FILED
MAY 25 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-068 / 92-458

STATE OF IOWA,

Appellee,

000733

vs.

ELTON OREN BISHOP, JR.,

Appellant.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

The defendant appeals from a judgment of the district court finding him guilty of two counts of fraudulent practices concerning nonpayment of taxes in 1986. **AFFIRMED.**

Lylea D. Critelli of Nick Critelli Associates, P.C., Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Odell McGhee, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

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OXBERGER, C.J.

Elton Bishop was charged with two counts of fraudulent practices, including failure to file and failure to pay state income taxes in 1986.

At trial, the State attempted to introduce evidence of prior convictions relating to tax issues. The State argued that this information went to Bishop's truth and veracity. The district court allowed the prior convictions to be introduced by the State. The district court noted it would inform the jury that the evidence of prior bad acts could only be used for impeachment purposes. The jury found Bishop guilty on two counts of fraudulent practices.

Bishop appeals.

Discussion

We review for an abuse of discretion. State v. Musso, 398 N.W.2d 866, 868 (Iowa 1987). To demonstrate an abuse of discretion, the challenging party must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Ramirez, 400 N.W.2d 586, 583 (Iowa 1987). This requirement is a difficult standard to attain. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985).

Bishop maintains, pursuant to State v. Martin, 217 N.W.2d 536 (Iowa 1974), a hearing on the admissibility of prior convictions should be done at the pretrial stage of the proceedings. Bishop claims the trial court abused its

discretion in permitting the State to question him regarding his prior criminal record because the State did not request a pretrial Martin hearing on the issue of the admissibility of evidence of the prior conviction. The State conducted its Martin hearing immediately prior to the defense's case in chief. He submits that the mid-trial notification that a prior conviction would be admissible if he took the stand denied him the opportunity of effective assistance of counsel and preparation for defense.

In Martin, the court advised the following:

> As an additional guideline it is suggested trial courts should, on proper motion, grant a pretrial hearing for the purposes of eliciting and weighing relevant factors with regard to potential witness impeachment by show of a prior felony conviction.
>
> It may otherwise develop, in course of trial, a Code § 622.17 impeaching technique is to be employed. In such event, to avoid possible prejudice, a hearing outside the presence of the jury should be held so the judge can weigh and resolve relevant factors regarding admissibility of such credibility related evidence.

217 N.W.2d at 543-44 (citations omitted).

We do not read Martin to require the State to request a pretrial hearing on the admissibility of a prior felony conviction for impeachment purposes. While a pretrial hearing is suggested in Martin, a hearing during the course of trial is permitted. The hearing must, of course, occur outside the presence of the jury in order to avoid prejudice.

The hearing in Bishop's case, although occurring during the course , occurred outside the presence of the

jury. We find this sufficient to prevent any prejudice to Bishop. We find no abuse of discretion and affirm the trial court.

II. Ineffective Assistance of Counsel

Bishop next contends he received ineffective assistance of trial counsel due to his trial counsel's failure to request a limiting instruction on the evidence of the prior felony conviction.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. We therefore preserve Bishop's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.