FILED
AUG 27 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-249 / 90-640

600

STATE OF IOWA,

Appellee,

vs.

MARLA MOONEY,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Defendant appeals from her conviction, asserting ineffective asistance of counsel and abuse of the trial court's discretion in sentencing. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; Thomas S. Mullin, County Attorney; and Brian Buckmeier, Assistant County Attorney, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Marla Mooney and her boyfriend, Tom Reilly, were involved in an altercation with their friend, Larry Elenz, in a home shared by all three. During the altercation, Mooney stabbed and injured Elenz. She claimed she did so in order to protect herself and Reilly from harm at the hands of Elenz.

Mooney was charged with attempted murder. At the jury trial she presented a defense of justification. The jury found her guilty of the lesser-included offense of assault without intent to inflict serious injury but causing bodily injury, a violation of Iowa Code section 708.2(2). She has appealed from the resulting conviction and sentence.

Mooney contends her trial attorney rendered ineffective assistance by failing to object to two forms of improper evidence, as noted below. She suggests her ineffective assistance claims can be resolved on direct appeal because the present record is adequate to demonstrate counsel's ineffectiveness.

First, Mooney complains her attorney did not object to hearsay, did not move to strike hearsay which had already entered the record, and did not seek a mistrial because certain hearsay had entered the record even after an objection to it had been sustained. All of the testimony challenged as hearsay came from police officers, who testified Reilly had made statements to them blaming Mooney for provoking the initial altercation.

Second, Mooney complains her attorney did not object to evidence concerning Mooney's failure to abandon or retreat from her home to avoid the incident. She argues this evidence was irrelevant because she had no duty to retreat from her own home to avoid having to use reasonable force against an assailant.

In addition to her ineffective assistance claims, Mooney also contends the district court abused its sentencing discretion by declining to grant probation, by imposing the maximum sentence of one year in jail, and by relying on an improper sentencing factor (the alcohol use of her live-in boyfriend, who was apparently her husband).

Our standard of review is for errors at law. Iowa R. App. P. 4. However, when a petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of de novo review. Id.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987). There appears to be some support in the record for Mooney's ineffective assistance claim. However, the record is inadequate for an informed decision.

Therefore, we preserve this issue for postconviction proceedings.

Mooney next asserts the trial court abused its discretion in sentencing. We review for an abuse of discretion. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

The sentencing court was within the statutory limits in prescribing the sentence. Thus, there was no abuse in that regard. We have reviewed the trial court's reasons for the sentence. We determine the trial court was within its discretion in sentencing as it did. We affirm on this issue.

AFFIRMED.