**IN THE COURT OF APPEALS OF IOWA**

No. 0-833 / 00-0801
Filed March 14, 2001

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

**vs.**

**DOUGLAS MATTHEW MOORE,**
**Defendant-Appellant.**

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Appeal from the Iowa District Court for Lee (North) County, Cynthia H. Danielson, Judge.

Douglas Matthew Moore appeals from the district court's judgment and sentence entered following his conviction of attempt to commit murder in violation of Iowa Code section 707.11 (1999), imposed after a guilty verdict. He contends he was denied his constitutional right to effective assistance of counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Michael Short, County Attorney, and Gordon Liles, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

**MILLER, J.**

Douglas Matthew Moore appeals his conviction and sentence, entered following jury trial, for attempt to commit murder in violation of Iowa Code section 707.11 (1999). He contends he was denied his constitutional right to effective assistance of counsel. We affirm.

## I. BACKGROUND FACTS

Douglas and Melissa Moore were married in 1994 and lived in Missouri with their son Jonathan. In 1998, Douglas Moore (Moore) filed for divorce from Melissa Moore (Melissa). Both parents wanted custody of six-year old Jonathan. A Missouri court was scheduled to decide the issue of custody of Jonathan in November of 1999. Between August and October of 1999 Moore spoke several times with his friend Thomas Greer (Greer) of his plans to hire someone to kill Melissa so he could gain custody of Jonathan. Dawn Garrison (Garrison), Greer's half-sister, sometimes listened to these phone conversations. Garrison heard Moore talk about planting drugs on Melissa and the types of guns that could be used to "do away" with Melissa. On November 12, 1999 Greer was being held at the Lee County jail on a theft charge. At that time Greer informed the police of Moore's plans to have Melissa murdered and a meeting was set up at a motel in Fort Madison, Iowa between an undercover officer, Greer and Moore to arrange the murder. The undercover officer posed as a hit man from Chicago named "Carlos."

At the meeting with the undercover officer Moore supplied "Carlos" with a .380 handgun and a magazine for the gun containing six bullets. Moore told "Carlos" that the gun was in working condition and that he just wished Melissa

would "disappear." "Carlos" told Moore, "You understand that she's going to disappear graveyard dead, right?" Moore stated he understood that. Moore then wrote down Melissa's name and address, as well as several identifying characteristics of Melissa, directions to her house, and a description of her and her boyfriend's cars for "Carlos."

Moore was arrested when he walked out of the motel room and charged with attempted murder in violation of Iowa Code section 707.11. Moore was found guilty by a jury verdict and the court sentenced him to an indeterminate twenty-five year term of imprisonment from which he appeals.

Moore contends he was denied his constitutional right to effective assistance of counsel because of defense counsel's failure to object to the admission of evidence of other crimes and acts in violation of Iowa Rule of Evidence 404(b). He argues counsel should have objected to Melissa's testimony that he had been convicted of attempted parental kidnapping while their divorce case was pending and had assaulted her multiple times in the past and threatened to kill her. He argues counsel should have objected to Garrison's testimony about his plans to plant drugs on Melissa to get custody of his son and his plans to use a gun to do away with Melissa to get custody of his son. He further argues his counsel was ineffective for failing to call Greer as a witness on his behalf.

## II. SCOPE AND STANDARDS OF REVIEW

A defendant is entitled to the assistance of counsel under the Sixth Amendment of the United States Constitution and Article 1, section 10 of the Iowa Constitution. The right to counsel is a right to effective assistance of

counsel. *Strickland v. Washington,* 466 U.S. 668, 686 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). Because a claim of ineffective assistance of counsel implicates constitutional rights, our review is de novo. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999).

To establish an ineffective assistance of counsel claim, the defendant must show "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *Wenmark v. State*, 602 N.W.2d 810, 814 (Iowa 1999); *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). A reviewing court may look to either prong to dispose of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland,* 466 U.S. at 688, 104 S. Ct. at 2064, 80 L. Ed 2d at 693. The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance falls within the wide range of reasonable professional assistance. *Wenmark*, 602 N.W.2d at 814. The defendant has the burden of proving by a preponderance of the evidence both of the two elements of a claim of ineffective assistance. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996); *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

"Improvident 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) (quoting *Parsons v. Brewer,* 202 N.W.2d 48, 54 (Iowa 1972)). 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); *Cuevas v. State,* 415 N.W.2d 630, 632 (Iowa 1987). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Aldape*, 307 N.W.2d at 42.

While we often preserve ineffective assistance of counsel claims for a postconviction proceeding, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). However, this preference for preserving ineffective of assistance claims does not relieve Moore of his duty on direct appeal to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Astello*, 602 N.W.2d 190, 198 (Iowa Ct. App. 1999).

We need not decide whether counsel's performance is deficient before examining the prejudice component. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. The defendant must show counsel's failure to perform an essential duty worked to his or her actual and substantial disadvantage, thereby constituting a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation. *Miles*, 344 N.W.2d at 234.

## III. MERITS

Moore asserts the record is adequate to resolve his claims of ineffective assistance on direct appeal (but later states his claim concerning not calling Thomas Greer as a witness should be preserved for a possible postconviction proceeding). The State argues the merits of the claims, and does not suggest any should be preserved. We find all but one can be resolved, and that the one is too general in nature to allow us to address it or preserve it.

