

IN THE COURT OF APPEALS OF IOWA

No. 3-757 / 12-1894
Filed October 2, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CALVIN O. HOSKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil,
District Associate Judge.

A defendant convicted of harassment challenges his attorney's
performance at trial. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney
General, Jacob Marshall, Student Legal Intern, Thomas J. Ferguson, County
Attorney, and Peter Blink, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A jury convicted Calvin Hoskins of first-degree harassment for his threats against Carlos LaBeaux and LaBeaux's family members—communicated during a heated telephone conversation. On appeal, Hoskins claims his lawyer should have argued he had a legitimate purpose in communicating with LaBeaux and should have objected to the admissibility of the partial recording of their phone call. Because we find counsel's performance satisfied professional standards expected of criminal defense attorneys, we affirm.

I. Facts and proceedings

On the evening of August 31, 2011, Carlos LaBeaux missed a phone call from Amy Cooley, the mother of his three children. When LaBeaux called her back, Cooley's new boyfriend, Calvin Hoskins, joined their conversation.

LaBeaux recalled Hoskins saying he wanted to meet LaBeaux at the store "and when he seen me at the store, that's where I was going to lay." LaBeaux took those words as slang for Hoskins's intent to kill him. Hoskins then said: "Your mamma and your kids, that's who's going to bury you."

Hoskins also leveled threats toward LaBeaux's children, saying he was going to be at their bus stop and telling LaBeaux: "I'm going to make sure your kids get fucked." At that point in the conversation, Amy Cooley interjected: "Why would you say something like that to him?"

In a final provocation, Hoskins told LaBeaux he knew where LaBeaux's mother lived and by going to her house Hoskins would "bring [LaBeaux's] bitch ass to me." Because Hoskins was living less than a mile away from LaBeaux's

mother, upon hearing that last threat, LaBeaux hung up and called the police—asking them to check on his mother’s welfare. LaBeaux also took Hoskins’s threats seriously enough to personally drive his children the school the next day.

When Hoskins started making threats, LaBeaux had activated an application (app) on the cell phone he was using that recorded incoming voices. LaBeaux also put the conversation on speaker phone, which enabled his teenage daughter to hear Hoskins’s rant. The daughter recalled being scared when Hoskins, who was dating her mother, threatened to harm her and her brothers. She also heard Hoskins say “that he was going to go over to my granny’s house, and he said that he was going to make my dad come to him.”

When Cedar Falls police officer Katie Burkhardt responded to LaBeaux’s call, he played the recording for her. She then recorded the conversation onto a cassette tape.

The State charged Hoskins with harassment in the first degree, an aggravated misdemeanor in violation of Iowa Code section 708.7(2) (2011). At Hoskins’s jury trial, the prosecution offered the audio-recording as an exhibit. The court overruled defense counsel’s objection to its admission.

After the prosecutor started playing the exhibit during LaBeaux’s testimony, one of the jurors complained: “I don’t think any of us can understand anything that’s said up there. Can’t understand—can you guys decipher any that was said?” After a conference at the bench, the prosecutor resumed playing the tape. The speaker’s angry tone is clear from the audio-recording, but many of his exclamations are hard to make out. During her testimony Officer Burkhardt

explained the quality of the second recording was significantly worse than the original. But the officer remembered hearing Hoskins say on the original recording that he would “put a bullet” in LaBeaux.

The jury returned a verdict on the charge of harassment in the first degree. The court sentenced Hoskins to an indeterminate two-year term, ordering the sentence to be served concurrently with his sentences in three other aggravated misdemeanor cases, but consecutive to his sentence in an unrelated felony case. This is Hoskins’s appeal from his harassment conviction.

