

IN THE COURT OF APPEALS OF IOWA

No. 9-244 / 98-0393

Filed June 23, 1999

STATE OF IOWA,
Appellee,

vs.

JAMES L. MACLIN, JR.,
Appellant.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

James L. Maclin, Jr. appeals his conviction and sentence, following a jury trial,
for domestic abuse assault. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant
County Attorney, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

HUITINK, P.J.

James L. Maclin, Jr. appeals his conviction and sentence, following a jury trial, for domestic abuse assault. We affirm.

I. Background Facts and Procedure.

In October 1997, James Maclin, Jr. resided with Gretchen Hague and Jennifer Mittan in a duplex in Cedar Rapids, Iowa. On October 17, 1997, Maclin was charged by trial information with assault causing bodily injury (domestic abuse) arising out of an incident at the duplex on October 3, 1997.

At trial, Hague testified that on the evening of October 3, 1997, Maclin became angry with her because he was running out of cigarettes. She testified Maclin was intoxicated at the time. Mittan and her boyfriend, Allen Pierce, were present at the time the argument commenced. Hague testified Maclin struck her on the back of her neck with a video game system, poured a can of beer over her head, and threw water in her face, at which time Mittan and Pierce left the apartment. She further testified Maclin hit her in the face twice and threw her on her bed. Maclin also allegedly knocked her to the floor in the kitchen, kicked her in the ribs and slapped her face against his knee. Hague testified Maclin then sat her on the couch, held her arms and legs with his shins, and cut off her shoulder-length hair with scissors.

The jury found Maclin guilty of assault, penalty enhanced, in violation of Iowa Code section 708.2A(4) (1997). Maclin admitted he had been convicted of three prior

domestic abuse assaults. The district court sentenced Maclin to an indeterminate term of imprisonment not to exceed five years and a \$750 fine.

Maclin raises three issues on appeal: (1) the district court erroneously allowed the State to call Mittan as a rebuttal witness; (2) the district court refused to admit opinion testimony regarding Hague's honesty; and (3) Maclin contends he was denied effective assistance of trial counsel when his attorney failed to request a proper marshaling instruction for the offense of domestic abuse assault.

II. Scope of Review.

The determination to admit or to refuse to admit evidence lies initially in the discretion of the trial court, and we will not reverse except when an abuse of discretion is shown. *State v. McGhee*, 280 N.W.2d 436, 440-41 (Iowa 1979). Our review of Maclin's allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994).

III. Rebuttal Testimony.

A district court's ruling regarding the propriety of rebuttal evidence will be disturbed on appeal only upon a clear showing of abuse of discretion. *State v. Bakker*, 262 N.W.2d 538, 543 (Iowa 1978). Rebuttal evidence includes any competent evidence which explains, or is a direct reply to, or a contradiction of, material evidence introduced by the accused or which is brought out on his or her cross-examination. *State v. Nicholson*, 402 N.W.2d 463, 466 (Iowa App. 1987).

The general rule is that rebuttal witnesses need not be identified by endorsement on the indictment or county attorney's information. *State v. Fechter*, 397 N.W.2d 711, 713 (Iowa 1986).

As part of his case in chief, Maclin presented the testimony of his friend Larry Van Damme, who testified Maclin was with him most of the day. Van Damme stated they returned to the duplex at approximately 9:30 p.m. to retrieve cigarettes. He said he observed Mittan and Pierce outside the duplex on the steps. Van Damme claimed that upon their arrival, Hague became angry and accused Maclin of having an affair with their companion, Molly Barger. He testified Hague threw an object at Maclin and stated she was going to cut her hair short, brandishing a pair of scissors. Van Damme testified he did not see Maclin strike Hague or cut her hair.

On rebuttal, the State called Mittan as a witness to counter the testimony of Van Damme. Maclin objected, claiming he had not been properly notified Mittan would be called as a witness. The district court overruled the objection. Mittan maintained Van Damme and Barger did not come to the duplex that evening. Mittan further testified that when Maclin entered the home, he commenced an argument with Hague. Mittan testified the argument occurred at approximately midnight or 1 a.m. Mittan stated she saw Maclin knee Hague in the stomach and hit her. She next testified she left the home for a while, and upon her return discovered Maclin straddling Hague on the couch cutting her hair.

Maclin asserts the trial court erred in permitting Mittan to give testimony on rebuttal which was actually proof of the State's case in chief. The record discloses, however, that Mittan's testimony tended to impeach and contradict Van Damme's testimony regarding Maclin's whereabouts on the evening of October 3, 1997. Even though Mittan's testimony might also have been given in the State's case in chief, this did not render it inadmissible on rebuttal, since it contained elements of rebuttal. *See State v. Proulx*, 252 N.W.2d 426, 432 (Iowa 1977) ("The fact testimony used in rebuttal might have been used as part of the State's main case does not render it inadmissible in rebuttal if it rebuts some of the matters testified to by defendant's witnesses"). In fact, the trial court has discretion to admit in rebuttal evidence which should have been offered in chief that is not strictly rebuttal. *Id.* We find no abuse of discretion and we affirm on this issue.

