IN THE COURT OF APPEALS OF IOWA

No. 0-796 / 10-0302
Filed December 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ATIF EL SIR MOHAMED,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard II, District Associate Judge.

Defendant Atif Mohamed appeals from the judgment and sentence entered on his convictions for indecent exposure. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VOGEL, J.

Defendant Atif Mohamed appeals from the judgment and sentence entered on his convictions following a jury trial for indecent exposure in violation of Iowa Code section 709.9 (2007). The district court imposed a 365 day sentence with all but thirty days suspended, two years probation, and ordered he register as a sex offender. Mohamed asserts counsel was ineffective for failing to (1) object to questions submitted by jurors to be asked of witnesses; (2) seek admission of the victim's alcohol-related convictions, after the victim opened the door to such evidence; and (3) object to Sergeant Brotherton's testimony that she believed Mohamed committed the offense. We affirm.

I. Background Facts and Prior Proceedings

The jury could have found the following facts: On August 2, 2008, the victim and a female friend took a cab to a bar in Iowa City driven by Atif Mohamed of Number One Cab Company. They arrived downtown around 11:00 p.m. The victim testified she drank two long island iced teas, and her friend drank three seven-and-seven's. At approximately 1:00 a.m., they again called the cab company, and Mohamed responded to the call. The victim and her friend entered the cab along with three men. The victim's friend and the three men went to another party, and the victim continued home. After the four others left, Mohamed asked the victim to sit in the front seat and she agreed. He complimented the victim, telling her she was beautiful, and then as they were driving, he began touching her—first her arm, then upper chest, and she was upset by this. When he touched her breast, she testified she told him to stop, and he did. She stated, "take me home" and turned away. The victim then

testified, “I was looking out the window, avoiding him; and I heard his zipper unzip. I looked over; and umm, his penis was out of his pants.” She saw him holding his penis, told him that was “extremely inappropriate” and to take her home. He apologized, and she “raised her voice” saying, “Just stop! Take me home. Take me home.” He then took her home; she did not pay the cab fare. She called her friend immediately, and called her parents the following day. A day after that, she called the police and gave a statement to Sergeant Denise Brotherton. Sergeant Brotherton interviewed Mohamed on August 6.

Mohamed confirmed during his testimony that he asked the victim to sit in the front seat, complimented her, but denied exposing himself or touching her. He asserted she was very intoxicated and he had to help her into the front seat, and fasten her seatbelt. Sergeant Brotherton, on the other hand, testified that while questioning Mohamed, he did not indicate the victim was intoxicated nor needed any help into the cab.

A jury trial was held on August 10, 2009. Jurors were allowed to submit questions directed to the victim as well as to another witness for the State. The questions were shown to both the prosecutor and Mohamed’s defense counsel, and then asked by the court to the witnesses. Counsel was then allowed to conduct additional re-direct and re-cross examination. A slight modification occurred when Mohamed was testifying, as his defense counsel was allowed to choose which jury submitted questions would be asked of him. The questions were then asked by defense counsel and the State was allowed to follow with re-cross examination. There was never direct interaction between the jurors and the witnesses. The jury subsequently returned a guilty verdict, finding Mohamed

guilty of indecent exposure in violation of Iowa Code section 709.9. Following imposition of judgment and sentence, Mohamed appeals.

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, Mohamed must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See 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).

A. Juror Questions

Citing due process violations of the Sixth and Fourteenth Amendments of the United States Constitution, and Article One, Section Ten of the Iowa Constitution, Mohamed asserts he was denied effective assistance of counsel and hence a fair trial, as his counsel failed to object to questions submitted by jurors to be asked of witnesses.[1]

[1] No record was made of the in-chambers discussion between defense counsel, Mohamed, and the State regarding the decision to allow jurors to submit questions for witnesses.

Mohamed claims the procedure of allowing the jury to ask questions amounted to "structural error." *See State v. Feregrino*, 756 N.W.2d 700, 705–06 (Iowa 2008) (explaining that while ordinarily a defendant claiming ineffective assistance of counsel must show both a breach of duty and prejudice, in the context of deprivation of a constitutional right, the violation can amount to a structural defect in which prejudice is presumed). Mohamed correctly notes that our supreme court has approved jury questioning only in civil cases, not criminal cases. *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 555 (Iowa 1980). Mohamed acknowledges judges can ask questions of witnesses, even in criminal cases. *See State v. Dixon*, 534 N.W.2d 435, 441 (Iowa 1995) (allowing judge questioning). While he cites to various jurisdictions that approve jury questions in criminal cases, he notes that they do so with cautionary limits in place. *See United States v. Rawlings*, 522 F.3d 403, 408 (D.C. Cir. 2008); *United States v. Collins*, 226 F.3d 457, 462–63 (6th Cir. 2000); *United States v. Amjal*, 67 F.3d 12, 15 (2nd Cir. 1995). Mohamed also references jurisdictions that disapprove of the use of jury questions, citing misuse or prejudice to defendant. *See Wharton v. State*, 734 So.2d 985, 990 (Miss. 1998); *State v. Zima*, 468 N.W.2d 377, 379 (Neb. 1991); *Morrison v. State*, 845 S.W.2d 882 (Tex. Crim. App. 1992). Mohamed's appellate brief urged retention of this appeal by our supreme court, and he asserts the court "should invoke its supervisory authority to prohibit the practice due to its attendant risks" and "adopt specific safeguards for use in conjunction with jury questioning." As the case was transferred to this court, we focus on his specific claims that counsel breached an essential duty by failing to object to the practice of jury questioning. He claims

