

IN THE COURT OF APPEALS OF IOWA

No. 7-195 / 06-0836
Filed June 13, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT PAUL ASLING,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Robert P. Asling appeals his convictions, following jury trial, for third-
offense domestic abuse assault, as an habitual offender, and false imprisonment.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Jason B. Shaw, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant
County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

Robert P. Asling appeals his convictions, following jury trial, for third-offense domestic abuse assault, as an habitual offender, and false imprisonment. He contends the trial court erred in admitting irrelevant and prejudicial evidence of other bad acts and that he received ineffective assistance of counsel. We affirm his convictions and preserve his claims of ineffective assistance for a possible postconviction proceeding.

The defendant, Asling, and Melodie Asling (Melodie) are married and the parents of Ashley Asling (Ashley), who was twelve years old at the time of the trial. On June 11, 2005, Melodie reported to the Waterloo police that she had been held against her will and assaulted by Asling. She included in her statement to the police that approximately two weeks earlier Asling had kept her in her basement and hit her between the eyes causing “blood to go everywhere,” and the next day both of her eyes were swollen and bruised. She also stated that the next day she told Ashley that Asling did not do it but that she had fallen against a table.

Ashley also made a statement to the police on June 11 confirming almost everything Melodie had said, including that about three weeks earlier she had seen her mother with black eyes. Ashley told the police that when she initially asked her mom and dad how Melodie got the black eye they told her she tripped and hit her head on a table. She stated she later found in Asling’s car a letter from Melodie in which Melodie said she did not want Asling to tell Ashley what had happened in the basement. When Ashley asked Asling why he hit Melodie

he told her he “had to let his anger out on someone.” When Ashley later asked Melodie while alone how she got the black eye Melodie told her Asling had hit her. On June 22, 2005, Melodie advised the county attorney she had lied to the police about the incident with Asling on June 11 and that he was “innocent.”

On June 28, 2005, the State charged Asling, by trial information, with third-offense domestic abuse assault, causing bodily injury, a Class “D” felony, in violation of Iowa Code section 708.2A(4) (2005), and false imprisonment, in violation of section 710.7. The domestic abuse assault charge was enhanced to habitual offender status under section 902.8 based on two prior felony convictions. Prior to trial Asling made an oral motion in limine seeking to exclude any evidence concerning prior abuse or allegations of abuse of Melodie by him. The court conditionally overruled the motion and indicated it would revisit the issue in context during the trial.

During trial Asling objected to the testimony of a State’s witness, Michelle Foster, again raising an objection to evidence of prior abuse of Melodie by Asling. More specifically, he objected to her testimony relating to Melodie having two black eyes approximately three weeks prior to the incident in question. In response the State claimed Ashley would testify Asling had admitted to her that he hit Melodie and gave her the black eyes. The court admitted the testimony based on the State’s representation that it would connect the alleged prior assault to Asling through other testimony, including Ashley’s testimony. The court ruled Foster’s testimony had to be limited to the fact she had seen Melodie

with two black eyes approximately three weeks earlier. She was not allowed to testify what Melodie had told her, if anything, about how she got the black eyes.

At trial Melodie testified she had lied to the police on June 11 about the abuse and false imprisonment because she was using methamphetamine at the time and angry at Asling because he wanted to take her to a drug treatment program and she did not want to go. She testified everything in her police statement was false, including the part about him giving her the black eyes. Ashley also testified at trial that the statement she gave to the police on June 11 was false and denied that either Asling or Melodie had told her Asling gave Melodie the black eyes. Both Melodie's and Ashley's statements to the police were admitted into evidence for the limited purpose of showing how each had changed their stories since giving those statements to the police. Thus, their statements could only properly be considered by the jury for impeachment purposes.

The jury found Asling guilty of domestic abuse assault and false imprisonment. Asling stipulated to two prior convictions for domestic abuse assault and two prior felony convictions. The trial court sentenced him to a term of imprisonment of no more than fifteen years, with a three-year mandatory minimum, on the domestic abuse assault conviction and a concurrent term of incarceration of one year on the false imprisonment charge.

