

IN THE COURT OF APPEALS OF IOWA

No. 8-859 / 07-0850
Filed December 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PERRY BERNARDO BENDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt Stoebe (trial) and Frederick Breen (motion to suppress), District Associate Judges.

Perry Bender appeals following conviction and sentence for possession of a firearm by a felon and possession of marijuana as a habitual offender.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins and Laura Roan, Assistant Attorneys General, Timothy N. Schott, County Attorney, and Ricki Osborn, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Perry Bender appeals following conviction and sentence for possession of a firearm by a felon and possession of marijuana as a habitual offender. He asserts the following on appeal: (1) the district court erred in allowing certain testimony of Jennifer Maier and rebuttal testimony of Valerie Koesis and (2) his trial counsel was ineffective in failing to raise, litigate, and preserve the issues Bender now argues on appeal. We affirm.

I. Background Facts and Proceedings.

On January 20, 2006, Fort Dodge police executed a search warrant at Perry Bender's home, where they found a .44 caliber revolver and a Ziploc bag with remnants of marijuana. The police discovered the gun and marijuana in a small locked safe inside a duffel bag, which was buried under some clothes. The police found two keys to the safe, both without fingerprints. One key was hanging in the kitchen doorway and another was inside a kitchen drawer. A Saint Christopher's medal was also inside the kitchen drawer. Bender previously wore the medal around his neck when he went to Las Vegas and saw Jennifer Maier, his girlfriend and the mother of one of his children.

Bender denied having knowledge of the gun or the marijuana and alleged the gun belonged to Maier. Maier and the parties' son had moved in with Bender from Las Vegas about three weeks prior to the search. Maier denied owning the gun and testified that she had never seen Bender in possession of the gun.

Bender was charged with possession of a firearm by a felon and possession of marijuana as a habitual offender. The matter was tried to a jury. After the State rested, Bender called Maier to testify in his defense. He

questioned her about her knowledge of the gun and about other people who had access to his house. The State cross-examined Maier and asked when she had last spoken to Bender. The court overruled Bender's relevancy objection, and Maier stated that Bender called her three times over the lunch hour harassing her about her earlier testimony and accusing her of acting.

The State called a witness to rebut Maier's testimony. The State's rebuttal witness, Valerie Koesis, testified to a phone conversation she had with Bender on the day of the search. Koesis dated Bender from July 2005 to January 2007. According to Koesis, Bender stated the police had searched his home, found some marijuana but not enough to charge him, and taken his gun. When Koesis questioned whether Bender could have a gun because he was a felon, Bender replied that it did not matter because Maier was going to say it was hers.

Bender objected to Koesis's testimony as outside the scope of rebuttal, alleging he had not put in issue who possessed the firearm. The court allowed Koesis's rebuttal testimony, determining the purpose of Maier's testimony was to raise the issue that it was someone else's gun. Bender next objected to Koesis's testimony on discovery grounds because he was never given notice of Koesis as a rebuttal witness. Again, the court allowed Koesis's rebuttal testimony, noting that the State had never agreed to provide rebuttal evidence when it responded to Bender's pretrial discovery motion and that the State had discovered the information regarding Koesis and Bender's phone conversation within a week before trial.

The jury convicted Bender as charged. He was sentenced to a term of imprisonment of fifteen years for the firearm charge and 180 days on the drug charge, to be served consecutively. Bender now appeals.

II. Scope and Standard of Review.

Our review of evidentiary rulings is for abuse of discretion. We therefore review the trial court's allowance or refusal to allow evidence on the basis of abuse of discretion. *Vasconez v. Mills*, 651 N.W.2d 48, 55 (Iowa 2002); *State v. Weaver*, 608 N.W.2d 797, 806 (Iowa 2000) ("The trial court has considerable discretion in admitting rebuttal evidence . . ."). A court abuses its discretion when it exercised such discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *In re J.A.L.*, 694 N.W.2d 748, 751 (Iowa 2005); *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997).

We conduct a de novo review of alleged constitutional violations. *State v. Decker*, 744 N.W.2d 346, 353 (Iowa 2008). We therefore conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Unless the record on direct appeal is adequate to address these issues, a claim of ineffective assistance of counsel is generally preserved for postconviction proceedings. *State v. Bearnse*, 748 N.W.2d 211, 214 (Iowa 2008).

III. Merits.

A. Admission of Evidence.

Bender argues the district court abused its discretion in admitting (1) Jennifer Maier's testimony as to a recent phone conversation with Bender and

(2) Valerie Koesis's rebuttal testimony as to a phone conversation with Bender on the day of the search.

1. Testimony of Jennifer Maier.

Bender contends the admission of Maier's testimony violated his rights upon relevancy and prejudice grounds.¹ At trial, Bender objected to Maier's testimony about the last time Bender had contacted her. He contended the testimony was irrelevant. The State contended the testimony was admissible to show motive. Over Bender's objection, the court allowed the testimony.

The district court must employ a two-step analysis to determine whether the challenged evidence is admissible. *State v. Castaneda*, 621 N.W.2d 435, 440 (Iowa 2001). If it is not relevant, then the challenged evidence is not admissible. Iowa R. Evid. 402. "Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Castaneda*, 621 N.W.2d at 440 (quotations omitted).

