IN THE COURT OF APPEALS OF IOWA

No. 6-805 / 04-1357
Filed December 28, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMMIE JOE ALEXANDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson and Eliza J. Ovrom, Judges.

Timmie Joe Alexander appeals his convictions for third-offense operating while intoxicated, eluding, and driving while barred. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephen Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Timmie Joe Alexander was convicted of third-offense operating while intoxicated (OWI), felony eluding, and driving while barred, with the sentences on the first two convictions enhanced pursuant to the habitual offender statute, Iowa Code section 902.8 (2003). He appeals, contending the trial court violated his federal constitutional rights to due process and a fair trial in refusing to submit to the jury the issue of whether certain prior convictions were felonies and that the court erred in overruling his motion for judgment of acquittal because there was insufficient evidence those prior convictions were felony convictions. He also raises two claims of ineffective assistance of counsel. We affirm his convictions and preserve one ineffective assistance claim for a possible postconviction proceeding.

I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. On the evening of January 2, 2004, Trooper David Overton observed a vehicle make an illegal U-turn on Interstate Highway 35. Overton pulled behind the vehicle and activated his overhead lights and siren. However, instead of stopping the vehicle sped up and led Overton on a chase for approximately sixteen miles at speeds of up to 100 miles per hour. During the chase the vehicle was being driven erratically and in an unsafe manner. Eventually the vehicle was stopped when "stop sticks" perforated its tires. It was later determined the driver of the vehicle was the defendant Alexander.

Overton observed Alexander after he was finally stopped and saw that Overton's eyes were bloodshot and watery and he smelled of an alcoholic beverage. An open forty-ounce bottle of beer was found in his vehicle. Alexander refused to perform field sobriety tests and refused to give a breath sample. Overton requested a record check and found that Alexander's license was barred. On February 4, 2004, the State charged Alexander with OWI, third offense, in violation of Iowa Code section 321J.2(2)(c), eluding or attempt to elude a pursuing law enforcement vehicle, in violation of section 321.279(3)(b), and operating a motor vehicle while barred, in violation of section 321.561. The State filed an amended information on March 25, 2004, to clarify the State was seeking to enhance the punishment on the OWI and eluding charges on the grounds Alexander was an habitual offender under section 902.8.

Alexander's jury trial was bifurcated. He was first tried on the OWI, eluding, and driving while barred charges. Issues concerning his prior OWI convictions and whether he was an habitual offender based on his prior convictions were not submitted to the jury during this first trial. The jury found Alexander guilty on the charges submitted to it.

Alexander was then given the chance to affirm or deny his prior convictions. He denied both his prior convictions for OWI and that he had been convicted of prior felonies. Thus, jury trial was held on the issue of Alexander's prior OWI convictions. The jury found he had incurred each of the five prior OWI convictions alleged. Trial was then held on the issue of whether Alexander was an habitual offender. The jury found Alexander was the person who had been

convicted of OWI, third offense, on February 15, 1994 and burglary in the second degree on April 9, 1987.

The court sentenced Alexander to serve indeterminate terms of incarceration of fifteen years each on the OWI and eluding charges and two years on the driving while barred charge. The court ordered the terms to run consecutively. Alexander appeals, contending (1) the trial court erred in refusing to submit the issue of the whether his prior convictions for third-offense OWI and second-degree burglary were felonies to the jury, thereby violating his rights to due process and a fair trial; (2) his trial counsel was ineffective for failing to preserve this first issue; (3) the court erred in denying his motion for judgment of acquittal because there was insufficient evidence his prior convictions for third-offense OWI and second-degree burglary were for felonies; and (4) his trial counsel was ineffective for failing to object to the prejudicial nature of four of the State's exhibits.

II. MERITS.

At trial Alexander's counsel objected to the court's proposed jury Instruction Number 15 by stating,

> I have a similar objection to Instruction Number 15. I thought the state of the law was the State had to prove a felony. If they don't, it should be that they have to prove a felony and that should be a jury question. So I object to Instruction Number 15 . . . based on the fact there's nothing in that instruction stating the same.

