IN THE COURT OF APPEALS OF IOWA

No. 8-445 / 07-1440
Filed July 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOEL RILEY JR.,
Defendant-Appellant.

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

Joel Riley appeals following conviction and sentence for burglary in the third degree, enhanced domestic abuse causing bodily injury, child endangerment and criminal mischief in the fourth degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Joel Riley appeals following conviction and sentence for burglary in the third degree, enhanced domestic abuse causing bodily injury,[1] child endangerment, and criminal mischief in the fourth degree. He asserts the following on appeal: (1) the district court failed to order a new trial based on statements regarding Riley's pre-arrest silence in violation of his Fifth Amendment right to remain silent and (2) ineffective assistance of counsel for his trial counsel's failure to (i) preserve a Fifth Amendment violation claim and request a proper jury instruction, (ii) move in arrest of judgment based on inconsistent verdicts, and (iii) move in arrest of judgment based on insufficient evidence. We affirm.

I. Background Facts and Proceedings.

On the morning of April 1, 2007, Michelle Gage went to work and left Joel Riley to care for the couple's two daughters, Sydney and Olivia, then five and six years old. Riley had spent the previous night at Gage's duplex, where she and the children had lived since December 2006. The couple lived together from 1998 until 2004, and since that time, Riley occasionally spent the night with Gage and the children.

Gage and Riley began to argue when Gage arrived home from work. Gage asked him to leave the apartment but he resisted, telling Gage that she should pack his stuff for him. Gage became upset and threw his clothes outside. Gage then sent the children to stay with the downstairs neighbor, predicting the situation would escalate into domestic violence. Riley head-butted Gage and

[1] The amended trial information filed June 26, 2007, listed three prior domestic abuse assault convictions for the enhancement of Riley's current domestic abuse conviction.

slapped her across the face as the couple argued over the clothes. At some point, the children came back upstairs from the neighbor's apartment. As Gage and the children pushed their front door shut in an effort to keep Riley out of the apartment, a loose board fell down on six-year-old Olivia's forehead, causing a bump. The apartment's front door frame cracked during the struggle. Soon after, Gage saw Riley tearing apart the deadbolt on the downstairs door. In her attempt to stop him, Riley pushed her back into the wall, breaking the wall.

Riley left the apartment shortly before police arrived. Neither Riley nor Gage called or went to the police, nor do they know who called the police. Police found Gage hysterical and pacing around the apartment, with scratches on her face and the beginning of a black eye. The police interviewed Gage at the apartment, then brought her into the police station where she gave a more detailed statement. At the time Gage made her statements to the police, Riley had not yet been arrested or contacted by the police. The police were only attempting to gather information from Gage. The police arrested Riley several days later.

Trial began on June 26, 2007, and the jury entered the verdicts set out above. On August 6, 2007, the court sentenced Riley to five years for the burglary and domestic abuse convictions, two years for the child endangerment conviction, and one year for the criminal mischief conviction, all concurrent. Two 180-day jail sentences for two no-contact order violations also ran concurrently. Riley now appeals.

II. Scope and Standard of Review.

We conduct a de novo review of alleged constitutional violations. *State v. Decker*, 744 N.W.2d 346 (Iowa 2008). We also conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings. *Id*. Where the record is adequate to address the issue, however, such claims will be considered on direct appeal. *Id*.; *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999). In this case, the record is sufficient to permit a ruling. We review counsel's conduct considering the totality of the circumstances. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007).

III. Issues on Appeal.

A. Motion for Mistrial.

Riley argues the prosecutor committed misconduct by commenting on his pre-arrest silence. He contends these comments were made during redirect examination of the victim, Michelle Gage. He points to the following redirect examination of Michelle regarding his failure to report the incident to police:

> Q. And during the time that you're at the house and you're telling [the police] what the defendant did to you, is the defendant there saying she did this, this, and this to me? A. No.
> Q. When you go to the police station and you're giving your statement saying he did this, this, and this to me, do you see the defendant there saying she did this, this, and this to me? A. No.

After this questioning and outside the presence of the jury, defense counsel moved for a mistrial, and the State responded:

> DEFENSE COUNSEL: I am making a motion for a mistrial at this time. One of the things that's very clear from the authority of the State of Iowa that cannot be commented during a trial is the defendant's right to remain silent and the right that he has not to make any kind of a statement at all. During the last questioning

> Ms. Gage was asked, "Did you see Mr. Riley making any statement to the police at the home? Did you see Mr. Riley at the police station making any statement to the police?" And the implication was, well you, Ms. Gage, made a statement to the police at your house and at the station but Mr. Riley didn't. That is clearly an improper comment on his right to remain silent and on his right not to give a statement, and for that reason I'm making a motion for a mistrial.
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> . . . .
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> STATE: Your honor, I don't believe it's commenting at all on his right to remain silent. He had no contact with the police at that point. [Defense counsel] was questioning [Ms. Gage] about whether the police were telling her to focus on her injuries and what her marks were and what happened to her rather than what had happened to Mr. Riley. It's simply to point out that obviously their focus would be on Ms. Gage because she is the person that they're dealing with, she is the person they're taking statements from. It's not a situation where Mr. Riley is at the home telling them this, this, and this and they're trying to compare it. They're simply trying to gather the information about what happened to her and what her injuries are. It has absolutely nothing to do with whether, when Mr. Riley was contacted by the police, whether he chose to remain silent or not.

