IN THE COURT OF APPEALS OF IOWA

No. 8-440 / 07-1393
Filed July 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY MORA,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Thomas R. Hronek, District Associate Judge.

The defendant appeals from his conviction of third-offense public intoxication. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Stephen Holmes, County Attorney, and Keisha Cretsinger, Assistant County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Tony Mora appeals from his conviction of third-offense public intoxication, in violation of Iowa Code sections 123.46(2) and 123.91(2) (2007). He contends his trial counsel was ineffective in failing to object to the lack of a marshalling instruction outlining the elements the State was required to prove. We review his claim de novo. *State v. Allison,* 576 N.W.2d 371, 373 (Iowa 1998).

On the afternoon of March 30, 2007, Officer Scott Clewell came into contact with Tony Mora. Mora was sitting on the front steps of a building with two or three other people, awaiting the arrival of a taxi cab he had called. Clewell noticed Mora smelled of the odor of an alcoholic beverage, had bloodshot, watery eyes, his speech was slurred, and the front of his pants was wet in a manner consistent with someone who had urinated on himself.

When asked if he had been drinking, Mora replied that he had a cab coming and was not driving. Clewell recalls that at some point, Mora admitted he was intoxicated. Mora denies telling Clewell he was intoxicated. Mora refused to complete field sobriety tests or submit to a breath test.

Mora was arrested. He then became belligerent and uncooperative. He yelled intermittently during the hour he was in his holding cell. When being transported to the hospital, Mora initially refused to leave the holding cell. He exhibited difficulty with his balance.

Mora testified at trial. He claimed that he had consumed two alcoholic beverages prior to speaking with the officer. Mora takes medication for a heart condition and anxiety. The medication has the side effects of slurred speech and impaired balance. Mora claimed that his pants were wet from spilling a drink.

Mora contends his counsel was ineffective in failing to object to the lack of a marshalling instruction in the jury instructions. He claims such an instruction was necessary to inform the jury which elements the State was required to prove to support a guilty verdict, as well as instruct the jury on simulated intoxication.

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.

To succeed with such a claim, a defendant must prove two elements. *State v. Brooks,* 555 N.W.2d 446, 448 (Iowa 1996). First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* We can affirm on appeal if either element is lacking. *Id.*

We review jury instructions to determine if they are correct statements of the law and are supported by substantial evidence. *State v. Scalise*, 660 N.W.2d 58, 64 (Iowa 2003). We read all of the instructions together, not piecemeal or in artificial isolation. *Id.* The district court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the applicable law. *Id*.

We find the record adequate to decide the first part of Mora's claim. We conclude trial counsel was not ineffective in failing to object to the lack of a separate marshalling instruction. Iowa Code section 123.46(2) states, "A person shall not be intoxicated or simulate intoxication in a public place." Instruction number nine adequately sets forth the law regarding public intoxication by stating, "The law of the state of Iowa provides that anyone who is intoxicated or simulating intoxication in a public place commits a public offense." The other instructions set forth definitions and the State's burden of proof. Although it is necessary that the marshalling instruction include all elements of the offense, it was not necessary for each element to be defined in the same instruction. *State v. Conner*, 241 N.W.2d 447, 462 (Iowa 1976).

Mora also argues counsel was ineffective in failing to object because the term "simulating intoxication" was not defined in the jury instructions. In *State v. MaGuire*, 200 N.W.2d 832, 834 (Iowa 1972), our supreme court found the legislature intended to make it illegal to pretend or to feign intoxication. It rejected the argument "that one may be criminally responsible even though his simulation resulted from illness, physical peculiarity, or other natural cause." *Id.* The jury instructions do not make this distinction. Although the State claims it did not rely on the "simulating intoxication" theory at trial, the prosecutor makes this argument in closing, stating "at least appeared to be under the influence." Because "a lawyer is entitled to his day in court, especially when his professional reputation is impugned," *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999), we preserve this claim for a possible postconviction relief action.

AFFIRMED.