

**IN THE COURT OF APPEALS OF IOWA**

No. 7-831 / 06-1567  
Filed November 29, 2007

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**SAMUEL CLARK TOOSON,**  
Defendant-Appellant.

---

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

Defendant-appellant appeals from his conviction and sentence for second-degree sexual abuse and assault while participating in a felony. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

**SACKETT, C.J.**

Defendant-appellant, Samuel Tooson, appeals from his conviction and sentence for second-degree sexual abuse and assault while participating in a felony. He contends the court erred in admitting other-bad-acts evidence and in not merging the assault with the sexual abuse. He also contends trial counsel was ineffective in not making a specific enough motion for judgment of acquittal and in not objecting to evidence of defendant's prior incarceration or questions about the truthfulness of a witness. We affirm.

**I. Background**

The State charged defendant with second-degree sexual abuse, assault while participating in a felony, assault by use or display of a dangerous weapon, carrying weapons, and possession of a firearm as a felon. The charges arose from an incident in which a woman alleged defendant sexually assaulted her at gunpoint and forced her to smoke cocaine at gunpoint. Following a jury trial, defendant was convicted of second-degree sexual abuse and assault while participating in a felony.

**II. Scope of review**

Evidentiary rulings generally are reviewed for an abuse of discretion. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003). Constitutional claims, such as ineffective assistance of counsel claims, are reviewed de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). We review alleged violations of the merger doctrine under Iowa Code section 701.9 (2005) for errors at law. *State v. Belken*, 633 N.W.2d 786, 794 (Iowa 2001).

### III. Analysis

A. *Admission of other-bad-acts evidence.* Defendant contends the court erred in admitting certain cellular telephone records because they were unfairly prejudicial evidence of other bad acts. See Iowa R. Evid. 5.404(b). The State contends error was not preserved on this claim. Defendant made a motion in limine seeking to exclude evidence of any prior criminal record or that he allegedly supplied drugs to anyone other than the victim. When the State first sought to introduce the telephone records, defendant's relevancy objection led to the State withdrawing the offer of the records. The State offered the records again after the testimony of a defense witness. The court admitted the records over defendant's relevancy objection. In the discussion on the record, the State argued any prejudicial evidence that defendant supplied drugs was already in the record through testimony of other witnesses.

We conclude defendant's relevancy objection was insufficient to preserve error on the rule 5.404(b) claim he raises on appeal. See *State v. Mulvany*, 603 N.W.2d 630, 632-33 (Iowa Ct. App. 1999). We further conclude the court did not abuse its discretion in admitting the evidence over defendant's relevancy objection. See *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005); Iowa R. Evid. 5.402.

B. *Ineffective Assistance.* Defendant contends trial counsel was ineffective in several particulars. "To prove ineffective assistance of counsel, the appellant must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted." *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). "There is a presumption the attorney acted competently, and prejudice will not be found

unless there is ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007) (quoting *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998)). Although such claims are generally preserved for postconviction relief actions, we will resolve them on a direct appeal in two situations:

If the record on appeal shows . . . that the defendant cannot prevail on such a claim as a matter of law, we will affirm the defendant’s conviction without preserving the ineffective-assistance-of-counsel claims. Conversely, if the record on appeal establishes both elements of an ineffective-assistance claim and an evidentiary hearing would not alter this conclusion, we will reverse the defendant’s conviction and remand for a new trial.

*State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (citations omitted).

1. Defendant first contends counsel was ineffective in

failing to move for judgment of acquittal specifically based on the failure of the evidence to show that the defendant displayed a weapon in a threatening manner or used or threatened to use force creating a substantial risk of death or serious injury during the sex act.

In *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004) the supreme court addressed a claim that counsel failed to raise an issue adequately in a motion for judgment of acquittal:

Clearly, if the record in this case fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted. On the other hand, if the record reveals substantial evidence, counsel’s failure to raise the claim of error could not be prejudicial. Consequently, the claim of ineffective assistance of counsel in this case can and should be addressed on direct appeal.

The court instructed the jury on the elements of second-degree sexual abuse, including:

3. During the sex act, the defendant:

- a. Displayed a dangerous weapon in a threatening manner;
- or
- b. Used or threatened to use force creating a substantial risk of death or serious injury to any person.

Jury Instruction No. 20. It further defined the phrase “displayed a dangerous weapon in a threatening manner” to mean “to show or make apparent to another person that a dangerous weapon existed so as to intimidate the other person.”

Jury Instruction No. 23. Iowa Code section 709.3 provides, in relevant part, that a person commits second-degree sexual abuse if

[d]uring the commission of sexual abuse the person displays in a threatening manner a dangerous weapon, or uses or threatens to use force creating a substantial risk of death or serious injury to any person.

