IN THE COURT OF APPEALS OF IOWA

No. 1-247 / 00-283
Filed July 18, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC BONITA PEPPERS,
Defendant-Appellant.

FILED
JUL 18 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

The defendant appeals following his convictions for second-degree sexual abuse, domestic abuse assault while displaying a dangerous weapon and false imprisonment. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, J. Patrick White, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

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VAITHESWARAN, J.

Eric Bonita Peppers appeals his judgment and sentence for second-degree sexual abuse, domestic abuse assault while displaying a dangerous weapon, and false imprisonment. He contends trial counsel was ineffective in failing to: (1) object to prior bad acts evidence; (2) object to the State's impeachment of defense witnesses with their prior convictions; (3) object to the State's use of extrinsic evidence to impeach a defense witness on what he contends was a collateral issue; (4) file a motion to dismiss for violation of his speedy trial rights; (5) cross-examine and impeach State witnesses; (6) call certain witnesses; and (7) strike a juror. Peppers also seeks reversal based on cumulative error. We affirm, preserving issues two, four, six, and seven for postconviction relief.

I. Background Facts and Proceedings.

The jury could have found the following facts. Peppers lived in Iowa City with his girlfriend Felicia, their daughter, and Felicia's two other daughters. After using crack cocaine one morning, Peppers told Felicia he wanted to have sex. Although Felicia was reluctant, she began to undress to avoid a confrontation. As she did so, Peppers noticed discharge on her panti-liner. Convinced Felicia had been having sex with his friend Preston Bradford, he rammed his fingers into her vagina to check for semen, while simultaneously hitting her and stabbing the bed with a kitchen knife. Soon, Bradford appeared at the apartment. After answering the door, Peppers returned to the bedroom and told Felicia to get dressed because he intended to take her to the country to "finish this."

Peppers then pushed Felicia toward and into his car, strapped her into the passenger seat and began driving. As he drove, Peppers hit Felicia with his fists and a wire hanger. Felicia stated she could not escape because the passenger door would not open from the inside. To stop the assault, Felicia ultimately agreed she had slept with Bradford. Peppers then calmed down and decided to retaliate against Bradford by having him arrested for selling drugs. He drove to the sheriff's office to execute this plan. When they arrived there, Felicia sought help from an officer.

The State charged Peppers with second-degree sexual abuse, domestic abuse assault while displaying a dangerous weapon, and false imprisonment. *See* Iowa Code §§ 709.1, 709.3(1), 708.1, 708.2A(2)(c) and 236.2. Peppers demanded, waived, and reasserted his right to a speedy trial. In the interim, his first attorney withdrew and new counsel was appointed to represent him. The case was tried to a jury, which returned guilty verdicts on all three counts.

Peppers' attorney moved for a new trial and moved to withdraw. In addition, Peppers filed a pro se motion for new trial, asserting his attorney was ineffective. The district court denied the motions and sentenced Peppers to a prison term not exceeding twenty-five years on the sexual abuse count, two years on the domestic abuse count, and one year on the false imprisonment count, to be served concurrently. This appeal followed. All Peppers' arguments are premised on ineffective assistance of counsel.

II. Ineffective Assistance of Counsel Standards.

We review ineffective assistance of counsel claims de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). While we generally preserve such

claims for postconviction relief proceedings, we will consider them on direct appeal when the record is adequate to address the issue. *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

To succeed, Peppers must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Carter*, 582 N.W.2d 164, 165 (Iowa 1998). The first element requires an applicant to overcome a strong presumption of counsel's competence and establish counsel's conduct was outside the normal range of competency. *Irving v. State*, 533 N.W.2d 538, 540 (Iowa 1995). The second element requires proof that, but for counsel's errors, the trial outcome would have been different. *Wemark v. State*, 602 N.W.2d 810, 817 (Iowa 1999). We may affirm on appeal if either element is lacking. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999).

III. Prior Bad Acts Evidence.

Prior to trial, Peppers filed two motions in limine seeking to exclude certain specific acts of violence perpetrated against Felicia. The State responded that it did not intend to introduce evidence of specific acts but only evidence that Felicia "submitted to Mr. Peppers out of fear and knows he can be violent when using drugs." The district court sustained the motions, stating:

> The ruling means that no mention of any kind may be made of prior assaults by the Defendant against this victim. And counsel, I'm sure, understand that if the Defendant opens the door to prior bad acts of Defendant, then that may change what evidence may be allowed in. But for purposes of your voir dire, your opening statements, and your evidence, until something does--done by the Defendant opens that door, those two motions are sustained.

At trial, Felicia generally referred to Peppers' violent past but made no mention of specific bad acts. Peppers argues his attorney should have objected to these

general references on the ground they unfairly prejudiced him. *See* Iowa R. Evid. 403.

Assuming without deciding that defense counsel breached an essential duty by failing to object to this evidence, we conclude Peppers did not establish the trial outcome would have changed but for this omission.

The evidence against Peppers was overwhelming. Felicia's testimony concerning Peppers' actions in their bedroom and car was corroborated by a wealth of other evidence.

