IN THE COURT OF APPEALS OF IOWA

No. 1-544 / 00-1559
Filed December 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID MICHAEL ADCOCK,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Newt Draheim, Senior Judge (trial), Peter Newell, District Associate Judge (sentencing).

Defendant appeals from the judgment and sentence entered upon jury verdicts finding him guilty of false imprisonment in violation of Iowa Code section 710.7 (1999) and domestic abuse assault in violation of section 708.2A(2)(a). **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Richard N. Dunn, County Attorney, and Laura Roan, Assistant Attorney General, for appellee.

Nancy Lynn Robertson of the Iowa Coalition Against Domestic Violence, Des Moines, for amicus curiae.

Heard by Sackett, C.J., and Miller, J., and C. Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (2000).

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MILLER, J.

David Adcock appeals from his convictions for false imprisonment in violation of Iowa Code section 710.7 (1999) and domestic abuse assault in violation of section 708.2A(2)(a). He contends (1) the trial court erred in allowing evidence of his prior bad acts, (2) the trial court erred in allowing hearsay evidence, and (3) his trial counsel was ineffective in failing to object to hearsay testimony of Dr. Van Gorp and in failing to request a limiting jury instruction on his prior bad acts evidence. We affirm.

I. BACKGROUND FACTS.

The jury could find the following facts from the evidence. Adcock and his former girlfriend, Dawn Peterson, have a son, Dalton. After finding photographs taken by Peterson, then his live-in girlfriend, of Dalton with another man, Adcock threw her to the floor and punched her in the head with his fists. This incident occurred on July 19, 1999. Peterson and Dalton subsequently moved to her mother's house. Shortly thereafter, Adcock took Dalton. Peterson and Adcock arranged to exchange Dalton at a restaurant in Iowa Falls on July 29, 1999. Peterson brought along her younger sister, Lacy. When Adcock and Dalton arrived, Lacy went outside. After the meal, Adcock and Peterson got into his Blazer so they could talk briefly and Adcock could give her a greeting card. Meanwhile, Dalton ran to Lacy. When Peterson did not react to the card as Adcock had expected, Adcock became angry, called her a "slut," and threatened to take Dalton. Peterson recalled Adcock grabbing her by the neck making it hard for her to breathe and stating, "You're coming with me, I'm going to kill you." Adcock then drove away from the restaurant while shocking her with a stun gun

in her side. Peterson pulled herself through the window and, upon hearing Adcock gun the engine, she jumped to the pavement.

Adcock was charged with second-degree kidnapping and aggravated domestic abuse assault. The State reduced the kidnapping charge to third-degree kidnapping. After trial, the jury found Adcock guilty of false imprisonment and domestic abuse assault. The court sentenced him to 365 days in the county jail for false imprisonment and thirty days for assault, to be served consecutively.[1] Adcock appeals.

II. PRIOR BAD ACT EVIDENCE.

Adcock contends the trial court erred in admitting evidence of the July 19 assault and in failing to weigh the probative value of the evidence against its potential prejudice. He asserts the evidence was more prejudicial than probative, and it did not fit any of the exceptions listed in Iowa Rule of Evidence 404(b).

The scope of review is for the correction of errors at law. Iowa R. App. P. 4. We generally review evidentiary rulings for abuse of discretion. *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997). An abuse of discretion occurs when a trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

Iowa Rule of Evidence 404(b) states:

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[1] The Iowa Supreme Court granted a limited remand for resentencing. On remand, Adcock was committed to the custody of the Iowa Department of Corrections.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Iowa R. Evid. 404(b). This rule "is a codification of our common-law rule that one crime cannot be proved by proof of another." *State v. Castaneda,* 621 N.W.2d 435, 439 (Iowa 2001). Rule 404(b) seeks to exclude evidence that serves no purpose except to show the defendant is a bad person, from which the jury is likely to infer he or she committed the crime in question. *Id.* at 439-40. Accordingly, to be admissible, evidence must be relevant "to prove some fact or element in issue other than the defendant's criminal disposition." *Id.* at 440 (quoting *State v. Cott,* 283 N.W.2d 324, 326 (Iowa 1979)).

