IN THE COURT OF APPEALS OF IOWA

No. 16-1600
Filed November 22, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS DEAN CHINBERG,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Randy V. Hefner, Judge.

A defendant appeals his conviction for willful injury causing serious injury alleging his attorney was ineffective in a number of respects. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Timothy M. Hau, Assistant Attorney General, for appellee.

Considered by Danilson, C.J., Tabor, J., and Scott, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

SCOTT, Senior Judge.

Dennis Chinberg appeals his conviction for willful injury causing serious injury, in violation of Iowa Code section 708.4(1) (2016). On appeal, he asserts counsel was ineffective in failing (1) to object to a jury instruction regarding his out-of-court statements to the sheriff deputies, (2) to object to the State's impeachment of his chief defense witness with the witness's prior conviction, (3) to object to the State's questions to the sheriff deputies that he contends improperly shifted the burden of proof to the defense. Because we conclude Chinberg cannot prove prejudice, we reject his ineffective-assistance claims and affirm his conviction.

I. Background Facts and Proceedings.

On March 6, 2016, Chinberg, along with his adult son, Colt, and other acquaintances, went to the house of Tom Talsma to confront Talsma about Talsma's treatment of Chinberg's grandson. An altercation ensued, and Talsma was seriously injured in the fight.

Charges were brought against Chinberg and others, and the matter proceeded to a jury trial against Chinberg in September 2016. Witnesses to the fight testified for the State that Chinberg participated in the beating of Talsma. Witnesses for the defense testified the fight was just between Chinberg's son and Talsma, and Chinberg did not join in the fray. The jury returned a verdict of guilty as charged, and the court sentenced Chinberg to ten years in prison. He appeals asserting his counsel was ineffective in a number of ways.

II. Scope and Standard of Review.

We review ineffective assistance claims de novo as they implicate a defendant's constitutional rights under the Sixth Amendment. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

> We ordinarily preserve such claims for postconviction relief proceedings. "That is particularly true where the challenged actions of counsel implicate trial tactics or strategy which might be explained in a record fully developed to address those issues." We will resolve the claims on direct appeal only when the record is adequate.

Id. (citations omitted). We determine the record is adequate to resolve Chinberg's claims on direct appeal.

III. Ineffective Assistance of Counsel.

To prove a claim of ineffective assistance of counsel, Chinberg must prove by a preponderance of the evidence that counsel failed to perform an essential duty and he suffered prejudice as a result. *State v. Thorndike*, 860 N.W.2d 316, 320 (Iowa 2015). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id*. (citation omitted). Thus, if we conclude Chinberg failed to prove he was prejudiced by the inaction of counsel, we need not address whether counsel performed deficiently. *See id*.

To prove prejudice, Chinberg must prove "counsel's errors were so serious as to deprive [him] of a fair trial." *See id*. He must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See id*. (citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

A. Jury Instruction. Chinberg first asserts counsel should have objected[1] to the court giving the jury an instruction that stated, "You have heard evidence claiming Defendant made statements before this trial while not under oath. If you find such a statement was made, you may regard the statement as evidence in this case the same as if Defendant had made it under oath during the trial." Chinberg asserts this instruction is a misstatement of the law and "a constitutional violation of the most flagrant variety" because it deprived him of his right against self-incrimination. He concedes that his out-of-court statements were properly admitted as evidence under Iowa Rule of Evidence 5.801(d)(2)(A), but he objects to the court allowing the jury to "engage in the legal fiction that Chinberg made those statements in court while under oath." He claims this instruction effectively made him testify against himself and the jury would more readily accept statements made under oath than those made out of court.

While Chinberg does not specifically indicate which out-of-court statement(s) he believes the jury improperly considered to be "under oath," we

[1] Chinberg also asserts the court erred in giving this instruction because it had a duty to instruct properly the jury on the law. We acknowledge that "[i]t is the trial court's duty to instruct a jury fully and fairly, even without request," but in order to preserve error on a claim of instructional error for appeal in "our adversary system," counsel has a burden "to make a proper record . . . by specifically objecting to instructions in their final form, requesting instructions and voicing specific exception in event they are refused." *State v. Sallis*, 262 N.W.2d 240, 248 (Iowa 1978). We note defense counsel's proposed instructions included an instruction similar to the one given by the court, though the words "under oath" were not included in defense counsel's proposal. Defense counsel did not object to the court's instruction when the court invited the parties to voice their concerns. We thus consider the claim that the district court erred in instructing the jury to not be preserved for our review, and we instead address the issue through the ineffective-assistance rubric. *See State v. Fountain*, 786 N.W.2d 260, 262–63 (Iowa 2010) ("Normally, objections to giving or failing to give jury instructions are waived on direct appeal if not raised before counsel's closing arguments, and the instructions submitted to the jury become the law of the case. . . . Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules." (citations omitted)).

