IN THE COURT OF APPEALS OF IOWA

No. 9-272 / 08-0993
Filed June 17, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ENVER MUSIC,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Appellant appeals his conviction and sentence for assault and assault causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Enver Music appeals his conviction and sentence for assault and assault causing bodily injury in violation of Iowa Code section 708.2(2) and 708.2(6) (2007). He contends that the court erred in admitting prior testimony of an unavailable witness, and also that his trial counsel was ineffective. We affirm.

I. Background Facts and Proceedings

On August 18, 2007, police officer Yanira Scarlett responded to a call at Tropik restaurant in Des Moines. Upon arrival, she found Jasmin Sivac and Saki Hoduzik with stab wounds to their bodies. Officer Scarlett informed the detectives' unit that a third person, Enver Music, had also been involved in this incident. At trial, Tara Lake testified that she had been with Music the night of the altercation. She and Music went to Tropik, and as she parked the car, Music went inside to find a friend. Later, as she approached the restaurant, she saw Music and others in a group outside the restaurant, and heard the owner yelling for someone to call the police. She observed three people who appeared to be "hugging," then saw a man pull a knife from his own shoulder. She saw that Music had blood on his clothes, but that he was not injured, and they left the scene. Lake testified that Music admitted having a prior disagreement with one of the individuals that was stabbed, and to stabbing two men that night.

Police Officer Terry Pote investigated the August 18, 2007 incident. He reported that the first victim, Sivac, told him that Music owed him money, and when he requested it, Music stabbed him. The second victim, Hoduzik, informed him that he was trying to break up the fight when Music stabbed him. Police were unable to find Music for a few weeks, but eventually Officer Pote received a

call from Music, which Officer Pote recorded. Music explained to Pote that he was assaulted by two men, thrown against a window, and kicked. Music claims he insisted they stop, but when they did not, he pulled out his pocket knife and "just started stabbing." Music stated that he received severe scrapes to his knees, a bump on his head, and one of his legs was injured. Neither Sivak nor Hoduzik testified at trial, but Hoduzik's prior testimony was read into the record. The jury returned verdicts finding Music guilty of assault and assault causing bodily injury.[1] He appeals.

II. Prior Testimony

In the case of hearsay rulings, our review is for correction of errors at law because admission is prejudicial to the non-offering party unless the contrary is shown. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

In October 2007, Hoduzik's deposition was taken to support revocation of Music's probation. Both the State and the defense assumed Hoduzik would continue to be available for further discovery in the assault charges against Music as well as appearing at trial. When Hoduzik was not able to be located shortly before the April 2008 trial, the State moved to allow his prior deposition to be read into the record. Music contends that the court erred in determining Hoduzik to be an unavailable witness under Iowa Rule of Evidence 5.804.[2]

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[1] Music was sentenced to a jail term of thirty days for count one and seven months for count two.

[2] Music also mentions the Confrontation Clause, but he has failed to argue or cite authority for this claim, and as it was not raised or ruled on by the district court, therefore is not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) (A party seeking to appeal an issue must call the district court's attention to the issue in order to preserve error). During oral argument, Music conceded the issue was waived on appeal.

"Unavailability as a witness" includes situations in which the declarant is absent from the trial or hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means." Iowa R. Evid. 5.804(a)(5). It is the State's burden to prove a witness is unavailable and that it used diligence in trying to find the witness. *State v. Zaehringer*, 325 N.W.2d 754, 759 (Iowa 1982). It is not enough to merely prove that the witness is beyond reach of subpoena, without showing any effort to secure his voluntary return and without any indication that if he had been asked he would have refused to do so. *State v. Reddick*, 388 N.W.2d 201, 204 (Iowa Ct. App. 1986). "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531, 2543, 65 L. Ed. 2d 597, 613 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, U.S. Wash. (2004). The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. *Id.*

Music contends the State did not make a good faith effort to obtain Hoduzik for trial, and he should not have been considered "unavailable" such that his prior deposition testimony was allowed to be read into the evidence. The State made two attempts to serve a subpoena to Hoduzik's residence; an investigator made multiple visits to his home and place of employment, and checked Hoduzik's passport status through the State Department, all to no avail. The State was informed by Hoduzik's family that he had left the country, returning to Bosnia. The court found that reasonable efforts had been made by the State to compel the witness to be present at trial, and declared Hoduzik

unavailable. *See id.* at 76, 100 S. Ct. at 2544, 65 L. Ed. 2d. at 614 (finding witness was unavailable when witness was not at her last-known real address, had left the state, and her specific whereabouts were unknown even to family members). We agree.

