IN THE COURT OF APPEALS OF IOWA

No. 2-660 / 11-1305
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DELFINO IXBA,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Michael R. Mullins (ruling on motions in limine), and Daniel P. Wilson (second trial), Judges.

Delfino Ixba appeals from a jury verdict and conviction for sexual abuse in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Lisa Holl, County Attorney, and Patrick McElyea, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ. Mullins, J., takes no part.

POTTERFIELD, J.

Delfino Ixba appeals from his jury verdict, conviction, and sentence for sexual abuse in the third degree. He contends the district court erred in denying his two motions for mistrial based on prosecutorial misconduct during his trial. He also appeals two district court evidentiary rulings: first, that expert testimony regarding cultural norms was inadmissible, and second, that his employment-related tax document was discoverable and admissible. Absent preservation of error, he alternatively argues he was provided with ineffective assistance of counsel.

We affirm, finding the court did not abuse its discretion in finding no prosecutorial misconduct and excluding evidence regarding cultural norms. We find the tax document issue is not preserved for our review and preserve the ineffective-assistance-of-counsel claim for postconviction proceedings.

I. Facts and Proceedings

Delfino Ixba was charged with sexual abuse in the third degree after S.C., then fourteen years old, gave birth to his son. Almost a year prior, Ixba began living with S.C. and her family and gave S.C. a ring. Ixba's defense at trial was that he and S.C. were cohabiting as husband and wife at the time of their sexual contact.

Before trial, Ixba filed a motion in limine to prevent the State's mention during trial of prior bad acts, specifically sexual relations with S.C., which occurred outside Wapello County. At a hearing on the motion, the State agreed not to mention this act. The State also filed a motion in limine, seeking to exclude on relevance and juror confusion grounds testimony from Ixba's expert

regarding Mexican cultural norms. This motion was granted. The case first went to trial in April of 2011, and resulted in a mistrial after jurors were unable to reach a unanimous verdict.

Before the second trial, the motions in limine were renewed and prior rulings affirmed. In addition, the State sought employment-related tax documents on which Ixba indicated he was unmarried. Ixba filed a motion to quash the county attorney's subpoena, which was denied.

During the second trial, Ixba twice moved for a mistrial, first after the State suggested in its opening statement that Ixba would testify, and second after the State's questioning of an officer resulted in a response revealing the prior acts outside of Wapello County. Ixba's counsel immediately objected following this testimony, and the jury was admonished to disregard the officer's statement. Ixba was found guilty and filed a motion in arrest of judgment and a motion for new trial. Both were denied and he now appeals.

II. Prosecutorial Misconduct

We review a district court's denial of a motion for mistrial based on prosecutorial misconduct for abuse of discretion. *State v*. *Greene*, 592 N.W.2d 24, 30 (Iowa 1999). Ixba points to two instances in which he alleges prosecutorial misconduct occurred—first, during the State's opening statement, and, second, during the State's examination of an officer.

A. Opening Statement

During its opening statement, the State said, "Mr. Cook, along with Mr. Ixba are going to tell you this is a husband and wife relationship." In response, Ixba filed a motion for mistrial, which the court denied. The State contends this

remark was made to forecast the argument Ixba would make at trial. Ixba claims the remark informed the jury that Ixba would testify. He did not. At the close of the evidence, the district court instructed that Ixba "decided not to testify . . . no inference of guilt shall be drawn from that fact."

Ixba must show both that misconduct occurred and that the defendant was prejudiced to the extent that he was denied a fair trial. *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003). Prejudice is the key component, as "it is the prejudice resulting from the misconduct, not the misconduct itself that entitles a defendant to a new trial." *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003).

We agree with the district court that the prosecutor's single remark does not rise to misconduct sufficient to "deprive the defendant of a fair trial." *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). Thus, we find no abuse of discretion in the court's denial of his motion for mistrial.

B. Witness Testimony

Ixba next contends that the prosecutor committed misconduct in the following exchange about an officer's interview of S.C.:

> State: What kind of questions did you ask her? Witness: …Basically, I asked her some background questions about how she knew Mr. Ixba. And she told me that she had met him on December 8th, 2008. And they started out just as friends . . . And then after about a year, they became sexually active. That they first started having sex in Albia.

During the hearing before the first trial regarding the defendant's original motion in limine, the prosecutor agreed not to reference Ixba's earlier sexual relations with S.C. outside of Wapello County. Because the prosecutor violated this agreement, Ixba contends the prosecutor committed misconduct.

Once again, Ixba must show prejudice resulted from this testimony. *Graves*, 668 N.W.2d at 870. Here, the testimony was stricken from the record, and the court admonished the jury to disregard the statement. Where a jury is instructed to disregard testimony, we presume it is sufficient to cure prejudice. *State v*. *Brotherton*, 384 N.W.2d 375, 381 (Iowa 1986). The incident was also isolated and brief. Prejudice usually results from persistent efforts to inject prejudicial matter before the jury rather than isolated incidents suggest. *See State v*. *Anderson*, 448 N.W.2d 32, 34 (Iowa 1989). As such, we cannot find prejudicial misconduct or an abuse of discretion by the district court in its decision to deny Ixba's motions for mistrial.

