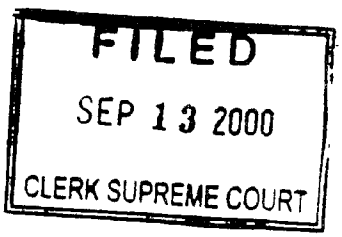
IN THE COURT OF APPEALS OF IOWA

No. 0-481 / 99-1410
Filed September 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY AUGUSTUS MALLETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, District Associate Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of assault causing injury in violation of Iowa Code sections 708.1 and 708.2(2) (1999). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Danielle Davis, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of assault causing injury in violation of Iowa Code sections 708.1 and 708.2(2) (1997). He contends the district court erred in admitting a broken cup into evidence over his chain-of-custody objection. He also contends his trial counsel was ineffective in (a) failing to object to prejudicial hearsay evidence, (b) failing to object to and introducing evidence of his other bad acts, contrary to his motion in limine, (c) failing to file the motion in limine in a timely manner, and (d) failing to discover and present evidence from the victim that he injured his head shaving, not in the assault. We affirm.

On May 25, 1999, Black Hawk County Sheriff's Deputy Brian Shock observed Mallett, an inmate, locking Gates, another inmate, in Gates's cell. Deputy Shock told Mallett he would be locked down after lunch for two hours. Mallett wanted to begin his lockdown right away, and locked himself in his cell several times. Subsequently, Deputy Shock released Mallett from his cell to join the other inmates for lunch.

Shortly thereafter, Deputy Shock observed Mallett strike Gates several times with a closed fist. The first blow knocked Gates to the floor. Mallett struck Gates three to five times "full force" while Gates lay on the floor. Gates lay unresponsive for a short period of time. Mallett returned to eating his lunch and went into his cell when instructed to do so.

Deputy Shock was informed a broken cup was used in the situation. He did not observe the cup being used as a weapon against Gates, but noticed

spilled juice in the area around Gates. Deputy Shock observed the broken cup in Sergeant Mossman's office after the incident. The broken cup and the spilled juice led him to believe Mallett used the cup as a weapon in the assault.

Black Hawk County Sheriff's Deputy Timothy Engstrom observed the same incident. He observed Mallett standing over Gates and striking him in the head, using "as much force as he could." Gates was unresponsive for two or three minutes. Deputy Engstrom observed a cut of one inch or less on the back of Gates's head. The cut was bleeding at the time. Deputy Engstrom described Gates's demeanor as "groggy" and "kind of confused" immediately after the assault.

A trial information, filed June 3, 1999, charged Mallett with assault causing bodily injury, a serious misdemeanor, in violation of Iowa Code sections 708.1 and 708.2(2). A jury found Mallett guilty of assault causing injury on August 18, 1999. The district court sentenced Mallett to a term not to exceed one year, to be served consecutively to any other sentence Mallett was serving. Mallett appeals.

I. Admission of Evidence. We review the admission of evidence over a chain-of-custody objection for abuse of discretion. Iowa R. App. P. 4; *State v. Mehner*, 480 N.W.2d 872, 877 (Iowa 1992); *State v. Ramirez*, 485 N.W.2d 857, 858 (Iowa App. 1992). The trial court may admit the evidence when satisfied it is reasonably probable tampering, substitution or alteration of evidence did not occur. *State v. Mayes*, 286 N.W.2d 387, 391 (Iowa 1979). Absolute certainty is not required. *Id.* The trial court determines the sufficiency of physical evidence

identification in light of the article's nature, circumstances surrounding its custody and the likelihood of intermeddlers tampering with it. *Mayes*, 286 N.W.2d at 391; *Ramirez*, 485 N.W.2d at 858-59. In reaching its decision, the court may presume state agents or officials did not tamper with evidence in their custody. *Ramirez*, 485 N.W.2d at 859. Where the exhibits consist of solid objects which are not easily susceptible to undetected alteration, the exhibits may be admitted into evidence despite a break in the chain of custody. *State v. Houston*, 439 N.W.2d 173, 179 (Iowa 1989). When the trial court has determined the identity of the exhibit has been sufficiently determined, any contrary indication or speculation affects the weight of the evidence, not its admissibility. *Id.*

The cup, a solid object, is not easily susceptible to undetected alteration. Deputy Shock testified a broken cup was brought to his attention shortly after Mallett's assault on Gates. The deputy did not find the cup and he never had possession of it, but he observed it in sergeant Mossman's office within hours of its seizure.

