IN THE COURT OF APPEALS OF IOWA

No. 6-1009 / 05-1915
Filed February 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT CHARLES GEIGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mark Kruse, District Associate Judge.

Robert Geiger appeals from his conviction for domestic assault while using or displaying a dangerous weapon. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Jeffrey S. Lavallee, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Baker, JJ.

VOGEL, J.

Robert Geiger was charged with and convicted of domestic assault while using or displaying a dangerous weapon in violation of Iowa Code sections 708.1 and 708.2A(2)(c) (2005). He had threatened to use a lighter to blow up a riding lawn mower his live-in girlfriend, Bonnie Crowner, was sitting on; he also shook a bowie knife at her and then, three times, threw it into a tree not far from where she was sitting. On appeal, Geiger maintains the court erred in overruling his motion for mistrial. He also asserts various grounds of ineffective assistance of counsel.

Mistrial.

Geiger first argues that the court erred in failing to grant his motion for mistrial based on three grounds: (1) the prosecutor's description of him as a "dangerous man" during opening statements; (2) a police officer's testimonial reference to Crowner as "the victim"; and (3) Crowner's testimony that she "knew [Geiger] was capable of doing something like this."

We initially conclude Geiger has failed to preserve contentions (1) and (2) for appellate review. First, no transcript of the opening statement was made[1] and the scant record made following the alleged statement is insufficient to "provide this court with a record affirmatively disclosing the error relied upon." *See State v. Christianson*, 337 N.W.2d 502, 504 (Iowa 1983). This failure to provide an adequate record results in waiver of the issue. *Id*. Second, the claim regarding the officer's reference to Crowner as a "victim" was not urged as a

[1] Opening statements are now required to be reported. *See* Iowa R. Crim. P. 2.19(4) and Iowa R. Civ. P. 1.903(2)(*c*).

ground for mistrial.[2] *See Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

We thus address the remaining claim that the court should have granted a mistrial based on the following testimony by Crowner:

> Prosecutor: How did you feel when he [threatened to blow you up]?
> Crowner: I felt very scared and threatened.
> Prosecutor: Why?
> Crowner: Because I feared for my life. I knew that he was capable of doing something like that.

Geiger asserts this testimony constitutes improper evidence of prior bad acts. *See* Iowa R. Civ. P. 5.404(*b*) (prohibiting evidence of other crimes, wrongs, or acts to prove a person acted in conformity with that character). We reject this contention, agreeing with the State that this testimony did not convey knowledge of a prior bad act, but rather that it was appropriate evidence going to an essential element of the crime. The court instructed the jury that the State had to establish Geiger "act[ed] with the specific intent to place Bonnie Jean Crowner in fear of immediate physical contact . . . ." As our supreme court determined in *State v. Reynolds*, 670 N.W.2d 405, 414-15 (Iowa 2003), the victim's reaction to the defendant's behavior is relevant to the question of the defendant's intent to harm. As such this evidence did not violate rule 5.404(*b*), was relevant and

[2] Regardless, Geiger's counsel objected outside of the presence of the jury to the use of the term "victim." The court sustained this objection and instructed the prosecutor to "refer to her as her name, Ms. Crowner."

admissible. We therefore affirm the district court's denial of Geiger's motion for mistrial.

Ineffective Assistance of Counsel.

Geiger asserts his trial counsel was ineffective in failing to object to the admission of the following evidence:

> 1. Crowner's testimony regarding his collection of knives, which he alleges was intended to paint him "as a violent and dangerous individual."
> 2. The testimony of a neighbor, who had witnessed some of the events, that he had heard Geiger had knives.
> 3. A deputy sheriff's testimony relating that a dispatcher had told him "there was a domestic disturbance and the lady stated the male was threatening to light the lawn mower on fire, trying to blow up that or a can of gasoline."
> 4. Another deputy's testimony that Crowner advised him Geiger had threatened her with a knife.

The question of counsel's performance is a constitutional claim which this court reviews de novo. *State v. Carter,* 602 N.W.2d 818, 820 (Iowa 1999). The defendant must prove that counsel failed to perform an essential duty and that prejudice was the result. *Id.* Unless the defendant can show both by a preponderance of the evidence, we will affirm. *State v. Greene,* 592 N.W.2d 24, 29 (Iowa 1999). We prefer to preserve ineffective assistance of counsel claims for possible postconviction relief proceedings but will consider them in a direct appeal if the record is adequate. *State v. Casady,* 597 N.W.2d 801, 807 (Iowa 1999).

We first conclude the record is inadequate to address Geiger's claims to the extent he argues the testimony of the neighbor and the two deputies constituted inadmissible hearsay. We further conclude the record is inadequate to address Geiger's claims regarding Crowner's testimony about his knife

collection. We therefore preserve them for a possible postconviction relief application.

We next proceed to address his contention the admission of the alleged hearsay statements violated his Sixth Amendment right under the United States Constitution to confront witnesses. In particular, he argues the complained-of evidence was testimonial in nature. However, as the Supreme Court made clear in *Crawford v. Washington,* 541 U.S. 36, 59 124 U.S. 1354, 1369, 158 L. Ed. 2d. 177 (2004), the Confrontation Claus does not prohibit the admission of such testimony where the declarant testifies. Here, both the neighbor and the deputies testified at trial and were thus subject to cross-examination regarding their purported hearsay testimony. [3]

Conclusion.

We conclude the trial court did not abuse its discretion in denying Geiger's motion for mistrial. We further conclude trial counsel did not provide ineffective assistance in failing to object to certain testimony on Confrontation Clause grounds, but preserve other ineffectiveness claims for further development of the record in a possible postconviction relief proceeding. Finally, whether specifically addressed or not in this opinion, we have reviewed and found meritless each of Geiger's claims.

AFFIRMED.

[3] However, to the extent Geiger argues the deputy's information relayed to him from the dispatcher violates this right, we preserve that issue for possible postconviction relief.