Officers at the sheriff's department testified Felicia was upset, trembling and crying. They observed facial bruises and welts on her body. One of the officers searched Peppers' car and found a wire hanger bent in the shape of the welts on Felicia's arms. Another officer searched Felicia's apartment and found a knife and slashed bedding in the master bedroom.

Medical personnel from the hospital where Felicia was examined that day testified she sustained extensive facial and vaginal bruising and confirmed Felicia's testimony she had been struck with a closed fist, open palm and wire hanger.

Both law enforcement and medical personnel gave testimony consistent with Felicia's trial testimony. In light of this extensive corroborating evidence, we conclude Peppers failed to established he was prejudiced by trial counsel's failure to object to the prior bad acts evidence. Therefore, this ineffective assistance of counsel claim must fail.

IV. Impeachment of Defense Witnesses.

The State impeached two defense witnesses with their prior convictions for delivery of cocaine. Peppers argues defense counsel should have objected to the State's use of their prior convictions on the ground the probative value of the evidence was outweighed by its prejudicial effect under Iowa Rules of Evidence 609(a) and 403. In response, the State appears to argue that evidence of prior drug convictions of a witness is per se admissible to impeach the credibility of a witness where the witness denies drug use. We disagree with the State.

Iowa Rule of Evidence 609(a)(1) states in pertinent part that prior crimes evidence offered to impeach a witness other than the defendant and punishable by a prison term of more than a year is admissible, "subject to rule 403."[1] Iowa Rule of Evidence 403 states in pertinent part that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Defense counsel did not urge that the witnesses' convictions should have been excluded because they were unfairly prejudicial and the district court, accordingly, did not make a record on this issue. While defense counsel may have had sound reasons for not objecting on this ground, those reasons are not apparent in the record before us. *See Cox v. State*, 554 N.W.2d

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[1] "For the purpose of attacking the credibility of a witness: (1) Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 403, if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted . . . ." *See State v. Roth*, 403 N.W.2d 762, 767 (Iowa 1987) (addressing old version of rule); *Cf. State v. Daly*, ___ N.W.2d ___, ____ (Iowa 2001) (addressing portion of rule 609(a) dealing with prior convictions of defendant).

712, 715 (Iowa Ct. App. 1996). Therefore, we preserve this issue for postconviction relief.

V. Impeachment with Collateral Evidence.

Peppers next argues his attorney should have objected to rebuttal testimony of State employees offered to refute testimony of certain defense witnesses. The State called investigator Exley-Schuman to rebut Preston Bradford's denial that he had told Exley-Shuman of Peppers' cocaine use. The State called probation officer Gates to rebut Peppers' denial he became irate when confronted about a missed appointment with the officer. Peppers maintains their testimony amounted to improper collateral impeachment by extrinsic evidence.

Again, even if this omission amounted to a breach of an essential duty, Peppers could not establish prejudice. *Cf. Schrier v. State*, 347 N.W.2d 657, 665 (Iowa 1987) (finding no constitutional error in counsel's failure to object to impeachment with extrinsic evidence). Accordingly, we reject this ineffective assistance of counsel claim.

VI. Speedy Trial Rights.

The parties concede Peppers' trial took place more than ninety days after he reasserted his right to a speedy trial. Peppers argues his attorney should have notified the court that the trial date was outside the time limit. We deem the record inadequate to address this issue and, accordingly, preserve it for postconviction relief.

VII. Cross-Examination and Impeachment of State Witnesses.

Peppers contends his attorney was ineffective in failing to: (A) challenge Felicia's denial of cocaine use in light of laboratory results which revealed the presence of cocaine metabolites in her system; (B) challenge Felicia's statement that Peppers pushed her into the car, in light of her prior sworn statement suggesting otherwise; and (C) challenge a physician's statement that Felicia told her there had been penetration, in light of prior sworn testimony in which she stated there had been no penetration.

A. Felicia's testimony regarding cocaine use. On direct examination, Felicia testified she never used crack cocaine. Peppers argues defense counsel should have attempted to impeach her with laboratory evidence revealing the presence of cocaine metabolites in her system. Had counsel done so, he may have marginally impugned her credibility and her recollection of events on the morning of the incident. However, he achieved the same result by establishing Felicia was a heavy marijuana user, a fact that Peppers confirmed. Additionally, the laboratory results would not have established Felicia used cocaine or any other illicit drug just prior to the incident. Felicia strenuously denied she did and an officer corroborated her testimony, stating he saw no signs she was under the influence of drugs on the morning of the incident. For these reasons, defense counsel could reasonably have concluded impeachment with the laboratory results would have been of limited value. We find no breach of an essential duty in counsel's failure to pursue this line of cross-examination.

B. Felicia's testimony regarding entry into car. Peppers contends his attorney did not exploit a discrepancy between Felicia's trial and deposition

testimony on the question of whether she was pushed into the car. At trial, she stated,

> Peppers pushed me to the car. I then got into the car, he got in, and he strapped me down in the seat belt. You cannot get out of the car because the door is broke. You have to roll the window down to open up the door.

