IN THE COURT OF APPEALS OF IOWA

No. 1-932 / 11-0347
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES K. DANIELS, Jr.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Charles Daniels appeals from his convictions for first-degree burglary, domestic abuse assault—third or subsequent offense, child endangerment without injury, and criminal mischief in the fourth degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Michael J. Walton, County Attorney, and Joseph A. Grubisich, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VOGEL, P.J.

Charles Daniels appeals from his convictions for first-degree burglary, domestic abuse assault—third or subsequent offense, child endangerment without injury, and criminal mischief in the fourth degree. Despite the district court's inadvertent mention of the domestic abuse count as being a "third offense," the district court did not abuse its discretion in denying Daniels's motion for a mistrial because there was only one such reference that occurred after the presentation of evidence, the court took curative measures requested by defense counsel, and the evidence against Daniels was strong so as to minimize any possible prejudicial effect. Daniels's ineffective-assistance-of-counsel claim also fails because Daniels did not demonstrate any resulting prejudice.

I. Background Facts and Proceedings

In the early morning hours of September 9, 2010, Daniels knocked on the secured outer door of a three-apartment complex where his former girlfriend, D.H., and their three-year-old son, K.D., resided. Daniels had been calling D.H.'s cell phone "constantly" that night, but D.H. told Daniels he was not allowed to come over to D.H.'s apartment. Upon hearing the knocking, D.H.'s neighbor, who knew that Daniels was a frequent visitor of D.H.'s, let Daniels inside the common area and returned to her apartment. Daniels forced open the locked door that led to D.H.'s second-floor apartment. D.H. heard the door being kicked in; three to five minutes passed. Daniels then pushed open D.H.'s bedroom door. D.H. ran to her closet. Daniels went to the closet and proceeded to pull D.H. out of the closet by grabbing her hair; he then began using his fist to hit D.H. The bi-fold closet door was torn from the closet. Neighbors in D.H.'s apartment

complex, as well as next door, heard D.H. screaming and called the police. D.H. and Daniels's son was present during the entire altercation, and pleaded for Daniels to stop. When Daniels finally tired, D.H. jumped over the bed, broke the window, and yelled for help.

Three officers from the Davenport Police Department were dispatched to the apartment. They observed the front door to D.H.'s apartment had been forced in, the frame lying on the stairs. Upstairs, Daniels was lying on the living room couch, his face sweaty. Daniels relayed to Officer Matthew Bowman that he had arrived at D.H.'s around 1:00 a.m., had a civilized conversation with her, and then went to sleep on the couch. He also assured them there had not been an altercation. Officer Bowman noted Daniels had a two-inch spot of blood on his shorts. Daniels told Officer Bowman the blood was from his fingers, as he had a tendency to chew on them, which caused them to bleed. Officer Bowman observed that Daniels had no apparent injuries to his hands or fingers, nor was he bleeding from anywhere else on his body. D.H. had a swollen left cheek and a swollen eye, and also had blood coming out of her nose and mouth.

Daniels was charged by trial information with burglary in the first degree under Iowa Code section 713.1 and 713.3; domestic assault—third or subsequent offense under Iowa Code section 708.2A(4); child endangerment under Iowa Code section 726.6; and criminal mischief fourth degree[1] under Iowa Code section 716.1 and 716.6 (2009). A jury trial was held December 27 and 28, 2010, with the jury returning guilty verdicts on all counts. Daniels appeals.

[1] Daniels was initially charged with criminal mischief in the third degree under Iowa Code section 716.1 and 716.5, but this count was amended at trial to a fourth-degree charge under Iowa Code section 716.1 and 716.6.

II. Standard of Review

We review a district court's ruling on a denial of a motion for mistrial for an abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006). Where an ineffective-assistance-of-counsel claim is advanced, our review is de novo. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008).

III. Mistrial

Daniels claims the district court erred in not granting him a mistrial and contends reversal is required because "the court's reference to the domestic abuse count as a 'Third Offense' effectively revealed Daniels'[s] prior domestic abuse conviction to the jury, information which was so prejudicial that it deprived Daniels of a fair trial." The State argues the district court acted within its discretion in denying Daniels's request for a mistrial as the solitary reference did not prejudice Daniels in light of the overwhelming evidence supporting the charges.

The district court "has broad discretion in ruling on motions for mistrial." *State v. Brown*, 397 N.W.2d 689, 699 (Iowa 1986). This is because the district court "was in a better position to gauge the effect of the matter on the jury." *State v. Waters*, 515 N.W.2d 562, 567 (Iowa Ct. App. 1994). "The court is found to have abused its discretion only when defendant shows prejudice which prevents him from having a fair trial." *State v. Callender*, 444 N.W.2d 768, 770 (Iowa 1989).

Here, the district court inadvertently referenced Daniels's domestic abuse charge as a "third offense"—one time—when reading the instructions to the jury. Following a discussion in chambers, defense counsel Ingham stated:

> At this time the defendant would move for a mistrial in this case on the grounds that the Court having inadvertently read Count 2 as the original charge Domestic Abuse, Third Offense, which, of course, the jury may not be made aware of. Because of the extraneous information presented to the jury, a fair trial cannot be had by Mr. Daniels.

