

**IN THE COURT OF APPEALS OF IOWA**

No. 8-921 / 08-0147  
Filed December 31, 2008

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JEFFREY ALLAN MOORE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,  
Judge.

Jeffrey Moore appeals his convictions and sentences for willful injury  
causing serious injury and going armed with intent. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney  
General, Michael J. Walton, County Attorney, for appellee.

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

**MILLER, J.**

Jeffrey Moore appeals his convictions and sentences, following jury trial, for willful injury causing serious injury and going armed with intent. He contends the district court failed to exercise discretion by neglecting to consider suspending the sentence for going armed with intent, and that his trial counsel rendered ineffective assistance by failing to object to improper questioning and comments by the prosecutor. We affirm his convictions and sentences and preserve his ineffective assistance of counsel claim for a possible postconviction proceeding.

This case arises out of a shooting that occurred in Bettendorf on the night of April 30, 2007. On that night Matthew Auliff went to visit his friend, Jill Vandewalle, at her apartment around 11:00 or 11:30 p.m. As they were talking in the parking lot, Vandewalle noticed a man walking toward them and decided to go back into her apartment. The man was later identified as the defendant, Moore. According to Auliff, he was getting into his car to leave when Moore said something to him. He could not hear what he said so he got out of his car to find out what Moore wanted and noticed he was holding a gun. Auliff asked Moore what the gun was for and Moore told him it depended on whether Auliff was a car burglar. Auliff explained it was his car and asked, "What are you going to do? Shoot me?" Auliff testified Moore then took two steps toward him, put the gun to his face, asked him to tell him "what it feels like to die," and then shot him.

Moore testified at trial that he was watching a movie in his house around midnight when he heard noises outside his window that sounded like a male and

female talking louder than normal for that time of night. Moore got his .38 caliber revolver and went outside to see what was going on. He stated he took the gun for personal protection because he thought it was a rough neighborhood, but had no intention of harming anyone. He saw a man and woman, Auliff and Vandewalle, standing together by a car with their arms around each other. Moore testified he got about ten feet away from the couple and asked them to keep it down. Vandewalle then told Auliff to leave, hugged him, and walked back toward her apartment. According to Moore, when he was about six feet away Auliff told him to mind his own business and go back into his house. Moore said, "o.k.," and turned to go back toward his house. He claimed he got only a few feet away when he realized Auliff was right behind him. Moore testified that he flinched when he felt Auliff's arm on his shoulder and as he turned to push him away he accidentally jerked the trigger and the gun fired. Moore claimed he saw Auliff run away and did not think he was hurt.

The State charged Moore, by trial information, with attempted murder, in violation of Iowa Code section 707.11 (2007) (Count I), willful injury causing serious injury, in violation of section 708.4(1) (Count II), and going armed with intent, in violation of section 708.8 (Count III). Jury trial commenced on December 10, 2007, and the jury found Moore guilty as charged on Counts II and III, and of the lesser-included offense of assault with intent to commit serious injury, in violation of sections 708.1 and 708.2(1), under Count I.

The district court merged the verdict for assault with intent to commit serious injury with the conviction for willful injury causing serious injury for

sentencing purposes and sentenced Moore to an indeterminate term of imprisonment of no more than ten years on that conviction, and an indeterminate term of imprisonment of no more than five years on the going armed with intent conviction. The court ordered the sentences to be served consecutively.

Moore appeals, contending the court failed to exercise discretion when it neglected to consider suspending the sentence for going armed with intent, and that his counsel rendered ineffective assistance by failing to object to prosecutorial misconduct in questioning Moore and in comments made during closing argument.

We review a sentence imposed by the district court for correction of errors at law. Iowa R. App. P. 6.4; *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *Grandberry*, 619 N.W.2d at 401. A sentence will not be upset on appeal unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure. *Id.*; *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998).

When a sentence is not mandatory, a district court must exercise discretion in determining what sentence to impose. *State v. Millsap*, 704 N.W.2d 426, 433 (Iowa 2005). When a sentencing court has discretion, it must exercise that discretion and failure to do so calls for vacating the sentence and remanding for resentencing. *State v. Ayers*, 590 N.W.2d 25, 27 (Iowa 1999). The district court must demonstrate its exercise of discretion by stating upon the record the reasons for the particular sentence imposed. *State v. Thomas*, 547 N.W.2d 223,

225 (Iowa 1996). “A statement may be sufficient, even if terse and succinct, so long as the brevity of the court's statement does not prevent review of the exercise of the trial court's sentencing discretion.” *State v. Johnson*, 445 N.W.2d 337, 343 (Iowa 1989). “The sentencing court, however, is generally not required to give its reasons for rejecting particular sentencing options.” *Thomas*, 547 N.W.2d at 225.

Here the reasons given by the district court for the imposition of consecutive sentences of incarceration included the unreasonable amount of force used, the severity of the crime, and the need to protect the community. We conclude that although the court's statement of reasons may be somewhat terse, it is sufficient to show the court did in fact exercise its discretion and considered proper factors in determining Moore's sentences. The court was not required to separately state reasons for rejecting concurrent sentences, or for rejecting a suspended sentence and probation on the conviction for going armed with intent, provided that it stated reasons for ordering the sentences to be served consecutively, *see id.*, which it did.

Moore argues the court's statement during sentencing that “The Iowa legislature has set it as one that requires mandatory incarceration” shows the court improperly believed probation was not a sentencing option for the going armed with intent conviction. However, we believe it is clear from the context in which this statement was made that the court was referring to the willful injury conviction, not the going armed with intent conviction. Thus, despite Moore's argument to the contrary, this statement does not demonstrate that the court

mistakenly believed probation was not an option on the going armed with intent conviction.

Moore has the burden of affirmatively demonstrating that the district court abused its sentencing discretion. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983). We conclude he has not met his burden to show that the court failed to exercise available discretion.

Moore also claims his trial counsel rendered ineffective assistance by failing to object to prosecutorial misconduct in violation of his constitutional right to due process of law as set forth in *State v. Graves*, 668 N.W.2d 860 (Iowa 2003). More specifically, he claims that on cross-examination the prosecutor improperly asked him to comment on the credibility of other witnesses by asking him if the other witnesses had lied during their testimony, and during closing arguments made remarks characterizing Moore as a liar.

In order to prevail on his claims of ineffective assistance of counsel, Moore must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id.* at 392. 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 a possible postconviction relief proceeding. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Such a proceeding allows an adequate record of the claim to 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.

An adequate record is important because "[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000).

Moore's trial attorney has had no opportunity to explain his strategy and actions in not objecting to the prosecutor's challenged questioning and statements. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Accordingly, we preserve this claim of ineffective assistance of counsel for a possible postconviction proceeding.

For the reasons set forth above, we conclude Moore has not shown that the district court failed to exercise its available sentencing discretion when it imposed consecutive terms of imprisonment. We preserve Moore's specified claim of ineffective assistance of counsel for a possible postconviction proceeding.

**AFFIRMED.**