IV. Opinion Testimony Concerning Hague's Veracity.

Maclin claims the district court erred in not allowing defense counsel to question defense witness Mary Jackson concerning her opinion of Hague's honesty. Jackson testified she worked with Hague the day after the alleged assault. After testifying regarding Hague's physical appearance on October 4, 1997, defense counsel asked her whether she believed Hague to be an honest person. The State objected on the grounds of relevancy, and the court sustained the objection. Following the court's ruling, defense counsel immediately ceased his examination of Jackson.

We find no abuse of discretion concerning this issue. Our review of the record indicates defense counsel failed to lay a proper foundation concerning Jackson's ability to give opinion testimony regarding Hague's truthfulness. *See State v. Scalf*, 254 Iowa 983, 989-90, 119 N.W.2d 868, 870 (Iowa) ("This is permissible when but only when the witness had laid a foundation of experience, contact and observation sufficient to form an opinion as to the trait of defendant's character involved. Mere acquaintance is not enough.").

V. Ineffective Assistance of Counsel.

To demonstrate ineffective assistance of counsel, one must show that "under the entire record and totality of the circumstances" his attorney's performance was not "within the normal range of competence." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). One must show that his lawyer failed to perform an essential duty, and that failure resulted in prejudice. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997).

In order to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel's error, the result of the proceeding would have been different. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). The Iowa Supreme Court, however, has stated it is not necessary to determine whether counsel's performance was deficient before examining the prejudice

component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The court quoted *Strickland v. Washington*:

The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Taylor, 352 N.W.2d at 685 (quoting *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699-700). Pursuant to *Taylor*, we may affirm Maclin's conviction because he has failed to prove prejudice without deciding whether there was a failure of duty. See *Taylor*, 352 N.W.2d at 685.

At the conclusion of Maclin's trial, the jury was instructed as follows regarding the charged offense:

The State must prove all of the following elements of the crime of Assault Causing Bodily Injury:

1. On or about the 3rd day of October, 1997, the defendant did an act which was meant to cause pain for (sic) injury or result in physical contact which was insulting or offensive to Gretchen Hague.
2. The defendant had the apparent ability to do the act.
3. The defendant's act caused a bodily injury as defined in Instruction No. 12.

If the State has proved all these elements, the defendant is guilty of Assault Causing Bodily Injury. If the State has proved only element 1 and 2, the defendant is guilty of Assault. If the State has failed to prove elements 1 or 2, the defendant is not guilty.

The jury was also provided with a special interrogatory supplemental to the jury instructions, which read:

If you find the defendant JAMES LEE MACLIN, JR. guilty of Assault Causing Bodily Injury or Assault, please answer the following interrogatory:

“Do you find that the defendant and Gretchen Hague were cohabitating at the time of the assault?”

The jury, using instruction number eleven, returned a verdict finding Maclin guilty of the lesser-included offense of assault. The jury also answered the special interrogatory in the affirmative, thus finding Maclin and Hague were cohabiting at the time of the assault. In accordance with the jury’s findings, the district court sentenced Maclin to an enhanced five-year indeterminate term of incarceration reflective of a third or subsequent domestic abuse assault conviction. *See Iowa Code § 708.2A(4).*

As the basis for his ineffective assistance argument, Maclin maintains his counsel was ineffective for failing to object to the court’s jury instruction as to the elements of domestic abuse assault. He contends that as a result of his counsel’s deficient representation, the jury was not properly instructed on all the elements of domestic abuse assault, specifically that cohabitation is a necessary element of the offense. He contends he was sentenced for a class D felony (domestic abuse assault, third or subsequent offense), while the jury, through its instructions, found him guilty of only simple assault.

We do not believe, based upon our review of the entire record, that a marshaling instruction including the required cohabitation element and defining cohabitation would have resulted in a different outcome.

Our supreme court has outlined several factors relevant to determining whether parties are cohabiting:

1. Sexual relations between the parties while sharing the same living quarters.
2. Sharing of income and expenses.
3. Joint use or ownership of property.
4. Whether the parties hold themselves out to be husband and wife.
5. The continuity of the relationship.
6. The length of the relationship.

See State v. Kellogg, 542 N.W.2d 514, 518 (Iowa 1996).

The record indicates Hague and Maclin had been involved in a relationship for eight months and had been living together for six months at the time of the assault. The record also contains evidence that while the duplex was rented in Maclin's name, most of the furniture was provided by Hague, and they also split the cost of rent, utilities, and other expenses. The jury could have reasonably found Maclin was cohabiting with Hague in response to the special interrogatory. Maclin has failed to demonstrate he was prejudiced by his trial counsel's failure to lodge a proper objection to the district court's instruction of the jury. We affirm on this issue.

AFFIRMED.