IN THE COURT OF APPEALS OF IOWA

No. 2-198 / 11-0859
Filed May 9, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH EUGENE SCARCELLO,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Carlynn D. Grupp, District Associate Judge.

Defendant appeals from his conviction of assault resulting in injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin Parrott, Assistant Attorney General, and Carlyle D. Dalen, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Joseph Scarcello appeals from his conviction of assault resulting in injury. He contends the court abused its discretion in admitting testimony he was viewing "inappropriate" websites on the complaining witness's computer. He also contends he received ineffective assistance of counsel. We affirm.

I. Background Facts and Proceedings.

Scarcello was arrested and charged with assault resulting in injury after police responded to a 911 call from Monica Neilsen. Scarcello told the police he acted in self-defense. Neilsen told police Scarcello got angry when she told him to get off her computer. She said he overturned a table, shoved her into the wall, and pulled a chair she was using to defend herself out of her hands, which broke one arm of the chair and caused a bruise on one of her fingers and possibly broke the finger.

Scarcello filed a motion in limine seeking, in part, to prevent the State from introducing evidence or testimony concerning (1) his criminal record of assaults or violations of no-contact orders, (2) any outstanding warrant for violation of a no-contact order, and (3) Scarcello's use of Neilsen's computer to view "inappropriate" websites. The State agreed not to mention Scarcello's criminal record except as impeachment if he testified. The State also agreed not to mention the outstanding warrant. The district court allowed the State to introduce testimony Scarcello was viewing inappropriate websites as a basis for the dispute resulting in the altercation, but not to go beyond describing the websites as "inappropriate."

During the jury trial, the State elicited testimony from the officer who responded to the 911 call: "Dispatch hadn't reported back to us that he had a local warrant for his arrest." The court sustained Scarcello's attorney's objection to the testimony. Later, during cross-examination of Neilsen, Scarcello's attorney asked several questions about drug use by Scarcello and Neilsen. A question about why Neilsen allowed Scarcello to stay at her house brought out testimony concerning Scarcello's mental health.

Scarcello's attorney did not object to any of the court's proposed jury instructions, but requested and obtained an instruction on Scarcello's justification defense. The jury found Scarcello guilty of assault resulting in injury. The court sentenced him to one year in jail, with all but ninety days suspended, imposed a fine, and placed conditions on Scarcello's one-year probation.

II. Scope of Review.

We review a district court's decision to admit evidence over an objection based on Iowa Rule of Evidence 5.403 for an abuse of discretion. *See State v. Martin*, 704 N.W.2d 665, 671 (Iowa 2005). A district court abuses its discretion when it exercises discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Redmond*, 803 N.W.2d 112, 117 (Iowa 2011) (citation omitted). When a defendant alleges ineffective assistance of counsel, our scope of review is de novo. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). Ineffective-assistance-of-counsel claims are generally reserved for postconviction relief actions unless the record is adequate to address them on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006).

III. Merits.

A. Evidentiary Ruling. Scarcello contends the district court abused its discretion in allowing the State to introduce evidence he was viewing "inappropriate" websites. He argues the limited probative value is substantially outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 5.403.

The State asked Neilsen if she "became upset about inappropriate things being viewed" by Scarcello on her computer. She said he was viewing "inappropriate things" and she had "asked him twice not to go to those sites." When asked what happened, Neilsen said, "Oh, I just had told him—I said, you need to close those out, they're going to—." The State then asked, "Let me just ask you, we know that it's inappropriate material that you believed; is that right?" Neilsen responded, "That's correct."

Scarcello contends it's "clear from the record, Neilsen was referring to a website displaying pornography." He asserts admission of evidence of pornography is highly prejudicial, especially when he was not charged with sexual abuse or possession or pornography. The State responds the reference to "inappropriate" websites is "extremely vague and suggestive of very little."

Under Iowa Rule of Evidence 5.403, once a district court determines evidence is relevant, it must then balance the evidence's probative value against the danger of unfair prejudice *State v. Reynolds*, 765 N.W.2d 283, 290 (Iowa 2009). "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." *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). Prejudice "does not simply mean damage to the

opponent's cause—for that can be a sign of probative value, not prejudice." 1 John W. Strong et al., *McCormick on Evidence* § 185, at 645 (5th ed. 1999).

After discussing the issue with the prosecutor and defense counsel, the court ruled:

> And I believe as the Court, Mr. Dalen, that a reference by the witness that this is her computer and she believed the Defendant was viewing inappropriate material or using it inappropriately sits in the jury's mind a reason for the owner to be concerned and I believe and now instruct the State to caution the witness to not go beyond the comment that in the witness's mind either the use or the material was inappropriate.
>
> Mr. Dalen: Can I back that up? You're saying that I can solicit that it's inappropriate. I just can't go beyond that an talk about the fact it's pornography?
>
> The Court: Correct. We're not trying a pornography case.

We conclude the district court carefully balanced the probative value and the danger of unfair prejudice when ruling the State could delve into how Scarcello was using Neilsen's computer as probative of the cause of the ensuing disagreement and altercation but limiting the State's inquiry so as to avoid terms that might tend to inflame the jury. We agree with the district court's determination the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 5.403 (giving the court discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"). We find no abuse of discretion. Having determined the court properly exercised its discretion under rule 5.403, we need not address Scarcello's argument under rule 5.103 concerning prejudice, as that analysis first requires a finding of error.