such a breach resulted in a structural error, causing him prejudice. In the alternative, he asserts he suffered actual prejudice because the jurors had to speculate as to the jury questions which were submitted but not asked of the witnesses, and the court gave no instruction as to any implications of which questions were not asked.

The State responds that defense counsel had no duty to raise the issue of jury questioning in criminal cases, even if it is an unsettled question, because in the civil context, the Iowa Supreme Court has approved the use of jury questions. *See State v. Vance*, ___ N.W.2d ___, ___ (Iowa 2010) (explaining that in an open question of law, the attorney's failure to lodge an objection may not be apparent from the record, and hence does not automatically constitute ineffective assistance of counsel); *Rudolph*, 293 N.W.2d at 555 (discussing jury questions in the civil context). Moreover, the State asserts the procedure of jury questioning used by the district court was consistent with the *Rudolph* case, and should be followed, as the majority of jurisdictions approve of the practice in criminal cases. The *Rudolph* court found,

> As finders of fact, jurors should receive reasonable help in resolving legitimate questions which trouble them but have not been answered through the interrogation of witnesses by counsel. Of course the questions must call for admissible evidence, and trial court discretion must be exercised to prevent abuse of the practice.

Rudolph, 293 N.W.2d at 556. *Rudolph* sets a precedent for civil cases in Iowa that the court has discretion in allowing jury questions. *Id.*

Mohamed relies heavily on the *Costello* case out of Minnesota, which does not allow juror questions. *State v. Costello*, 646 N.W.2d 204 (Minn. 2002) (stating that Minnesota Supreme Court acknowledged the current trend toward

juror questioning, but found such questions may prevent jurors from keeping an open mind and upset the burden of proof, and therefore did not allow juror questioning). The State is critical of this case, as in the eight years since the opinion was issued, other states have not followed Minnesota's lead by adopting this minority position. In jurisdictions where the issue has arisen, courts have generally recognized the discretion of the trial court to allow such questions. *Rudolph*, 293 N.W.2d at 555, *citing See, e.g., United States v. Callahan*, 588 F.2d 1078, 1086 (5th Cir.), cert. denied 444 U.S. 826, 100 S. Ct. 49, 62 L. Ed. 2d 33 (1979); *State v. Taylor*, 544 P.2d 714, 716–17 (1976); *People v. Gates*, 158 Cal. Rptr. 759, 761–62 (App. Dep't Super. Ct. 1979); *People v. Heard*, 200 N.W.2d 73, 74–76 (1972); *Byrge v. State*, 575 S.W.2d 292, 294–95 (Tenn. Crim. App. 1978); Annot., 31 A.L.R.3d 872, 879–80 (1970); *id.* at 54 (Supp. 1979). Many states have in fact rejected the *Costello* opinion, such as Vermont, Ohio, and Alabama, and joined the majority of states, allowing juror questions. *See e.g. Ex parte Malone*, 12 So. 3d 60, 63 (Ala. 2008); *State v. Doleszny*, 844 A.2d 773, 780 (Vt. 2004); *State v. Fisher*, 789 N.E.2d 222, 226 (Ohio 2003).

While we have guidance on the use of jury questions in civil cases in Iowa, and in criminal cases from other jurisdictions, the question remains open as to permitting jury questions in the criminal context in Iowa. With an unreported hearing on the issue of how the jury questions issue was handled in this case, we do not know defense counsel's position or strategy. As Mohamed is now claiming his counsel was ineffective for not objecting to the use of jury questions, the record is incomplete for our resolution of his claim. We express no opinion as to whether counsel had a duty to object to the questioning procedure, as

every lawyer is entitled to their day in court to explain his or her decision. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We preserve this claim for a possible post-conviction relief proceeding. *See State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

