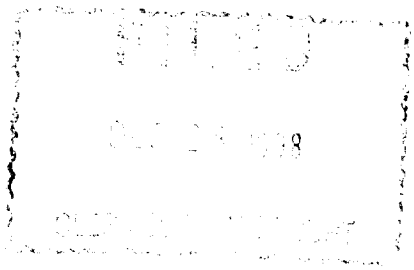
IN THE COURT OF APPEALS OF IOWA

No. 8-643 / 97-2356
Filed December 28, 1998

STATE OF IOWA,
Appellee,

vs.

MELVIN ANTHONY ROTH,
Appellant.



Appeal from the Iowa District Court for Emmet County, David C. Larson, District Associate Judge.

On appeal from his conviction for domestic abuse assault, second or subsequent offense, Melvin Roth claims his trial counsel was ineffective in failing to properly object to hearsay evidence and in failing to subpoena the testimony of a key witness. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Lynn K. Fillenwarth, County Attorney, and Richard Meyer, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

HUITINK, J.

Melvin Roth appeals his conviction for domestic abuse assault, second or subsequent offense. We affirm.

I. Background Facts and Proceedings.

In January 1996, Roth was involved in an altercation with his wife, Brenda Roth, while attending a high school wrestling meet. Immediately prior to the incident, Brenda was engaged in conversation with her neighbor, Bridget VanderHoff. Roth grabbed Brenda by the neck and threw her into a coat rack two times. VanderHoff was an eyewitness to the entire incident.

Roth was charged with domestic abuse assault, second or subsequent offense, in violation of Iowa Code section 708.2A(3)(b) (1995). A jury found him guilty as charged.

Roth appeals his conviction, alleging he was denied his Sixth Amendment right to counsel. He contends his trial counsel was ineffective in two respects: (1) failing to timely object to hearsay testimony; and (2) failing to subpoena the victim as a defense witness. We find both arguments to be without merit, and accordingly affirm Roth's conviction.

II. Ineffective Assistance of Counsel.

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction relief proceedings. *See State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). When the record is adequate to decide the issue, however, we will resolve such

claims on direct appeal. *Id.* We find the record is adequate to decide this case on direct appeal.

Established principles govern our review of appellant's claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *Id.* at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

The Iowa Supreme Court 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*, 352 N.W.2d at 685. 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 v. State*, we may affirm applicant'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.

A. Hearsay Testimony.

Roth first argues his counsel was ineffective for failing to properly object to the testimony of Emmet County Sheriff's Deputy Larry Jensen regarding a conversation the officer had with the victim. When questioned by the State concerning the incident, Deputy Jensen testified:

> Q: When you first saw Brenda Roth, what was her appearance or demeanor at that time?
> A: She was nervous, looked like she was scared.

Q And did you ask her to give you a written statement regarding what had happened there?
A: Yes, I did.
Q: And did she give you a written statement?
A: No, she didn't.
Q: Did she tell you why she would not give a written statement?

Defense Counsel: Your honor, these are hearsay, and the State needs to call that witness if they wish to put in this hearsay.
The Court: Overruled.

Q: Did Brenda Roth tell you why she would not give a statement?
A: Yes, she did.
Q: What did she tell you?
A: She was afraid to say anything, that her husband would retaliate against her later or come back against her.

Iowa Rules of Evidence 801 and 802 provide that an out-of-court oral statement of an individual is inadmissible as evidence if offered for the truth of the matter asserted. *State v. Miller*, 204 N.W.2d 834, 840 (Iowa 1973). Hearsay statements are inadmissible unless the statements are subject to one of the exceptions listed in Iowa Rules of Evidence 803 or 804. *State v. Reitenbaugh*, 392 N.W.2d 486, 489 (Iowa 1986).

Hearsay testimony wrongfully entered into evidence is presumed to be prejudicial. *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986). The contrary is established when the record shows that the challenged evidence did not impact on the jury's finding of guilt. *State v. Barrett*, 445 N.W.2d 749, 754 (Iowa 1989). Prejudice will not be found where substantially the same evidence is in the record without objection. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992).

Even if we find Roth's counsel had a duty to object a second time to the same line of questioning, we find Roth has failed to establish the prejudice prong of a viable ineffective assistance of counsel claim. Roth's argument fails to take into account the eyewitness testimony of Bridget VanderHoff. VanderHoff witnessed the entire incident. She testified Melvin Roth grabbed Brenda Roth by the back of the neck and twice threw her into a coat rack. She testified that during the incident Brenda was crying and scared. She further testified that when she (VanderHoff) tried to intervene, Brenda ran away from the scene crying. VanderHoff also testified that Brenda had red marks on her neck where Roth had grabbed her. VanderHoff finally testified Brenda was offended by Roth's attack. Faced with this testimony, we cannot say Roth's counsel's failure to timely object to Deputy Jensen's testimony was prejudicial. Bridget VanderHoff's eyewitness testimony corroborated Deputy Jensen's testimony. VanderHoff's testimony also served as proof of each of the elements of the charged offense. We cannot say, as a matter of law, the admission of Deputy Jensen's testimony undermined our confidence that justice was done in this case.

B. Failure to Subpoena Brenda Roth.

Roth's second ineffective assistance of counsel argument is his counsel was ineffective for failing to subpoena the victim, Brenda Roth. We find this claim to be without merit.

The record indicates defense counsel's decision not to subpoena Brenda Roth was a deliberate one. Defense counsel strategically decided not to depose or subpoena Brenda Roth because he felt the statements of Deputy Jensen were hearsay and thus inadmissible.

With regard to this claim, Melvin Roth has failed to overcome the legal presumption that his counsel's actions were reasonable. We will not find ineffective assistance of counsel based merely on strategic decisions. "'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 49, 54 (Iowa 1972)). Further, the record reflects when defense counsel recognized the need to call Brenda Roth, he made several attempts to contact her and also filed a motion to continue in an attempt to have her testify. We cannot say counsel's actions were constitutionally deficient.

Even if we were to find Roth's trial counsel breached an essential duty in not issuing a subpoena for Brenda Roth, we are not convinced her testimony would have made the outcome of the trial any different.

We find Melvin Roth has failed to carry his burden on either of his assertions of ineffective assistance of counsel.

AFFIRMED.