

IN THE COURT OF APPEALS OF IOWA

No. 7-228 / 06-0861
Filed July 25, 2007

KEITH ORVIS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Kellyann Lekar, Judge.

Keith Orvis appeals the district court's ruling denying his application for postconviction relief following his conviction for domestic abuse assault.

AFFIRMED.

Kathryn Mahoney and John J. Rausch, Rausch Law Firm, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

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

MILLER, J.

Keith Orvis appeals the district court's ruling denying his application for postconviction relief following his conviction for domestic abuse assault. We affirm.

The charge leading to Orvis's conviction for domestic abuse assault arose out of an October 6, 2002 incident between Orvis and his live-in girlfriend, Marsha Fisher. Waterloo Police Officer Shawn Monroe took Fisher's statement regarding the incident on the same date. At that time Fisher told Monroe that Orvis "pushed her in the couch into the wall causing her to hit her head on the wall behind the couch." Fisher did not at that time state she had been physically assaulted in any other manner or that she had suffered any physical injuries.

On October 9, 2002, Fisher returned to the police station and told Officer Monroe she has not been entirely truthful on October 6, and that she had a bruise on her leg from the incident. Fisher showed Monroe bruises on the back and side of one of her legs that were caused by Orvis's assault on October 6. Monroe had photographs taken of Fisher's injuries, but because Fisher was intoxicated he did not take a statement from her at that time.

On October 16, 2002, Fisher returned to the police station, sober, and gave a statement to Officer Monroe. In this statement she asserted Orvis "didn't want her to sleep, so he grabbed her by the leg and drug her off the couch and pushed her up against the wall . . . [a]nd they continued to argue, and he knocked her off the couch."

Orvis was charged with domestic abuse assault causing bodily injury. Prior to trial he filed a motion in limine in which he sought, in part, to prohibit the State from introducing evidence of other bad acts. The district court did not specifically rule on this portion of Orvis's motion.

During Officer Monroe's testimony the State asked him whether Fisher reported any injuries from the assault when he spoke with her on October 6. Monroe answered that she had said she had no physical injuries, and when he asked her if there was any pain when she hit her head "she replied she couldn't tell due to a prior head injury, she wasn't sure if she had pain or not." The State later asked Monroe if anything else happened on or after October 16, 2002, concerning this case. He replied,

I was advised by the courthouse deputies that Keith Orvis had been arrested at the courthouse. I don't remember if he was arrested on unrelated charges or not, but upon that detention I took my charges over to the jail and charged him with the assault.

During the State's direct examination of Fisher she was asked about her decision to provide a more detailed report of the assault on October 9 after having made an initial statement on October 6.

Q: Okay. And why did you decide that it was time to come in and report what had happened physically between you?

A: I'd just gotten fed up with this going on and being left homeless because of that kind of stuff happening.

Q: What kind of stuff happening?

A: Arguing and fighting.

Q: Being physically assaulted?

A: It had happened before.

The jury found Orvis guilty of the lesser-included offense of domestic abuse assault in violation of Iowa Code section 708.20(3)(a) (2001). He

appealed his conviction arguing, in part, that his trial counsel was ineffective for failing to object to other bad acts evidence including Monroe's testimony regarding Fisher's mention of a prior head injury, Fisher's testimony that "It had happened before," and Officer Monroe's testimony regarding Orvis's arrest. *State v. Orvis*, No. 03-0962 (Iowa Ct. App. April 28, 2004). This court concluded Orvis's trial counsel was ineffective for failing to object to the "It had happened before" testimony from Fisher and we reversed his conviction. On further review our supreme court summarily vacated the court of appeals' decision, affirmed Orvis's conviction and sentence, and preserved his claims of ineffective assistance for a possible postconviction relief proceeding. *State v. Orvis*, 03-0962 (Iowa July 30, 2004).

Orvis filed an application for postconviction relief on March 3, 2005. The postconviction court identified the following as issues raised by Orvis in his postconviction application.

