IN THE COURT OF APPEALS OF IOWA

No. 3-963 / 12-1903
Filed December 5, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DOUGLAS LEE JONES,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee (North) County, Mary Ann Brown, Judge.

Douglas Jones appeals from his conviction and sentence for assault causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael P. Short, County Attorney, and Clinton R. Boddicker, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

DOYLE, P.J.

Douglas Jones appeals from his conviction and sentence for assault causing bodily injury. He contends the district court lacked the authority to order that he complete a batterer's education program as a part of his sentence, and therefore, that portion of his sentence is void. Additionally, he asserts his trial counsel was ineffective in (1) failing to object to the general-intent jury instruction the court submitted to the jury, and (2) eliciting evidence of Jones's nonviolent character, thus "opening the door" for admission of his past crimes that reflect poorly on his credibility. We affirm his conviction and sentence, and we preserve his second ineffective-assistance-of-counsel claim for possible postconviction relief proceedings.

***I. Background Facts and Proceedings*.**

Following an incident between Douglas Jones and his girlfriend, Jones was charged with domestic abuse assault causing bodily injury, in violation of Iowa Code sections 708.1(1), 708.2A, and 236.2 (2011). The State later dropped the allegation of domestic abuse and reduced the charge to assault causing bodily injury, in violation of Iowa Code sections 708.1(1) and 708.2(2). A jury found Jones guilty of assault causing bodily injury.

Jones agreed to be sentenced immediately following the guilty verdict. After the State and Jones's counsel made sentencing recommendations to the court, the court noted Jones had a criminal history involving acts of resistance and aggression, indicating he had "some type of temper problem that [he was] not able to manage or control." The court explained it was not "sure jail or a fine,

either one," was a good way to address Jones's temper problem. In fashioning Jones's sentence, the court stated:

> [Q]uite honestly, I think the most important thing I can do in this sentence is try to promote and encourage some mechanism to help you control your temper. So I think the first thing that I need to do in this sentence is require that you complete the Batterer's Education Program. There's no indication to me that that's happened in the past, and I am going to require that.
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> . . . .
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> Because of that, I'm going to impose a significant suspended jail sentence to encourage you to go to that Batterer's Education because your suspended jail sentence will be conditioned upon the fact that you successfully complete that Batterer's Education Program, and you need to know that if you don't go, you face a substantial amount of jail time. I think that's the most important thing we can do for everyone in this case is for you to get some help in managing that temper.
>
> . . . .
>
> . . . Your suspended jail sentence will be conditioned upon your prompt payment of the fine, surcharge and court costs, plus completing the Batterer's Education Program.

The next day, the district court entered its written judgment entry, stating Jones was

> sentenced to serve one year in [jail], less credit for time served. All but ten days of the jail sentence is ordered suspended conditioned on defendant's good behavior for a period of one year. As a condition of the *good behavior probation*, the defendant is ordered to complete the Batterer's Education Program.

(Emphasis added.)

Jones now appeals. He asserts the district court exceeded its statutory authority in imposing, as a term of his sentence, completion of a batterer's education program. He also contends his trial counsel was ineffective in failing to challenge the jury instructions on intent and in opening the door to impeachment of Jones's trial testimony with his two prior felony convictions and his conviction for assault. We address his arguments in turn.

II. Discussion.

A. Batterer's-Education-Program Condition.

"Our review of the sentence imposed in a criminal case is for correction of errors at law." *State v. Mott*, 731 N.W.2d 392, 394 (Iowa 2007). "A sentence must comply with all applicable statutes. If a sentence is not authorized by statute, it is void." *State v. Manser*, 626 N.W.2d 872, 874 (Iowa Ct. App. 2001). We therefore examine the sentence imposed by the district court to determine whether it complies with the relevant statutes. *See State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994). A sentence imposed in accordance with applicable statutes will be overturned only for an abuse of discretion or a defect in the sentencing procedure, such as consideration of impermissible factors. *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983).

The State agrees with Jones that the district court would lack authority to impose completion of a batterer's education program as part of his sentence. *See Manser*, 626 N.W.2d at 875 (finding imposition of a batterer's education or treatment program as a term of sentence was not statutorily authorized). However, the State maintains the court placed Jones on probation, specifically "good behavior probation," as indicated in the court's judgment entry. Because the batterer's-education-program condition was not outside of the statutory limits for conditions of probation, the State contends Jones's sentence was not void. Jones responds that "good behavior probation" referenced in the judgment entry was an invalid form of probation, and he notes the court did not expressly state on the record it was placing Jones on probation.

