

**IN THE COURT OF APPEALS OF IOWA**

No. 9-866 / 09-0639  
Filed December 17, 2009

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

**vs.**

**DENISE HARMON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Colin J. Witt, Judge.

Appeal from conviction of wanton neglect of a resident of a health care facility. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Celene Gogerty, Assistant County Attorney, for appellee.

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

**SACKETT, C.J.**

Defendant-appellant, Denise Harmon, appeals from her conviction of wanton neglect of a resident of a health care facility. She contends trial counsel was ineffective in not objecting to irrelevant prior-bad-acts evidence. We reverse and remand for new trial.

**Background.** Appellant, a former employee of a health care facility, was charged by trial information with two counts of wanton neglect of a resident of a health care facility, in violation of Iowa Code section 726.7 (2007). The trial information alleged the crimes occurred “on or about September–October, 2007.” Harmon’s motion in limine, seeking to exclude evidence concerning her actions toward any residents except the two that were the basis for the charges (D.J. and S.S.), was granted. The State offered testimony of a coworker concerning Harmon’s actions toward D.J. that occurred in “July or August” of 2007. Trial counsel did not object to the testimony. On cross examination, trial counsel inquired again into the dates of the actions, to confirm whether they were in July or August. After the State rested, it moved to amend the trial information to conform to the evidence, to extend the time from September–October to July–October. Trial counsel resisted, but the court allowed the amendment.

The jury found Harmon guilty of the charge concerning D.J. and not guilty of the charge concerning S.S. The court sentenced Harmon to two years in prison, suspended the sentence, and placed her on probation for two years.

**Scope of Review.** Review of ineffective-assistance-of-counsel claims is de novo. *State v. Cromer*, 765 N.W.2d 1, 6 (Iowa 2009). “The successful

ineffective-assistance-of-counsel claim requires proof by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted.” *Id.*

**Merits.** Harmon contends counsel was ineffective in not objecting to irrelevant evidence of an act that occurred before the time period of the acts forming the basis for the charges. See Iowa Rs. Evid. 5.402 (relevance), 5.404(b) (other bad acts). She argues that if counsel had objected, the evidence would not have been admitted. If the evidence had not been admitted, the court would not have allowed the State to amend the trial information to include the additional acts. She further argues she was prejudiced because, without the evidence of the prior act, she likely would have been acquitted of the charge concerning D.J. as she was of the charge concerning S.S.

The State argues the evidence of prior acts concerning D.J. was direct evidence of Harmon’s commission of wanton neglect of a resident of health care facility, and not subject to rule 5.404(b). The State argues, alternatively, that the prior act was “so closely related to that conduct that it was intrinsic to the offense.”

We agree with Harmon that her “trial attorney failed to make a timely and appropriate objection . . . on the basis that this evidence was evidence of a prior, irrelevant bad act and, even if relevant, this evidence was more prejudicial than probative.” The trial information restricted the charged events to “on or about September—October, 2007.” Harmon’s motion in limine, concerning events outside that time period and related to other persons than D.J and S.S., was

granted. When the State elicited testimony concerning an event that counsel should have known was outside the time period of the trial information, counsel should have objected on the grounds of relevance and that the testimony was improper prior-bad-acts evidence.<sup>1</sup> See Iowa Rs. Evid. 5.401, 5.402, 5.404(b). Although the State argues the evidence was either not improper under rule 5.404(b) or was not subject to the rule at all, we do not believe the evidence was relevant to the charges set forth in the original trial information. The analysis of the evidence under rules 5.404(b) or 5.403 would not be necessary if the court had sustained a proper objection based on relevance. We conclude counsel failed in an essential duty. See *Cromer*, 765 N.W.2d at 7.

To prevail on her claim of ineffective assistance, however, Harmon must also demonstrate prejudice. See *id.* To establish prejudice, a defendant must show the probability of a different result is “sufficient to undermine confidence in the outcome.” *State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). “In determining whether this standard has been met, we must consider the totality of the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial.” *State v. Graves*, 668 N.W.2d 860, 882-83 (Iowa 2003). In the case before us, the evidence of Harmon’s actions in July provided the basis for the court to grant the State’s motion to amend the trial information, expanding the time period to include July and August. It also provided the basis for modifying

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<sup>1</sup> Or if counsel felt blind-sided counsel should have moved to strike the evidence.

the proposed jury instructions to include the additional time period and the acts that occurred therein. The evidence of Harmon's acts in July concern only D.J. The actions encompassed by the original trial information that relate to D.J. are the same as those that relate to S.S. The only difference between the two counts of the amended trial information is to include Harmon's July actions affecting D.J. The jury acquitted Harmon of the charge concerning S.S. We see no reason, if the evidence concerning both residents was the same, that the jury would not have acquitted Harmon of the charge concerning D.J. as well. Since the effect of counsel's failure to object to the evidence is likely the basis for the different result, our confidence in the outcome is undermined and we conclude Harmon has demonstrated a reasonable probability of a different result. See *Reynolds*, 746 N.W.2d at 845.

**Conclusion.** As Harmon has demonstrated both counsel's failure to perform an essential duty and prejudice, we conclude she has proved counsel was ineffective in not objecting to the evidence and the subsequent amendment of the trial information. We reverse her conviction concerning D.J. and remand for new trial.

**REVERSED AND REMANDED.**