II. Scope and standard of review

Because Hoskins’s complaints about the quality of his legal representation spring from the Sixth Amendment, we review them de novo. *See State v. Canal*, 773 N.W.2d 528, 530 (Iowa 2009). To the extent Hoskins calls into question the sufficiency of the State’s proof, we review substantial evidence claims for errors at law, viewing the totality of the evidence in the light most favorable to the verdict. *See State v. Button*, 622 N.W.2d 480, 484 (Iowa 2001).

As a general rule appellate courts postpone deciding ineffective assistance claims until possible postconviction relief proceedings so the parties may fully develop the record. *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011). But where enough facts appear in the trial transcript to settle the dispute on direct appeal, we will do so. *Id.* at 171. Here, we find the record complete enough to decide the ineffectiveness claims.

Hoskins must prove his trial attorney failed to perform an essential duty and prejudice resulted. *See Button*, 622 N.W.2d at 483. If he cannot show both prongs by a preponderance of the evidence, we will affirm. *See id.*

III. Analysis

Hoskins alleges his attorney committed two significant errors during the trial which prejudiced his chances for acquittal. Hoskins asserts counsel was ineffective, first, in not challenging the sufficiency of the State's evidence regarding the legitimate purpose element of harassment, and second, in failing to object to the admissibility of the one-sided recording under Iowa Rules of Evidence 5.106 and 5.403. We will examine both allegations in turn.

A. Was counsel ineffective for not alleging the State's failure to show Hoskins's communication was without a legitimate purpose?

To prove harassment, the State bore the burden to prove the following elements: Hoskins had the intent to intimidate, annoy, or alarm LaBeaux, and communicated with him by telephone "without legitimate purpose" and in a manner likely to cause LaBeaux annoyance or harm. *See* Iowa Code § 708.7(1)(a). Harassment is elevated to first degree if the communication involved a threat to commit a forcible felony. *Id.* at § 708.7(2).

Hoskins's counsel moved for judgment of acquittal, concentrating mostly on the enhancing element, arguing: "[T]here's no statement that he's going to kill him or even hit him. So we believe if there is some harassing nature to this phone call, it wasn't really directed specifically at Mr. LaBeaux."

On appeal, Hoskins contends his attorney breached a material duty in not attacking the State's proof the communication was "without legitimate purpose."¹ He maintains the pauses in the recording indicate "it is possible" he and LaBeaux were trading insults and threats, though only Hoskins's statements were captured by the phone app.² If counsel had flagged the incomplete evidence, Hoskins maintains the court would have granted the motion for judgment of acquittal.

The State counters that trial counsel had no basis to challenge the legitimate purpose element because Hoskins made "true threats" against LaBeaux and "true threats" never have a legitimate purpose. See *Button*, 622 N.W.2d at 485. Courts have defined "true threats" as statements an ordinary, reasonable person—familiar with the context—would interpret as conveying the speaker's intent to inflict injury or damage. *Id.* (citing *State v. Milner*, 571 N.W.2d 7, 13 (Iowa 1997)).

While the jurors did not have access to LaBeaux's side of the conversation, we nevertheless find they were reasonable in concluding Hoskins's threats lacked any legitimate purpose. Even if he were responding to insults from LaBeaux, which the record does not show, Hoskins words were definite enough to be understood by an ordinary, reasonable person to suggest impending harm to LaBeaux and his family members. See *State v. McGinnis*,

¹ The requirement that punished speech be "without legitimate purpose" serves as the constitutional safety valve in the harassment statute. *Button*, 622 N.W.2d at 485; *State v. Fratzke*, 446 N.W.2d 781, 783 (Iowa 1989) (identifying element as protection against criminalizing unpopular speech).

² Neither Hoskins nor Amy Cooley testified at trial. Defense counsel did not ask LaBeaux or his daughter on cross-examination whether LaBeaux threatened or insulted Hoskins during the phone conversation.