The trial court overruled the objection finding that the instruction was from the "standard jury instructions," it was appropriate, and that the State did prove through the testimony of the two Clerks of Court that the offenses were felonies.

On appeal Alexander contends the court violated his constitutional rights to due process and fair trial under the principles set forth in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000), by overruling his objection and not submitting to the jury the issue of whether his prior convictions for third-offense OWI and second-degree burglary were felonies.

"Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal." *Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995). Issues not raised before the trial court, including constitutional issues, cannot be raised for the first time on appeal. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). We require error preservation, even on constitutional issues. *State v. Mulvany*, 600 N.W.2d 291, 293 (Iowa 1999). This court does not recognize a "plain error" rule which allows appellate review of constitutional challenges not preserved at the district court level in a proper and timely manner. *McCright,* 569 N.W.2d at 607.

> Well-settled principles following the tenor of rule [of civil procedure 1.924] govern our review of objections to instructions. We consider only those objections to instructions a party previously raised with the district court. A party objecting to the court's instruction must specify the subject and grounds of the objection. A party's objection must be sufficiently specific to alert the district court to the basis for the complaint so that if there is an error the court can correct it before submitting the case to the jury. A party's general objection to an instruction preserves nothing for review. Additionally, a party is bound by the objection the party makes to the district court's instructions and may not amplify or change the objection on appeal.

State v. Maghee, 573 N.W.2d 1, 8 (Iowa 1997) (citations omitted).

In the district court Alexander did not raise the *Apprendi* constitutional issue that he now attempts to assert on appeal. We conclude he has not preserved this issue for our review, as he has raised for the first time on appeal, and we will not further address it.

However, Alexander further claims that if we determine this issue was not preserved for our review, as we now have done, then his trial counsel was ineffective for failing to make a proper objection based on *Apprendi*. We review claims of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To establish an ineffective assistance of counsel claim, the defendant must show "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

We conclude Alexander's trial counsel had no duty, under either *Apprendi* or state law, to request that the trial court submit to the jury the question of whether Alexander's two prior convictions were for felonies. First, in *Apprendi,* the Supreme Court held that any fact which increases the penalty for a crime beyond the prescribed statutory maximum, *other than the fact of a prior conviction*, must be submitted to the jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455. Because *Apprendi* did not even require that the issue of whether Alexander had incurred

prior convictions be submitted to the jury, it clearly did not require that the issue of whether any prior convictions were felonies be submitted to the jury. Thus, because *Apprendi* does not apply to issues concerning Alexander's prior convictions his trial counsel was not ineffective for not objecting to the instruction on this basis. Counsel is not ineffective for failing to raise meritless issues or make meritless objections. *State v. Greene*, 592 N.W.2d 24, 30 (Iowa 1999); *State v. Smothers*, 590 N.W.2d 721, 724 (Iowa 1999); *State v. Atwood*, 342 N.W.2d 474, 477 (Iowa 1984).

Second, we note that under state law the only issue for the jury to decide here was whether Alexander was the person who had been convicted of the previous offenses of second-degree burglary and third-offense OWI. Under Iowa Rule of Criminal Procedure 2.19(9) when the offender is subject to an increased sentence due to alleged prior convictions, and the offender denies he or she is the person previously convicted, the only question the jury need decide is the identity of the offender as the person previously convicted. Any other objections "shall be heard and determined by the court." Iowa R. Crim. P. 2.19(9). Once the jury has determined the defendant was the person previously convicted, the question of whether the prior offenses were felonies is a legal determination to be made by the court. *See State v. Spoonmore,* 323 N.W.2d 202, 203 (Iowa 1982) (finding the trial court erred in permitting the jury to decide whether the prior offenses alleged in support of sentencing enhancement were felonies); *State v. Smith,* 282 N.W.2d 138, 142-43 (Iowa 1979) (holding that in habitual offender proceeding the trial court did not err in instructing the jury the defendant had just

been convicted of a class "C" felony; the only issue for the jury was defendant's identity as the person twice previously convicted of a felony, with questions of whether the prior convictions were qualifying felonies to be determined by the court); *cf. State v. Buchanan,* 604 N.W.2d 667, 668 (Iowa 2000) (treating the issue of whether an offense was a felony for the purposes of the felon in possession of a firearm statute as a legal question to be decided by the court).