On appeal Asling first contends the trial court erred in admitting the evidence that Melodie had black eyes approximately three weeks prior to the incident in question. He argues the evidence was not relevant because the State

failed to show he was the one who inflicted the injury, and that he was prejudiced by the admission of this evidence because the jury was likely to conclude he caused the black eyes and if he had assaulted Melodie before he probably did it again. Asling further claims his trial counsel was ineffective for failing to move for mistrial based on the admission of this evidence and failing to object to Instruction No. 17.

Evidentiary rulings are generally reviewed for an abuse of discretion. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003); *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001). An abuse of discretion occurs when the trial court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). “Even if an abuse of discretion is found, reversal is not required unless prejudice is shown.” *Buenaventura*, 660 N.W.2d at 50.

In general, relevant evidence is admissible and irrelevant evidence is not admissible. See Iowa R. Evid. 5.402. Relevant evidence is evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Iowa R. Evid. 5.401. Even when evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Iowa R. Evid. 5.403.

State v. Taylor, 689 N.W.2d 116, 123 (Iowa 2004).

As set forth above, the trial court admitted evidence that Melodie had black eyes approximately three weeks prior to the incident in question based on the State’s representation it would show that Asling had admitted to Ashley he

had inflicted the injury on Melodie.¹ The court cautioned that if the State did not make the necessary connection between Asling and the prior assault, Asling would be “in great shape” for a mistrial. The State told the court it was “willing to take the risk” that Ashley would testify Asling had admitted the assault to her.

At trial Ashley denied Asling ever admitted to her that he gave Melodie a black eye approximately three weeks prior to the incident in question. Ashley’s prior statement to the police, which included the statements regarding Asling’s admission to her regarding the alleged prior abusive behavior was admitted, but could properly be considered for impeachment purposes only. Based on the record before us the State therefore did not in fact make the connection it had earlier represented it would, that Asling was the one who caused Melodie’s black eyes. However, Asling did not move for mistrial. Nor did he seek to have the challenged evidence stricken. Therefore, the trial court was never asked to revisit its prior ruling and determine whether the State had properly connected the evidence of black eyes to Asling.

Accordingly, we conclude the trial court did not abuse its discretion in conditionally admitting the evidence of the prior alleged assault, pursuant to Iowa Rule of Evidence 5.104(b), based on the State’s representation it would connect that assault to Asling. The fact the State failed to make this connection and that Asling then did not to seek a mistrial or to have the evidence stricken does not mean the trial court abused its discretion by conditionally admitting the evidence.

¹ The court’s ruling conditionally admitting this evidence was consistent with Iowa Rule of Evidence 5.104(b).

Asling next alleges his trial counsel was ineffective for failing to move for mistrial based on the admission of the evidence discussed above relating to Melodie's black eyes, and in failing to object to jury Instruction No. 17. Instruction No. 17 provides:

Evidence has been offered to show that the defendant made statements at an earlier time and place.

If you find any of the statements were made, then you may consider them as part of the evidence, just as if they had been made at this trial.

Asling appears to argue the evidence of a prior assault, not properly connected to him, was therefore irrelevant and unfairly prejudicial, and that because Ashley's statement to the police could be considered only to impeach her Instruction No. 17 improperly allows the statement to be used for substantive purposes. When there is an alleged denial of constitutional rights, such as an allegation of ineffective assistance of counsel, we review the totality of the circumstances in the record de novo. *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).

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) (citing *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, Asling 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).

We conclude the trial court did not abuse its discretion in conditionally admitting the challenged evidence based on the State's representations. Asling did not seek a mistrial based on the State's failure to properly connect the evidence to him, nor did he seek to have the evidence stricken. Accordingly, we affirm Asling's convictions and preserve his specified claims of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.