IN THE COURT OF APPEALS OF IOWA

No. 8-221 / 97-1411
Filed June 24, 1998

STATE OF IOWA,
Appellee,

vs.

MICHAEL W. BAUGE,
Appellant.

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, Judge.

Michael Bauge appeals from his conviction, following a jury trial, for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Mary E. Richards, County Attorney, and Angelina M. Smith, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

PER CURIAM.

Defendant, Michael Bauge, appeals from his conviction, following a jury trial, for operating while intoxicated, first offense, in violation of Iowa Code section 321J.2 (1997). Bauge contends he was denied effective assistance of trial counsel in failing to ask the court to instruct the jury that a tape recording was being used only as impeachment evidence. We affirm.

Officer Melco observed a car driven by Bauge crossing over the center line of the highway. Officer Melco stopped the car. Bauge was arrested and charged with operating while intoxicated (OWI), first offense. At the time, Bauge was driving a car owned by his friend, Brian Williams.

At Bauge's jury trial, Williams testified Bauge had been with him the day of the arrest and was not intoxicated. Williams testified his parents phoned him and told him Bauge was arrested for OWI. He called the police on the night of the arrest about getting his car back. He spoke with Chief Nels Nord.

The State challenged Williams' version of events and suggested to Williams that he had "assumed" the OWI arrest had taken place when Bauge did not return — not that he had been told of the arrest by his parents. Williams denied this. As impeachment evidence, the State called Chief Nord and played a tape of his phone conversation with Williams that night. On the tape Williams said: "Well, I know that he got picked up because they probably got him for OWI, too." Williams also told the chief he had allowed Bauge to drive his car after Bauge had been drinking.

Bauge testified he was not intoxicated and was unable to perform some field sobriety tests because of physical disabilities. The jury found Bauge guilty.

On appeal, Bauge contends his trial counsel was ineffective in failing to ask the court to instruct the jury that the tape recording and officer Nord's testimony could only be considered as impeachment evidence, not substantive evidence because it was hearsay. The State responds defense counsel did not need to ask for a limiting instruction because another instruction told the jury to consider whether a witness has made inconsistent statements in deciding what testimony to believe. The State also asserts not requesting a limiting instruction was trial strategy designed not to call the jury's attention to the statements on the the tape.

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App.1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice a defendant must prove there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied* 459 U.S. 841, 103 S.Ct. 90, 74 L.Ed.2d 83 (1982); *State v. Nebinger*, 412

N.W.2d 180, 191-92 (Iowa App. 1987). Preserving the matter for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). However, if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim, we may resolve it in the direct appeal. *Nebinger*, 412 N.W.2d at 191-92.

The defendant asserts his trial counsel failed in an essential duty by not requesting a limiting instruction concerning the use of Williams' statements contained in the tape. As hearsay, they could not be considered to prove the truth of their content,[1] but only to demonstrate Williams made inconsistent statements about the incident. In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Because a defendant is not entitled to perfect representation, we will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989); *Fryer v. State*, 325 N.W.2d 400, 413-15 (Iowa 1982). Trial counsel need not request every possible instruction to display competency, even where an

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[1] Williams' taped statement is hearsay as a statement that Bauge was intoxicated.

instruction would otherwise be available. *Wycoff v. State*, 382 N.W.2d 462, 472 (Iowa 1986); *Frank v. State*, 376 N.W.2d 637, 640-41 (Iowa App.1985).

The defendant cites two cases in support of his claim trial counsel should have requested a jury instruction on prior inconsistent statements: *State v. Washington*, 308 N.W.2d 422, 424 (Iowa 1981) and *State v. Cuevas*, 282 N.W.2d 74, 82 (Iowa 1979). Neither case stands for the principle the defendant asserts. In *Washington*, trial counsel requested an instruction on prior inconsistent statements which the trial court denied. On appeal, the court determined such an instruction was inappropriate because the inconsistent statements all were made in court before the jury. In *dicta* the court stated "[A]n instruction on a prior inconsistent statement is warranted only if the statement was made in advance of trial." and cited *Cuevas*. In the instant case, there was no request for such an instruction and no denial by the court. In addition, the *dicta* quoted was in the context of differentiating between *prior* inconsistent statements and conflicting testimony in court. Nothing in *Washington* requires an instruction on prior inconsistent statements.

In *Cuevas*, as in *Washington*, defense counsel requested an instruction and the court refused. In *Cuevas* the supreme court did not "determine whether failure to give the requested instruction was reversible error where . . . trial court gave the general instruction on credibility of witnesses." *Cuevas*, 282 N.W.2d at 82. In the case before us, the general instruction on credibility of witnesses was given, which

includes instruction on inconsistent statements by a witness as a factor to consider in determining what testimony to believe.

In *State v. Wright*, 274 N.W.2d 307, 314 (Iowa 1979), the defendant requested a specific instruction, which the court refused. On appeal, the supreme court held the general instruction given by the court encompassed the principles of the specific instruction, and, therefore, the trial court did not err in refusing the specific instruction. The opinion cited *Upton v. Paxton*, 72 Iowa 295, 33 N.W. 773 (1887) to support the proposition a specific instruction on inconsistent statement is not required if the general instruction on weight and credibility of witnesses is sufficient. We conclude the principles announced in *Wright* and *Upton* apply in the circumstances before us. It is not error for the trial court to refuse to give a specific instruction on inconsistent statements where the general instruction given on witness credibility adequately instructs the jury. Similarly, it is not ineffective assistance of counsel for defense counsel not to request the specific instruction when the general instruction will suffice. Moreover, *Upton* and *Wright* both suggest a specific instruction may call the evidence in question to the jury's attention. In the case before us, it is unlikely Bauge would want the jury to have the statements by Williams concerning Bauge's drinking and driving brought to its attention by the court.

For the defendant to prevail in his claim trial counsel was ineffective, he must prove both that counsel failed in an essential duty and that the defendant was prejudiced. *State v. Howes*, 525 N.W.2d at 876. Because we have determined trial

counsel did not fail in an essential duty, we need not address whether the defendant was prejudiced. We find the defendant has failed to prove by a preponderance of evidence trial counsel was ineffective, we affirm the conviction and sentence of the trial court.

AFFIRMED.