assume the offending statements include those Chinberg made in the sheriff deputy's vehicle after he was arrested and read his *Miranda*[2] rights as contained on the video recording from the vehicle. In that video, Chinberg volunteered, "You know what, if more people do what I did, there wouldn't be none of these motherf***ers shaking kids until they kill'em." The video was played for the jury, and the deputy testified as to the content of Chinberg's statement as well. This statement contradicted the testimony of Chinberg's defense witnesses that asserted Chinberg did not join in on the assault of Talsma but was merely present, approximately eight feet away from the fight.

Upon our review of the record in this case, we conclude that even assuming counsel breached an essential duty in failing to object to the instruction at issue, there is no reasonable probability the outcome of the case would have been different. Chinberg concedes the statement he made to the deputies was admissible evidence, and it is not reasonable to believe the result of the trial would have been different if the court had eliminated the instruction telling the jury it may consider the statement as if it had been made at trial under oath. Because Chinberg cannot prove he was prejudiced by the inclusion of this jury instruction, we deny this claim of ineffective assistance of counsel.

B. Impeachment by Prior Conviction. Next, Chinberg asserts counsel was ineffective in failing to object to the State's use of a prior conviction to impeach a witness, Randy Comly, who testified in his defense. Prior to trial, the State gave

[2] *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

notice that it intended to impeach Comly with his prior conviction. On the morning of trial, the court ruled:

> Even though the conviction occurred more than ten years ago, [Comly] did not discharge his sentence until within the ten-year period. So impeaching that witness with the question have you been convicted of a felony or did you discharge your sentence on a felony within the past ten years will be permitted.
>
> Assuming the answer is yes, the State will be entitled to ask, and was that a felony drug charge? Presumably the answer will be yes.

When Comly testified, defense counsel solicited the information about the prior conviction from him, knowing the court had already ruled the information would be admissible:

> Q. Now, have you ever been convicted of a felony before? A. Yes.
> Q. And was that in 2002? A. Yes.
> Q. Was that for a drug felony? A. Yes.
> Q. Are you currently using any illegal drugs? A. No.
> Q. Were you using illegal drugs back in March of 2016? A. No. That was [fourteen] years ago.

Under Iowa Rule of Evidence 5.609(a)(1), evidence of a prior felony conviction is admissible against a witness to attack the witness's credibility. However, the conviction is not admissible "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date." *See* Iowa R. Evid. 5.609(b). Chinberg asserts counsel was ineffective in not arguing to the court that by the time of trial more than ten years had lapsed since Comly had been released from confinement. He claims the record is clear that both the State and the court were operating under the belief the ten-year period extends until a sentence is discharged rather than until the person is released from prison. He

notes Comly was released from prison on May 30, 2006, and his work release ended on September 5, 2006. Both dates were more than ten years before the September 12, 2016 trial. Chinberg acknowledges that Comly's parole ended in 2009, but he argues "parole is not synonymous with confinement."

We need not address the question of whether confinement encompasses parole under rule 5.609(b) because we conclude Chinberg cannot prove he was prejudiced by the admission of Comly's prior criminal history. While the admission of prior drug crimes has been found prejudicial when admitted against a defendant, the same prejudice is not present when it is a witness, and not the defendant, who is impeached with a prior drug offense. *See State v. Liggins*, 524 N.W.2d 181, 188–89 (Iowa 1994) (noting the admission of evidence of prior drug dealing against a defendant was "inherently prejudicial" because "[i]t appealed to the jury's instinct to punish drug dealers"); *State v. Yaggy*, No. 10-1186, 2012 WL 163234, at *4 (Iowa Ct. App. Jan. 19, 2012) ("The extent to which prior convictions are prejudicial depend[s] on whether the impeached is the accused or another witness. If the prior conviction is that of the accused, the jury may assume guilt through propensity to commit a crime . . . . Because Sires was merely a witness, such danger does not present itself here. It is not logical for the jury to infer a conviction by a defense witness shows the propensity of the defendant to commit a separate act five years later."); *see also* Iowa R. Evid. 5.609 cmt. (noting the Report of Senate Committee on the Judiciary provided, "In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence").

