

IN THE COURT OF APPEALS OF IOWA

No. 8-410 / 07-0694
Filed July 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TISHA CAROL BARGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Michael J. Newmeister, Judge.

Tisha Carol Barger appeals the judgment and sentence entered following her conviction of false reports. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Harold Denton, County Attorney, and Nicholas Maybanks, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Tisha Carol Barger appeals the judgment and sentence entered following her conviction of false reports in violation of Iowa Code section 718.6 (2005). Barger contends the district court erred when it allowed in an officer's testimony relating an earlier encounter with Barger in an area known for prostitution that was unrelated to the crime of false reports. Additionally, Barger asserts that she was denied the effective assistance of counsel when trial counsel failed to object to hearsay testimony relating that Barger was not assaulted but was engaged as a prostitute, as well as prejudicial testimony regarding Barger's past convictions for prostitution, which Barger claims had been excluded from evidence by her sustained motion in limine. We affirm Barger's conviction and preserve her ineffective assistance claims for possible postconviction relief proceedings.

I. Background Facts and Proceedings.

On March 31, 2005, at about 3:30 a.m., the Cedar Rapids Police Department dispatcher received a peculiar 911 call. The female caller pretended to be the dispatcher's roommate, and the dispatcher concluded that the caller was trying to share information without specifying an emergency. The dispatcher then asked the caller several questions to determine the situation, and the caller indicated that a sexual assault with a weapon was involved. Based upon the caller's response, several patrol officers were immediately dispatched with lights and sirens activated on their vehicles to the home of James Brown, the location where the 911 call was made.

Upon arriving, the first responding officer heard a woman screaming, "He's going to kill me." The officer looked through the window and initially saw nothing.

The officer then knocked on the door, but no one answered. The officer heard more screaming and looked through the window again. He observed a nude male, later identified as Brown, who then disappeared from view. The officer knocked again and looked through another window. The officer saw a nude female, later identified as Barger. Although the officer did not see any assault in progress, he heard more screaming and subsequently attempted to kick in the door. Brown then answered the door, looking wide-eyed and confused. Barger continued screaming and came forward and slapped Brown. Brown was placed in handcuffs, and Brown and Barger were separately questioned.

Barger told the officers that she met Brown at a bar and they returned to his house for drinks. Barger stated Brown then sexually assaulted her. Additionally, Barger told the officers that Brown had a gun and that he was going to kill her. However, upon further questioning, Barger modified her statement, asserting she thought there was a gun. Barger later informed the officers that there probably wasn't a gun. Despite her changing statements regarding the gun, Barger maintained that she had been sexually assaulted.

Brown gave a much different account to the officers. He stated he had not sexually assaulted Barger, but admitted he and Barger had a "sex for money" exchange. Brown claimed he had paid Barger thirty dollars. After observing that Brown was not in possession of a weapon, the officers asked for and received permission to search Brown's home. The officers searched but did not find any guns in Brown's home.

The officers determined that neither Barger nor Brown was injured. After completing their investigation, the officers concluded that Brown had not sexually

assaulted Barger, and that Brown did not have a gun. Both Brown and Barger were charged with prostitution, to which Brown plead guilty. Thereafter, Barger's charge was amended to false reports in violation of Iowa Code section 718.6. The amended charge alleged that Barger falsely reported that she had been the victim of an assault with a dangerous weapon.

Prior to trial, Barger filed a motion in limine requesting that the district court exclude certain evidence. Specifically, Barger requested evidence regarding any officer's belief that Barger was a known prostitute be precluded by the court as hearsay. Additionally, Barger requested that the court preclude the State and its witnesses from mentioning Barger's previous convictions, one of which was for prostitution. Barger argued that none of the prior convictions were relevant and that their prejudicial effect would outweigh their probative value. The district court sustained the motion in limine over the State's resistance.

The matter proceeded to trial. During trial, an officer testified on direct examination by the State that she had encountered Barger earlier in the evening after responding to a call regarding a suspicious person on the southeast side of Cedar Rapids. The following exchange took place:

Q. Have you been called to that part of town in the past for any investigation of criminal activity?

[BARGER'S COUNSEL]: Objection. Irrelevant.