Finding Hoduzik unavailable, the district court allowed his deposition testimony from Music's probation revocation hearing to come into evidence under the former testimony exception to the hearsay rule. *See* Iowa R. Evid. 5.804(*b*)(1) (providing that when declarant is unavailable, admission of former testimony is allowed "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination"). At trial, the court found that upon review of the probation revocation hearing deposition of Hoduzik:

> [T]here were no formal restrictions placed on the ability of the defendant to . . . cross examine this witness. I understand there were maybe time constraints, but certainly the opportunity was there . . . the rule only requires an opportunity. It also requires a similar motive to develop the testimony. And certainly there was a similar motive since it was the allegation that the defendant committed this very crime which was at issue in that case and which was the basis upon which the State sought to revoke his probation.

We agree with the district court that Music's defense counsel was given adequate opportunity to cross examine Hoduzik during the probation revocation deposition testimony, and was similarly motivated to protect his client. Therefore, we affirm the district court's admission of Hoduzik's former testimony.

III. Ineffective Assistance of Counsel

Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Music

must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). Ordinarily, we do not decide ineffective-assistance-of-counsel claims on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We prefer to reserve such questions for postconviction proceedings so the defendant's trial counsel can defend against the charge. *Id.* However, we depart from this preference in cases where the record is adequate to evaluate the appellant's claim. *Id.*

IV. Motion in Limine

On March 26, 2008, just seven days before trial, the State filed a "motion in limine" asking the court to admit Hoduzik's prior testimony from the probation revocation hearing into the record. Music's trial counsel filed a resistance on March 27, 2008, but failed to assert the State's motion was untimely, and now claims his attorney was ineffective for this failure. The State acknowledges its motion was mislabeled, as it should have made a motion seeking admission of evidence pursuant to Iowa Rule of Evidence 5.104(a). *See* Iowa R. Evid. 5.104(a) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court"); *see Twyford v. Weber*, 220 N.W.2d 919, 922 (Iowa 1974) (defining a motion in limine as a term used to secure a protective order against prejudicial questions and statements). As this was not a motion in limine,

the timeliness of the motion, nine days before trial, under Iowa Rule of Criminal Procedure 2.11(4), is therefore inapplicable. Counsel breached no essential duty in not asserting this point in its resistance.

V. Prior Bad Acts

Music next contends his counsel was ineffective for failing to object to evidence of his prior bad acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity with the prior criminal acts. Iowa R. Evid. 5.404(*b*).

In the recorded phone conversation to Officer Pote, Music mentioned a prior driving while license suspended conviction, and now argues that the jury improperly considered this information in reaching its verdict. He also argues that Pote's reference to Music's photo being "in our system" prejudiced the jury. First, we find that the prior driving conviction has little relevance to the assault charges on which Music was convicted. Even if it were relevant, we find that Music's brief mention of it is not the type of "prior bad act" that would likely rouse prejudicial emotions in the jury such that they would be more likely to convict him of the current charges. *See State v. Rodriquez*, 636 N.W.2d 234, 243 (Iowa 2001) (finding that the court must consider the degree of prejudice that would result from admission of the prior acts testimony, and when put in perspective, if it would rouse the jury to hostility and cause prejudice). The statement was made in a brief, nearly inadvertent manner, and there is no evidence that it was offered by the State to prove the character of Music in order to show he was acting in conformity with his prior criminal act. *See Mohammed v. Otoadese*, 738 N.W.2d 628, 633 (Iowa 2007) (finding that patient's estate was not prejudiced by

the erroneous admission of testimony regarding an unrelated case; the testimony was brief in the context of all information at trial). Therefore, we find that Music was not prejudiced by his mention of his driving conviction and counsel breached no essential duty in failing to redact it from the phone recording. Likewise, we find Pote's "in our system" comment was brief, and without any contextual basis. We also find no breach of duty in not objecting to this comment. Further Music has not argued how, if at all, he was prejudiced by the comment.

VI. Officer Pote's Testimony

Finally, Music contends that counsel was ineffective for failing to (1) object to Officer Pote's testimony regarding what the two victims told him, and (2) correct specific testimony. At trial, Pote testified to statements made by both Sivak and Hoduzik regarding their versions of what occurred on the night of the attack. Music claims those statements were inadmissible hearsay and counsel failed to object to their admission. While the State concedes the hearsay issue, it argues that it could have been a strategic decision by counsel to not object. Music also contends that the State did not adequately cross-examine Pote. He claims his trial counsel was ineffective on cross examination for failing to correct Pote's testimony and ask additional questions regarding Music's failure to leave the area prior to and by way of avoiding the altercation. The State contends that cross-examination was a sufficient strategic decision. *Id.*

Ineffective-assistance-of-counsel claims

> involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma, 626 N.W.2d at 143. In order to determine whether these were in fact strategic decisions, we preserve these claims for possible postconviction proceedings so the record can be fully developed as to Music's trial counsel's decisions. We therefore preserve Music's ineffective-assistance-of-counsel claims regarding failure to object to and correct Officer Pote's testimony for a possible postconviction relief proceeding.

AFFIRMED.