If the court finds the evidence is relevant, the court must then determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 403 (noting that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice"). "Probative value gauges the strength and force of

¹ Bender also claims Maier's testimony violated his discovery rights. However, the only issue preserved for appeal with regard to Maier's testimony is Bender's relevancy claim. A defendant must preserve error by making an objection at the earliest opportunity after the grounds for the objection become apparent. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). Bender preserved his claim of relevancy at trial by raising an objection during Maier's testimony.

relevant evidence.” *Castaneda*, 621 N.W.2d at 440. Unfair prejudice is an “undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one.” *Id.*

Bender’s counsel questioned Maier about how long she had lived with Bender, who had been in the home, who had access to the home, her clothing and other materials, how often Bender was in the home, where Bender spent the night, what Bender did in the home, whether she had ever seen the gun or knew Bender had a gun, and whether the gun was hers. Bender argued Maier’s testimony merely indicated who had access to the apartment. However, it is clear the implication of the questioning was that the gun was someone else’s or, specifically, that the gun belonged to Maier.

The State’s questions to Maier with regard to the last time Bender contacted her were relevant to show Bender was surprised by Maier’s testimony and that he had expected her to testify the gun was hers. The evidence was not unfairly prejudicial. Maier’s testimony was short and only vaguely described Bender’s tone and language. Maier testified that Bender called her three times during the break from trial and that she hung up on him twice. Bender harassed her about what her testimony had been about that morning and accused her of “trying to get a Grammy or an Oscar.”

We find the testimony was relevant and not unfairly prejudicial and the district court did not abuse its discretion in admitting it into evidence.

2. Testimony of Valerie Koesis.

Bender alleges the admission of Koesis’s rebuttal testimony was beyond the scope of Maier’s testimony and violated his discovery rights. At trial Bender

objected to Koesis's rebuttal testimony about her phone conversation with Bender on the day of the search. He contended the testimony was beyond the scope of rebuttal because he had not put in issue who possessed the firearm. The State contended the testimony was admissible as direct contradictory testimony to rebut the inference that someone else had access or ownership of the gun under the definition of dominion and control. Over Bender's objection, the court allowed the testimony.

Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party. *Weaver*, 608 N.W.2d at 806. Evidence that has no direct tendency to do this is inadmissible on rebuttal. *Id.* Generally, rebuttal evidence is confined to new matters first introduced by the opposing party. *Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996).

The State offered the testimony of Koesis to refute the defendant's position that someone else may have had access to the gun. Police discovered the gun in Bender's home, not on his person, and therefore the issue was whether he had constructive possession of it. Without proof of a defendant's dominion and control over an item, the more people who have access to the item, the less likely it is that the defendant constructively possessed it. See *Maxwell*, 743 N.W.2d at 193-94. The subject of who accessed the gun was not a new issue, and had been raised throughout pretrial discovery and during trial. Koesis's rebuttal testimony was clearly necessary to disprove the implications raised by Maier's testimony.

Bender also argues that the rebuttal testimony should not have been allowed because the State failed to give notice of Koesis's testimony. The State

contends it only discovered the information regarding Koesis and Bender's phone conversation within a week before trial. The State further claimed it had never agreed to provide rebuttal evidence when it responded to Bender's pretrial discovery motion.

The State only intended to use Koesis's testimony to rebut certain evidence Bender chose to present. When Bender called Maier to testify in his defense, he placed in issue other people who may have had access to the gun. The State rebutted Bender's evidence with Koesis's testimony implying that the gun was Bender's. The State was not obligated to give notice to Bender of Koesis's potential rebuttal testimony. *State v. Belken*, 633 N.W.2d 786, 795 (Iowa 2001) (acknowledging the State is not required to disclose rebuttal witnesses); *Greiman v. State*, 471 N.W.2d 811, 813 (Iowa 1991) ("rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the other side"; thus, until the defense presents evidence, the State cannot know if rebuttal is necessary) (internal quotation omitted); see Iowa R. Crim. P. 2.19(3). The State also noted in its response to Bender's discovery motion that it had specifically declined to reveal rebuttal evidence as part of its open file policy.

We find the rebuttal evidence was properly allowed. The district court did not abuse its discretion in admitting the testimony of Koesis.

B. Ineffective Assistance of Counsel.

Bender argues his counsel was ineffective in failing to raise, litigate, and preserve the issues Bender now argues on appeal. Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow

the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. See *Bearse*, 748 N.W.2d at 214; *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). Upon our review, we conclude the record is adequate to address Bender's ineffective assistance of counsel claims on direct appeal.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *Maxwell*, 743 N.W.2d at 195. A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

As we discussed above, the district court did not err in admitting the testimony of Maier and Koesis. We conclude there was no violation of Bender's rights and counsel was therefore not ineffective for failing to raise, argue, or preserve those issues. Furthermore, even if we were to assume counsel failed to perform an essential duty by not raising, arguing, or preserving the issues, we would be unable to find that prejudice resulted from such inaction. The evidence in this case was more than sufficient to sustain the verdicts against Bender. We find Bender's ineffective assistance of counsel claims to be without merit.

We affirm Bender's convictions.

AFFIRMED.