After Deputy Shock's initial trial testimony, personnel in the sheriff's department attempted to locate the broken cup. They found a cup bearing the label "Mallett, Tony, cup broken." The report number on the deputy's original incident report matched the number on the label. Deputy Shock could not explain where the cup had been between the time he saw it in sergeant Mossman's office and the time of trial, but he identified the cup as the same or similar to the cup he observed shortly after the incident. In particular, Deputy Shock noted the appearance of a red substance in the broken cup, consistent

with the red Kool-Aid he believed was served on the day of the assault. Deputy Shock's testimony adequately established a chain of title. The trial court properly admitted the broken cup into evidence.

Even if the district court erred in admitting the broken cup into evidence, the error was harmless. Deputy Shock and Deputy Engstrom observed Mallett strike Gates, knocking him to the floor. They observed Mallett continue hitting Gates in the head with his fist as Gates lay on the floor. Based on this testimony, the jury could have found Mallett guilty without considering the broken cup. Thus, any error in the admission of the evidence was harmless. *See State v. Rice*, 543 N.W.2d 884, 887-88 (Iowa 1996). We affirm the trial court on this issue.

II. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Mallett raises several claims of ineffective assistance of counsel. First, he claims he received ineffective assistance of counsel due to counsel's failure to object to prejudicial hearsay evidence. At trial, the prosecutor asked Deputy Engstrom about the nature of Gates's injuries. The deputy testified Gates was unconscious and remained unresponsive for two to three minutes upon his arrival at the scene. When Gates did respond, Deputy Engstrom described his demeanor as follows:

> Q. What was Mr. Gates's demeanor during this time? A. Like I say, he was kind of – kind of groggy I guess, you know, like he had been sleepy. Kind of confused. He acted like he didn't know what happened.
>
> Q. Did he complain of any pain? A. Just his head a little bit. I don't – I don't think there was much else that he mentioned at the time.

Mallett claims his attorney should have objected to the deputy's testimony regarding the victim's complaint of pain as prejudicial, improper hearsay. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c); *Rice*, 543 N.W.2d at 887. Hearsay is generally inadmissible unless it falls within one of the enumerated exceptions set forth in the rules. Iowa R. Evid. 802-804; *Rice*, 543 N.W.2d at 887. Iowa Rule of Evidence 803(3) provides an exception to the hearsay rule, even though the declarant is available as a witness, where the statement reflects the declarant's then existing physical condition. Thus, declarations of present pain and suffering after an injury are admissible. *Shover v. Iowa Lutheran Hosp.*, 252 Iowa 706, 721, 107 N.W.2d 85, 94 (1961).

Gates told Deputy Engstrom his head hurt shortly after the assault. As a declaration of present pain, the statement would have been admitted over counsel's hearsay objection. Accordingly, counsel was not ineffective in failing to lodge an objection to the challenged statement, as any hearsay objection would have been overruled. *Rice*, 543 N.W.2d at 888 (counsel not ineffective for failure to make a meritless objection).

Second, Mallett complains his trial counsel was ineffective for filing an untimely motion in limine. Mallett's attorney filed a motion in limine on August 12, 1999, five days before the commencement of trial. Iowa Rule of Criminal Procedure 10(4) provides a motion in limine shall be filed no later than nine days

before trial. Mallett claims his counsel was ineffective for failing to do so. We disagree. The late filing of the motion in limine did not prejudice Mallett. The court ruled on the merits of the motion, without consideration of its late filing.

Third, Mallett claims his trial counsel was ineffective for failing to object to other bad-acts testimony and for soliciting such testimony. Finally, Mallett claims his trial counsel failed to discover and introduce exculpatory evidence to which the victim would allegedly have testified.

We conclude the record in this case is insufficient for us to address Mallett's last two claims of ineffective assistance of counsel in this direct appeal. Therefore, we preserve the following of Mallett's claims of ineffective assistance of counsel for possible postconviction relief action, so the facts can be further developed: (1) counsel's failure to object to other bad-acts testimony and solicitation of such testimony; and (2) counsel's failure to discover and introduce exculpatory evidence for postconviction relief proceedings. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

AFFIRMED.