THE COURT: Overruled.

A. Down on that side of town?

Q. Yes. A. Yes.

Q. What kind of criminal activity? A. Any kind of public [intoxication], any kind of drug activity, suspicious person break-ins.

Q. Have you ever been called to that part of town in reference to any prostitution activity? A. Yes.

Q. Did you have contact with [Barger] then at approximately 12:52 a.m.? A. Yes.

Another officer also testified on direct examination by the State that Brown had stated the incident was sex for money for around thirty dollars, without objection by Barger's counsel. Additionally, the following exchange took place during the State's cross-examination of Barger, without objection:

Q. Isn't it true you have been charged with prostitution by the Cedar Rapids Police Department before? A. It is.

Q. Isn't it true that you actually pled guilty to prostitution in May of 2004? A. It was true that I was thrown in jail for missing a pretrial date, and the only way to get out of jail was to plead guilty.

Q. You pled guilty to the crime of prostitution, did you not? A. I did.

Q. And isn't it true that as a part of that crime you actually approached an undercover police officer in the 1200 to 1300 block area of 2nd or 3rd Streets in Cedar Rapids? A. It is true.

Q. And that interaction was then captured on audiotape? A. It was.

Q. And as a result of that money was exchanged with a uniformed police officer? A. It was.

Q. And that money was later found on your person? A. It was.

Q. As a result of that you did plead guilty to prostitution? A. It is.

Following trial, the jury found Barger guilty of false reports. Barger now appeals.

II. Discussion.

A. Evidentiary Ruling.

Barger first contends the district court erred when it allowed testimony regarding an earlier encounter with Barger in an area known for prostitution that was unrelated to the crime of false reports. The State responds that Barger did not preserve error on this issue because her trial counsel did not object to the specific questions that elicited the challenged testimony. We agree.

In the present case, the district court overruled a relevancy objection by Barger to the question of whether or not the officer had been called to that part of town in the past for any investigation of criminal activity. However, Barger actually complains of later testimony given regarding the officer's testimony that the area was known for prostitution activity, which came in without objection. Although a ruling on a motion in limine may obviate the need for an objection in certain cases, this is not such a case. *Cf. State v. Daly*, 623 N.W.2d 799, 800 (Iowa 2001) (ruling was sufficiently definitive as to avoid necessity for objection at trial). Here, it was unclear from the district court's ruling on the motion in limine whether evidence that Barger had been in an area known for prostitution activity would be admissible. Thus, in order to preserve error on the admissibility of the contested evidence, Barger needed to object to the evidence when it was presented at trial. *See State v. Mendiola*, 360 N.W.2d 780, 782 (Iowa 1985) (McCormick, J., concurring specially) ("When a motion in limine is overruled, error is not preserved unless objection is made when the evidence is offered."). Barger did not object to the evidence she asserts the district court erroneously allowed at trial. Therefore, error was not preserved on her claims that the court erred in admitting the challenged evidence.

B. Ineffective Assistance of Counsel Claims.

We review claims of ineffective assistance de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). To prevail on a claim of ineffective assistance, Barger must establish as a matter of law that counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052, 2064, L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626

N.W.2d 134, 142 (Iowa 2001). Generally, we preserve claims of ineffective assistance to allow full development of the facts surrounding counsel's conduct. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). This is because postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance. *Id.*

Barger asserts that she was denied the effective assistance of counsel when trial counsel failed to object to hearsay testimony relating that Brown had stated that Barger was not assaulted but was engaged as a prostitute, as well as prejudicial testimony regarding Barger's past convictions for prostitution, which Barger claims had been excluded from evidence by her sustained motion in limine. The State maintains such evidence was admissible and counsel may have assumed that the district court would have overruled her objections. In this case, we conclude the record is inadequate to address Barger's claims of ineffective assistance of counsel. Accordingly, we preserve these claims for possible postconviction relief proceedings.

AFFIRMED.