B. Admissible Evidence

Mohamed next asserts counsel was ineffective for failing to seek admission of the victim's alcohol-related convictions, after the victim opened the door to such evidence. The State filed a motion in limine, which the court sustained as to the victim's past convictions for public intoxication and possession of alcohol as a minor. Mohamed claims both the State's direct questioning, when the victim admitted drinking the night in question, and jury questions related to her use of alcohol, to which she stated in part, "I'm not an alcoholic," opened the door to allow evidence of her convictions. He asserts counsel was ineffective for failing to pursue this line of questioning as it "opened the door," to undercut the ruling in limine. He also claims counsel should have made a record of any in-chambers discussions regarding this line of questioning. Mohamed asserts information of the victim's prior alcohol convictions would have contradicted her assertion she didn't have a problem with alcohol, and that she therefore minimized her drinking in relating her version of the incident. Such testimony could have supported Mohamed's claim that the victim was intoxicated on the night in question, which in turn would have called into question both her perception of what occurred and her overall credibility.

The State responds that counsel breached no duty, because the victim's prior alcohol use and convictions were irrelevant to her perceptions that night,

and were therefore inadmissible. The State further argues the information was inadmissible because an "opponent" did not open the door to further questioning on the subject of past alcohol abuse, as a juror asked the question. *State v. Jones*, 471 N.W.2d 833, 835 (Iowa 1991) (explaining that evidence that is otherwise inadmissible may be introduced when an opponent has opened the door because "[o]ne who induces a trial court to let down the bars of a field of inquiry that is not competent or relevant to the issues cannot complain if his adversary was also allowed to avail himself of the opening").

Mohamed concedes the evidence came in through a juror question, but he fails to cite further authority to support the proposition that when a *juror*, as opposed to an "opponent" opens the door to inadmissible evidence, the trial court has discretion to allow the adversary to offer otherwise inadmissible evidence. *See Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W .2d 685, 691 (Iowa 1994) ("[R]andom mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration."); *State v. Judkins*, 242 N.W.2d 266, 267 (Iowa 1976) (explaining the proposition of "opening the door"). If we were to preserve this issue for possible post-conviction relief, and the district court were to find counsel breached an essential duty by not objecting to the jury submitted questions and procedure utilized, the issue of whether counsel should have pursued this line of questioning may be seen in a different light. However, we choose to resolve this on direct appeal, as we agree with the State that even if a duty had been breached, there was no resulting prejudice. *See Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001) ("If the claim lacks prejudice, it can be decided on that ground alone without deciding

whether the attorney performed deficiently."). The victim admitted to drinking that night, testified as to what and how much she had consumed, and admitted to not being sober enough to drive herself home. The jury therefore had facts from the victim herself upon which it could consider her level of impairment and whether it affected the credibility of her allegations against Mohamed. We find no resulting prejudice from counsel's performance in not pursuing a line of questions regarding the victim's prior alcohol related convictions. As such, this claim of ineffective assistance of counsel fails.

C. Sergeant Brotherton's Testimony

Mohamed next asserts counsel was ineffective when he failed to object to a portion of Sergeant Brotherton's testimony. During Sergeant Brotherton's interrogation of Mohamed, she told him that she believed the victim's version of what had happened. Then, during trial and recalling her interrogation, Sergeant Brotherton testified, "I told him I believed that he did do what [the victim] said," and "I informed [Mohamed], because I did believe [the victim], that I would be charging him." Mohamed claims he was prejudiced by this testimony, as "credibility" was critical to his case and Sergeant Brotherton's statement was an impermissible comment on the victim's credibility. *See State v. Graves*, 668 N.W.2d 860, 873 (Iowa 2003) (holding prosecutor's questioning witness veracity by posing a "were-they-lying" questions to another witness is improper.)

The State responds that Sergeant Brotherton's statements provided context for Mohamed's responses during police interrogation. *See State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007) (explaining that similar claims of statements made during interrogations by police officers have been rejected

primarily on the basis that they are not "testimony" given by witnesses at trial and were not offered at trial to impeach the defendant, but to provide context for his responses). The State also argues Sergeant Brotherton's decision to charge Mohamed with a crime evidenced to the jury that during her investigation of the alleged crime, she did not accept his claims of innocence. The State concedes that "there is at least some authority from other jurisdictions to support the objection which Mohamed suggests," but contends Mohamed's counsel did not breach an essential duty by failing to object to Sergeant Brotherton's testimony.

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, we preserve this claim for a possible post-conviction relief proceeding. *See State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

III. Conclusion

Because we find the record is incomplete for our resolution of Mohamed's claim regarding questions submitted by jurors to be asked of witnesses, as well as Mohamed's claim counsel was ineffective for failing to object to Sergeant Brotherton's testimony regarding the police interrogation, we preserve both issues for possible post-conviction relief. We find counsel was not ineffective for failing to seek admission of the victim's alcohol-related convictions.

AFFIRMED.