

IN THE COURT OF APPEALS OF IOWA

No. 0-846 / 10-0431
Filed December 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RAYMOND CARL REDMOND,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Judge.

Raymond Carl Redmond appeals his conviction 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 W. Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin S. Lies, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

DOYLE, J.

Raymond Redmond appeals his conviction for indecent exposure. He contends the district court erred in allowing evidence of a prior harassment conviction to be admitted into evidence, asserting the court failed to balance the probative value and the likely prejudicial effect of admitting evidence of the prior conviction. Redmond also claims his trial counsel rendered ineffective assistance by failing to object to prosecutorial misconduct. Upon our review, we affirm his conviction and preserve his claim of ineffective assistance of counsel for a possible postconviction proceeding.

I. Background Facts and Proceedings.

After P.M. reported to police that Redmond had exposed himself to her, the State filed a trial information charging Redmond with indecent exposure, a serious misdemeanor in violation of Iowa Code section 709.9 (2009). The matter proceeded to a jury trial.

P.M. testified that on the evening of October 13, 2009, she went to visit Redmond and his roommates at their apartment. After she arrived, she learned Redmond's roommates were not home. Redmond sat down, and he appeared very agitated and upset. She stated that Redmond then asked her if she wanted to see his "dick." She told him to keep it in his pants. She reported he walked over to her, and as he was walking, he unzipped his pants and took out his penis. She described his penis as "stimulated." She stated she kept telling Redmond it was not right and he needed to put it away. She stated he twice put his penis away but then pulled it back out again. She stated he put it away again, and then

grabbed her breasts. She was able to get away when someone knocked on the door. She went to a nearby friend's apartment, and the police were called.

On cross-examination, P.M. stated Redmond was very intoxicated when she arrived at his apartment, but she had not had anything to drink that evening until after she left Redmond's apartment. She testified she had been diagnosed with "bipolar two" for which she was prescribed medications, but she had not taken her medications at the time the incident occurred.

The responding officer testified that on the evening of the incident, he had been previously called to the hotel building where Redmond and P.M. lived after an argument broke out between Redmond and residents of another apartment. He testified that at the time he responded to the first call, Redmond was seriously intoxicated. He told Redmond to go back to his apartment and stay there for the rest of the evening. He testified he later spoke with P.M. after responding to her call and she did not appear intoxicated. He testified P.M. was a little confused, because she was not sure if she just wanted Redmond talked to and told to knock it off, or if she wanted to press charges against him. The officer stated P.M. was also confused as to Redmond's actions, as she claimed she was like a mother figure to him and she was shocked he had done this to her.

After the State rested, the State advised the court and the defense that if Redmond planned to testify, it intended to impeach Redmond's testimony with his 2009 first-degree harassment conviction. The court reserved ruling on the issue until the State was ready to cross-examine Redmond.

Redmond testified he remembered the police showing up after an altercation he had with other tenants in the building earlier that night. He said he

passed out on the floor of his apartment thereafter. Redmond testified he did not wake up until officers arrived later that night to arrest him for indecent exposure. He further testified he did not have any occasion to do anything to P.M. that evening.

Prior to cross-examination, the State indicated again it intended to question Redmond about his prior harassment conviction. Redmond objected, arguing the State had not shown the conviction was admissible under any rules, and the conviction was extremely prejudicial to Redmond, outweighing any evidentiary value of the conviction. The court found that Iowa Rule of Civil Procedure 5.609(a) was applicable and, after hearing the arguments of counsel, ruled:

Under these circumstances, in my opinion, the probative value of admitting the evidence of the prior conviction and nothing beyond that outweighs the prejudicial effect of the accused and should be allowed under Rule [5.609(a)]. We're not dealing with evidence of a conviction for a crime that involved dishonesty or false statements so that's not the provision of the rule that we're referring to. We're referring to simply to a prior conviction for an aggravated misdemeanor and it's certainly within the ten-year period. And again I'm of the view that the probative value outweighs its prejudicial effect to Mr. Redmond and I'll at least allow the State to refer to the fact that he has that prior conviction on his record. [I w]ould note [Redmond's] objection

. . . .
Anything else?

Redmond's counsel indicated he would prefer to let the objection stand and made no further objections at that time.

On cross-examination, Redmond admitted he was very intoxicated the evening of the incident and probably had at least a twelve-pack of beer to drink within a couple of hours. He claimed he passed out and did not wake up until the

police banged on his door. He denied exposing himself to P.M.. The State then questioned him about the harassment conviction. The following exchanges occurred:

Q. Okay. You've previously been convicted of first degree harassment; is that correct?

[REDMOND'S COUNSEL]: Objection, Your Honor, previously urged.

THE COURT: Okay. I'll note the objection; it's overruled for reasons previously indicated. . . .