B. Ineffective Assistance. Scarcello contends his attorney was ineffective in three particulars. He asserts his attorney (1) failed to object to the

omission of or to request certain jury instructions, (2) failed to move to strike testimony concerning a warrant or to move for a mistrial, and (3) improperly introduced evidence of Scarcello's drug use and his mental health and medication.

1. Jury Instructions. Scarcello contends his attorney was ineffective in not objecting to the omission of an instruction on specific intent, such as Iowa Criminal Jury Instruction 200.2, because assault contains specific-intent elements. *See State v. Fountain*, 786 N.W.2d 260, 264-65 (Iowa 2010). He also contends his attorney should have objected to Instruction No. 9 on justification because it was incomplete.

Instruction No. 5 was the marshaling instruction on assault resulting in injury. The relevant element provided:

> 1. On or about the 9th day of February, 2011, the Defendant did an act which was intended to cause pain or injury or result in physical contact which was insulting or offensive to Monica Neilsen.

The court did not give an instruction on general intent or specific intent. Scarcello argues, "without the proper specific intent instruction, the jury may have concluded Scarcello's voluntary act caused Neilsen's injuries and, therefore, he was guilty."

"[P]ostconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). Such is the case here. Although Scarcello's attorney did not request a specific-intent instruction, we are unable on this record to assess whether the failure constituted ineffective assistance of counsel. *See Fountain*, 786 N.W.2d at 263-67 (discussing specific-intent

instructions as they relate to ineffective assistance). We therefore preserve this claim for possible postconviction proceedings. *See State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (stating we generally preserve such claims for postconviction relief proceedings where an adequate record can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims).

Next, Scarcello challenges the instruction relating to justification. Instruction No. 9 quoted the first paragraph of Iowa Criminal Jury Instruction 400.10 and provided:

> [I]f a Defendant is confronted with the use of unlawful force against himself, he is required to avoid the confrontation by seeking an alternative course of action before he is justified in repelling the force used against him.

Scarcello contends his attorney should have requested an instruction on the exception to the "alternative course of action" as it relates to his justification defense. The last paragraph of Criminal Jury Instruction 400.10 describes the exception:

> If the alternative course of action *involved a risk to his life or safety, and he reasonably believed that*, then he was not required to take or use the alternative course of action to avoid the confrontation, and he could repel the force with reasonable force.

(Emphasis added.)

A district court has a duty to instruct the jury fully and fairly on the applicable law concerning all issues raised by the evidence. *State v. Schuler*, 774 N.W.2d 294, 297 (Iowa 2009). A jury instruction must be supported by substantial evidence. *Id.* The only evidence concerning justification came through the testimony of the investigating officer.

> Q. Now, when you talked to him what did he, if anything, did he tell you about what had just occurred? A. I asked him what happened? Why things were broken and in disarray in the living room. He explained to me that it was actually Ms. Neilsen . . . that was throwing that stuff around and breaking it herself.
>
> . . . .
>
> Q. Anything else that you can recall that he said about this incident? A. I asked him about the hole in the wall. And he said that she actually pushed him into the hole in the wall and that's what caused it.

On cross-examination, the officer added: "Mr. Scarcello told me he didn't have any injuries, so kind of reason to believe that it would make sense that if your head went through the wall, you would have a bruise on the back of it."

This testimony can be seen as a basis for the instruction on justification the court gave. It does not provide substantial evidence to support the instruction Scarcello claims counsel should have requested because there is no evidence the alternative course of action "*involved a risk to his life or safety, and he reasonably believed that*." Because there is not substantial evidence for the instruction, it would not have been proper for the court to give it. Accordingly, counsel had no duty to request it. This claim fails. *See Palmer*, 791 N.W.2d 840, 851 (Iowa 2010).

2. Moving to Strike Testimony or for a Mistrial. In his motion in limine, Scarcello moved to exclude any reference to a warrant for his arrest. The prosecutor stated he planned to keep any such evidence out and had instructed the police officer who responded to the 911 call "not to talk about the arrest as far as it applies to a no contact order violation or even the information regarding the warrant." At trial, the following exchanges occurred as the officer was testifying:

> PROSECUTOR: Now, explain to the jury, what did you see when you arrived. A. We went to the front door—we were initially

> called there for a dispute. The caller reported to our dispatch that Mr. Scarcello was there. Dispatch hadn't reported back to us that he had a local warrant for his arrest.
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> DEFENSE COUNSEL: Objection.
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> COURT: Sustained.

No further mention of a warrant was made. Scarcello's attorney did not move to strike the testimony or move for a mistrial.

Scarcello argues he was prejudiced because the jury "was free to consider the evidence of an arrest warrant in their credibility determination."

In order to prove prejudice, Scarcello must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011) (citation omitted). Scarcello's bare assertion he was prejudiced is insufficient. The only evidence he presented came in through cross-examination of the State's witnesses, so his credibility was not before the jury in the same manner as it might have been had he taken the stand. The passing, ambiguous comment about a warrant, without more, does not convince us there is a reasonable probability the result of the trial would have been different if it had not been made or if it had been stricken from the record.

3. Evidence Concerning Drug Use and Mental Health. Scarcello contends his attorney improperly introduced evidence of his drug use and his mental health and medication. All of the testimony complained of came through cross-examination of Neilsen.

This claim illustrates why ineffective-assistance claims are not often resolved on direct appeal and instead are preserved for postconviction relief. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). "Because '[i]mprovident trial

strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *Ondayog*, 722 N.W.2d at 786. We preserve this claim for possible postconviction proceedings where the record can be more fully developed. *See Biddle*, 652 N.W.2d at 203.

AFFIRMED.