

IN THE COURT OF APPEALS OF IOWA

No. 3-427 / 10-0688
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY DUANE HUBBS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Douglas C. McDonald, Judge.

A defendant appeals his conviction and sentence for assault causing bodily injury. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and Alan Haverkamp and William Ripley, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

The defendant, Timothy Hubbs, appeals his conviction and sentence for assault causing bodily injury pursuant to Iowa Code section 708.2(2) (2009). He claims his counsel was ineffective for not issuing subpoenas to the police officers and in not objecting to medical testimony not noticed in the minutes of evidence. He also claims the district court abused its discretion in sentencing him by only focusing on one element in determining the appropriate sentence. Because the record is insufficient for us to address the ineffective-assistance-of-counsel claims, we preserve those for possible postconviction action. We also find the district court did not abuse its discretion in sentencing Hubbs, and we affirm the conviction and sentence.

I. Background Facts and Proceedings

A rational juror could have found as follows: Hubbs and Steven Boore are neighbors. In the early morning hours of August 13, 2009, Hubbs and Boore got into an argument over where Boore should park his car. Hubbs hit Boore with his fist on the left side of his jaw, knocking Boore to the ground. Hubbs continued to hit and kick Boore when he was on the ground. The police were called, and Hubbs was arrested.

The minutes of testimony contained a list of five witnesses, including two police officers. It stated, "The following witnesses will testify in accordance with statements, actions, and observations attributable to them as contained in the attached investigative reports." Hubbs filed a notice of defense of self-defense on September 22. After a mistrial on December 14, a second jury trial commenced on March 29, 2010. Boore testified he suffered a fractured jaw and

a ruptured disk in his lower back from the incident, which sometime later required surgery. The police officers failed to appear. The jury rejected Hubbs's claim of self-defense and found him guilty of the offense of assault causing bodily injury. Hubbs was sentenced to one year in jail subject to reconsideration after Hubbs underwent an evaluation for possible drug or alcohol treatment. He appeals.

II. Ineffective Assistance of Counsel

Hubbs specifically claims he was denied effective assistance of counsel because his attorney (1) failed to object to the victim's additional medical testimony on the theory it was not properly noticed in the minutes of testimony, it lacked foundational medical support to establish the injuries were attributable to Hubbs, and it was based on hearsay statement by medical professionals, and (2) failed to subpoena the police officers to impeach the victim's testimony about his additional injuries and to support Hubbs's claim of self-defense.¹

We review claims of ineffective assistance of counsel de novo. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). We ordinarily preserve such claims for postconviction relief proceedings. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). "That is particularly true where the challenged actions of counsel implicate trial tactics or strategy which might be explained in a record fully developed to address those issues." *State v. Rubino*, 602 N.W.2d 558, 563 (Iowa 1999). We will resolve the claims on direct appeal only when the record is adequate. *Id.*

¹ According to one police report, Hubbs told police Boore struck him first. That same report stated Hubbs had redness and swelling to his right ear and small scrapes on his knees. The other police report observed Boore had bruising, small cuts, and swelling to his head and legs. Boore refused medical attention at the scene but was later transported to the hospital by a private vehicle because he felt dizzy.

Hubbs boils his ineffective-assistance-of-counsel claims down to one origin: “The critical failure of defense counsel in trial preparation was his failure to subpoena the police officers for trial.”² Hubbs’s brief suggests “it may be the defense attorney let all this testimony [regarding the victim’s injuries] come in without objection in order to attack Boore’s credibility for prior inconsistent statements. . . . The practical problem with that strategy was that the attorney had not subpoenaed the police to relate the prior inconsistent statements.”

These issues are better left for postconviction relief, to which the State agrees. The present record does not show whether trial counsel knew the victim would testify concerning additional injuries and the officers’ testimonies could be used to impeach the victim. Moreover, because the officers did not testify we do not know if they would testify consistent with their reports on both direct and cross-examination to the extent it would impeach the victim’s statements. Moreover, it is unclear from the record before us whether the officers’ testimonies would support Hubbs’s theory of self-defense: that he attempted to retreat from the hostilities and was attacked by Boore. To any extent trial counsel intended to impeach Boore’s testimony rather than directly attacking it would be a question of strategy we are not able to discern on this record.

We therefore preserve the claims for any possible postconviction relief action.

² It is unclear from the record on appeal whether the police officers were subpoenaed by the State, and if so, why they failed to appear.

III. Illegal Sentence

Hubbs's claim the district court improperly sentenced him is reviewed for an abuse of discretion. See *State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003). An abuse of discretion is found when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). In exercising this discretion, the court may consider a variety of circumstances, including the nature of the offense and attending circumstances, as well as the defendant's age, character, propensities, and chances of reform. *State v. Boltz*, 542 N.W.2d 9, 10 (Iowa Ct. App. 1995). We review the entire record and look to see if the reasons articulated by the trial court are sufficient to enable us to determine if an abuse of discretion occurred. *Id.* Even a succinct and terse statement of reasons may be sufficient as long as the brevity displayed does not prevent us from reviewing the exercise of the trial court's sentencing discretion. *Id.*

Hubbs argues the district court abused its discretion in only focusing on one factor—the seriousness of the offense—and by citing another factor not supported by evidence—Hubbs's substance abuse. However, Hubbs fails to point out the district court also considered his lack of remorse and acceptance of guilt, as well as his history of alcohol related crimes.

Hubbs also argues it was improper for the district court to consider his need for alcohol treatment because according to Hubbs there was not substantial evidence alcohol was a factor in the crime. Looking at the record as a whole, there is substantial evidence alcohol was a factor in the crime, and therefore, the consideration of the need for treatment was appropriate. First, the victim testified

Hubbs gave off a “very heavy” smell of alcohol. One of the officers recorded in his report, Hubbs “had a strong odor of an alcoholic beverage.” Additionally, Hubbs admitted at sentencing he had at least one conviction for operating while intoxicated and had gone through an alcohol treatment program as a result. Assessing the need for treatment was not utilizing an improper factor as to render the sentence an abuse of discretion. Hubbs has not affirmatively shown how the district court abused its discretion, and we therefore affirm the sentence.

IV. Conclusion

On this direct appeal the record is insufficient for us to address Hubbs’s claims of ineffective assistance of counsel. The district court did not abuse its discretion in sentencing because it utilized proper factors. We therefore affirm the sentence and preserve the ineffective-assistance-of-counsel claims for possible postconviction relief.

AFFIRMED.