IN THE COURT OF APPEALS OF IOWA

No. 1-083 / 10-0758
Filed March 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK LEONARD TUBBS,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Kim M. Riley, District Associate Judge.

Mark Tubbs contends trial counsel was ineffective in failing to object to the jury instructions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Randall J. Tilton, County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ. Tabor, J., takes no part.

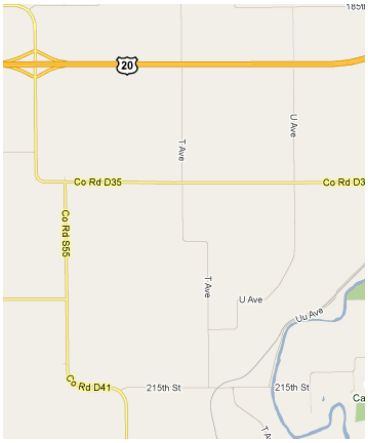
POTTERFIELD, J.

Mark Tubbs contends trial counsel was ineffective in failing to object to the jury instructions, asserting they did not adequately define "willfully" for purposes of eluding in violation of Iowa Code section 321.279(1) (2007). Because we find the jury instructions adequately covered the necessary mens rea according to the statute, we affirm.

I. Background Facts and Proceedings.

Deputy Mitchell Kappel of the Hardin County Sheriff's Office was on patrol on August 31, 2008. He was in uniform and driving a marked police car. At about 4 a.m., Deputy Kappel received a report of a white Chrysler LeBaron convertible with Hardin County plates heading eastbound on Highway 20 that had tried to run somebody off the road.

Deputy Kappel located the vehicle and asked the radio dispatcher to run a license plate check. The license plates were registered to a person whom the officer knew had recently moved out of state and as belonging on a 1990 blue Chevy Lumina. The officer and the convertible were traveling on county highway D35 and approaching the intersection to T Avenue when Deputy Kappel turned on his emergency lights to make a traffic stop. The convertible turned south onto T Avenue, a gravel road. Deputy Kappel followed and turned on the patrol car's siren. The convertible continued on T Avenue through a sharp curve to the east where the rear end of the convertible went into the ditch, but the driver corrected and continued through the next sharp curve turning back



south. Deputy Kappel continued to follow the vehicle traveling south on T and then turning west on 215th Street. At the intersection of 215th Street and county road D41, the convertible slowed but did not make a complete stop at the stop sign. Deputy Kappel, lights flashing and siren wailing, came within ten to fifteen feet of the convertible and moved to the left so the driver could see the patrol car in his rearview mirror. The convertible did not stop. The two vehicles proceeded north on D41, the convertible taking the next curve fast enough that it "ended up going into the southbound lane so it would stay on the curve and continued north." At the intersection of D41 and S55, the convertible came to a stop and Mark Tubbs exited the driver's side. Deputy Kappel placed him in handcuffs and Tubbs was charged with eluding.

At the jury trial Deputy Kappel described his pursuit and estimated that from the time he turned on the siren to when the convertible pulled over they had traveled "about four miles" in "a little over five minutes."

Tubbs testified that he was on his way home to Steamboat Rock (which lies south of Highway 20 and east of T Avenue) on the morning of August 31, 2008. He stated he did not see the patrol car when he was traveling on D35, or on T Avenue, or on 215th street. "I did not see the vehicle until I was on the curves on the blacktop, back on the blacktop." He stated the convertible top impeded his view of vehicles approaching from the rear. He also stated he did not hear the siren. Tubbs stated he was "circling back around" to go back to Steamboat when he realized the patrol car was there and he then pulled over. "I stopped at two stop signs." "[I]f I was trying to outrun him I would have just kept on going."

The jury was instructed on the elements of eluding in Instruction No. 14, which stated in pertinent part:

> The State must prove all of the following elements of Eluding or Attempting to Elude a Law Enforcement Vehicle:
>
> 1. On August 31, 2008, the Defendant was the driver of a motor vehicle.
>
> 2. A peace officer was in uniform and drove a marked official law enforcement vehicle.
>
> 3. The peace officer gave Defendant a visual (flashing red and blue lights) and audible (siren) signal to stop.
>
> 4. Defendant willfully failed to bring his motor vehicle to a stop or otherwise willfully eluded or attempted to elude the pursuing law enforcement vehicle, after being give a visual and audible signal to stop.
>
> If the State has proved all of the elements, the Defendant is guilty of Eluding or Attempting to Elude a Law Enforcement Vehicle.

