

IN THE COURT OF APPEALS OF IOWA

No. 3-470 / 12-1492

Filed June 26, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESSE WAYLON THROGMARTIN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Sean W. McPartland,
Judge.

Jesse Throgmartin appeals after pleading guilty to domestic assault
causing bodily injury, second offense. **AFFIRMED.**

David A. Cmelik of David A. Cmelik Law, P.L.C., Cedar Rapids, for
appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant
Attorney General, Jerry Vander Sanden, County Attorney, and Nicholas
Maybanks and Nicholas Scott, Assistant County Attorneys, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Jesse Throgmartin appeals after pleading guilty to domestic assault causing bodily injury, second offense. Because he has failed to demonstrate trial counsel was ineffective or that the court considered an impermissible factor at sentencing, we affirm.

I. Background Facts and Proceedings.

Jesse Throgmartin previously has been convicted twice of domestic abuse assault (in 2002 and 2003).

In a complaint filed March 12, 2012, Throgmartin was charged with domestic assault causing bodily injury, third offense. The complaint alleged Throgmartin, on March 12, 2012, “assaulted [his girlfriend], with whom he resides, by slamming her head against the hood of the car and shoving her to a concrete floor resulting in bodily injury.”

The minutes of testimony include these descriptions of the assault:

Upon arriving in the garage area, [girlfriend] told Throgmartin to leave and that she would get him a cab. The defendant began calling [her] names and slammed her against the hood of the car in the garage. The defendant then began yelling louder at her and [girlfriend] began kicking and flailing about in an attempt to get away from him. [She] attempted to bite the defendant’s hand anytime it was near her face. [She] was thrown to the cement floor where she hit her head. . . .

. . . [Girlfriend] had a large bump on the back of her head and was very distraught. [She] did not go to the hospital at that time because there were children in the home. The defendant was arrested and the police left the residence. [Girlfriend] later had bruising on her body from the assault which became visible at a later time. Photographs were taken of this bruising. [She] later became nauseous and was experiencing symptoms that she believed were indicative of a concussion. [She] went to the hospital the next morning.

A no-contact order issued. On April 11, 2012, the defendant consented to a finding of contempt for violating the no-contact order.

On June 29, 2012, Throgmartin entered a written plea of guilty to a lesser included offense of domestic assault causing bodily injury, second offense. He also submitted a written consent to waive presence, which reads in part: "I acknowledge that I have read the complaint, Trial Information and Minutes of Testimony attached to the Trial Information. I agree that the Minutes of Testimony are substantially correct and I admit there is a factual basis for the charge for which I am now pleading guilty."

A presentence investigation report recommended a two-year prison sentence for these reasons:

This was a violent crime in which the victim sustained significant injuries. He has a history of assaultive behavior. The defendant is not appropriate for the Gerald Hinzman Center due to his violent history. He has had the benefit of a residential placement in the past. He has had the benefit of probation supervision and he expressed a desire to not be placed on supervision. The defendant has violated the NCO since he was arrested in this offense. This sentence will hold the defendant accountable and serve to protect the community.

At the sentencing hearing, the complaining witness read a statement, which the defendant now asserts was rife with vitriol and hyperbole.

The district court did impose a two-year term of imprisonment, stating, "I have reviewed the presentence investigation report and the documents included in the court file. I am going to adopt the recommendation set forth in the presentence investigation report." The court reasoned, "I believe that the sentence in this particular case is justified based upon the history of the

Defendant's prior convictions, but I think it is particular[ly] justified based upon the violent nature of this crime to which the Defendant has pled guilty."

Throgmartin now appeals, contending his trial counsel was ineffective in failing to assert that Iowa Code section 915.21(3) (2011)¹ violates his confrontation

¹ Section 915.21 provides for victim impact statements, providing:

1. A victim may present a victim impact statement to the court using one or more of the following methods:

a. A victim may file a signed victim impact statement with the county attorney, and a filed impact statement shall be included in the presentence investigation report. If a presentence investigation report is not ordered by the court, a filed victim impact statement shall be provided to the court prior to sentencing. Unless requested otherwise by the victim, the victim impact statement shall be presented at the sentencing hearing in the presence of the defendant, and at any hearing regarding reconsideration of sentence. The victim impact statement may be presented by the victim or the victim's attorney or designated representative.

b. A victim may orally present a victim impact statement at the sentencing hearing, in the presence of the defendant, and at any hearing regarding reconsideration of sentence.

c. A victim may make a video recording of a statement or, if available, may make a statement from a remote location through a video monitor at the sentencing hearing, in the presence of the defendant, and at any hearing regarding reconsideration of sentence.

d. A victim may make an audio recording of the statement or appear by audio via a speakerphone to make a statement, to be delivered in court in the presence of the defendant, and at any hearing regarding reconsideration of sentence.

e. If the victim is unable to make an oral or written statement because of the victim's age, or mental, emotional, or physical incapacity, the victim's attorney or a designated representative shall have the opportunity to make a statement on behalf of the victim.

2. A victim impact statement shall include the identification of the victim of the offense, and may include the following:

a. Itemization of any economic loss suffered by the victim as a result of the offense. For purposes of this paragraph, a pecuniary damages statement prepared by a county attorney pursuant to section 910.3 may serve as the itemization of economic loss.

b. Identification of any physical injury suffered by the victim as a result of the offense with detail as to its seriousness and permanence.

c. Description of any change in the victim's personal welfare or familial relationships as a result of the offense.

rights. He also asserts the district court considered an impermissible factor in sentencing him, claiming “there are no facts in the actual record regarding the ‘violent nature of this crime.’”

