IN THE COURT OF APPEALS OF IOWA

No. 2-056 / 11-0433
Filed March 14, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES CHARLES TYSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul Macek, Judge.

A defendant appeals from his convictions of attempt to commit murder and willful injury causing serious injury as a habitual offender. **CONVICTION AFFIRMED; SENTENCE VACATED IN PART.**

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

James Charles Tyson, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael J. Walton, County Attorney, and Amy Devine, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

In July 2009, James Tyson attacked a stranger, Michael Grabbe. Grabbe was standing outside of a bar when Tyson approached him and stated "You're going to die." Tyson stabbed Grabbe approximately fifteen times, severely injuring him so that upon arrival to the hospital, Grabbe had stopped breathing and his heart had stopped beating. The doctor who treated Grabbe later testified that Grabbe "was close to not surviving." When Tyson was apprehended about one and one-half blocks from where the attack occurred, he threw a large knife on the ground that had Grabbe's blood on it. Tyson also had Grabbe's blood on his clothes.

Tyson was charged with attempt to commit murder in violation of Iowa Code 707.11 (2009) and willful injury causing serious injury in violation of section 708.4(1). The State also alleged that Tyson was an habitual offender pursuant to section 902.8. A trial was held to the court. Tyson claimed he acted in self defense, testifying that he stabbed a man "probably twice" but "didn't stab nobody no fifteen times." The district court found Tyson guilty as charged. Tyson stipulated to his prior felony convictions. The district court sentenced Tyson to terms of imprisonment for twenty-five and fifteen years, to be served consecutively. The district court also imposed a $10,000 fine for the willful injury conviction. Tyson appeals, asserting his trial counsel was ineffective and the district court erred in imposing sentence.[1]

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[1] Additionally Tyson filed a pro se brief, in which he indicates he acted in self-defense and challenges the fact that the State did not enter into evidence pictures of Grabbe's stab wounds. His brief does not comply with the rules of appellate procedure in a

I. Ineffective Assistance of Trial Counsel.

Tyson asserts his trial counsel was ineffective for (1) failing to object to evidence of his and the victim's character and criminal history and (2) failing to pursue the defenses of diminished capacity and voluntary intoxication. We review ineffective-assistance-of-counsel claims de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Although ineffective-assistance-of-counsel claims do not need to be raised on direct appeal, a defendant may do so if he has reasonable grounds to believe the record is adequate to address his claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). If we determine the record is adequate, we resolve the claim. *Id.* If we determine the record is inadequate, we must preserve the claim for postconviction-relief proceedings, regardless of our view of the potential viability of the claim. *Id.*

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted from this failure. *Straw*, 709 N.W.2d at 133. A defendant's inability to prove either element is fatal and therefore, we may resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

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number of ways, including not addressing error preservation or standard of review, not citing to the record, and not containing a specific legal argument. *See* Iowa R. App. P. 6.903(2). We find his argument is waived and without merit. *See, e.g.*, *Baker v. City of Iowa City*, 750 N.W.2d 93, 103 (Iowa 2008) (holding that a party's "conclusory contention" was waived where the party failed to support it with an argument and legal authorities); *McCleeary v. Wirtz*, 222 N.W.2d 409, 417 (Iowa 1974) (holding that a "subject will not be considered" where a "random discussion" is not supported by a legal argument and citation to authority).

A. Criminal History.

Tyson first argues his trial counsel was ineffective for failing to object to evidence of his and the victim's character and criminal history. He points to the following testimony during the State's direct examination of Grabbe:

> Q. Now, around July 3rd of 2009, or any time, really, in your past, Michael, have you ever been one to start fights? A. No. I'm not that type of person. I don't—I walk away. I don't, you know, get into a competition with anything, you know.
>
> Q. So you've had no convictions for assaults? A. No.

Tyson later testified that around the time of the altercation, he regularly carried a knife for protection and that on the night of the attack, he was attacked by three men and he used his knife to protect himself. He stated he was not on his schizophrenia medication, but was intoxicated at the time of the attack. The following exchange occurred on cross-examination:

> Q. When you get intoxicated, which you say that you were on the 3rd of July, do you get more violent and more angry? A. No, not really. This is the first time it's ever happened to me, and my intentions were not to kill anybody that night. I just got out of jail and I want to party that day.
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> Q. What did you just get out of jail for? A. Public intox.
>
> Q. You say that this is the first time that this has happened to you, yet you have a lot of convictions for assault and various carrying weapons charges? A. No.
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> Q. Don't you? A. No. I just got one for carrying—one charge for Carrying Weapons.
>
> Q. Yeah, but— A. I've got a lot of assaults, though.
>
> Q. You have an Assault with Weapons and a Carrying Weapons conviction in 2001? A. Carrying Weapons, that's all. That's the only one I've got, Carrying Weapons.
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> Q. You have an Assault on a Police Officer conviction in 2002? A. That was spit. I spit on him.
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> Q. Assault Causing Bodily Injury conviction in 2003? A. That was spit. I spit. I spit on people a lot.
>
> Q. Assault on a Police Officer conviction in 2004? A. I spit on people a lot.