In addition, Comly was not the only witness to testify to Chinberg's version of the events. Comly's daughter, who was also present at the time of the fight, also testified Chinberg was not involved and the fight occurred solely between Talsma and Chinberg's son. Thus, even if the jury had doubted Comly's credibility due to the brief mention of his drug conviction, which had occurred fourteen years earlier, the jury also had the identical, unimpeached testimony from Comly's daughter to consider. We thus conclude Chinberg cannot prove a reasonable probability the result of the trial would have been different if Comly's prior conviction had been excluded. *See Thorndike*, 860 N.W.2d at 320.

C. Burden of Proof. Finally, Chinberg asserts counsel was ineffective in failing to object to the State's questions posed to the sheriff deputies who interacted with Chinberg during his arrest. He asserts the State was attempting to shift the burden of proof to the defense by asking the deputies whether Chinberg had attempted to exculpate himself at the time of his arrest. The questions Chinberg finds improper were:

> Q. Did Mr. Chinberg ever say that he or anyone else did not assault Mr. Talsma? A. No.
>
> . . . .
>
> Q. During this time that—I guess at any time that you had interaction with Mr. Talsma or, sorry, Mr. Chinberg, did he ever say to you that Tom Talsma tried to assault him or anybody else? A. Not that I heard.
>
> Q. Did he ever say that Tom Talsma threatened him or anybody else? A. No.
>
> Q. Did he ever say he or anyone else in this party did not assault Tom Talsma? A. Again, not that I heard.

Chinberg asserts these questions resulted in a distortion of the State's burden of proof. Since commenting on the failure of a defendant to call witnesses on his behalf is improper, *see State v. Hanes*, 790 N.W.2d 545, 556 (Iowa 2010), then

Chinberg asserts commenting on a defendant's failure to articulate his innocence at the time of his arrest is also improper.

"A prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as it is not phrased to call attention to the defendant's own failure to testify." *State v. Bishop*, 387 N.W.2d 554, 563 (Iowa 1986). In addition, it is "improper for the State to shift the burden to the defense by suggesting the defense could have called additional witnesses." *Hanes*, 790 N.W.2d at 556. However, the questions at issue in this case did not highlight Chinberg's failure to testify in his defense or his failure to call witnesses to testify on his behalf. Instead, the questions were asked to indicate the inconsistency between the statements Chinberg made at the time of his arrest and the defense he was attempting to make at trial through his witnesses.

The deputies testified to statements Chinberg made after he was arrested while being transported to jail. Those statements acknowledged Chinberg's awareness of the assault on Talsma at the time of his arrest and included an explanation as to why Talsma was assaulted—because Chinberg believed Talsma had treated Chinberg's grandson improperly causing the grandson to develop a stutter. The State then inquired of the deputies whether Chinberg's statements at the time of the arrest were consistent with his defense at trial—that it was his son, not himself, that participated in the fight and Talsma instigated the fight. The deputies reported that Chinberg never denied being part of the assault and such an assertion would be inconsistent with the statement he did make to the deputies after his arrest—"You know what, if more people do *what I did*, there wouldn't be none of these motherf***ers shaking kids until they kill'em." (Emphasis added.)

The State was permitted to point out that inconsistency to the jury, and we conclude its action of doing so did not improperly shift the burden of proof to Chinberg. Thus, counsel had no duty to object.

In addition, even if counsel had objected and the jury had not heard the testimony, we conclude Chinberg failed to prove by a preponderance of the evidence the result of the trial would have been different. Our confidence in the outcome is not undermined by excluding this testimony from the deputies. *See Thorndike*, 860 N.W.2d at 320.

IV. Conclusion.

Because we conclude Chinberg cannot prove he was prejudiced by his counsel's failure to object to the jury instruction regarding his out-of-court statements, to object to the impeachment of his witness with the witness's prior conviction, or to object to the State's questions to the sheriff deputies regarding whether Chinberg denied participating in the assault on Talsma at the time of his arrest, we affirm his conviction.

AFFIRMED.