IN THE COURT OF APPEALS OF IOWA

No. 6-160 / 05-0829
Filed April 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY WAYNE SENSEMAN,
Defendant-Appellee.

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy, Judge.

Jeffrey Senseman appeals his conviction for sexual abuse in the second degree. **AFFIRMED.**

James A. Schall of Shall Law Office, Storm Lake, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, and Phil Havens, County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Jeffrey Wayne Senseman appeals his conviction for sexual abuse in the second degree. He contends the trial court erred in not allowing proposed testimony of a witness, in sustaining a portion of the State's motion in limine, and in denying his motion for new trial. He also raises several claims of ineffective assistance of trial counsel. We affirm his conviction and preserve his ineffective assistance of counsel claims for a possible postconviction proceeding.

I. BACKGROUND FACTS AND PROCEEDINGS.

From the evidence presented at trial the jury could find the following facts. On the evening of October 19, 2004, Brandi Adams was at home with her fiancé, John Reidinger. At approximately 11:00 p.m. Adams decided to go to Wal-Mart to get some cigarettes and to call her friend Mitch Bolte to discuss his recent break-up with his girlfriend.[1] She drove to Wal-Mart and once inside she heard someone call her name. When she turned around she saw Isaac Salinas. Adams had known Salinas since July 2004 when he was the live-in boyfriend of one of her co-workers. She estimated that she saw him around fifteen times between July 2004 and October 19, 2004. Adams testified she did not socialize with Salinas but felt she knew him well, characterized him as a friend, and said he had always been friendly to her.

In Wal-Mart, Adams and Salinas had a brief conversation. Adams told Salinas she was going to call Bolte and Salinas told her he was going to buy some alcohol. Apparently Salinas also knew Bolte because Salinas stated he

[1] Although Adams and Bolte were not close friends, they had become acquainted through Bolte's girlfriend, who worked with Adams.

had not spoken to him in awhile and wanted to talk to him too. Adams used the pay phone to call Bolte. Bolte told Adams he was coming to Storm Lake and they discussed meeting somewhere in Storm Lake for coffee and to talk. As Adams was talking to Bolte, Salinas repeatedly asked to talk to him. Eventually Adams gave Salina the phone and went to the bathroom. When she returned Salinas was still talking to Bolte and Adams told Salinas she needed to talk to Bolte again to find out where to meet him. However, Salinas hung up the phone before Adams could speak further with Bolte. Salinas told Adams that Bolte had said to meet him at Bel-Air Beach. Adams told Salinas she did not know where Bel-Air Beach was. Salinas said she could just follow him and his friend, the defendant Jeff Senseman, and they would show her where it was.

Salinas then told Adams he needed to buy some liquor so she went with him to the liquor department, they stopped and got a container of lime juice in the produce section, and then they walked to the front of the store. Salinas asked if Adams would buy the alcohol for him because he had forgotten his identification. She agreed and bought the alcohol with Salinas's money. Adams then bought her cigarettes separately and gave Salinas his alcohol, change, and the receipt. That Wal-Mart receipt was later found in the front pocket of Senseman's jeans which were found at the scene of the incident which gave rise to the charge against Senseman.

After making their purchases Adams and Salinas left Wal-Mart and Adams got into her car. Salinas went over to Senseman's Bronco, talked to him for a few minutes, then came over and got into Adams's car, telling her he was going

to ride with her and they would follow Senseman. Senseman took a back route to Bel-Air Beach and did not go through town. Adams also recalled that the stereo in Senseman's Bronco was turned up very loud.

Adams estimated it was approximately 11:30 p.m. when they arrived at the parking area of Bel-Air Beach. Salinas said he had to go to the bathroom and walked over to some bushes to urinate. Adams turned her back to Salinas and was facing into the Bronco on the passenger side looking at Senseman. She heard Salinas return and turned around to face him. As she did Salinas shoved Adams by her shoulders and she fell backward onto the seat of the Bronco with Salinas standing in front of her. Salinas held Adams's wrists over her head until Senseman could lean over from where he was seated on the driver's side and grab her wrists.

Salinas lifted up Adams's shirt and pushed up her bra while Senseman continued to hold her wrists. He then pulled her pants and underwear down and digitally penetrated her vagina while Senseman continued to hold her wrists. Adams testified Senseman then said, "Let's flip the bitch over" and they turned her over onto her stomach. As this was all occurring Adams stated she continued to struggle and told them "to stop, and to let go, not to do it."