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401. "Evidence is relevant if a reasonable person might believe the probability of the truth of the consequential fact to be different if the person knew of the challenged evidence." *State v. Brown,* 569 N.W.2d 113, 116 (Iowa 1997) (quoting *State v. Plaster,* 424 N.W.2d 226, 229 (Iowa 1988)).

If the evidence is relevant for a legitimate purpose, the court must then assess whether the evidence's "probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 403. "'Probative value' gauges the strength and force of" the tendency of evidence "to make a consequential fact more or less probable." *State v. Plaster,* 424 N.W.2d 226, 231 (Iowa 1988). Unfairly prejudicial evidence is evidence that

> appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.

Id. (quoting 1 Jack B. Weinstein et al., *Weinstein's Evidence* ¶ 403[03], at 403-33 to 403-40 (1986)). A proper weighing of probative value and unfair prejudice requires that the court consider

> on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other hand, the degree to which the jury will probably be roused by the evidence to overmastering hostility.

State v. Wade, 467 N.W.2d 283, 284-85 (Iowa 1991) (quoting Edward W. Cleary, *McCormick on Evidence* § 190, at 453 (2d ed. 1972)). There must be clear proof that the defendant committed the prior bad acts. *Brown*, 569 N.W.2d at 117.

We first consider the trial court's conclusion that the evidence was relevant to a legitimate issue in the case.[2] We find that the July 19 incident and the circumstances leading up to it, namely Adcock's discovery of the photographs, were relevant to facts and elements in issue concerning the July 29 incident. The prior assault was relevant to Adcock's intent to seriously injure Peterson, which the State was required to prove for third-degree kidnapping and aggravated domestic abuse assault. *See State v. Haskins*, 573 N.W.2d 39, 45 (Iowa Ct. App. 1997) (finding evidence that defendant grabbed his wife's hair and

[2] We note that Adcock has raised as an issue the trial court's failure to expressly discuss and apply the balancing test required under Iowa Rule of Evidence 403. However, he did so only in part of one sentence in his brief, and he has not supported this issue with argument or authority. As such, he has not sufficiently presented this issue for our review. *See Luke v. State*, 465 N.W.2d 898, 903 (Iowa Ct. App. 1990) (stating that failure to argue or cite authority in support of an issue may be deemed a waiver of the issue).

beat her head against a car relevant to the issue of intent in an attempted murder and domestic abuse assault prosecution). This evidence was also relevant to his motive to bring a stun gun to the meeting with Peterson and to show an absence of mistake in Peterson being shocked by the stun gun. *See id.* (evidence that the defendant intentionally assaulted his wife during previous argument tended to rebut his accidental shooting argument). Adcock claimed that Peterson's injuries were inflicted accidentally as they struggled over the stun gun. Last, we find this evidence relevant to show the relationship of Adcock and Peterson. *See State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa Ct. App. 1998).

While the trial court did not expressly apply the balancing test required by Iowa Rule of Evidence 403, it implicitly found the probative value of the prior bad act evidence was not substantially outweighed by the danger of unfair prejudice. We agree. First, we find this evidence was needed, as this was a he said/she said case. Second, there was clear proof that Adcock committed the prior act. Peterson's testimony was clear and unambiguous, and Adcock's own testimony corroborated all details except striking Peterson. Third, we find the strength of the admitted evidence on the elements of confinement and intent was high. The evidence of the July 19 assault was strong to show the charged assault was part of an ongoing "breakup" of the parties' relationship, the prior assault was close in time to the charged assault, and the prior assault involved the same or similar issues concerning the parties' breakup as did the charged assault.