### A. Failure to Object based on Rule of Evidence 404(b)

Melissa testified Moore had threatened to kill her if he lost custody of their son, Jonathan; he had been convicted of attempted parental kidnapping on October 26, 1999; he had assaulted her when she was seven months pregnant with Jonathan; he had thrown her against a stove, pointed a gun at her, and threatened to kill her in 1993; and he had been convicted of assaulting her in an incident between 1994 and 1997 in which he threatened to kill her and Jonathan. Moore's attorney objected to some, but not all, of this evidence. The primary objections were lack of relevance and materiality.

Garrison testified that between August and October 1999 she had talked to Moore on the phone on numerous occasions when Moore called to talk to Greer, and that on four or five occasions Greer had her listen in on conversations between Moore and himself. She testified that the conversations included planning to plant drugs on Melissa so Moore could get Jonathan back, and discussion of guns for the purpose of doing away with Melissa so he could get custody of Jonathan. Moore's attorney objected on hearsay grounds to evidence of the content of these conversations.

Moore challenges all of this testimony as being in violation of Iowa Rule of Evidence 404(b) and argues that his counsel was ineffective in failing to make a rule 404(b) objection to this testimony.

Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Other crimes, wrongs, or acts evidence is admissible if (1) the evidence is relevant to establish a legitimate issue in the case, and (2) there is clear proof the individual against whom the evidence is offered committed the prior acts. *State v. Alderman*, 578 N.W.2d 255, 258 (Iowa Ct. App. 1998). Moore alleges the State did not meet the second requirement for admissibility of these prior crimes and acts, clear proof that he committed them. More specifically, he claims clear proof is lacking because there was no corroboration of either Melissa's or Garrison's testimony regarding the prior acts. He argues trial counsel was ineffective for failing to make an objection to this testimony on this ground.

"Clear proof is a lesser standard than beyond a reasonable doubt." *State v. Zeliadt*, 541 N.W.2d 558, 561 (Iowa Ct. App. 1995) (citing *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985)). Corroboration is not necessary to meet the clear proof standard. *Id.* Therefore objections to the testimony in question based on a lack of corroboration would have been meritless. Counsel is not ineffective for failing raise meritless issues or to make questionable or meritless objections. *State v. Smothers,* 590 N.W.2d 721, 724 (Iowa 1999); *State v. Atwood*, 342 N.W.2d 474, 477 (Iowa 1984). Because a rule 404(b) objection based on lack of

corroboration would have been meritless, we conclude Moore's counsel was not ineffective for not making such an objection.

However, even assuming trial counsel should have made such an objection and it would have had merit, we conclude Moore has failed to show prejudice resulted. At trial officers' testimony and tape-recorded conversations chronicled for the jury a series of conversations and events which took place between Moore, Greer and undercover police officers. Several of the recorded conversations were by phone, but the last conversation was recorded in a face-to-face meeting with Moore in a Fort Madison motel room. These taped conversations clearly demonstrate all of the following took place. An undercover officer posing as a hit man named "Carlos" contacted Moore to set up a meeting in Iowa regarding killing Moore's wife. They discussed what caliber of gun would be used. When "Carlos" asked Moore to bring a gun, Moore turned around and drove back to Missouri to get a gun. Moore said that the gun he would get worked, and was not marked. Moore met with "Carlos" at the motel, gave "Carlos" the gun with ammunition, and expressed to "Carlos" his desire to have his wife Melissa "disappear." He told "Carlos" the gun was not registered. Moore gave "Carlos" a detailed description of Melissa, where she lived, and what she drove. He also wrote out this information for "Carlos." He stated to "Carlos" that he would be out of the area when the killing took place. Finally, "Carlos" made clear to Moore that "disappear" meant that Melissa would "disappear graveyard dead" and Moore said, "I understand that."

There was overwhelming evidence, aside from the challenged testimony, of Moore's guilt. We find Moore has not shown that but for his trial counsel's

alleged error in not objecting to testimony based on rule 404(b) there is a reasonable probability the result of the proceeding would have been different. Moore was convicted based on the strong evidence against him set forth above and trial counsel's alleged error does not undermine our confidence in the outcome of the proceedings.

**B. Failure to call Greer as a Witness.**

Moore's remaining claim is that his trial counsel was ineffective for failing to call Greer as a witness on his behalf. Moore contends Greer was a "key witness for his defense of denying hiring assassins." Moore then states, "In appellate counsel's opinion the record on this issue . . . needs to be developed at a postconviction relief hearing," and requests that the issue be preserved for postconviction relief.

In complaining about the adequacy of an attorney's representation, it is not enough to simply claim counsel should have done a better job, for example, should have called a witness. *Dunbar*, 515 N.W.2d at 15 (citing *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983)). Moore does not state what Greer's testimony would have been or how it would have supported his defense. His claim is thus too general in nature to allow us to address it or preserve it for a possible postconviction proceeding. *Id.*; *see also White*, 337 N.W.2d at 519-20 (same).

## IV. CONCLUSION

Corroboration is not necessary to meet the "clear proof" standard for admissibility of evidence of prior crimes and acts. Defense counsel therefore did not breach an essential duty by not objecting to the testimony of Melissa and

Garrison on the ground that such testimony lacked corroboration. However, even assuming such an objection would have merit, Moore has not shown he was prejudiced because the overwhelming evidence against him leaves no reasonable probability that the outcome of the proceedings would have been different absent the challenged testimony.

Furthermore, we cannot address or preserve Moore's claim that counsel was ineffective in not calling Greer as a witness on his behalf because he has given no indication of what Greer's testimony would have been or how it would have benefited his defense. We conclude Moore has not shown that he was denied his constitutionally guaranteed right to effective assistance of counsel.

**AFFIRMED.**