Senseman then told Salinas to take Adams wrists and he did so. Senseman took off his pants and underwear and attempted to force Adams to perform oral sex on him, but was unable to do so as he did not have an erection and Adams resisted. Salinas then inserted his fingers in Adams's vagina and anus. He did this for "a little bit" and then started slapping Adams's left buttock.

He slapped her six or seven times before Senseman told him to stop or he would leave a mark. Salinas then jerked Adams's head to the right and started sucking on the left side of her neck, after which he said, "There. Now I left a mark."

Next, Senseman digitally penetrated Adams's vagina. This caused Adams pain and she continued to tell the men to stop and let her go. She screamed in Salinas's face to "get the fuck off me." Despite Adams's continuing resistance, including attempts to bite him, Salinas twice more digitally penetrated Adams's vagina.

Adams then began to act as if she was going to get sick, saying she was dizzy, and that she thought she was going to vomit and pass out. Salinas grabbed her face and said, "Don't die on me bitch." Adams just kept repeating she was going to get sick and pass out until both men backed away from her and let go of her wrists such that she was able to slip out of the Bronco. She pulled up her pants and ran for her car. Adams got in the car, locked the doors and took off towards town. As she was driving she saw headlights behind her and thought it was Salinas and Senseman so she sped up. The lights got really close and then blue and red emergency lights came on and she could see it was a police car behind her. She pulled over and an officer approached her car. She recognized the officer as Buena Vista County deputy sheriff Larry Small from when she had worked at the truck stop where he would go for breakfast.

Deputy Small was on duty at 12:17 a.m. on October 20, 2004. He was parked and operating a stationary radar when a four-door Chevy Lumina traveling north passed his location traveling thirty-eight miles per hour in a

twenty-five-mile-per-hour zone. He stopped the vehicle for speeding and recognized Adams as a cook who had worked at the local truck stop but whose name he did not know until he saw it on her driver's license. Deputy Small observed that Adams was extremely nervous, much more so than the average person at a traffic stop, and was not able to focus. Small asked Adams why she was so upset. Initially she said there was nothing wrong. He then noticed a mark on the left side of Adams's face below the jaw line. He mentioned the mark and Adams tried to cover it up. After asking Adams several more times what was wrong and whether she had been the victim of an assault, Adams told Small she was trying to get away from two guys. She told him about the Bronco and where the assault had taken place. When she mentioned the Bronco Deputy Small remembered seeing a Bronco about one-half hour earlier heading south. His attention had been drawn to the Bronco because the bass was so loud he could hear it long before he could see the vehicle. He also recalled a four-door passenger car following the Bronco but had not noted the make or model.

Deputy Small then asked Lieutenant Jeff Lundberg, who had arrived at the scene to assist with the stop, to check the areas on the south side of the lake. Lundberg drove to Bel-Air Beach and found no people or vehicles there. He did, however, find a pair of shoes and blue jeans on the ground. The jeans were partially turned inside out. Lundberg checked the pockets of the jeans and found a billfold containing, among other things, Senseman's driver's license, social security card, and voter registration card.

While Lundberg was gone Deputy Small continued to speak with Adams. She told him she was trying to get away from two guys, one was named Isaac. When Lundberg returned with Senseman's license Small showed it to Adams and asked her if he was one of the men she was trying to escape. Adams "shied away" from the license and said it was.

Deputy Small had observed some minor injuries on Adams. He saw a mark on her neck and some abrasions on the palms of her hands. He observed a red mark on her middle finger and she gave him a broken ring. Adams reported to Small that her hands had been squeezed very tight, her fingers had been crushed, and her ring had broken and dug into her finger. She had been wearing rings on nearly every finger at the time of the incident.

Deputy Small took Adams to the emergency room. Dr. David Archer examined Adams at about one o'clock in the morning of October 20, 2004. He found a bruise on the left side of her neck, some bruising on both forearms and on her hands, with more bruising on the right side than the left. He also observed a very small laceration between the opening of her vagina and her anus. There was also bruising on her wrists which he believed to be consistent with someone having held her wrists.

After Adams was finished at the hospital Deputy Small drove Adams to the south side of the lake and she was able to identify Bel-Air Beach as the place she had been assaulted. Lieutenant Lundberg met them there and identified this as the same location he found the jeans containing Senseman's billfold.