On the other side of the balancing process, the trial court was required to consider the degree of prejudice that would result from admission of the prior act testimony. Although evidence of the prior assault would have the potential to

unfairly prejudice the jury, we must put the potential effect of this evidence in perspective. The State did not elicit great detail about the prior assault and spent a small amount of time on this line of questioning. The prior assault was not as brutal and shocking as the charged assault and kidnapping. This is not a case where the prior assault would rouse the jury to "overmastering hostility." *See State v. Larsen,* 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) (holding that potential prejudicial effect of subsequent acts evidence was "neutralized by the equally reprehensible nature of the charged crime").

On balance, we cannot say that the trial court did not fairly weigh the probative value of the prior assault against the probable danger of admitting it. The trial court did not abuse its discretion in admitting this evidence. Accordingly, we affirm the trial court's decision to permit evidence of the prior assault.

III. ALLEGED HEARSAY.

Adcock claims that certain statements made by Dalton to Lucinda Hernandez and Peterson after the incident were inadmissible as hearsay. Hernandez testified at trial that Dalton told her Adcock bought a stun gun and he was going to use it on Peterson. Hernandez also testified that Dalton said Adcock had a gun and was going to kill Peterson and her male friend. Peterson testified that Dalton told her he saw the gun. The trial court overruled Adcock's objections to this evidence. We review the admission of hearsay evidence for the correction of errors at law. *State v. Tangie,* 616 N.W.2d 564, 568 (Iowa 2000).

The testimony of Hernandez and Peterson concerning what Dalton told them about purchasing and seeing a stun gun was hearsay as defined in Iowa Rule of Evidence 801(c). Therefore, the testimony would be inadmissible hearsay unless it comes within one of the exceptions to the hearsay rule. The trial court admitted the testimony under the excited utterance exception to the hearsay rule. Iowa R. Evid. 803(2).

We find that, even if the trial court erred in admitting this evidence, the error was harmless. For alleged errors not of a constitutional magnitude, the test of prejudice for harmless error purposes is "whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice." *State v. Traywick,* 468 N.W.2d 452, 454-55 (Iowa 1991) (quoting *State v. Massey,* 275 N.W.2d 436, 439 (Iowa 1979)). We find the evidence of Adcock's guilt was overwhelming. *See State v. Belken,* 633 N.W.2d 786, 797 (Iowa 2001) (stating that even if trial court erred in admitting evidence, the error is harmless when the State's evidence of guilt is overwhelming). Adcock threatened to kill Peterson. Witnesses saw Peterson leaning out of his Blazer. She was seen jumping out of the window head first at about the time Adcock accelerated the vehicle. Peterson was panicked and bleeding from falling on the sidewalk. Adcock admitted he left the restaurant with Peterson, and that he called her a derogatory name and told her he would take Dalton. He admitted to possessing the stun gun. Peterson's injuries suggest she was either shocked with the gun more than once or the time of the exposure was long. We affirm on this issue.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL.

Adcock asserts his trial counsel was ineffective for failing to (1) object to the testimony of Dr. Van Gorp who testified that Peterson stated Adcock had assaulted her on July 19, and (2) request a jury instruction on the issue of Adcock's prior bad act that would advise the jury regarding the proper consideration of that evidence.

Adcock is entitled to the assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, section 10 of the Iowa Constitution. The right to counsel is a right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). Because a claim of ineffective assistance of counsel implicates constitutional rights, we review de novo the totality of the circumstances surrounding counsel's representation of the defendant. *See State v. Carter,* 602 N.W.2d 818, 820 (Iowa 1999); *State v. Risdal,* 404 N.W.2d 130, 131 (Iowa 1987).

To establish an ineffective assistance of counsel claim, the defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wenmark v. State.* 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.* at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693. A strong presumption exists that counsel's performance falls within the wide range of reasonable professional assistance.

