

IN THE COURT OF APPEALS OF IOWA

No. 2-958 / 11-1133
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AKI MALIK ROSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

Appeal from convictions of voluntary manslaughter and five counts of
intimidation with a dangerous weapon. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney
General, Michael J. Walton, County Attorney, and Melisa Zaehring, Assistant
County Attorney, for appellee.

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

EISENHAUER, C.J.

Aki Ross appeals from his convictions of voluntary manslaughter and five counts of intimidation with a dangerous weapon. He contends his attorneys were ineffective in (1) failing to request proper jury instructions on intimidation, (2) failing to move for judgment of acquittal on all the intimidation counts, (3) failing to move for judgment of acquittal on intimidation counts on the basis of merger, and (4) failing to make a proper argument for having the deposition of an unavailable witness read for the jury. He also contends the court abused its discretion in not allowing relevant evidence essential to his theory of defense. We affirm.

Ross initially was charged with first-degree murder and intimidation with a dangerous weapon with intent after an incident between two groups of people. The confrontation ended with Ross and a man from the other group firing their guns. One of Ross's shots killed a man. Ross filed a notice of self-defense and defense of others. The State later amended the trial information to add six more counts of intimidation based on the number of shots Ross fired. Ross moved to dismiss the additional intimidation counts because (1) the identically-worded counts failed to allege "separate independent acts" of intimidation, (2) there was no factual basis to support seven counts, and (3) the multiple identical counts would confuse the jury and prejudice him. The court denied the motion at the beginning of trial.

At the close of the State's evidence, Ross moved for a directed verdict, stating, "I don't think the State has put on enough evidence to prove its case." The court denied the motion. Ross sought to compel a member of the victim's

family to testify, contending she could relate the excited utterances made to her just after the incident by others at the scene, including the other shooter. After it was shown she was unavailable, Ross sought to have her deposition read to the jury. The State resisted, contending the evidence was cumulative. The court agreed. Ross also sought to introduce photographs of gunshot wounds on his body from previous shootings in order to show his mental state in this incident. The State resisted, contending the photos were irrelevant. The court did not allow the photographs, but it allowed Ross to testify he had been shot several times before and to provide some detail as to the number of wounds and their locations, with the caveat he would be opening himself up to cross-examination on his prior bad acts if he testified concerning the circumstances in which he received the wounds.

The jury instructions contained two marshaling instructions, one for the murder charge and one for all of the intimidation charges. On the murder charge, the jury found Ross guilty of the lesser-included offense of voluntary manslaughter. The jury found Ross guilty of five of the seven intimidation counts. The court sentenced Ross to a prison term not to exceed ten years on each count, to be served consecutively. Ross appeals.

Our review is for correction of errors at law. Iowa R. App. P. 6.907. We review the trial court's evidentiary rulings for an abuse of discretion. *State v. Huston*, 825 N.W.2d 531, 536 (Iowa 2013). We review claims of ineffective assistance of counsel de novo. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). To prove a claim of ineffective assistance of counsel, a defendant has the burden

to prove (1) counsel failed in an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Ineffective Assistance. Ross contends his trial attorneys were ineffective in (1) failing to request proper jury instructions on intimidation, (2) failing to move for judgment of acquittal on all the intimidation counts, (3) failing to move for judgment of acquittal on intimidation counts on the basis of merger, and (4) failing to make a proper argument for having the deposition of an unavailable witness read for the jury. Although we normally preserve ineffective assistance claims for postconviction relief proceedings to allow for full development of the facts surrounding the attorney's conduct, *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997), we will resolve them on direct appeal when the record is adequate. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We find the record is not adequate to address Ross's ineffective-assistance claims and preserve them for possible postconviction relief proceedings.

Exclusion of Photographs. Ross contends the trial court abused its discretion in excluding photographs of gunshot wounds on his body from previous incidents. He argues this evidence was relevant and essential to show his state of mind for his justification defense. The trial court allowed Ross to testify he had been shot and wounded before and also to provide some detail as to the number of wounds and their locations, with the caveat he would be opening himself up to cross-examination on his prior bad acts if he testified concerning the circumstances in which he received the wounds. Ross argues his "brief testimony lacked the powerful relevance that photographs would have provided." We conclude the trial court did not abuse its discretion. The

photographs would have been cumulative to his testimony. See Iowa R. Evid. 5.403 (allowing exclusion of cumulative evidence). We affirm on this issue.

AFFIRMED.