III. Evidence of Custom

We review the district court's decision to admit or exclude evidence for abuse of discretion. *State v*. *Paredes*, 775 N.W.2d 554, 560 (Iowa 2009). Ixba was convicted of sexual abuse in the third degree, with the following elements:

> A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances:
> . . . .
> 2. The act is between persons *who are not at the time cohabiting as husband and wife* and if any of the following are true:
> . . . .
> b. The other person is twelve or thirteen years of age.

Iowa Code §709.4(2)(b) (2009) (emphasis added). Before the first and second trials, the court granted the State's motions in limine to prevent Ixba from presenting expert testimony regarding Mexican marital traditions.[1] Ixba argued this evidence would support his theory that he and S.C. were, under their cultural

[1] The judge presiding over the second trial referenced the ruling of the judge presiding over the first trial. In this circumstance, we turn to the first ruling for our review.

norms as they exist in Mexico, cohabiting as husband and wife. The trial court found the statutory element was not a subjective one; it did not matter whether Ixba and S.C. believed they were married to each other. Instead, the element provided for an exception only if the couple objectively cohabited in the status of husband and wife, whether common-law or otherwise.[2] Ixba presented expert testimony in an offer of proof during the second trial that in Mexico, Ixba's relationship to S.C. would have been "sort of like a trial marriage." Introduction of this testimony, the court found, would confuse the jury as to which country's rules it should apply, and the testimony was therefore more prejudicial than probative. *See* Iowa R. Evid. 5.403.

We find no abuse of discretion in the district court's well-reasoned decision. *See State v. Rains*, 574 N.W.2d 904, 916 (Iowa 1998) (finding trial court did not abuse its discretion in excluding expert testimony where "admission of this testimony may have confused the jury and clouded the relevant issues in this matter.").

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[2] The jury in the second trial was provided with the following instruction regarding the statutory definition of cohabiting as husband and wife:

> "Cohabiting as husband and wife" means either that the defendant Ixba and the alleged victim, [S.C.], were married to each other, or that the defendant and alleged victim, [S.C.], cohabited as though they were married, but were not in fact necessarily married.
>
> To cohabit means to live together as spouses or to live together in a sexual relationship when not legally married.
>
> Cohabitation means to live together as husband and wife. This includes the mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations.

Ixba did not object to this instruction.

IV. Admissibility of Tax Document

A. Preservation of Error

Shortly before trial, Ixba filed a motion to quash a county attorney's subpoena for a tax document—his W-2 showing a check mark that indicated he was single—on the grounds the subpoena had been obtained by ex parte communication between the prosecutor and court and violated discovery rules. The court denied Ixba's motion to quash. At trial, Ixba objected to the document's admission as incomplete. The court overruled the objection. In his post trial motion in arrest of judgment and motion for new trial, he again argued the court erred in admitting the tax document, this time on the ground that he was not timely notified of its existence before trial. On appeal, Ixba raises myriad other grounds: that the document was somehow privileged under the tax code, that the relevance and probative value were diminished due to Ixba's English language difficulties, that the State failed to properly disclose the document, that the timely disclosure rule of Iowa Rule Criminal Proceedure 2.19(2) was violated, that the document was hearsay, and that it violated Ixba's right to confrontation under the Iowa and federal constitutions. He raises neither the ex parte communication, nor the incompleteness grounds on appeal.

> The general rule with respect to error preservation is that unless the reasons for an objection are obvious a party attempting to exclude evidence has the duty to indicate the specific grounds to the court so as to alert the judge to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible.

State v. Decker, 744 N.W.2d 346, 353 (Iowa 2008). We find none of the evidentiary objections now raised were preserved in the district court. Only one

of these grounds, untimely disclosure, was raised before the district court, and it was included only in Ixba's post trial motions. "A motion for a new trial ordinarily is not sufficient to preserve error where proper objections were not made at trial." *State v*. *Constable*, 505 N.W.2d 473, 478 (Iowa 1998). "As a general rule, objections to evidence must be raised at the earliest opportunity after the grounds for objection become apparent." *State v*. *Johnson*, 476 N.W.2d 330, 333 (Iowa 1991). "Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal." *In re K*.*C*., 660 N.W.2d 29, 38 (Iowa 2003). We find Ixba's claims regarding the admissibility of the tax document are not preserved for appeal.

B. Ineffective Assistance of Counsel

In anticipation of the error preservation problem, Ixba argues in the alternative that this court should consider the same claims in the context of an ineffective-assistance-of-counsel claim. We review claims of ineffective assistance of counsel de novo. *State v*. *Utter*, 803 N.W.2d 647, 651 (Iowa 2011). In order to prove his counsel was ineffective, appellant must show both that counsel failed to perform an essential duty and that prejudice resulted from the failure. *State v*. *Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). The first prong requires that counsel did not act as a "reasonably competent practitioner" would have. *Id.* "At such a [postconviction] hearing trial counsel will have opportunity to explain its conduct and performance and the court will have a complete record." *State v*. *Slayton*, 417 N.W.2d 432, 436 (Iowa 1987).

The second prong requires a showing of a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. *Id.* We find the record is insufficient to determine the ineffective-assistance-of-counsel claim; therefore, we decline to address it here and preserve the issue for postconviction relief. *See State v*. *Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

AFFIRMED.