Wenmark, 602 N.W.2d at 814. The defendant has the burden of proving by a preponderance of the evidence both of the two elements of a claim of ineffective assistance. *Ledezma v. State,* 626 N.W.2d 134, 145 (Iowa 2001); *State v. Shumpert,* 554 N.W.2d 250, 254 (Iowa 1996); *Brewer v. State,* 444 N.W.2d 77, 83 (Iowa 1989).

"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)); *see also Wenmark,* 602 N.W.2d at 814. A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer,* 609 N.W.2d 526, 531 (Iowa 2000); *Cuevas v. State,* 415 N.W.2d 630, 632 (Iowa 1987).

While we often preserve ineffective assistance claims for possible postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady,* 597 N.W.2d 801, 807 (Iowa 1999). We find this record adequate to address Adcock's claims.

An ineffective assistance claim may be disposed of if the defendant fails to prove either of the two prongs of such claim. *State v. Cook,* 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we need not determine whether counsel's performance is deficient before undertaking the prejudice determination. *State v. Wissing,* 528 N.W.2d 561, 564 (Iowa 1995). In order to prove prejudice the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "A

'reasonable probability is a probability sufficient to undermine confidence in the outcome' of the defendant's trial." *State v. Bugely,* 562 N.W.2d 173, 178 (Iowa 1997) (quoting *State v. Kraus,* 397 N.W.2d 671, 673 (Iowa 1986)).

Adcock first claims trial counsel was ineffective in failing to object at trial to the testimony of Dr. Van Gorp concerning statements Peterson made to him after the July 29 assault. Dr. Van Gorp treated Peterson in the emergency room after the second assault. The prosecutor asked Dr. Van Gorp whether, while he was talking with Peterson, she told him about a previous incident when Adcock had abused her. Dr. Van Gorp answered that while he was getting Peterson's medical history from her she said Adcock had hit her in the head several times with his fists about two weeks earlier. Adcock's trial counsel did not object to this testimony.

This statement is hearsay. *See* Iowa R. App. P. 801. However, we find it admissible under Iowa Rule of Evidence 803(4) as an exception to the hearsay rule. *See* Iowa R. Evid. 803(4) (statements for purposes of medical diagnosis or treatment). The Iowa Supreme Court has adopted a two-part test for establishing the admissibility of rule 803(4) hearsay evidence: first, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. *State v. Hildreth,* 582 N.W.2d 167, 169-70 (Iowa 1998). We find that the content of Peterson's statement to Dr. Van Gorp concerning the July 19 assault is consistent with the purposes of promoting treatment, and is of a nature reasonably relied on by a physician in treatment or diagnosis. Because this evidence was admissible, an

objection to it would have been meritless. Counsel has no duty to object to such testimony. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

Additionally, even if the testimony did not fall within a hearsay exception, we find no prejudice resulted to Adcock. Peterson testified to the assault herself, and therefore Dr. Van Gorp's testimony is merely cumulative. *See State v. Wixom*, 599 N.W.2d 481, 484 (Iowa Ct. App. 1999) (stating that when evidence is merely cumulative, it cannot be said to injuriously affect the complaining party's rights). We find no merit in Adcock's first ineffective assistance claim.

Adcock's second claim of ineffective assistance is that counsel failed to request a jury instruction on the issue of Adcock's prior bad act, which would have advised the jury regarding the proper consideration of that evidence. The trial court did not give a limiting instruction and counsel did not prequest one. Nevertheless, we find there is no prejudice because there was overwhelming evidence of Adcock's guilt. We find no merit in this ineffective assistance claim.

V. CONCLUSION.

We find the evidence of Adcock's prior assault of Peterson was properly admitted under Iowa Rule of Evidence 404(b). We conclude any error in the admission of the testimony of Hernandez and Peterson concerning statements made by Dalton is harmless error. We find the record adequate to address Adcock's challenges to the effectiveness of trial counsel, and we find his claims without merit. We affirm the district court's judgment and sentence.

AFFIRMED.