The State then agreed the language "third offense" was used, and the judge responded:

> The actual instruction that I give is the correct instruction. I don't think it means anything to them at this point. They don't have a copy. Oftentimes I give each individual juror a copy of it—of the instructions. I haven't done that here. The last thing, of course, I told them was the criminal mischief fourth degree. I don't know that they—I don't know that it—that it can't be cured by simply giving the correct instruction at this point in time. They don't know first offense, second offense, third offense means in any event at this point in time. We haven't gotten that far in the instructions.
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> MR. INGHAM: The problem is it sort of signals prior crimes, wrongs or acts that weren't before the jury at the time of the trial. Anyway, I'd ask for a ruling.
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> THE COURT: The request for a new trial is denied. I believe it's cured by the instructions being—the proper instruction being given in this case, which is count—which is Instruction No. 15, which simply tells them domestic abuse assault.
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> MR. INGHAM: Well, not conceding the motion, I would ask for a further curative effort by the Court and that is could the Court simply begin reading the instructions anew and substitute for Count 2 domestic assault?

The judge and the State agreed to defense counsel's proposal.

The pertinent question is whether the district court was "clearly unreasonable in concluding a fair and impartial verdict could be reached" notwithstanding the district court's inadvertent reference to the domestic abuse count being a "third offense." *See State v. Hunt*, 801 N.W.2d 366, 373 (Iowa Ct. App. 2011) (discussing whether the district court's failure to grant a mistrial despite an inadvertent reference to an OWI was "clearly unreasonable" such that it was an abuse of discretion).

First, although the exact words the court uttered were not reported, according to both Daniels and the State, the mention of the term "third offense" was isolated and brief. *See State v. Greene*, 592 N.W.2d 24, 32 (Iowa 1999) ("Whether the incident was isolated or one of many is also relevant; prejudice results more readily from persistent efforts to place prejudicial evidence before the jury."). While indicating the domestic abuse count was a "third offense" might have resonated with the jury, it is important to note that the single reference was not made during the presentation of the evidence, and no other references were made to the previous offenses that would preclude the jury from reaching a fair and impartial verdict. Second, the district court took curative measures, as requested by defense counsel, which included reading the jury instructions to the jury for a second time, with no mention of the domestic abuse count as a "third offense." *See Newell*, 710 N.W.2d at 32 (noting the district court's exercise of discretion was not clearly unreasonable where the court gave a general jury instruction for the jurors to disregard a witness's single reference to the defendant's previous drug charges). Finally, the State's presentation of evidence against Daniels was strong. *See Greene*, 592 N.W.2d at 32 (noting a final consideration in determining whether prejudice resulted is whether the evidence against the defendant is strong). D.H. testified as to the events of the early morning—including the three to five minutes that elapsed between Daniels breaking in her downstairs door, climbing the staircase, and entering her bedroom. D.H.'s apartment complex neighbor corroborated the timing evidence and testified as to the screams she heard coming from D.H.'s apartment. A neighbor in a separate building, as well as Officer Janet Martin and Officer

Bowman, also testified that they heard screams coming from D.H.'s apartment when they arrived on the scene.

Consideration of all these factors leads us to conclude that Daniels was not prejudiced by the district court's inadvertent reference to the domestic abuse count as being a "third offense." Because there was a single reference made after the presentation of evidence, the court took curative measures requested by defense counsel, and the evidence against Daniels was strong—therefore minimizing any prejudicial effect, the district court did not abuse its discretion in denying Daniels's motion for mistrial.

IV. Ineffective Assistance of Counsel

Daniels next asserts trial counsel was ineffective for failing to object to Officer Martin's testimony that could have been construed to imply prior police contacts and prior assaultive behavior.[2] In asserting an ineffective-assistance-of-counsel claim, Daniels must establish (1) his counsel failed to perform an essential duty and (2) prejudice resulted from such failure. *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Both elements must be proved by a preponderance of the evidence. *Id.* The claim fails if either of the two elements is lacking. *State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010).

Daniels claims trial counsel was ineffective in failing to object to this testimony by Officer Martin:

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[2] Daniels also raised an ineffective-assistance claim in the event we found error was not preserved on his motion for mistrial. As error was preserved on his motion, we will not proceed to analyze the ineffective-assistance claim based on error preservation.

> [T]here were two units that were originally dispatched. Myself and Officer Hatfield were dispatched, and Sergeant Welke, who is a sergeant on third shift, got on the radio and said—because they said the suspect's name was Charles Daniels, so he—Sergeant Welke got on the radio and told us to at least send one other officer to this call, so then Officer Bowman responded as well.

Daniels asserts that testimony "effectively revealed to the jury that the officers had prior confrontations with Daniels and considered Daniels to pose a danger to officer safety." He further contends that "[i]n the instant case, the prior police contacts implied by Officer Martin's testimony are irrelevant and unduly prejudicial, since there is no indication that such contacts related to prior domestic assault incidents involving D.H."

"[T]o establish prejudice, the defendant must show there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Braggs*, 784 N.W.2d at 34 (internal quotation marks omitted).

> A defendant need only show that the probability of a different result is "sufficient to undermine confidence in the outcome." In determining whether this standard has been met, we must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial.

Bowman v. State, 710 N.W.2d 200, 206 (Iowa 2006) (citations omitted). Daniels did not demonstrate that but for trial counsel's failure to object to Officer Martin's testimony, the result of the proceeding would have been different. Daniels's assertions regarding how members of the jury would perceive him based on Officer Martin's brief statement of "because they said the suspect's name was Charles Daniels, so he—Sergeant Welke got on the radio and told us to at least send one other officer to this call" are purely speculative, as there was no

mention of previous contact with the police or information that would describe his relationship or history with D.H. Moreover, Officer Martin's isolated comment was slight in light of the largely uncontested evidence against Daniels, such that the outcome of the proceeding would not have been different without such testimony.

Because Daniels has failed to demonstrate by a preponderance of the evidence that he was prejudiced by Officer Martin's testimony, Daniels's ineffective-assistance-of-counsel claim must fail.

AFFIRMED.