At approximately 9:40 a.m. on October 20, 2004, deputy sheriff Don McClure went to Senseman's home and asked if he could talk with him about an incident that had occurred the night before. McClure did not tell Senseman what the incident was about but asked him what he had done the night before. Senseman stated he was concerned he was being framed because he could not find his pants or billfold. He said he had had a lot of trouble with his stepdaughter and was concerned she was setting him up for something. Senseman said he had been in his home all night the night before with Salinas and had left only once when they went in his Bronco to Wal-Mart to buy liquor. He stated he had stayed in the truck while Salinas went into Wal-Mart. Senseman said they then went back to Senseman's residence, where his wife was watching television, and did not leave the rest of the night. He stated he and Salinas drank heavily that night, that he had consumed a twelve-pack of beer and a bottle of liquor. Senseman also told McClure he had neither seen anyone he knew nor visited with anyone while at Wal-Mart.

Senseman later gave a taped interview to McClure and another officer. Although he initially stuck to his earlier story, he then changed it and told the officers he and Salinas had run into Adams at Wal-Mart the night before. He said Adams voluntarily went to the Bel-Air Beach parking area with them and once there she began "making out" with Salinas. Senseman stated that as things progressed Salinas pushed up Adams's shirt and bra and was fondling her breasts. He saw Salinas then help Adams take off her pants and underwear and saw him "playing with her." He told the officers that Adams offered to perform

oral sex on him but that he was unable to get an erection so "that was the end of that." He stated that while she was trying to perform oral sex on him, Salinas had "slapped her ass." Senseman acknowledged both he and Salinas rubbed Adams's vagina but denied he touched her anus.

Senseman said the entire encounter was completely consensual and that Adams got mad at them because neither one could get "a hard on." He opined that Adams probably claimed she did not consent because her "old man" probably saw the marks on her buttocks so she fabricated the assault to cover up the fact she had been sexually involved with him and Salinas. Swabs were taken from the fingers of Senseman and Salinas. The major donor from the swabs taken from both men's fingers was consistent with Adams's DNA profile.

The State filed a trial information charging Senseman and Salinas with sexual abuse in the second degree, in violation of Iowa Code section 709.3(3) (2003). Senseman and Salinas were tried together to a jury and the jury found both guilty as charged. The court sentenced Senseman to an indeterminate twenty-five-year term of incarceration. Senseman appeals his conviction, contending the trial court erred in not allowing testimony from a proposed defense witness, in sustaining a portion of the State's motion in limine, and in denying his motion for new trial. He also raises several claims of ineffective assistance of trial counsel.

II. MERITS.

A. Prior Complaints.

The day before trial the State filed a motion in limine which sought, in part, to keep out any evidence of prior incidents in which Adams had made complaints to law enforcement officers. The State argued that such evidence would be immaterial and irrelevant to the issues and confusing to the jury and thus should not be presented to the jury without prior court approval. The court sustained the State's motion, without prejudice to Senseman's right to make an offer of proof at trial to show the evidence was relevant and material. The State argues Senseman did not preserve this issue for appeal because the district court's ruling on the motion in limine was not final and Senseman never made an offer of proof or raised the issue of any proposed testimony at trial.

It is generally recognized that a ruling on a motion in limine does not preserve error, because error does not occur until the matter is presented at trial unless the court's ruling on the motion amounts to an unequivocal holding on the issue. *State v. Delaney,* 526 N.W.2d 170, 177 (Iowa Ct. App. 1994). When, as occurred in this case, a motion in limine is made by the State, no evidence is introduced on presentation of the motion to the trial court, counsel argues in generalities, the court sustains the motion but does not preclude defendant from presenting the matter for reconsideration when the parties try the case or from making an offer of proof, and the defendant then does neither at trial, the case falls under the general rule that orders on motions in limine are not final and reviewable. *State v. Langley*, 265 N.W.2d 718, 720-21 (Iowa 1978).

In granting the State's motion the district court expressly stated,

> The court reserves the right to change its ruling on said motion at any time during the course of the trial. Also, this ruling is without prejudice to the right to offer proof during the course of the trial in the jury's absence of those matter covered by the motion. If it appears in the light of the trial record that the evidence is relevant, material and competent, it may then be introduced subject to the opposing counsel's objections as part of the record of the evidence for the jury's consideration.

At trial Senseman did not make an offer of proof or otherwise preserve the subject of Adams's alleged prior complaints to law enforcement officers. We conclude that because the trial court's ruling on this portion of the State's motion in limine was clearly not a final ruling it is not reviewable by this court. *See id.* at 721; *see also Delaney*, 526 N.W.2d at 177 (holding objection at trial required to preserve error where ruling on motion in limine did not preclude evidence in question). Otherwise stated, Senseman has not preserved error on this issue.