> Q. Going Armed with Intent, which is a felony conviction, in 2005? A. That was a BB gun.
> Q. Another Going Armed with Intent conviction that same year, in 2005? A. No Just Going Armed with Intent one—they tried to charge me with robbery, trying to say I robbed somebody, but I didn't rob nobody, I scared, I played a joke on them, scared them with a BB gun.
> Q. And then Assault Causing Bodily Injury conviction in March of 2009? A. 2009? March?
> Q. In March. A. Oh, yeah. Somebody called me out my name.
> Q. I'm sorry, because why? A. Somebody called me out of my name.
> Q. And then this, which occurred July 3rd of 2009? A. Yeah, I got hit in the face and got jumped on.

During the State's closing argument, the prosecutor argued:

> And although we may not be able to wrap our minds around why he did this, because clearly it doesn't appear to be a drug deal gone bad or a robbery, sometimes people are volatile, violent, and evil, and this is this defendant. According to his record, he has had nothing but assaults and charges with carrying and going armed with intent. [The victim] has not had one assault conviction.

On appeal, Tyson argues this evidence was not relevant to any legitimate issue in the case, other than the impermissible purpose to show that Tyson had a general propensity to commit the crime. The State responds that the evidence was relevant to disprove Tyson's claim of self-defense, and alternatively that even if the evidence was erroneously admitted Tyson cannot establish prejudice. Because we may resolve an ineffective-assistance-of-counsel claim on either prong, we need not examine whether counsel should have objected and resolve this claim on the prejudice prong. *See Graves*, 668 N.W.2d at 869 (explaining that we may resolve an ineffective-assistance-of-counsel claim on either the duty or prejudice prong).

Tyson admitted he stabbed Grabbe and the only issue was whether he did so in self defense. Tyson testified that he was approached by three people, one ripped his shirt and one punched him in the face, and he pulled his knife and stabbed someone a couple of times. Other evidence, however, demonstrated that Grabbe was outside of a bar with a friend who was smoking a cigarette when Tyson approached him. Grabbe was unarmed, but Tyson had a large knife. One officer explained that after Tyson was arrested, he photographed Tyson and did not observe any defensive wounds on Tyson. While Tyson claimed he only stabbed Grabbe to "get him off of me" and "probably" stabbed Grabbe twice, he actually stabbed Grabbe fifteen times.

In this bench trial, the evidence was overwhelming that Tyson was the aggressor. *See also State v. Casady*, 491 N.W.2d 782, 786 (Iowa 1992) ("There is less danger of unfair prejudice resulting from the use of the evidence in this case because [the defendant] was tried to the court. The prejudicial effect of other-crimes evidence is reduced in the context of a bench trial."). Consequently, Tyson cannot establish prejudice and his ineffective-assistance-of-counsel claim must fail.

B. Affirmative Defenses.

Tyson next asserts his trial counsel was ineffective for failing to pursue the defenses of diminished capacity and voluntary intoxication. Because this was not at issue, the record contains no information to support these affirmative defenses and is therefore inadequate for us to reach Tyson's ineffective-

assistance-of-counsel claim on appeal. We preserve this claim for possible postconviction relief proceedings.

III. Sentencing.

Tyson also asserts the district court erred in imposing his sentence by (1) permitting victim impact testimony that was not authorized by statute and (2) in imposing an unauthorized fine. We review his claims for correction of errors at law. *State v. Ross*, 729 N.W.2d 806, 809 (Iowa 2007) (reviewing whether the district court had authority to impose a fine for correction of errors at law); *State v. Valin*, 724 N.W.2d 440, 444 (Iowa 2006) ("[W]e review a defendant's sentence for the correction of errors at law.").

A. Victim Impact Statement.

Tyson argues the district court erred by considering testimony from the victim's sister. Prior to the sentencing hearing, a presentence investigation report was completed. The PSI noted that Grabbe testified at trial and did not want any further contact with Tyson. Grabbe completed a written victim impact statement and reported that his sister planned on attending the sentencing hearing.

At the sentencing hearing, the court considered the PSI, including Grabbe's written victim impact statement. In addition, the State offered testimony from Grabbe's sister. Tyson objected, arguing Grabbe's sister was not a victim and could not give a victim impact statement. The district court overruled the objection and permitted Grabbe's sister to testify.

