

IN THE COURT OF APPEALS OF IOWA

No. 0-732 / 09-1837
Filed December 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JON ANDREW WELTHA,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, William J. Pattinson,
Judge.

Defendant Jon Andrew Weltha appeals from the judgment and sentence entered on his convictions and sentence, asserting ineffective assistance of counsel. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Stephen Holmes, County Attorney, and Keisha Creitsinger and Jessica Reynolds, Assistant County Attorneys, for appellee.

Jon Weltha, pro se.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Defendant Jon Andrew Weltha appeals from the judgment and sentence entered on his convictions for assault, in violation of Iowa Code sections 708.1(1) and 708.2(6) (2007), willful injury causing bodily injury, enhanced as an habitual offender, in violation of sections 708.4(2); 902.9(3), and assault causing bodily injury, in violation of sections 708.1(1) and 708.2(2). He asserts trial counsel was ineffective for failing to object to prejudicial “bad acts” evidence, as well as withdrawing a request for a justification instruction.

I. Background Facts and Prior Proceedings

The jury could have found the following facts: On March 24, 2009, Weltha and girlfriend Anna were arguing. After apparently forcing Anna to have sex with him, Weltha punched her twice in the eye. Anna threatened to call the police, and while struggling to get away, Weltha began choking her. Anna testified that as she called 911, Weltha took the phone and “proceeded to head-butt me and spit on my face.” She followed him from the bedroom to “make sure he was leaving, that he wouldn’t hurt my kids or my mom.”¹ As he was leaving, Anna “was trying to shoo him out the door, and that’s when he kicked me in my thigh and also kicked me in my vagina.”

Anna stated she then saw Weltha standing outside by her car, and feared he would follow through with his past threats to disable her vehicle. She went outside to make certain her vehicle was not tampered with, and encountered Weltha calling the police and reporting an assault by her, inflicted on Weltha.

¹ Anna’s mother watched the children that evening, and was in the home when the incident occurred.

When the officers arrived, Anna informed them of what had transpired. Weltha gave a very different story, reporting that Anna had attacked him while he slept. Weltha was arrested based on the vague nature of his story and Anna's more credible version of the incident, indicating to the police that Weltha was the primary aggressor.

Weltha was charged with sexual abuse in the third degree, willful injury, and serious assault causing bodily injury, as amended with the habitual offender sentencing enhancement. Weltha filed a notice of self-defense. Following a June 30, 2009 jury trial, Weltha was found guilty of assault, willful injury causing bodily injury, and assault causing bodily injury, with the habitual offender sentencing enhancement. Weltha appeals asserting he was not afforded effective assistance of counsel.

II. Standard of Review – Ineffective Assistance of Counsel

We review ineffective-assistance-of-counsel claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa 2004). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). A claim may be resolved on either prong. *Id.* To establish prejudice, Weltha must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). If "the court determines the claim cannot be addressed on appeal, the court must preserve it for a postconviction-relief proceeding, regardless of the

court's view of the potential viability of the claim." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

III. Ineffective Assistance of Counsel

Citing due process violations of the Sixth and Fourteenth Amendments of the United States Constitution, and Article One, Section Ten of the Iowa Constitution, Weltha asserts trial counsel was ineffective for failing to object to prejudicial or irrelevant bad acts evidence. Specifically, Weltha asserts counsel was ineffective for: (1) failing to object to Anna's testimony that she had been previously abused by Weltha; (2) failing to object to Anna's testimony that Weltha had been known to cut brake lines, as well as not objecting to the prosecutor's reference to this in closing argument; and (3) failing to redact a statement by Anna recorded on videotape that Weltha had told her "he was not going back to prison again." Weltha also asserts counsel was ineffective for withdrawing a justification instruction. The State concedes this last issue must be preserved for a possible post-conviction relief proceeding.

We find the resolution of all the claims of ineffective assistance of counsel should be preserved for possible post conviction proceedings as the record is incomplete for our resolution on direct appeal. Only in rare cases will the trial record alone be sufficient to resolve the claim. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Ordinarily, ineffective-assistance-of-counsel claims are best resolved by post conviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). With no record of counsel's trial strategy or of the unreported discussions referenced in the record, we preserve

Weltha's claims for a possible post conviction relief proceeding. See *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

AFFIRMED.