IN THE COURT OF APPEALS OF IOWA

No. 8-1017 / 07-2045
Filed February 4, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDWARD (NMN) MARTIN, III,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Defendant appeals his domestic abuse assault conviction. **CONDITIONALLY AFFIRMED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Edward (NMN) Martin, III, Clarinda, appellant pro se.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

EISENHAUER, J.

In October 2007, a jury found defendant Martin guilty of domestic abuse assault causing bodily injury. Martin stipulated to four prior domestic abuse convictions, one of which involved the same victim, and was sentenced to prison. On appeal he argues: (1) the letters he wrote to the victim were improperly admitted into evidence; (2) the court utilized an incorrect standard in ruling on his motion for a new trial; and (3) his attorney was ineffective.

We conclude the letters were properly admitted and Martin has failed to prove ineffective assistance of counsel. We reverse the trial court's denial of Martin's motion for new trial and remand for reconsideration using a weight-of-the-evidence standard. We have considered the additional issues raised and the issues not specifically addressed are without merit.

I. Letters to the Victim.

Martin argues the letters he wrote while he was in jail awaiting trial were erroneously admitted because they were not relevant, were unduly prejudicial, and went beyond the scope of direct examination. In ruling on this evidentiary challenge, "we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion." *State v. Shortridge*, 589 N.W.2d 76, 81 (Iowa Ct. App. 1998).

The State had to prove Martin and the victim were cohabitating, an allegation denied by the defendant. *See* Iowa Code § 236.2(4)(a) (2007). Relevant evidence is evidence having any tendency to make a fact of consequence "more probable or less probable than it would be without the

evidence." Iowa R. Evid. 5.401. However, even relevant evidence is inadmissible if it is unfairly prejudicial. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). We find no abuse of discretion in the district court's relevancy determination: "I think [the letters are] relevant to show the long-standing and continuing relationship the parties have had and continue to have."

Second, the defense attorney argued the letters were unduly prejudicial because the jurors might "believe that's a violation of a no-contact order." The court noted there had "been no evidence about a no contact order" existing during the time Martin wrote the letters. Thus, there is no abuse of discretion.

Third, we find no abuse of discretion in the court's overruling the defense attorney's objection concerning the scope of cross-examination: "[I]n the course of [direct] examination, your client, in answer to your questions, minimized his relationship to this woman and how much contact he had with her, and so I'm going to let the State develop that." The evidence was properly admitted.

II. Motion for New Trial.

Martin asserts the district court used the wrong standard in ruling on his motion for a new trial by not determining whether the verdict was contrary to the weight of the evidence. In considering a motion for new trial, if the court concludes the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside. *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). The State admits the court did not expressly use a weight-of-the-evidence analysis.

We conclude the district court's ruling on the motion for new trial incorrectly utilized a sufficiency-of-the-evidence standard. The ruling is reversed and the matter remanded for the district court to rule on the motion applying the weight-of-the-evidence standard. However, a reversal of Martin's conviction is not necessary because, on remand, the district court may determine a new trial is not warranted. If the district court denies the motion for new trial on remand, our affirmance will stand. If the motion is granted, Martin's conviction will be set aside and the court will order a new trial. We do not retain jurisdiction.

III. Ineffective Assistance of Counsel.

In order to prevail on his claims of ineffective assistance of counsel, Martin must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). Martin's inability to prove either element is fatal. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We evaluate the totality of the relevant circumstances in a de novo review. *Id*. at 392.

Martin first argues his counsel was ineffective by not specifically objecting to the admission of the jailhouse letters on the grounds such evidence "violates Iowa R. Evid. 5.404(b) regarding other crimes, wrongs, or acts." Martin claims the letters show he was violating a no-contact order. As discussed above, there was no evidence in the record indicating Martin was subject to a no-contact order during the time when he authored the letters. Consequently, trial counsel had no duty to make a meritless motion. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

The lack of duty to make a meritless motion also disposes of Martin's contention his counsel was ineffective by failing to argue the letters are inadmissible because they suggest he was trying to improperly influence the victim's testimony. A defendant's attempts to influence a witness constitute an "admission by conduct" with independent probative value. *State v. Stufflebeam*, 260 N.W.2d 409, 412 (Iowa 1977).

CONDITIONALLY AFFIRMED AND REMANDED.