On appeal, both the State and Tyson agree, as do we, that Grabbe's sister's testimony was erroneously admitted. The use of victim impact statements during sentencing is a matter of statutory authority. *See* Iowa Code § 915.21 (authorizing the use of victim impact statements); *State v. Matheson*, 684 N.W.2d 243, 244 (Iowa 2004) ("Authority to submit impact statements is authorized under Iowa Code section 915.21 and is wholly statutory."). Iowa Code section 915.10(3)[2] defines who is a victim that is permitted to give a victim impact statement. The statutory definition, however, does not apply to the victim's sister in the present case. *See State v. Tesch*, 704 N.W.2d 440, 452 (Iowa 2005) (holding that a victim's "wife was not a 'victim' under the first sentence of the statutory definition because her harm flowed from the injuries suffered by her husband as a result of the offense and not directly from the criminal acts).

Consequently, the issue on appeal is what the appropriate remedy is in this case. The answer depends on the content of the victim impact statement. *See Matheson*, 648 N.W.2d at 244. If the victim impact statement contains information that is already contained in the record, the defendant cannot establish he was prejudiced by the erroneous admission and the sentence will be affirmed. *See id.* at 245 (citing *State v. Sumpter*, 438 N.W.2d 6, 9 (Iowa 1989)

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[2] This code section states:

> "Victim" means a person who has suffered physical, emotional, or financial harm as the result of a public offense or a delinquent act, other than a simple misdemeanor, committed in this state. "Victim" also includes the immediate family members of a victim who died or was rendered incompetent as a result of the offense or who was under eighteen years of age at the time of the offense.

(no prejudice where the court concluded, although the victim-impact statements were hostile and bitter and expressed a strong desire for the ultimate retribution, they told the judge little, if anything, that was not already apparent)). Alternatively, if the victim impact statement introduces information that is prejudicial and outside the record, then we presume the district court considered the information erroneously admitted and reverse and remand for resentencing. *See Matheson*, 684 N.W.2d at 244 (explaining that where the district court overruled a defendant's objection to a victim impact statement and the district court did not affirmatively state the erroneously admitted victim impact statement would not be factor in its sentencing decision, we cannot assure the sentencing court did not consider it); *Sumpter*, 438 N.W.2d at 9 (explaining that prejudicial types of information that would not otherwise be available to the judge include allegations of unproven crimes or other facts outside the record).

Ultimately, the State and Tyson disagree as to whether Grabbe's sister's statement contained information outside of the record. Tyson specifically asserts Grabbe's sister's testimony introduced evidence Grabbe used to do physical work, his life was saved by an experimental heart surgery, and the sister had to take off work to transport the victim to doctor's appointments. Those facts, however, were apparent from the record. At trial, the doctor who treated the victim testified that the paramedics had to ventilate the victim because he had stopped breathing and the victim's heart was not beating when he arrived at the emergency room. The victim had multiple stab wounds that damaged several

organs, which required heart and lung surgery and abdominal surgery to repair his stomach, colon, small bowel, pancreas, and liver.

Grabbe also testified to his injuries, including that he later had a second heart surgery during which a device was put in his heart "to make the blood flow the one way it's supposed to." In his written victim impact statement, Grabbe explained he continued to have effects from the attack, both psychological (nightmare and problems sleeping and needs to attend counseling) and physical (he was stabbed over seventeen times and remains under medical care). He reported that when he was released from the hospital, the doctors instructed him he could not live by himself and he had to live with his sister, and he relies on his sister to care for him, pay his expenses, and transport him to medical appointments. Grabbe stated that the crime "totally changed my life." He further stated,

> I think the person who did this should be in prison for the rest of his life. I do now know why he did this to me. . . . [Tyson] came up to us and said to me "You got to die" and started stabbing me. Before I could do anything I fell to the ground. The doctor[s] told me I died in the ambulance, the doctor in the ER brought me back to life.

At the sentencing hearing, Grabbe's sister's testimony was brief, less than two written transcript pages. She explained Grabbe was unable to work and needed extensive medical treatment, referencing his heart surgery that both Grabbe and Grabbe's doctor testified about. She also stated she missed work to take the victim back and forth to doctor's appointments. We agree with the State that in this case, the victim's sister's statement did not contain any information that was not already apparent from the court file, and already known by the

sentencing judge who had also been the trial judge. Because the statement did not contain prejudicial information, Tyson cannot demonstrate the erroneous admission of the testimony caused him prejudice.

B. Fine.

Tyson asserts the district court erred in imposing a $10,000 fine for his conviction of willful injury causing serious injury as an habitual offender, and the State agrees. Iowa Code section 902.9 provides that "[a]n habitual offender shall be confined for no more than fifteen years." It does not authorize the imposition of a $10,000 fine. Iowa Code § 902.9; *Ross*, 729 N.W.2d at 809 (explaining that section 902.9 does not authorize a fine as part of the sentence for an habitual offender convicted of a class "C" felony). Because the imposition of the fine was not permitted by statute, it is illegal and void. *Ross*, 729 N.W.2d at 809. Accordingly, we vacate the unauthorized fine.

CONVICTION AFFIRMED; SENTENCE VACATED IN PART.