IN THE COURT OF APPEALS OF IOWA

No. 2-825 / 11-1213
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WALTER LEE MILLER JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Charles H. Pelton, Judge.

Defendant appeals his convictions for two counts of solicitation, money laundering, and possessing contraband. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Bower, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, S.J.

Walter Miller Jr. appeals his convictions for solicitation (to introduce contraband into jail), in violation of Iowa Code section 705.1 (2009), a class D felony; solicitation (to commit prostitution), in violation of section 705.1, an aggravated misdemeanor; money laundering, in violation of section 706B.2(1) and .2(2)(a), a class C felony; and possessing contraband, in violation of sections 719.7(3)(a) and .7(4)(b), a class D felony. Miller contends he received ineffective assistance because his defense counsel did not object to questions the State raised during cross-examination of him, or to the State's presentation of a rebuttal witness. We conclude Miller has not shown he received ineffective assistance of counsel, and we affirm his convictions.

I. Background Facts & Proceedings

The charges in this case arose when Miller was in the Scott County Jail on another charge. Prior to the criminal trial the State agreed it would not introduce evidence of the nature of the underlying charge. During the trial defense counsel alerted the court that Miller wanted to testify against the advice of counsel. The court engaged in a colloquy with Miller to outline some of the possible pitfalls, stating, "You can open the door to areas that you might not want to open for the State," and "You open yourself to cross-examination, and open yourself to impeachment; that is, to challenge your credibility based on your prior criminal record."

The court granted Miller's request to make his own statement to the jury, without questions from defense counsel. Miller immediately stated he was in jail

on a drug charge. The prosecutor asked to approach the bench, and a discussion off the record was held. The court then indicated that the State had withdrawn its objection. Miller spent some time reviewing his underlying drug charge, blaming the conviction on Tiffany Burmeister, his girlfriend, and police officers. He also attacked the credibility of Burmeister. Miller discussed the present charges and presented his own exhibits.

After Miller's personal narrative, the State noted Miller's statements were not entirely relevant and asked to make a record that this was Miller's choice. The court noted, "To some extent, he's managing his own defense. . . . Is that what you intended to do?," and Miller responded, "Yes." The prosecutor also asked, "Mr. Miller, everything that you told the jury, that's evidence that you wanted before them, is that correct?" He answered, "Yes, ma'am."

The prosecutor then proceeded to cross-examine Miller about the underlying criminal charge and the current charges. The State presented the testimony of an officer involved in Miller's previous criminal case as a rebuttal witness.[1] The officer testified to the factual background for the previous charge. Miller cross-examined the officer himself.

Defense counsel requested a limiting instruction concerning evidence of other wrongful acts, and the court agreed to give the instruction. As noted above, the jury found Miller guilty of two counts of solicitation, money laundering,

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[1] At the beginning of the rebuttal witness's testimony, defense counsel asked for a minute with Miller, and a discussion was held off the record between the two. The record does not show defense counsel raised an objection with the court.

and possessing contraband.[2] He was sentenced to a total term of imprisonment not to exceed fifteen years, to be served consecutively to the sentence he was already serving. Miller appeals, claiming he received ineffective assistance of counsel.

II. Standard of Review

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, a defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

III. Ineffective Assistance

A. Miller contends he received ineffective assistance because his defense counsel did not object to questions the State raised during cross-examination of him.[3] He asserts defense counsel should have objected when

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[2] The jury found Miller not guilty of ongoing criminal conduct, human trafficking, and a second charge of possessing contraband. Other charges of conspiracy to commit a felony and furnishing a controlled substance to inmates were dismissed by the State during the course of the trial.

[3] The parties do not address the issue of whether Miller was engaged in self-representation during the period of cross-examination and the presentation of the rebuttal witness. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (noting a defendant

the State questioned him on cross-examination about matters that were not relevant and were more prejudicial than probative. He admits he "opened the door" in his direct testimony but asserts the prosecutor took unfair advantage of the situation, and defense counsel should have objected.

The record is clear it was Miller himself who "opened the door" by insisting on introducing evidence that was not relevant to the present charges against him. *See State v. Parker*, 747 N.W.2d 196, 206 (Iowa 2008) ("Our prior cases recognize an 'opening the door' principle of evidence."). The Iowa Supreme Court has noted there are "risks involved when a party offers evidence of questionable relevancy and which may be unfairly prejudicial or may confuse the issues." *Lala v. Peoples Bank & Trust Co.*, 420 N.W.2d 804, 808 (Iowa 1988).

The doctrine of curative admissibility applies when an adversary has introduced "door opening" evidence. *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). In Iowa the doctrine of curative admissibility provides, "when one party introduces inadmissible evidence, with or without objection, the trial court has discretion to allow the adversary to offer otherwise inadmissible evidence on the same subject when it is fairly responsive." *Vine St. Corp. v. City of Council Bluffs*, 220 N.W.2d 860, 864 (Iowa 1974).

Under the doctrine of curative admissibility, the State could present evidence that was not relevant if the evidence was offered in response to the irrelevant evidence offered by Miller. *See State v. Jones*, 471 N.W.2d 833, 835 (Iowa 1991) ("[O]ne who induces a trial court to let down the bars of a field of

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that elects to represent himself cannot claim ineffective assistance of counsel). For this reason we also do not address this issue.

inquiry that is not competent or relevant to the issues cannot complain if his adversary was also allowed to avail himself of the opening."). Defense counsel did not have an obligation to object to the cross-examination of Miller on the ground that the State was presenting irrelevant evidence. *See State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011) (noting defense counsel does not breach an essential duty by failing to pursue a meritless issue).

B. Miller also asserts defense counsel should have objected to the testimony of the rebuttal witness on the grounds that it involved evidence of prior bad acts under Iowa Rule of Evidence 5.404(b). In his direct testimony, Miller stated he had not committed the drug offense that caused him to be in jail at the time of the present offenses and that Burmeister was the guilty party. When a defendant testifies he has not committed previous crimes, the State is permitted to impeach that testimony. *Parker*, 747 N.W.2d at 207. One method of impeachment is to present the testimony of a rebuttal witness. *See State v. Schaffer*, 524 N.W.2d 453, 457 (Iowa Ct. App. 1994). Again, defense counsel did not have an obligation to raise a meritless issue. *See Brubaker*, 805 N.W.2d at 171.

C. Because we have determined defense counsel did not breach an essential duty, we do not need to address the issue of prejudice. *See Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998) (noting that if a defendant makes an insufficient showing on either prong of the two-part test for ineffective assistance of counsel, we need not address both components).

We conclude Miller has failed to show he received ineffective assistance of counsel. We affirm his convictions.

AFFIRMED.