The jury found Tubbs guilty of eluding and he now appeals. His sole claim on appeal is that trial counsel was ineffective in failing to object to the jury instructions.

II. Scope of Review.

The scope of review for ineffective assistance of counsel claims is de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). Under this review, we independently evaluate the issues considering the totality of the circumstances. *Id.* Normally ineffective assistance of counsel claims are preserved for postconviction relief proceedings in order to develop a more complete record. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). However, this court may address the claim on direct appeal if the record is adequate. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010).

III. Analysis.

Tubbs raises his erroneous instruction claim in the context of an ineffective-assistance-of-counsel claim. Thus, we must decide whether it can be determined as a matter of law that Tubbs's counsel was ineffective in failing to request a jury instruction and whether the record demonstrates Tubbs was prejudiced because of this error. *Id*. Counsel has no duty to raise an issue that has no merit. *Id.* Thus we must first determine whether the record demonstrates, as a matter of law, the existence or absence of a meritorious claim. *Id*.

On appeal, Tubbs contends trial counsel was ineffective in not requesting an instruction defining "willfully" as set out in Iowa Criminal Jury Instruction 2800.3: "'Willfully' means intentionally or by fixed design or purpose and not accidentally."

The State responds that the instructions given adequately covered the necessary level of men rea. We agree.

Section 321.279(1) provides:

> The driver of a motor vehicle commits a serious misdemeanor if the driver willfully fails to bring the motor vehicle to a stop or otherwise eludes or attempts to elude a marked official law enforcement vehicle driven by a uniformed peace officer after being given a visual and audible signal to stop. The signal given by the peace officer shall be by flashing red light, or by flashing red and blue lights, and siren. For purposes of this section, "peace officer" means those officers designated under section 801.4 . . . .

The jury was instructed on the elements of the offense as set out above. They were further instructed:

> The term "willfully" as used in these instructions refers to the Defendant's state of mind at the time of or just prior to the commission of the offense with which Defendant is charged. Because it is a state of mind, it is seldom capable of direct proof.

> Ordinarily, it must be determined from the conduct of the person and the reasonable inferences which may be drawn therefrom in accordance with common experience and observation. "Willfully," in this case means a conscious awareness by the Defendant of the peace officer's visual or audible signal to stop and Defendant's response thereto.

"Courts have long struggled for an all-encompassing definition of the word 'willfully.' These efforts have been unsuccessful because no generic term can accommodate all the various offenses in which the subject's will is an intended element of a crime." *State v. Azneer*, 526 N.W.2d 298, 299 (Iowa 1995). In *Azneer*, the court stated that when criminalized conduct is inherently wrong, "willful" means "intentionally, deliberately, and knowingly." *Id.*; *see also State v. Hofer*, 238 Iowa 820, 833, 28 N.W.2d 475, 482 (1947) (stating "willful" as used in murder statute means "intentional and not accidental").

Here the jury was instructed that to convict Tubbs, they had to find he "willfully failed to bring his motor vehicle to a stop or otherwise willfully eluded or attempted to elude the pursuing law enforcement vehicle, after being given a visual and audible signal to stop." They were further instructed "'[w]illfully,' in this case means a conscious awareness by the Defendant of the peace officer's visual or audible signal to stop and Defendant's response thereto." And also,

> To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person know the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude that a person intends the natural results of his acts.[1]

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[1] This is identical to the uniform instruction on general criminal intent. *See* Iowa Crim. Jury Instruction 200.1. In *State v. Pierce*, No. 03-0485 (Iowa Ct. App. Mar. 10, 2004), we stated eluding is a general intent crime.

Read together, the jurors were informed that to convict Tubbs, they were required to find he was consciously aware of the officer's signals to stop and that his failure to stop was voluntary, and not by mistake or accident. This was sufficient. *See State v. Marin*, 788 N.W.2d 833, 837–38 (Iowa 2010) (stating the court is required to "instruct the jury as to the law applicable to all material issues in the case" and "[i]n doing so, the court is not required to give any particular form of an instruction; rather, the court must merely give instructions that fairly state the law as applied to the facts of the case"). Trial counsel was not ineffective for not objecting to the instructions given. We therefore affirm.

AFFIRMED.