Therefore, although Alexander's trial counsel did in fact object to the challenged instruction and request the court submit the issue of whether Alexander's prior convictions were felonies to the jury, he had no duty to do so under Iowa law because the question calls for a legal determination to be made by the court. Any such objection would therefore have been without merit. *See Greene*, 592 N.W.2d at 30; *Smothers*, 590 N.W.2d at 724.

Alexander next claims the district court erred in denying his motion for judgment of acquittal. He contends there was insufficient evidence he was an habitual offender because there was insufficient evidence that two prior convictions were for felonies. Our scope of review and many of the standards of review that apply in sufficiency-of-the-evidence challenges are set forth in *State v. Webb*, 648 N.W.2d 72, 75-76 (Iowa 2002), and need not be repeated here.

As set forth above, the only facts the State was required to prove to the jury was that Alexander was the person convicted of the prior offenses of second-degree burglary and third-offense OWI. Once it had done so it had met its burden of proof. The question of whether those convictions were felonies called for a legal determination to be made by the court.

Nevertheless, there in fact was substantial evidence presented during the habitual offender phase of Alexander's trial from which the trial court could find that the two prior convictions were for felonies. The State called the clerk of court for Warren County who testified that Alexander was convicted of burglary in the second degree in Warren County and that crime was a felony. Similarly, a supervisor in the criminal division of the clerk of court's office in Polk County testified that Alexander was convicted of third-offense OWI in Polk County and that crime was a felony. In addition, the State introduced the judgment entries for these convictions, showing Alexander had been convicted of the second-degree burglary in 1987 and the third-offense OWI in 1995. Thus, even assuming the State was required to prove that those two prior convictions were felonies, we conclude the evidence was sufficient to do so and was therefore sufficient to support the enhancement of his sentences under the habitual offender provision of the Code. The court did not err in denying Alexander's motion for judgment of acquittal.

Finally, Alexander claims his trial counsel was ineffective for failing to object to four of the State's trial exhibits (2B, 4C, 5C, and 7B) on the basis of their prejudicial nature. The first three exhibits in question are applications by Alexander for court-appointed counsel in some of his prior OWI cases, and the fourth is an application for court-appointed counsel in his prior burglary case. All were admitted without objection.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to

leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

As set forth above, Alexander can only succeed on his ineffectiveness claim by establishing both that his counsel breached an essential duty and that prejudice resulted. *Wemark,* 602 N.W.2d at 814. No record has yet been made before the trial court on this issue. Trial counsel has not been given an opportunity to explain his actions and the trial court has not considered and ruled on the ineffectiveness claims. Under these circumstances, we pass this issue of ineffective assistance of counsel in this direct appeal and preserve it for a possible postconviction proceeding. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). Accordingly, we preserve Alexander's claim of ineffective assistance of counsel regarding the specified exhibits for a possible postconviction proceeding.

We conclude Alexander did not preserve error on the trial court's alleged violation of his constitutional rights under *Apprendi*. However, we further conclude his trial counsel was not ineffective for not making such an objection, because *Apprendi* is not applicable to the question of prior convictions. Furthermore, under Iowa law the question of whether a defendant's prior convictions were felonies for purposes of sentencing enhancement is a legal

determination for the court and thus need not be submitted to the jury. We affirm Alexander's convictions and preserve his claim that his trial counsel was ineffective for not objecting to the four specified State's exhibits on the basis of their alleged prejudicial nature for a possible postconviction proceeding.

AFFIRMED.