

IN THE COURT OF APPEALS OF IOWA

No. 9-697 / 08-1925
Filed October 21, 2009

ROBERT PAUL ASLING,
Applicant-Appellee,

vs.

STATE OF IOWA,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, John J. Bauercamper, Judge.

The State appeals the district court's grant of a new trial following Robert Asling's application for postconviction relief. **AFFIRMED.**

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellant.

James Peters, Independence, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

The State appeals the district court's grant of a new trial following Robert Asling's application for postconviction relief. Because we agree with the district court that counsel should have moved for a mistrial when evidence of a prior bad act was introduced without clear proof of the commission of the act by Asling, resulting in prejudice to him, we affirm.

I. Background Facts and Proceedings

In June 2005, a jury found Asling guilty of false imprisonment and domestic abuse assault, enhanced by his habitual offender status. Asling appealed his conviction, arguing the district court erred in allowing evidence concerning prior assaultive conduct toward the same person, his wife, Melodie, and claiming trial counsel was ineffective for failing to move for a mistrial. On direct appeal, we found the district court did not err in conditionally admitting evidence of prior assaultive conduct, and preserved the ineffective assistance claim¹ for possible postconviction relief.² The facts of the case, as summarized on direct appeal are as follows:

The defendant, Asling, and Melodie Asling (Melodie) are married and the parents of Ashley Asling (Ashley), who was twelve years old at the time of the trial. On June 11, 2005, Melodie reported to the Waterloo police that she had been held against her will and assaulted by Asling. She included in her statement to the police that approximately two weeks earlier Asling had kept her in her basement and hit her between the eyes causing "blood to go everywhere," and the next day both of her eyes were swollen and

¹ A related claim was made regarding an instruction given to the jury, however the district court did not rule on the claim, nor is it before us in this appeal.

² *State v. Asling*, No. 08-1925 (Iowa Ct. App. June 13, 2007).

bruised. She also stated that the next day she told Ashley that Asling did not do it but that she had fallen against a table.

Ashley also made a statement to the police on June 11 confirming almost everything Melodie had said, including that about three weeks earlier she had seen her mother with black eyes. Ashley told the police that when she initially asked her mom and dad how Melodie got the black eye they told her she tripped and hit her head on a table. She stated she later found in Asling's car a letter from Melodie in which Melodie said she did not want Asling to tell Ashley what had happened in the basement. When Ashley asked Asling why he hit Melodie he told her he "had to let his anger out on someone." When Ashley later asked Melodie while alone how she got the black eye Melodie told her Asling had hit her. On June 22, 2005, Melodie advised the county attorney she had lied to the police about the incident with Asling on June 11 and that he was "innocent."

Prior to trial Asling made an oral motion in limine seeking to exclude any evidence concerning prior abuse or allegations of abuse of Melodie by him. The court conditionally overruled the motion and indicated it would revisit the issue in context during the trial.

During trial Asling objected to the testimony of a State's witness, Michelle Foster, again raising an objection to evidence of prior abuse of Melodie by Asling. More specifically, he objected to her testimony relating to Melodie having two black eyes approximately three weeks prior to the incident in question. In response the State claimed Ashley would testify Asling had admitted to her that he hit Melodie and gave her the black eyes. The court admitted the testimony based on the State's representation that it would connect the alleged prior assault to Asling through other testimony, including Ashley's testimony. The court ruled Foster's testimony had to be limited to the fact she had seen Melodie with two black eyes approximately three weeks earlier. She was not allowed to testify what Melodie had told her, if anything, about how she got the black eyes.

At trial Melodie testified she had lied to the police on June 11 about the abuse and false imprisonment because she was using methamphetamine at the time and angry at Asling because he wanted to take her to a drug treatment program and she did not want to go. She testified everything in her police statement was false, including the part about him giving her the black eyes. Ashley also testified at trial that the statement she gave to the police on June 11 was false and denied that either Asling or Melodie had told her Asling gave Melodie the black eyes. Both Melodie's and Ashley's statements to the police were admitted into evidence for the limited purpose of showing how each had changed their stories since giving those statements to the police. Thus, their

statements could only properly be considered by the jury for impeachment purposes.

State v. Asling, No. 08-1925 (Iowa Ct. App. June 13, 2007).

In October 2008, after a hearing on Asling's application for postconviction relief, the district court found Asling's counsel ineffective for failing to move for a mistrial. In its ruling, the court stated that "[i]n order to be permitted to [use prior bad acts evidence], the State must connect up this evidence with other evidence of guilt. The court is not satisfied that the prosecutor met this burden." Also concerned with the potentially devastating effect the prior bad acts evidence may have had on the jury, the court found actual prejudice was shown by defense counsel's failure to move for a new trial. The court granted Asling a new trial and the State appeals.