B. Proposed Testimony of a Witness.

Following the State's case-in-chief and the testimony of the first witness for the defense, the State made a motion in limine seeking to exclude proposed testimony of Ruth Davis, Senseman's mother, regarding alleged prior inconsistent statements by Adams. The trial court sustained the motion. Senseman later made an offer of proof, elaborating on what Davis's testimony would have been. The offer indicated Davis would have testified she called Adams and in response to Davis asking, "Why are you trying to ruin Jeff Senseman's life?" Adams responded, "I am not trying to ruin Jeff Senseman's life. Jeff didn't do anything," and "Look, I told you before Jeff did not touch me or do anything to me. I am not accusing Jeff of anything." The offer further

indicated that in response to Davis asserting Adams was "making some very strong accusations" Adams had responded, "Look, I told you before I am not accusing Jeff of doing anything to me, so don't call me anymore."

The trial court had made an unequivocal ruling on the motion.[2] It had determined that under Iowa Rule of Evidence 5.613 Davis's proposed testimony would be improper impeachment of Adams because Adams was never given an opportunity to admit or deny that she had made the statements in question. Thus, the court had concluded Davis would not be allowed to testify regarding the alleged prior inconsistent statements.

Senseman argues on appeal that the trial court erred in excluding Davis's proposed testimony. We review rulings on general evidentiary issues for an abuse of discretion. *State v. Belken,* 633 N.W.2d 786, 793 (Iowa 2001); *State v. Smith,* 573 N.W.2d 14, 17 (Iowa 1997).

It is clear from our review of the record that Senseman's purpose in calling Davis was to impeach Adams's trial testimony with alleged prior out-of-court statements. Accordingly, admission of Davis's testimony is governed by rule of evidence 5.613(*b*). This rule provides, in relevant part,

> Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

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[2] As set forth above, while normally a ruling on a motion in limine will not preserve error, it will do so if the court's ruling is a final one. *Delaney,* 526 N.W.2d at 177. Here the court's ruling was final and unequivocal.

We agree with the trial court that Senseman did not afford Adams an opportunity to explain or deny the alleged prior inconsistent statements. The defense did not raise the existence of these statements during its cross-examination of Adams, and thus also did not afford the State an opportunity to interrogate Adams about them. Furthermore, although Senseman stated to the court that "justice otherwise requires" the admission of Davis's testimony, he did not elaborate on or make an argument as to why the court should apply this exception to the rule in this case.

We agree with the trial court that Senseman did not satisfy the foundational requirements of rule 5.613 for the admission of Davis's proposed testimony. We conclude the trial court did not abuse its discretion in excluding Davis's proposed testimony.

C. New Trial.

Senseman next argues the trial court erred in denying his motion for new trial based on newly discovered evidence. We review the denial of a motion for a new trial based on newly discovered evidence for abuse of discretion. *State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996). The trial court is in the better position to determine whether the new evidence would have probably changed the result of the trial. *Id.* Motions for new trial based on newly discovered evidence should be viewed with disfavor and should be granted sparingly. *State v. Beeson,* 569 N.W.2d 107, 112 (Iowa 1997).

The newly discovered evidence in this case consists of affidavits from Tina Jepsen and Carrie Wunder. Jepsen states in her affidavit that she heard the

closing arguments in Senseman's trial and learned at that time that Adams had testified her ring was broken during the sexual assault. She further states that she saw Adams's ring prior to the date of the crime, noticed it was broken, and offered to return to Adams an identical ring Adams had earlier given to her. Jepsen stated she knew it was the same ring because they showed it on the projector during closing arguments. Wunder's affidavit states she spoke with Adams after the trial and Adams told Wunder that "she lied under oath" at the trial. Wunder also states she saw Adams sitting in the front seat of Deputy Small's patrol car in early March of 2005.

The trial court denied Senseman's motion for new trial based on the alleged newly discovered evidence, concluding in part:

> Brandi Adams has not recanted her trial testimony. The Court views this evidence as an attempt to discredit the testimony of Brandi Adams. The Court seriously questions the credibility of the two affiants. The jury has assessed the credibility of Brandi Adams from her trial testimony. The jury obviously believed most, if not all, of her testimony. [Senseman's] motion for a new trial, based upon newly discovered evidence, is without merit.

For the following reasons we agree with the trial court's denial of new trial.

