

IN THE COURT OF APPEALS OF IOWA

No. 9-966 / 09-0421
Filed December 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY JOE LEGGIO,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Appeal from the judgments and convictions for sexual abuse and indecent contact with a child. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Matthew Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

The defendant-appellant, Terry Leggio, appeals from the judgments and convictions for second-degree sexual abuse, third-degree sexual abuse, and indecent contact with a child. He contends the district court erred in denying his motion for mistrial and counsel was ineffective in not immediately objecting to prior-bad-acts evidence or moving for mistrial. We affirm the judgment and convictions and preserve the ineffective-assistance claim.

BACKGROUND. The defendant was charged with multiple counts of sexual abuse and indecent contact with a child, based on allegations concerning his conduct with two of his girlfriend's daughters. During the trial, as the prosecutor was questioning a child protective assessment worker about her investigation of the allegations, the following interchange occurred:

Q. Did you do anything else in your investigation of this case? A. I completed checks on [the mother] and Mr. Leggio within the DHS system. I found a founded assessment of indecent contact with a child with Mr. Leggio being the perpetrator named in the report.

After the prosecutor asked a few more questions unrelated to the founded assessment, defense counsel asked to make a motion outside the jury's presence. Following a discussion off the record, the court cautioned the jury:

Ladies and gentlemen of the jury, there was a reference made by [the witness] with respect to some background information she obtained and with respect to a founded report in reference to the defendant. You are not—you are not allowed under the laws of this state to consider that in determining whether or not Mr. Leggio is guilty of the offense for which he stands trial here today.

Defense counsel told the court that was satisfactory.

Later, in chambers, defense counsel moved for a mistrial. The court noted that the evidence came in without objection and that it had “cured it the best [it] could . . . by advising them that they’re not to consider that.” The court overruled the motion for mistrial.

SCOPE OF REVIEW. We review district court rulings on motions for mistrial for an abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006). We review claims counsel rendered ineffective assistance de novo. *State v. Cromer*, 765 N.W.2d 1, 6 (Iowa 2009).

MERITS. *Motion for mistrial.* Appellant contends the court erred in denying his motion for mistrial. The State contends error was not preserved. “[A] mistrial motion must be made when the grounds therefor first become apparent.” *State v. Jirak*, 491 N.W.2d 794, 796 (Iowa Ct. App. 1992). The record does not show any objection or motion to strike by defense counsel when the prior-bad-acts testimony was given. The unrecorded sidebar that resulted in the court’s cautionary statement to the jury did not occur until after the State finished questioning the witness. The actual motion for mistrial was not made until after this witness and the next witness were finished testifying. We conclude error was not preserved on this issue.

Ineffective assistance. Appellant contends counsel rendered ineffective assistance if error was not preserved. To establish ineffective assistance of counsel, an appellant must demonstrate by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2009). An appellant’s inability to prove either

prong defeats the claim of ineffective assistance of counsel. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003). Ordinarily, we preserve ineffective-assistance claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* “Even 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) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)). “Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel.” *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). Because we find the record is insufficient to address appellant’s ineffective-assistance claims on direct appeal, we preserve his claims for possible postconviction relief proceedings.

We affirm the judgments and convictions and preserve appellant’s ineffective-assistance-of-counsel claims for possible postconviction relief proceedings.

AFFIRMED.