During her deposition she testified:

> He--well, he made me get in the car. He made me get in the car. I had no choice. Preston was sitting right there, watching. He pushed me out. He made me get out. He made me get out of the house. He made me get out of the house in the car. He was right behind me, on my ass. I-- there was no way I could run or nothing. He made me get in the car and he strapped me down with the seat belt.

We find nothing more than a semantic distinction between the two statements. As defense counsel would have gained little ground by exploiting this distinction, we conclude he did not breach an essential duty by failing to do so. *Cf. Steinkuehler v. State*, 507 N.W.2d 716, 721 (Iowa Ct. App. 1993) (finding no prejudice in counsel's failure to impeach with prior statement).

C. Physician's Testimony. A medical resident who examined Felicia on the date of the incident testified that Felicia told her Peppers "penetrated" her with his fingers. Peppers argues defense counsel should have impeached the physician with a medical progress note in which she stated "there was no penetration." We disagree with Peppers that his attorney breached an essential duty by failing to raise this discrepancy. The physician's trial testimony was more specific than her statement in the progress note, but did not differ in material respects.

VIII. Failure to Call Witnesses.

Peppers contends his attorney was ineffective in failing to call witnesses who might have stated the knife slashes to the bed occurred earlier, as well as witnesses who might have stated Felicia had a history of getting Peppers into trouble. We deem the record inadequate to resolve this issue and accordingly preserve it for postconviction relief.

IX. Failure to Strike Juror.

Peppers contends his attorney was ineffective in failing to strike a juror who, he contends, expressed ill feelings towards defense counsel based on his handling of a prior case. As the voir dire proceedings were not reported, the parties concede the record is inadequate to address the issue. Accordingly, we preserve the issue for postconviction relief.

X. Cumulative Error.

We conclude Peppers received effective assistance of counsel on the claims we have resolved here. Accordingly, there was no cumulative error. *State v. Wemark*, 602 N.W.2d 810, 818 (Iowa 1999).

XI. Disposition.

We affirm Peppers' judgment and sentence. We preserve for postconviction relief his claims that: (1) his attorney should have objected to the State's impeachment of his witnesses with their prior convictions; (2) his attorney

failed to protect his right to a speedy trial; (3) his attorney failed to call certain witnesses; and (4) his attorney failed to strike a juror.

AFFIRMED.

Mahan, P.J., concurs; Miller, J., concurs in part and dissents in part.

MILLER, J. (concurs in part and dissents in part)

I concur in the affirmance of the defendant's conviction and preservation of his sixth and seventh claims for a possible postconviction proceeding. I respectfully dissent from the preservation of his second and fourth claims, believing they can and should be dealt with and disposed of on direct appeal.

Evidence of the two defense witnesses' prior convictions for delivery of cocaine was admissible for impeachment under rule of evidence 609(a)(1) unless, under rule 403, its probative value was substantially outweighed by the danger of unfair prejudice. Defense counsel did not breach an essential duty by not objecting to such evidence unless not objecting to it constitutes conduct outside the normal range of competency. The evidence in question was prima facie admissible and counsel could quite reasonably conclude its probative value was not "substantially outweighed by the danger of unfair prejudice." Therefore, not objecting was not outside the normal range of competency.

The defendant waived speedy trial and previously scheduled trial was then continued to a date about four months later. About one week after waiving speedy trial he secured the appointment of new counsel. Then, after about one more week, he filed a written "motion" requesting speedy trial. His motion does not indicate he served a copy on either the State or his own attorney, and he makes no claim that he did so. Trial commenced 110 days later, as previously rescheduled. The defendant claims his attorney was ineffective in failing to file a motion to dismiss for violation of his right to speedy trial. He bases this claim on an assertion that his attorney "had a duty to fully review the court file, which contained the defendant's motion reasserting his right to a speedy trial," and

therefore should have notified the court that the defendant had reasserted the right and the previously scheduled trial was outside the time for speedy trial. I would reject this assertion and the claim of ineffective assistance which is based upon it.

Assuming without deciding that the defendant, who had requested and received court-appointed counsel, had the right to file the "motion" in question while represented by counsel, counsel had no duty to file a motion to dismiss for violation of defendant's speedy trial rights unless counsel knew or should have known of that "motion." The record provides no basis for finding that counsel knew of defendant's "pro-se" filing, and the defendant makes no claim that counsel in fact did so. Absent any evidence or claim to that effect, there is no reason to preserve for a possible postconviction proceeding any issue of breach of duty based on actual knowledge of the filing.

The State is obligated to serve on defense counsel a copy of its filings, and defense counsel is obviously aware of defense counsel's filings. It is apparently the defendant's position that defense counsel must from time to time review the court file to determine if there are any other filings of which counsel is not aware. The defendant cites no authority in support of his apparent assertion that defense counsel has a duty to periodically review the court file to determine if the defendant has filed something which the defendant has brought to the attention of neither the State nor defendant's own attorney, and I would reject out of hand the claim that such a duty exists. By preserving the defendant's fourth claim of ineffective assistance for a possible postconviction proceeding we implicitly accept the existence of such a duty.

For the foregoing reasons I would resolve the defendant's second and fourth claims of ineffective assistance of counsel against him on direct appeal and not preserve them for a possible postconviction proceeding.