243 N.W.2d 583, 589 (Iowa 1976) (“Threats of physical harm need not be directly expressed, but may be contained in ‘veiled statements’ nonetheless implying injury to the recipient when viewed in all the surrounding circumstances.”). When Hoskins threatens to go after LaBeaux’s children at the bus stop, even Amy Cooley is incredulous, asking: “Why would you say something like that to him?” Hoskins’s invocation of LaBeaux’s mother prompts LaBeaux to hang up and contact authorities. We find Hoskins’s statements constituted “true threats” actionable under the harassment statute. Trial counsel did not breach a material duty in declining to contest the legitimate purpose element, and any challenge to that element would not have had a reasonable probability of changing the outcome.

B. Was counsel ineffective for not arguing for exclusion of the recording under Iowa Rules of Evidence 5.106 or 5.403?

At a pretrial conference, defense counsel objected to the admission of the recorded phone call. Counsel argued the recording violated state and federal wiretapping statutes, and the relevance of the recording was outweighed by the danger of unfair prejudice. The court prohibited reference to the recording in opening statements, but did not rule on the overall admissibility of the tape. At trial, counsel objected under Iowa Code sections 727.8 and 808B.2. The court overruled the objection and accepted the recording as an exhibit.

On appeal, Hoskins contends trial counsel breached a material duty in not objecting to the recording under the rule of completeness at Iowa Rule of Evidence 5.106 or in not renewing his objection under the balancing test at Iowa

Rule of Evidence 5.403. Hoskins argues the recording was inaccurate and untrustworthy because it featured only one-half of the conversation between him and LaBeaux.

Rule 5.106 provides:

a. When an act, declaration, conversation, writing, or recorded statement, or part thereof, is introduced by a party, any other part or any other act, declaration, conversation, writing, or recorded statement is admissible when necessary in the interest of fairness, a clear understanding, or an adequate explanation.

b. Upon request by an adverse party, the court may, in its discretion, require the offering party to introduce contemporaneously with the act, declaration, conversation, writing, or recorded statement, or part thereof, any other part or any other act, declaration, conversation, writing, or recorded statement which is admissible under rule 5.106(a). This rule, however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

Iowa R. Evid. 5.106. The rule of completeness aims to avoid misleading impressions left by creative excerpting. See *State v. Garcia*, 302 P.3d 111, 116 (N.M. Ct. App. 2013). But it does not demand the trial court exclude evidence which is incomplete. See *Lomax v. State*, 16 S.W.3d 448, 449 (Tex. Ct. App. 2000) (describing similar Texas evidentiary rule as rule of admissibility rather than rule of exclusion). Counsel had no duty to urge an objection based on rule 5.106.

In *State v. Weatherly*, 519 N.W.2d 825, 826 (Iowa Ct. App. 1994), our court reiterated Iowa's test for admitting recorded conversations: did evidence establish the recording was "accurate and trustworthy?" In *Weatherly*, the recording picked up only the informant's side of a phone conversation. *Weatherly*, 519 N.W.2d at 825. Nevertheless, our court determined the trial court

did not abuse its discretion in allowing the recording into evidence because the informant testified the recording was accurate. *Id.* at 827. The same is true here. LaBeaux testified the State's exhibit was a true and accurate recording of what he heard on the night in question. Counsel had no duty to object under the test set out in *Weatherly*.

Finally, counsel was not ineffective in failing to renew his objection to the recording under rule 5.403. That rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Iowa R. Evid. 5.403. Hoskins argues the recording posed a risk the jury would decide his guilt based on emotion rather than the facts of the case. To the contrary, the recording—albeit poor quality—allowed the jury to hear the tenor of the communication itself. It was highly probative of how Hoskins delivered the threats to LaBeaux. Any prejudice from the one-sided nature of the communication did not outweigh the probative value. See *State v. Price*, 692 N.W.2d 1, 4-5 (Iowa 2005) (rejecting argument BAC was unduly prejudicial in under-the-influence prosecution). Hoskins fails to show trial counsel breached a duty or that he was prejudiced by counsel's omission.

AFFIRMED.