Riley argues the prosecution's questions constituted a violation of his rights under the Fifth Amendment. He contends he had no duty to talk to the police or reveal incriminating evidence and that it was improper for the prosecutor to point out, in front of the jury, that he chose to remain silent. *Doyle v. Ohio*, 426 U.S. 610, 617-19, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 99 (1976); *State v. Metz*, 636 N.W.2d 94, 97-98 (Iowa 2001). The State agrees with Riley that *Doyle* and *Metz* prohibit questions implicating a defendant's post-arrest, post-*Miranda* silence, but denies the prosecutor's questions addressed Riley's post-arrest silence. Rather, the State contends the prosecutor's questions were an attempt to rehabilitate Gage and the questions did not allude to Riley's right to remain silent.

The district court agreed and further determined Riley had opened the door to the State's questions for impeachment purposes when his counsel's opening statement to the jury discussed what Riley was "going to talk to [them] about." The court therefore reasoned that when Riley testified any infringement of his Fifth Amendment rights caused by Gage's redirect testimony would "cure itself."

We find the prosecutor's questions did not violate Riley's Fifth Amendment right to silence. His "silence" was not an issue. When Gage made statements to the police at her apartment and at the police station, Riley had not yet been arrested or contacted by the police. At that time the police were only attempting to gather information from Gage, and Riley did not even know the police had gone to the apartment or that the police were questioning Gage. Furthermore, even if we were to find the prosecutor's questions implicated Riley's silence, we agree with the district court that when Riley testified, any potential infringement of his Fifth Amendment rights caused by the questions would cure itself. We conclude the district court did not err in denying the motion for mistrial and affirm on this issue.

B. Ineffective Assistance of Counsel.

Riley contends his attorney was ineffective in failing to (1) preserve a Fifth Amendment violation claim and enter a proper jury instruction, (2) move in arrest of judgment based on inconsistent verdicts, and (3) move in arrest of judgment based on insufficient evidence.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted.

Maxwell, 743 N.W.2d at 196. A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

i. Failure to preserve a Fifth Amendment violation claim and enter a proper jury instruction.

Riley raises the argument he raised above alternatively as an ineffective assistance of counsel claim. He argues he received ineffective assistance of counsel because his counsel failed to preserve a Fifth Amendment violation claim when she did not request a jury instruction emphasizing his right to remain silent.

As we discussed above, the prosecutor's questions were not improper. We conclude there was no violation of Riley's Fifth Amendment right to silence. The prosecutor's questions were not improper and counsel was therefore not ineffective for failing to preserve the issue or request a jury instruction.

ii. Failure to move in arrest of judgment based on inconsistent verdicts.

Riley next argues his counsel was ineffective by failing to object to inconsistent verdicts. Riley acknowledges that the United States Supreme Court has held that inconsistent jury verdicts are not reviewable in *Dunn v. United States*, 284 U.S. 390, 393-94, 52 S. Ct. 189, 190-91, 76 L. Ed. 356, 359 (1932), and *United States v. Powell*, 469 U.S. 57, 69, 105 S. Ct. 471, 479, 83 L. Ed. 2d 461, 471 (1984), and that this rule was adopted into Iowa law in *State v.*

Hernandez, 538 N.W.2d 884, 889 (Iowa Ct. App. 1995).[2] In *Hernandez*, 538 N.W.2d at 889, our court stated in part:

> Thus, considering the historic reluctance of courts to inquire into the internal workings of the jury, the inability to determine whether the prosecutor or the defendant actually benefited by the inconsistency, and the prosecutor's inability to invoke review of inconsistent verdicts, the most desirable course of action to follow when confronted with inconsistent verdicts is to simply insulate the verdict from review. . . . Instead, the appellate review should be limited to whether sufficient evidence exists to support the verdict returned by the jury. . . . This approval is the most sensible under the circumstances and adequately protects defendants from irrational verdicts.

We disagree with Riley's contention that we should sway from such precedent. We conclude Riley's counsel was not ineffective for failing to object to the inconsistent verdicts rendered in this case.

iii. Failure to move in arrest of judgment based on insufficient evidence.

Riley finally argues his counsel was ineffective by failing to move in arrest of judgment based on insufficient evidence. Under Iowa law, a motion in arrest of judgment may not be used to challenge the sufficiency of evidence. *State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990). Counsel cannot be found ineffective for failing to raise a meritless issue. *State v. Greene*, 592 N.W.2d 24, 30 (Iowa 1999).

Furthermore, even if we were to assume counsel failed to perform an essential duty by not moving in arrest of judgment, we would be unable to find that prejudice resulted from such inaction. "[A] motion in arrest of judgment should be granted only when upon the whole record no legal judgment can be

[2] This rule has also been recognized in *State v. Fintel*, 689 N.W.2d 95, 100-01 (Iowa 2004), and *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa Ct. App. 1996).

pronounced." *Dallen*, 452 N.W.2d at 399. The evidence in this case was more than sufficient to sustain the verdicts against Riley. We therefore conclude Riley's counsel was not ineffective for failing to move in arrest of judgment based on insufficient evidence.

AFFIRMED.

Huitink, J., concurs; Sackett, C.J., concurs specially.

SACKETT, C.J. (concurring specially)

I concur only because I accept the majority's conclusion that Riley's testimony cured any problem. That said I am bothered by the prosecutor's challenged questions that I believe clearly attempted to imply defendant's silence and lack of an explanation of the events at a time when he was not even present. Unlike the majority I am not ready to say the questions were not a violation of Riley's Fifth Amendment right to silence. Cases should be tried on evidence, not on attempts to convey to the jury something that is not shown by evidence. I would hope the majority opinion is not interpreted as a stamp of approval of the challenged questions the prosecutor asked here.