In order to establish he is entitled to a new trial based on a claim of newly discovered evidence, Senseman must show (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial. *Beeson,* 569 N.W.2d at 112; *Jones v. State,* 479 N.W.2d 265, 274 (Iowa 1991). We agree with the trial court that Senseman did not make the required showing.

First, each affidavit appears to set forth evidence aimed only at impeaching Adams. Evidence that is merely impeaching does not entitle one to a new trial. We conclude the evidence in question does not satisfy the third element necessary for a new trial based on newly discovered evidence. *Varney v. State,* 475 N.W.2d 646, 651 (Iowa Ct. App. 1991) (citing *Jones v. Scurr,* 316 N.W.2d 905, 907 (Iowa 1982)).

Second, we give weight to the trial court's findings concerning witness credibility. *Ledezma v. State,* 626 N.W.2d 134,141 (Iowa 2001). Having done so we agree there is a serious question as to Wunder's and Jepsen's credibility. The lack of specificity in both affidavits sheds doubt on the veracity of the allegations and the credibility of the affiants.

Jepsen's statements do not specify how long prior to the crime she supposedly saw the ring in question broken. Thus, it is possible Adams could have had the ring fixed between that time and the time of the assault, or she could have purchased another identical ring between the time Jepsen saw the broken one and the assault. Jepsen also did not specify in what way the ring was broken when she saw it. The ring could have been slightly broken when she saw it but Adams was still wearing it and then it broke further or in additional places during the assault.

Wunder's affidavit alleged that some time after the trial Adams told her she had lied under oath. Even assuming Wunder's affidavit is true, apparently Adams did not specify what portion of her testimony was untrue. Thus, we cannot know whether she supposedly lied about some crucial aspect of the case

or about some minor, insignificant detail. It would be mere speculation on our part to assume, based solely on Wunder's affidavit, that Adams lied about such a material and relevant aspect of the case that a new trial is warranted. We refuse to engage in such speculation. Furthermore, Wunder's affidavit contains nothing that would assist in establishing the credibility of her claim. Finally, Wunder's claim that Adams was in Deputy Small's patrol vehicle several months after the incident in question is not material to the issues in the case.

We thus further conclude that none of the allegations in these affidavits probably would have changed the outcome of the trial. Some of the allegations are not relevant or material to the issues in the case and the vagueness of others lead us to question the affiants' credibility. "Without the probability of a different result, a new trial is not warranted." *Varney,* 475 N.W.2d at 651. The trial court did not abuse its discretion in denying Senseman's motion for new trial.

D. Ineffective Assistance of Counsel.

Finally, Senseman raises several claims of ineffective assistance of trial counsel. When there is an alleged denial of constitutional rights, such as a claim of ineffective assistance of counsel, we review the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). To prove trial counsel was ineffective the defendant must show that counsel failed to perform an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999).

More specifically, Senseman claims his trial counsel was ineffective for (1) failing to file a motion under Iowa Rule of Evidence 5.412 seeking admission of evidence that Adams had made previous false claims of sexual abuse, (2) not laying a proper foundation for calling Ruth Davis to testify regarding Adams's alleged prior inconsistent statements, (3) a lack of due diligence and failing to properly investigate and explore the testimony Tina Jepsen would have allegedly given concerning a broken ring, and (4) failing to adequately prepare and present Senseman's motion for new trial through more specific affidavits and testimony of Jepsen and Wunder.

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); *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can 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. As set forth above, Senseman can only succeed on his ineffectiveness claims by establishing both that his counsel failed to perform an essential duty and that prejudice resulted. *Wemark,* 602 N.W.2d at 814; *Hall v. State*, 360 N.W.2d 836, 838 (Iowa 1985). No record has yet been made before the trial court on these issues. Trial counsel has not been given an opportunity to explain his actions and the trial

court has not considered and ruled on the ineffectiveness claims. Under these circumstances, we pass the issues in this direct appeal and preserve them for a possible postconviction proceeding. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). Accordingly, we preserve the specified claims set forth herein for a possible postconviction proceeding.

III. CONCLUSION.

We conclude the trial court did not err in excluding the testimony of Ruth Davis and in denying Senseman's motion for new trial. Senseman did not preserve error on his claim the trial court erred in ruling on the portion of the State's motion in limine concerning evidence of prior complaints or reports to law enforcement by Adams. We preserve the specified claims of ineffective assistance of trial counsel for a possible postconviction proceeding.

AFFIRMED.