Upon a verdict of guilty, Iowa Code section 907.3(3) authorizes the trial court, "[b]y record entry at the time of or after sentencing," to "suspend the sentence and place the defendant on probation upon such terms and conditions as it may require." Thus, the court was not required to state on the record at the sentencing hearing that it was going to place Jones on probation, and its lack of a statement indicating probation is not controlling here.

"Probation" is statutorily defined as "the procedure under which a defendant, against whom a judgment of conviction of a public offense has been or may be entered, is released by the court subject to supervision by a resident of this state or by the judicial district department of correctional services." Iowa Code § 907.1(5). Although section 907.1(5) does not expressly provide for "bench probation," a judge is required to be a "resident of this state" as a judicial qualification, and would therefore satisfy the "supervision by a resident of this state" condition of section 907.1(5). *See also id*. § 46.14(1) (requiring judicial nominees be "residents of the state"). Additionally, "bench probation" has been mentioned as a form of probation throughout the years. *See, e.g.*, *Calvert v. State*, 310 N.W.2d 185, 186 (Iowa 1981); *State v. Pilcher*, 242 N.W.2d 348, 352 (Iowa 1976); *White v. Iowa Dist. Ct.*, No. 11-1831, 2012 WL 1864596, at *2 (Iowa Ct. App. May 23, 2012); *see also State v. Dailey*, 774 N.W.2d 316, 320-21, n.6 (Iowa Ct. App. 2009) (noting that direct judicial supervision of defendants occurs regularly in Iowa's state's drug court programs). One respected scholar notes that "bench probation," although rarely given, "is the most lenient form of probation," with "[v]ery few, if any, conditions . . . added." 4 Robert R. Rigg, *Iowa Practice: Criminal Law* § 32:43 (2013 ed.). Supervision is generally conducted

by the court, and the "defendant usually needs to comply with one or two conditions and report back to the court." *Id.*

Upon our review, we find "bench probation" was a valid form of probation under the statutory definition and therefore conclude the district court did not err in placing Jones on "good behavior probation." Consequently, this case is distinguishable from *Manser*, where the defendant was not placed on probation. *See Manser*, 626 N.W.2d at 875. Because the court's condition of completion of a batterer's education program was not outside of the statutory limits upon placement on probation, Jones's sentence is not void. Accordingly, we affirm on this issue.

B. Ineffective-Assistance-of-Counsel Claims.

Jones's remaining claims are raised in the context of ineffective-assistance-of-counsel. Our review is de novo. *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013). We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). However, if we find the record is adequate to address the allegations concerning counsel's performance, we will decide the claim on direct appeal. *State v. Fannon*, 799 N.W.2d 515, 519-20 (Iowa 2011); *see also* Iowa Code § 814.7(3). It is the unusual case when the record will be sufficient to resolve the claim on direct appeal. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

To prevail on his ineffective-assistance claims, Jones must prove by a preponderance of evidence that counsel failed to perform an essential duty and prejudice resulted. *See Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). To

prove the breach-of-duty prong of the analysis, a defendant must show counsel performed below the standard of a "reasonably competent attorney," measuring counsel's performance against "prevailing professional norms." *Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). "In accord with these principles, . . . counsel has no duty to raise an issue that has no merit." *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009). To establish the prejudice prong, "a defendant must show the probability of a different result is sufficient to undermine confidence in the outcome." *Everett*, 789 N.W.2d at 158 (internal quotation marks and citations omitted). A reviewing court need not engage in both prongs of the analysis if one is lacking. *See id.* at 159.

1. Jury Instructions.

At trial, the court submitted jury instructions defining both specific intent and general intent. Jones contends his attorney was ineffective in failing to object to the general-intent jury instruction given by the court because assault is a specific intent crime. Upon our de novo review, we conclude, even assuming without deciding his trial counsel breached his duty in failing to object to the challenged instruction, Jones cannot demonstrate the requisite prejudice.