1. That trial counsel was ineffective for failing to timely file a motion in limine.
2. That trial counsel was ineffective in failing to object to the testimony concerning the victim's prior head injury.
3. That trial counsel was ineffective for failing to introduce a video tape into evidence.
4. That trial counsel was ineffective for failing to effectively cross-examine the victim and failing to seek admission of the victim's prior bad acts including making a false report.
5. That trial counsel was ineffective for failing to investigate the facts of the case which Orvis maintains would have established that the victim did not live at his residence.

The court also noted that "[a]rguments were made at the postconviction hearing to suggest that Orvis continued to assert that trial counsel was ineffective for failing to object to the victim's testimony about prior bad acts." Presumably the

court was referring to the claim Orvis had also previously made that his counsel was ineffective for failing to object to Fisher's testimony that "It had happened before." However, the court "deem[ed] this allegation of ineffective assistance resolved by the decision of the Supreme Court of Iowa issued July 30, 2004." The court therefore did not consider that issue.

Following hearing the court denied Orvis's postconviction application. The court found, in relevant part, that counsel was not ineffective for failing to object to the evidence of Fisher's prior head injury because there was "nothing in the testimony that suggests that the jury would link the previous head injury with a previous episode of domestic abuse. The purpose of the testimony was in reference to the victim's memory problems." Orvis appeals from the court's denial of his application.

On appeal, Orvis claims the postconviction court erred in not finding his trial counsel was ineffective for failing to object to Fisher's testimony that "It had happened before," Officer Monroe's testimony that Fisher had a prior head injury, and Monroe's testimony that Orvis was arrested at the courthouse but Monroe could not remember whether the charges were unrelated. We typically review postconviction relief proceedings on claimed error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the applicant asserts a claim of constitutional nature, such as ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Id.*

To prove ineffective assistance of counsel the petitioner 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). To prove breach of duty, Orvis must overcome the presumption counsel was competent and prove that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove prejudice, Orvis must show there is a reasonable probability that but for his counsel's unprofessional errors the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *Ledezma*, 626 N.W.2d at 143-44. A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Ledezma*, 626 N.W.2d at 142.

Orvis did not raise the issue of Officer Monroe's testimony regarding Orvis being arrested at the courthouse in his postconviction application, the postconviction court did not identify that as an issue before it, and the court did not address the issue in its ruling. Issues must ordinarily be presented to and passed upon by the trial a court before they may be raised and adjudicated on appeal. *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000); *State v. Ashburn*, 534 N.W.2d 106, 109 (Iowa 1995). We do not review issues, even of constitutional magnitude, which are first raised on appeal. See *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982). Because Orvis has not preserved error on the issue of whether his trial counsel was ineffective for not objecting to Monroe's testimony concerning Orvis's courthouse arrest we decline to address the issue on appeal.

Orvis next claims his trial counsel was ineffective for not objecting to Officer Monroe's testimony that Fisher told him that due to a prior head injury she

could not tell if it hurt when she hit her head on the wall during Orvis's assault. He argues the evidence was objectionable because it was irrelevant and constituted improper evidence of other bad acts.

Iowa Rule of Evidence 5.404(b) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.” The rule “seeks to exclude evidence that serves no purpose except to show the defendant is a bad person, from which the jury is likely to infer he or she committed the crime in question.” *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001).

We agree with the postconviction court that there is nothing in the evidence that suggests the jury would believe Fisher's previous head injury was caused by domestic abuse. Nor does Monroe's testimony imply Orvis caused, or was in any way connected with, the prior head injury. Officer Monroe's testimony about Fisher's prior injury was only in reference to Fisher's memory problems.

We conclude this testimony did not raise the concerns rule 5.404(b) was designed to avoid because it did not suggest Orvis was a bad person, and it did not refer to any prior bad acts of the defendant. Further, we agree with the trial court that the evidence was relevant to explain why Fisher may have been unable to remember whether she had pain when she hit her head on the wall.

Orvis's trial counsel did not breach an essential duty by not objecting to the evidence concerning Fisher's prior head injury. See *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999) (counsel has no duty to raise meritless issues). We conclude the trial court correctly rejected this claim of ineffective assistance.