A. Yeah, I have been charged with first degree harassment.

Q. Okay. But it's not that you've been charged, you were convicted on August 21 of 2009; were you not? A. Yes, I was convicted of it, I guess, 'cause I went to court for it.

Q. Okay. And that was on August 21, 2009; correct?

A. Uh-huh.

The jury found Redmond guilty as charged. He was sentenced to 365 days in jail with all but 119 days suspended and with 119 days of credit. The court placed Redmond on probation for two years and ordered him to pay a fine. Additionally, the court imposed a ten-year special sentence of parole and notified Redmond of his duty to register as a sex offender.

Redmond appeals. He contends the district court erred in allowing evidence of his prior harassment conviction to be admitted into evidence, asserting the court failed to balance the probative value and the likely prejudicial effect of admitting evidence of the prior conviction. Redmond also claims his trial counsel rendered ineffective assistance by failing to object to prosecutorial misconduct.

II. Scope and Standards of Review.

We review evidentiary rulings for the correction of errors at law. See Iowa R. App. P. 6.907. Trial courts are granted broad discretion concerning the

admissibility of evidence. *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 149 (Iowa 2002). Discretion is abused when the court exercises discretion on grounds or for reasons that are clearly untenable. *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997). We only reverse a trial court's evidentiary rulings if it abused its discretion in balancing the probative force of the challenged evidence against the danger of undue prejudice or influence. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992).

III. Discussion.

A. Evidence of Prior Conviction.

On appeal, Redmond contends the district court failed to balance the probative value and the likely prejudicial effect of admitting evidence of his prior conviction. See Iowa R. Evid. 5.609(a). Specifically, he asserts the court failed to weigh the four factors set forth in set forth in *State v. Axiotis*, 569 N.W.2d 813, 816 (Iowa 1997), and *State v. Daly*, 623 N.W.2d 799 (Iowa 2001), in determining whether probative value of his prior conviction outweighed the prejudicial effect to him. The State contends Redmond did not specifically object on that ground and failed to preserve error. See *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). Alternatively, the State argues that the court applied the appropriate balance in admitting the conviction, and, in any event, the admission was harmless error.

Iowa Rule of Evidence 5.609(a) provides, in relevant part:

For the purpose of attacking the credibility of a witness:

(1) Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 5.403, if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the

probative value of admitting this evidence outweighs its prejudicial effect to the accused;

In *Daly*, our supreme court “reiterated that when balancing probative value and prejudicial effect for impeachment of a testifying defendant the trial court should consider the conviction’s (1) nature, (2) bearing on veracity, (3) age, and (4) tendency to improperly influence the jury.” *State v. Martin*, 704 N.W.2d 674, 676 (Iowa 2005) (discussing *Daly*, 623 N.W.2d at 802-03) (other citation and internal footnote omitted).

Here, the district court did not explicitly consider the foregoing four factors. Although Redmond’s counsel did not specifically object on the basis that the court failed to explicitly consider the factors, we will assume without deciding that this omission does not pose an obstacle to review and we will proceed to the merits of Redmond’s claim. See *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999).

In the case before us, the court instructed the jury it could only consider the evidence in evaluating the defendant’s credibility. The prior conviction was recent in time and not for the same crime as charged here. Moreover, we cannot conclude, from the record before us, the evidence of the prior conviction “was so likely to have influenced the jury improperly [that] the court abused its discretion in admitting it.” See *Daly*, 623 N.W.2d at 802-03. The testimony concerning the conviction was short and to the point. We conclude the district court did not abuse its discretion in allowing the State to use the defendant’s prior conviction to impeach his testimony at trial.

B. Prosecutorial Misconduct.

Redmond also claims his trial counsel rendered ineffective assistance by failing to object to prosecutorial misconduct in violation of his constitutional right to due process of law as set forth in *State v. Graves*, 668 N.W.2d 860 (Iowa 2003). Additionally, among other things, he claims that on cross-examination the prosecutor improperly asked him to comment on P.M.'s credibility by asking him if P.M. had lied during her testimony, and during closing arguments vouched for the veracity of P.M. and unfairly disparaged Redmond.

In order to prevail on his claims of ineffective assistance of counsel, Redmond must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id.* at 392. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for a possible postconviction relief proceeding. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Such a proceeding allows an adequate record of the claim to be developed “and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant’s claims.” *Biddle*, 652 N.W.2d at 203.

An adequate record is important because “[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel.” *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). A defendant is not entitled to perfect representation, but rather only that which is

within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000).

Redmond's trial attorney has had no opportunity to explain his strategy and actions in not objecting to the prosecutor's challenged questioning and statements. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Accordingly, we preserve this claim of ineffective assistance of counsel for a possible postconviction proceeding.

IV. Conclusion.

We affirm Redmond's conviction and preserve his claim of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.