IN THE COURT OF APPEALS OF IOWA

FILED
JUN 27 1996
CLERK SUPREME COURT

No. 6-238 / 95-724

STATE OF IOWA,
Appellee,

vs.

BRIAN CALDERON,
Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

Defendant appeals his convictions for willful injury and domestic abuse assault. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubal, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Mary E. Richards, County Attorney, and Stephen H. Holmes, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Habhab, J., and Hayden, S.J.*, but decided en banc.

CADY, J.

Brian Calderon, appeals his convictions for willful injury and domestic abuse assault. He claims the State improperly impeached its own witness and he received ineffective assistance of counsel. We affirm.

Calderon was arrested following an incident in a topless bar in Ames. One of the victims, Lisa, was a dancer at the bar and a friend of Calderon. Lisa and Calderon began to argue in the dressing room of the bar, which eventually escalated into a physical altercation. Two men were alerted to the altercation and went to Lisa's aid. The State charged Calderon with one count of domestic abuse, based upon allegations Calderon struck Lisa. Calderon was also charged with willful injury stemming from claims Calderon struck one of the men in the face with a beer bottle.

During and immediately following the incident, Lisa told several people Calderon struck her in the chest. At trial, however, Lisa denied she had been hit in the chest by Calderon. Over objections by Calderon's trial counsel, the State was permitted to admit evidence of: (1) Lisa's written statement to police that Calderon had punched her in the chest; (2) statements made by Lisa to her mother during the incident that Calderon hit her; (3) statements made by Lisa to a police officer immediately following the incident that Calderon hit her; and (4) statements made by Lisa to a paramedic that Calderon had tried to damage her breast implants.

Calderon claims he was denied a fair trial when the State was permitted to impeach Lisa. He also claims his trial counsel was ineffective for failing to object to

the impeachment testimony under the rule established in *State v. Turecek*, 456 N.W.2d 219 (Iowa 1990).

The State's right to impeach its own witness is not absolute. One limitation prohibits the prosecution from calling a witness who it expects to give unfavorable testimony solely for the purpose of introducing otherwise inadmissible evidence under the guise of impeachment. *Tracy*, 482 N.W.2d 675, 679 (Iowa 1992); *Turecek*, 456 N.W.2d at 224-25.

In this case, trial counsel failed to preserve error on the impeachment issue by making a timely objection based on a *Turecek* violation. Moreover, there was no indication the State called Lisa solely for the purpose of offering inadmissible evidence under the guise of impeachment. Lisa's testimony was not limited to impeachment, and most of the contradictory evidence introduced by the State was admissible independent of the impeachment rule. Lisa's statements to police at the scene of the assault constituted an excited utterance. Iowa R. Evid. 803 (2). Her statements to her mother were admissible as evidence of her existing mental, emotional or physical condition. Iowa R. Evid. 803 (3). Her statements to the paramedic were admissible as statements for medical diagnosis or treatment. Iowa R. Evid. 803 (4).

Even if some of the contradictory evidence was not otherwise admissible, we cannot conclude trial counsel was ineffective for failing to raise a timely objection based on a *Turecek* violation. To establish a claim of ineffective assistance of trial

counsel, the claimant must not only show counsel failed to perform an essential duty, but that prejudice resulted. *State v. Tracy*, 782 N.W.2d at 679.

Prejudice is established by showing a reasonable probability that but for counsel's unprofessional errors, the result would have been different. *Tracy*, 782 N.W.2d at 689. In this case, most of the evidence contradicting Lisa's testimony was admissible independent of the impeachment rule. This admissible evidence was substantial and clearly implicated Calderon. Thus, even if some of the contradictory evidence did not have an independent basis for admission, there is no reasonable probability the result would have been different. We affirm Calderon's convictions.

AFFIRMED.