Defendant contends the evidence shows he did not display the gun *during the sex act* but only before and after the act. He argues the State therefore did not prove all the elements of the charge, so counsel was ineffective in making only a general motion for judgment of acquittal that, even considering the evidence in the light most favorable to the State, a jury question was not presented.

The evidence was that the victim refused to undress until defendant threatened her with his gun. During the sex act defendant put the gun on the ground within reach. He threatened the victim again with the gun after the sexual assault. We conclude there was substantial evidence from which the jury could, following the instructions, find the defendant used or threatened the use of force during the sexual abuse. It need not have found the defendant had the gun in his hand during the act. Defendant cannot show prejudice. See *Truesdell*, 679 N.W.2d at 616 (“[I]f the record reveals substantial evidence, counsel’s failure to

raise the claim of error could not be prejudicial.”). Consequently, this claim of ineffective assistance must fail. See *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003) (recognizing failure to prove either prong of test is fatal to ineffective-assistance-of-counsel claim).

2. Defendant contends counsel also was ineffective in failing to object to evidence he was in jail on other charges before being arrested on the instant charges. A detective testified he interviewed the defendant on November first at the “Black Hawk County Jail,” and that he read defendant his rights when he interviewed him at the jail, but not when he interviewed him at a hospital because the defendant was “in custody” at the jail, but not at the hospital. On redirect, the detective agreed with the question, “In fact you advised him of his rights there because legally speaking he was in custody, you were questioning him, and you’re obligated to Mirandize him, correct?” Defendant argues this violated the motion in limine on defendant’s prior crimes. Defendant testified his encounter with the victim was consensual. He argues he “likely would have been acquitted on all charges” had the jury “not heard about his prior unrelated incarceration.”

We conclude the record is insufficient for us to address this claim. We preserve this claim for possible postconviction relief proceedings in order to give counsel the opportunity to respond to the claim in an evidentiary hearing. See *State v. Martinez*, 679 N.W.2d 620, 626 (Iowa 2004).

3. Defendant contends counsel was ineffective in failing to raise a proper objection to testimony on the credibility of the victim. Iowa prohibits questioning one witness as to whether another witness is telling the truth. *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006). “[W]ere-they-lying’ questions are improper

under any circumstance.” *Graves*, 668 N.W.2d at 873. These cases dealt with the prosecutor asking the defendant whether other witnesses were lying. We do not have similar circumstances before us in this case.

The victim’s friend was asked whether there were “glaring inconsistencies” in the victim’s version of events as told to the friend compared to when told to a nurse. A police detective was asked about inconsistencies in the victim’s story during multiple tellings and whether the victim’s demeanor caused the detective to believe she “was being less than truthful.” Defense counsel objected to the portion of the question about any inconsistencies that made the detective believe the victim “was being less than truthful” as invading the province of the jury. The court overruled the objection. These questions followed the court’s ruling:

Q. During the course of your interview with her, from the moment you had initial contact with her at her house on Newton, until the time you completed your contact with her after taking the statement from her, is there anything that led you to believe that she was giving you inconsistent information? A. No.

Q. Was there anything that led you to believe that she was being untruthful with you? A. No.

Such oblique questions are a far cry from asking a defendant “so you’re saying X was lying?” These questions merely inquired about whether the victim consistently gave the same version of events and whether her demeanor caused the detective to disbelieve her. They do not invade the province of the jury. The jurors were free to compare the victim’s consistent version of the events when told to various people with the defendant’s constantly changing version of events and to draw their own credibility conclusions. We conclude counsel did not fail in an essential duty in not objecting to this evidence.

C. *Failure to Merge Offenses.* Defendant contends the court erred in not merging assault while participating in a felony with second-degree sexual abuse.

Iowa Code section 701.9 provides for merger of lesser-included offenses into the greater offense if a jury returns a guilty verdict on both offenses. The purpose is “to prevent a court from imposing a punishment greater than that contemplated by the legislature.” *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000). Defendant argues assault while participating in a felony is a lesser-included offense of second-degree sexual abuse. See *State v. Johnson*, 291 N.W.2d 6, 9 (Iowa 1980) (holding assault while participating in a felony is a lesser-included offense of third-degree sexual abuse). The definition of assault while participating in a felony, however, has changed since *Johnson*. Iowa Code section 708.3 defines assault while participating in a felony:

Any person who commits an assault . . . *while participating in a felony other than a sexual abuse* is guilty of a class “C” felony if the person thereby causes serious injury . . . ; if no serious injury results, the person is guilty of a class “D” felony.

(Emphasis added). The language of the statute now excludes sexual abuse as the attendant felony. To find the defendant guilty of assault while participating in a felony in this case, therefore, requires his participation in a felony other than sexual abuse. Consequently, assault while participating in a felony cannot be a lesser-included offense of second-degree sexual abuse. The court did not violate section 701.9.

**AFFIRMED.**