Finally, Orvis claims his counsel was ineffective for failing to object to Fisher's testimony that physically assaultive behavior by Orvis "had happened before." As set forth above, the postconviction court determined this issue had been resolved by our supreme court when it vacated the court of appeals decision resolving Orvis's direct appeal and preserved the issue for a possible postconviction relief proceeding. We disagree. The supreme court's order preserved Orvis's claims of ineffective assistance of counsel for a possible postconviction relief proceeding, rather than addressing them. However, it made no determination as to the merits of his claims. Thus, this claim of ineffective assistance was not resolved by the supreme court's July 30, 2004 order.

The State argues that Orvis did not preserve this issue because the postconviction court did not reach it and he did not file an Iowa Rule of Civil Procedure 1.904(b) motion. However, it is clear the issue was presented to the court and the court expressly addressed the issue by stating it was not going to rule on the matter, reaching that result because of its mistaken belief the issue had already been resolved. Accordingly, we conclude no rule 1.904(b) motion was required by Orvis in order to properly preserve this issue for appeal. Furthermore, we do not agree with the State's argument that Orvis waived this issue. We believe he has sufficiently raised and argued the issue in his brief for us to address it.

Rule 5.404(b) provides,

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other

purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa Rule of Evidence 5.403 further limits any evidence deemed admissible under rule 5.404(b) by stating, “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. . . .”

We first address whether, if counsel had objected, Fisher’s statement would have been excluded as irrelevant character evidence. Relevancy is the tendency to make a consequential fact more or less probable. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988). We conclude the challenged testimony was relevant as rehabilitative testimony to explain why Fisher was not completely truthful or forthright with Officer Monroe regarding the full extent of the assault and her injuries on October 6, but then came in on October 9 to give him more details. During cross-examination of Officer Monroe defense counsel challenged Fisher’s credibility several times, including: suggesting or implying she had made up her story of physical assault; emphasizing she had changed her story; pointing out she changed her story only after she received a civil no contact order; noting she was intoxicated when she came to the police station on October 9 and implying her intoxication could be the cause of a poor memory and her bruising; and bringing up the fact that she had received treatment for an anxiety disorder. Following defense counsel’s attack on Fisher’s credibility, the State was entitled to attempt to rehabilitate her credibility during its direct examination of her. This is presumably the purpose for which the testimony in

question was offered. We conclude the evidence would not have been excluded as irrelevant if counsel had objected to it.

Having concluded the testimony was relevant for a legitimate purpose, we must now decide whether, if counsel had objected, the evidence would have been excluded as having a probative value substantially outweighed by the danger of unfair prejudice, under rule of evidence 5.403. A finding that the probative value of evidence is substantially outweighed by the danger of unfair prejudice precludes admissibility of even relevant evidence. *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001) (quoting *Plaster*, 424 N.W.2d at 231). In weighing probative value and unfair prejudice we are directed to consider

“on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other hand, the degree to which the jury will probably be roused by the evidence to overmastering hostility.”

Rodriguez, 636 N.W.2d at 240, (citing *State v. Wade*, 467 N.W.2d 283, 284-85 (Iowa 1991) (citation omitted)).

Here the challenged testimony was extremely brief, no details of any alleged prior incident(s) were given, and the State did not belabor the response or ask Fisher to expand upon it in any way. Accordingly, we believe that the single, brief reference to a prior physical assault against Fisher led to no significant danger of unfair prejudice.

We have concluded the testimony by Fisher that “It had happened before” was relevant to rehabilitate Fisher’s credibility and that its probative value was

not substantially outweighed by the danger of unfair prejudice to Orvis. We cannot conclude that Orvis's trial counsel breached an essential duty by failing to object to such testimony.

Based on our de novo review, and for all of the reasons set forth above, we conclude Orvis's trial counsel did not render ineffective assistance by not objecting to Officer Monroe's testimony regarding Fisher's prior head injury or Fisher's testimony that "It had happened before." Orvis did not preserve error on his claim concerning Monroe's testimony about Orvis's courthouse arrest. The postconviction court was correct in denying Orvis's application for postconviction relief.

AFFIRMED.