II. Standard of Review

Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Asling must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id.*

III. Ineffective Assistance of Counsel

The State contends the postconviction court erred in finding counsel's failure to move for a mistrial was (a) a breach of an essential duty, and (b) resulted in prejudice. During the criminal trial, the district court made clear that if the State was going to offer evidence suggesting that Asling had previously given Melodie two black eyes, it would have to make the connection that it was Asling who committed this prior abuse. The court cautioned defense counsel, "if it isn't connected up by admissions of your client, you're going to be in great shape for your mistrial." On direct appeal, we found that this connection was not made:

[b]ased on the record before us the State therefore did not in fact make the connection it had earlier represented it would, that Asling was the one who caused Melodie's black eyes. However, Asling did not move for mistrial. Nor did he seek to have the challenged evidence stricken. Therefore, the trial court was never asked to revisit its prior ruling and determine whether the State had properly connected the evidence of black eyes to Asling.

Because there was no clear proof that Asling had caused Melodie's black eyes, counsel for Asling should have moved for a mistrial, and failed to do so. *State v Taylor*, 689 N.W.2d 116, 130 (Iowa 2004) (requiring "clear proof" of prior misconduct).

We next must consider whether the postconviction court was correct in its determination that this breach of duty resulted in prejudice to Asling, or whether the State presented overwhelming evidence sufficient to overcome prejudice. *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). "Unfair prejudice arises when the evidence would cause the jury to base its decision on

something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party.” *Taylor*, 689 N.W.2d at 124. The State must present overwhelming evidence, such that the jury verdict would have been the same in spite of the prejudicial error.” See *Ledezma*, 626 N.W.2d at 148-49.

The State argues that the testimony at trial provided overwhelming evidence of Asling’s guilt on the current charges, such that Asling was not prejudiced by the inclusion of the evidence suggesting his prior assaultive conduct towards Melodie. See *State v. Sullivan*, 679 N.W. 2d 19, 29 (Iowa 2004) (explaining that properly admitted evidence must be overwhelming in order to overcome possible prejudice caused by evidence admitted in error). Because Melodie recanted her statement given to police, there was little direct evidence supporting the current charges that Asling assaulted Melodie. There was, however, testimony through several witnesses as to Melodie’s emotional state on the days surrounding the alleged incident. A neighbor, Michelle Foster, testified that Melodie pounded on her door around 5:30 a.m. on June 11, 2005, and “she was hysterical, she was cryin’, she was shakin’, she couldn’t get her words out. She could barely stand up. She seemed weak.” Foster also testified that

[Melodie] told me she was scared, that [Asling] had taken her out by IBP and she didn’t know what was going to happen to her, he wouldn’t let her out of the car. She then threw the car in park and jumped out of the car

Susan Blanford, the person with whom Melodie and Ashley were staying, testified that Melodie woke her up on June 11 around 6:30 a.m., and was “crying and upset and shaking . . . and [Melodie] said ‘He was going to kill me. He was going to kill me. I knew he was going to kill me this time. I jumped out of the

car.” Blanford also testified that later in the day Melodie “was concerned about [Asling] coming after her again.” Blanford’s daughter, Kaitlyn, testified that the night prior to this incident, she heard Melodie and Asling arguing and heard Asling say, “if Melodie or Ashley ever moved, he would hunt them down and murder them.” Following this incident, Blanford, Kaitlyn, Ashley, and Foster took Melodie to the police station. Officer Hammitt took Melodie’s statement, and described her as “extremely upset,” “shaking uncontrollably,” and “afraid to tell me what happened.” Ashley also gave a statement to the police.

During trial, both Melodie and Ashley denied the truth of their prior statements; therefore, the statements were not considered for purposes other than impeachment of their trial testimony. *State v. Berry*, 549 N.W.2d 316, 318 (Iowa Ct. App. 1996) (“A witness may generally be impeached by evidence of a statement made on a prior occasion inconsistent with material testimony given at trial. The prior inconsistent statement constitutes hearsay, and is admissible only for impeachment.”).

Because both Melodie and Ashley recanted their earlier statements, the only admissible evidence to prove Asling committed the June 2005 acts came through the above noted witnesses. While the testimony is significant evidence of Melodie’s emotional state on June 11, and is important as a reflection of her tumultuous relationship with and fear of Asling, it does not provide overwhelming evidence of domestic abuse assault and false imprisonment, such that the evidence of the prior alleged abuse did not prejudice Asling. *State v. Garrity*, 765 N.W.2d 592, 597 (Iowa 2009). Without evidence of Asling’s prior assaultive conduct, or corroborating testimony from Melodie or Ashley as to the events of

June 11, the admissible evidence is not overwhelming of Asling's guilt. Therefore, as the postconviction court found, Asling was prejudiced by his counsel's failure to move for a mistrial based upon the inclusion of prejudicial evidence, and the case was appropriately remanded for a new trial.

AFFIRMED.