II. Scope and Standard of Review.

Because ineffective-assistance-of-counsel claims raise constitutional issues, our review is de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

As for the challenge to his sentence,

[d]epending upon the nature of the challenge, the standard of review is for the correction of errors at law or for an abuse of discretion. *Compare State v. Freeman*, 705 N.W.2d 286, 287 (Iowa 2005) (“We review the district court’s sentence for correction of errors at law.” (citing *State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994); Iowa R. App. P. 6.4)), and *State v. Shearon*, 660 N.W.2d 52, 57 (Iowa 2003) (noting that the appellant challenged “the legality of his sentencing,” and that “[o]ur review is for the correction of errors at law”), with *State v. Alloway*, 707 N.W.2d 582, 584 (Iowa 2006) (“We normally review sentencing decisions for abuse of discretion.” (citing *State v. Evans*, 671 N.W.2d 720, 727 (Iowa 2003))), and *State v. Jose*, 636 N.W.2d 38, 41 (Iowa 2001) (stating we review a sentence that does not fall outside the statutory limits for an abuse of discretion (citing *State v. Cooley*, 587 N.W.2d 752, 754 (Iowa 1998))), and *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991) (“When a sentence is imposed within statutory limits, it will be set aside only for an abuse of discretion.”). Ultimately, however, we review a defendant’s sentence for the correction of errors at law. See *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996); Iowa R. App. P. 6.4. Nevertheless, in some circumstances it is necessary to determine whether legal error occurred because the district court

d. Description of any request for psychological services initiated by the victim or the victim’s family as a result of the offense.

e. Any other information related to the impact of the offense upon the victim.

3. *A victim shall not be placed under oath and subjected to cross-examination at the sentencing hearing.*

4. Nothing in this section shall be construed to affect the inherent power of the court to regulate the conduct of persons present in the courtroom.

(Emphasis added.)

abused its discretion. Such a circumstance occurs when the sentence imposed is within the statutory limits or the defendant's challenge to his or her sentence does not suggest it is outside the statutory limits. See *Neary*, 470 N.W.2d at 29 (noting that when the sentence imposed is within the statutory limits it is reviewed for an abuse of discretion); *Thomas*, 547 N.W.2d at 225 (noting that when "a defendant does not assert that the imposed sentence is outside the statutory limits, the sentence will be set aside only for an abuse of discretion").

State v. Valin, 724 N.W.2d 440, 444 (Iowa 2006).

III. Discussion.

A. *Ineffective assistance of counsel.* To prevail on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that (1) trial counsel failed to perform an essential duty, and (2) prejudice resulted from this failure. *Straw*, 709 N.W.2d at 133. A defendant's inability to prove either element is fatal and therefore, we may resolve a claim on either prong. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

The use of victim impact statements during sentencing is a matter of statutory authority. See Iowa Code § 915.21 (authorizing the use of victim impact statements); *State v. Matheson*, 684 N.W.2d 243, 244 (Iowa 2004) ("Authority to submit impact statements is authorized under Iowa Code section 915.21 and is wholly statutory."). Throgmartin contends trial counsel was ineffective for failing to raise a confrontation challenge to section 915.21.

Throgmartin offers no authority showing a right of confrontation exists at sentencing.² Our supreme court has implicitly rejected a defendant's claim that the right of confrontation is applicable at sentencing in *State v. Sailer*, 587 N.W.2d 756, 761 (Iowa 1998):

Sailer argues that allowing a victim impact statement to include allegations of unproven offenses denies defendants certain constitutional rights, such as the presumption of innocence and *the right of confrontation*. Sailer neglects to recognize the distinction between the sentencing phase of a criminal proceeding, in which the court is trying to determine an appropriate sentence for an offense for which guilt has already been established, and *the guilt phase of a criminal proceeding, during which the above-mentioned constitutional rights of the defendant must be protected vigilantly*.

(Emphasis added). Consequently, Throgmartin cannot establish trial counsel breached an essential duty in failing to raise such a challenge.³ See *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004) (noting defense counsel has no duty to raise an issue that lacks merit).

B. Sentencing. With regard to his claim that the district court must have considered improper factors at sentencing, suffice it to say that the record contains support for the court's reasoning, i.e. "the violent nature of the crime." Throgmartin acknowledged the substantial correctness of the minutes of

² The case cited by Throgmartin, *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), deals with a defendant's right to confront witnesses at trial. ("[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear *at trial* unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." (emphasis added)).

³ The unpublished case cited in Throgmartin's reply brief, *State v. Tyson*, No. 11-0433, 2012 WL 835846, at *4-5 (Iowa Ct. App. Mar. 14, 2012), is inapposite as it dealt with testimony at sentencing by the victim's sister, who is not statutorily authorized to present a statement.

testimony, which asserted he slammed the victim's head into the hood of a car and threw her to the cement, resulting in head injuries.⁴

AFFIRMED.

⁴ Although we find no use of an impermissible factor in sentencing Throgmartin in this record, the sentencing court may be well advised to state on the record that it is not considering any impermissible sentencing factors that may be recited in a victim impact statement.