There has been much discussion in recent years concerning the intent element of the crime of assault and its corresponding jury instructions. *See State v. Fountain*, 786 N.W.2d 260, 264-65 (Iowa 2010). In *Fountain*, Fountain was charged with domestic abuse assault causing bodily injury, and at trial, the jury was only given a general-intent jury instruction. *Id.* at 263. Our supreme court once again confirmed the crime of assault includes a specific intent element, and

it stated the trial court's failure to instruct on specific intent was error. *Id.* at 265. However, because Fountain's trial counsel failed to request a specific-intent instruction be given and error was not preserved, Fountain's claim was raised in the ineffective-assistance-of-counsel context. *Id.* Under the facts of that case, the supreme court ultimately determined Fountain's counsel had a duty to request the specific-intent jury instruction, noting specific intent is a higher burden for the State to prove and concluding trial strategy was the only explanation for counsel's breach. *Id.* at 266-67. Because the record before the court did not reveal "whether the defense strategy was to deny that any assault occurred and argue that [his girlfriend] simply made up the [allegation]" or to assert "the alleged injuries were merely the unintended byproduct" of the relevant contact, the court preserved the claim for possible postconviction relief proceedings. *Id.* at 267. Relevant here, the court went on to remark that if Fountain's defense was simply that the assault did not occur, "the distinction between a general intent instruction and a specific intent instruction may not have aided Fountain. If the defense strategy is to deny that any assaultive contact occurred, the individual elements of assault become unimportant." *Id.*

This is precisely the strategy presented in the case before us. The victim, Jones's then girlfriend, testified that on the night of the incident, Jones grabbed her by the throat, put her on the kitchen counter, and hit her head against the cabinets. She testified Jones then threw her, and she lost consciousness when the back of her head hit a decorative pot, causing severe head trauma. She testified she woke up in a puddle of blood, with police officers and two friends at her home. Photographs of the victim's injuries, taken by an officer approximately

two to three hours after he responded to the scene, were admitted into evidence showing injuries to the victim's neck area. Conversely, Jones testified and denied he assaulted his girlfriend. He acknowledged that she clearly suffered an injury that night, but he testified when he left the home after quarrelling with her, she was uninjured. Under these circumstances where the defendant denies the assaultive contact occurred, "the individual elements of assault become unimportant." *See id*. Jones has failed to show that there was any probability that the outcome of the proceedings would have been any different had his trial counsel objected. Accordingly, we affirm on this issue.

2. Character Evidence.

Jones next asserts his trial counsel was ineffective in eliciting evidence of Jones's nonviolent character from his witnesses, thus "opening the door" for the State to impeach his testimony with his two prior felony convictions for interference with official acts with a weapon, as well as a prior assault against a girlfriend when he was in trial for assaulting another girlfriend. *See, e.g.*, *State v. Carey*, 709 N.W.2d 547, 553 (Iowa 2006) (noting that, "[w]hile evidence of prior crimes is generally inadmissible under [our rules of evidence], the 'invited error' doctrine entitles the government to pursue inquiry into a matter, if evidence thereon was first introduced by [the] defendant"). Because the result of the case depended upon whether the jury believed the victim's testimony that Jones assaulted her or Jones's contrary testimony, Jones argues "[a]llowing the jury to learn that [he] had previously been convicted of assaulting a girlfriend was a critical factor in this credibility battle."

The State contends Jones's trial counsel likely made a tactical decision to elicit evidence of Jones's nonviolent character to discredit the victim's claim. The State also contends counsel took "a calculated risk that the benefit [of the witnesses'] testimony that [Jones] was not a violent man outweighed the danger from admission of two nearly-ten-year-old felony convictions." The State argues that, although ultimately unsuccessful, it was a reasonable strategy.

"[C]laims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney." *State v*. *Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). We conclude an additional factual record, providing trial counsel an opportunity to address this issue, is necessary. Therefore, we preserve this claim of ineffective assistance of counsel for possible postconviction relief proceedings. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

III. Conclusion.

Because we find the district court placed Jones on probation, its condition of completion of a batterer's education program was within its statutory limits, and thus Jones's sentence with the condition was legal. Additionally, we find Jones failed to show the requisite prejudice on his ineffective-assistance-of-counsel claim based upon his trial counsel's failure to object to a general-intent jury instruction because he denied the assaultive contact occurred. Finally, we preserve for possible postconviction relief proceedings his ineffective-assistance-of-counsel claim premised on his trial counsel's "opening the door" to allow

evidence that he had previously been convicted of assaulting another girlfriend and other crimes.

AFFIRMED.