IN THE COURT OF APPEALS OF IOWA

No. 2-697 / 10-0319
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY GEORGE BROTHERN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Appeal from conviction and sentence for domestic abuse assault, third offense, as an habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Michelle Wagner, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

EISENHAUER, C.J.

Anthony Brothern appeals from his conviction and sentence for domestic abuse assault, third offense, as an habitual offender. He contends his trial attorney was ineffective in not objecting to the amended trial information adding the habitual offender enhancement after the close of evidence at trial. We affirm.

I. Background Proceedings

In July 2009 Brothern was charged by trial information with count I: domestic abuse assault causing bodily injury, enhanced because of previous convictions of domestic abuse assault, and count II: domestic abuse assault, displaying a weapon. At the close of evidence at trial, the State moved to amend the trial information to add habitual offender as a sentencing enhancement to both charges. Brothern's trial attorney objected to the amendment to count II on due process grounds. The court granted the State's motion to amend both charges to add habitual offender as a sentencing enhancement. The jury convicted Brothern on count I and acquitted him on count II.

In November, after jury selection on the habitual offender enhancement trial began, Brothern decided to admit to the previous convictions. During questioning by the court, Brothern admitted his prior convictions and pleaded guilty to the charge of being an habitual offender and also to the enhancement because of the two previous domestic abuse assault convictions.

A week later, Brothern filed a combined motion for new trial and motion in arrest of judgment. He alleged the verdict should be set aside because it was "improper to bootstrap the charge of habitual offender out of an enhancement on an underlying misdemeanor. It is improper to render another enhancement on

the back of an enhancement." He further alleged he did not receive a fair trial because of ineffective assistance. He sought a new trial and arrest of judgment pending a hearing on the motion for new trial. Brothern also filed two pro se motions for new trial and in arrest of judgment, both alleging insufficient evidence to support his conviction of domestic abuse assault causing bodily injury. He also alleged the court erred in allowing his trial attorney to continue to represent him when there was a conflict of interest because of a previous representation and because of conflicts with his attorney.

At the hearing on the posttrial motions, Brothern's attorney argued allowing the State to amend the trial information after the trial began violated the rule of criminal procedure regarding amendments and "goes to fundamental fairness" concerning Brothern. The court denied the motions for new trial, finding no grounds for new trial under Iowa Rule of Criminal Procedure 2.24(2). The court also denied the motions in arrest of judgment, finding the amendment to the trial information was proper because it "simply changes the sentencing and is not a wholly new or different offense."

II. Scope and Standards of Review

Ineffective-assistance claims are reviewed de novo. *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012). Although claims an attorney rendered ineffective assistance are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate. *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999). We conclude the record is adequate for us to consider Brothern's claim. To prove ineffective assistance of his trial attorney, Brothern must show by a preponderance of the evidence (1) his

attorney failed to perform an essential duty and (2) prejudice resulted. *See State v. Madsen*, 813 N.W.2d 714, 723-24 (Iowa 2012). There is a presumption the attorney acted competently. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

III. Merits

Although stated as one issue, Brothern raises two claims. He first claims his attorney was ineffective in not objecting to the State's motion to amend the trial information during trial, thus not preserving the issue for appeal. He then claims the court erred in allowing the State to add the habitual offender enhancements after the close of evidence.

The underlying claim is not preserved for our review, but we must examine the trial court's action as part of our determination whether the attorney had a duty to object and whether Brothern was prejudiced.

Iowa Rule of Criminal Procedure 2.4(8)(a) provides:

> Generally. The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

Our supreme court recently determined the phrase "during the trial" excludes proceedings after a jury verdict and "means the period of time in which the trier of fact hears evidence and makes a decision based on that evidence." *State v. Bruce*, 795 N.W.2d 1, 4-5 (Iowa 2011) (overruling *State v. Berney*, 378 N.W.2d 915 (Iowa 1985)). "Furthermore, the interplay between rules 2.19(9) and

2.4(8)(a) suggests that 'trial,' even in the habitual offender context, concludes when the jury renders its verdict on the substantive offense." *Id.* at 4.

The State's motion to amend the trial information was made before the case was submitted to the jury. It was "during the trial." Iowa R. Crim. P. 2.4(8)(a). Adding the habitual offender enhancements did not charge "a wholly new and different offense." *Id.* "When the State alleges that a defendant is an habitual offender, the State is not charging a separate offense. This is because habitual-offender statutes do not charge a separate offense; they only provide for enhanced punishment on the current offense." *State v. Woody*, 613 N.W.2d 215, 217 (Iowa 2000) (citation omitted). "An amendment prejudices the substantial rights of the defendant if it creates such surprise that the defendant would have to change trial strategy to meet the charge in the amended information." *State v. Maghee*, 573 N.W.2d 1, 6 (Iowa 1997). Brothern knew from plea negotiations the habitual offender enhancement was possible if he refused the offer and went to trial. His trial strategy was to deny he committed the assault. The amendment neither created surprise nor necessitated a change in trial strategy. It did not prejudice Brothern's substantial rights. The amendment was proper under rule 2.4(8)(a).

Brothern argues his attorney should have objected on due process grounds. Procedural due process "requires notice and opportunity to be heard in a proceeding that is adequate to safeguard the right for which the constitutional protection is invoked." *State v. Willard*, 756 N.W.2d 207, 214 (Iowa 2008) (internal quotation marks and citations omitted). Concerning amendments during trial, dictating the application and amendment into the record in the presence of

the defendant and the defense attorney "shall constitute sufficient notice to the defendant." Iowa R. Crim. P. 2.4(8)(c). Brothern had notice and nearly six weeks to prepare for trial on whether he had the requisite prior convictions. The scheduled trial on the prior convictions was his opportunity to be heard in a proceeding adequate to safeguard his due process rights.

Because the amendment was proper under rule 2.4(8) and did not violate Brothern's due process rights, an objection to the amendment was meritless and would have been overruled by the court. His attorney had "no duty to pursue a meritless issue." *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011). "We will not find counsel incompetent for failing to pursue a meritless issue." *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). Brothern's trial attorney did not breach any essential duty, so we need not address the prejudice element of ineffective assistance. *See State v. Lane*, 743 N.W.2d 178, 184 (Iowa 2007) (noting the court may dispose of an ineffective-assistance-of-counsel claim if a defendant fails to prove either the duty or the prejudice prong).

AFFIRMED.