Ct. App. 1985). "The jury has no concern with the punishment which the law prescribes." *State v. Piper*, 663 N.W.2d 894, 915 (Iowa 2003) (quoting *State v. Purcell*, 195 Iowa 272, 274, 191 N.W. 849, 850 (1923)). "[K]nowledge of the penalty would only serve to confuse and distract the jury from its unique and important judicial function." *Hatter*, 381 N.W.2d at 375.

The jury instruction here did not inform the jurors of the probable penalties for the crime of willful injury. The jury instruction listed possible punishments for crimes in general, and thus did not violate the proscription against instructing the jury on the penalties in a case. Also, the instruction specifically informed the jury "you may neither speculate on what punishment in this case might be nor let it influence your verdict." There is a general presumption that a jury follows its instructions. *See State v. Glaus*, 455 N.W.2d 274, 278 (Iowa Ct. App. 1990).

We conclude the language objected to in Jury Instruction No. 1 was surplusage that was neither helpful to the jury nor prejudicial to Hanes. We will reverse only when an error in giving jury instructions results in prejudice to the defendant. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Hanes has not shown he was prejudiced by this instruction.

We affirm Hanes's conviction.

AFFIRMED.

Vogel, P.J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I respectfully dissent and would grant Hanes a new trial based on the district court's misleading jury instruction regarding punishment. I agree with the majority's well-reasoned opinion that the district court's additions to the uniform instructions on serious injury and specific intent contained some internal consistencies. I also agree that Hanes has not carried the heavy burden on his ineffective assistance claims to show that there is a "reasonable probability" that, but for counsel's failure to object to those instructions, "the results of the proceedings would have different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). However, counsel did object to the district court's addition to the instruction that advises jurors "you have nothing to do with punishment." I believe Hanes has shown the additional language was confusing, misleading, and prejudicial. The district court erred in overruling counsel's objection to the additional language.

It is well-settled law in Iowa that, "The trial court should in all criminal cases refrain from instructing the jury with regard to the punishment provided by statute for the crime with which a defendant is charged." *State v. Purcell*, 195 Iowa 272, 274, 191 N.W. 849, 850 (1923) (involving an accurate instruction on the punishment for the crime). The jury is to operate as a finder of fact and has no concern with the penalty prescribed by law. *Id.* "[K]nowledge of the penalty would only serve to confuse and distract the jury from its unique and important judicial function." *State v. Hatter*, 381 N.W.2d 370, 375 (Iowa Ct. App. 1985)

(involving a refusal to instruct on the accurate sentence for the crime and lesser-included offense).

> The statement to the jury of the possible punishment to be inflicted in an instruction has been repeatedly condemned. It should not be necessary to again repeat the caution. This court has, however, repeatedly said that a reversal will not be based upon this ground alone.

State v. Loucks, 253 N.W. 838, 841 (Iowa 1934).

We generally "prefer the uniform instructions be followed by the trial courts". *State v. Holtz*, 548 N.W.2d 162, 164 (Iowa Ct. App. 1996). We will not reverse a verdict because of an erroneous jury instruction unless the defendant shows prejudice. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Such error is presumed prejudicial "unless the contrary appears beyond a reasonable doubt from a review of the whole case." *State v. Caldwell*, 423 N.W.2d 564, 567 (Iowa Ct. App. 1988). "Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000). The district court's instruction listing a range of possible punishments for criminal offenses was misleading to the jury. The instruction would allow a juror to conclude that probation was a possible punishment for Hanes, which is not accurate because Hanes was on trial for a forcible felony. *See* Iowa Code § 907.3 (stating statutory language allowing deferred judgment and probation does not apply to a forcible felony).

The majority finds the district court's addition to the uniform instruction listed possible punishments for crimes "in general" and was neutralized by that

disclaimer and the admonition not to speculate on the punishment in this case. However, the district court's language invited speculation and affirmatively misled the jurors to believe erroneously that each of the listed punishments could be imposed on Hanes. The district court's rationale for giving the range of punishments—that jurors are curious about sentencing considerations—simply proves the point. The range of punishments, from probation to prison, in a case where prison was the only legal sentence, undermined the gravity of the jury's responsibility to apply the standard of proof beyond a reasonable doubt to the State's evidence, encouraged speculation, and gave the jurors an incorrect statement of the law as applied to the forcible felony for which Hanes was on trial.

Defense counsel's timely objection to the language the district court added to the uniform instruction should have been sustained. A review of the case shows that the district court's error prejudiced Hanes. Because the jury instruction was misleading and prejudicial, I would reverse and grant Hanes a new trial.