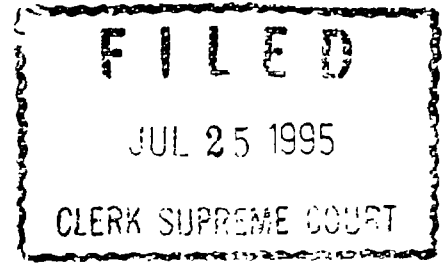


IN THE COURT OF APPEALS OF IOWA

No. 5-329 / 94-0807



STATE OF IOWA,

Appellee,

vs.

VICKI KAY ANDERSON,

Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Anderson appeals judgment and sentence, following jury trial, entered upon her conviction of first-degree robbery. **AFFIRMED.**

Kathy Goudy, Des Moines, for appellant.

Thomas J. Miller, Attorney General. Angelina M. Smith, Assistant Attorney General, and John Sarcone, County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

HUITINK, J.

At trial Anderson admitted attempting to steal a woman's purse. When passers-by intervened, they noted that Anderson was holding a switchblade knife with the blade exposed. Anderson was subdued by two men and held until police arrived.

Anderson was charged with first-degree robbery. At trial, her ninety-year-old victim testified that she did not see a knife. The persons who subdued Anderson testified that they saw the knife in Anderson's hand while the victim was on the ground. Law enforcement personnel testified that Anderson later tried to flee from the hospital.

Anderson chose to testify in her own behalf. The State orally moved to bar Anderson from testifying that the potential sentence for first-degree robbery is twenty-five years. Anderson's counsel agreed with the State that such testimony would be improper. Anderson informed the court that she ran from the hospital because one of the officers told her she would be a very old woman when she got out of prison. The district court sustained the motion in limine.

Anderson testified that she was a drug addict and she attempted to snatch the purse to purchase more crack cocaine. Anderson testified that she did not remove the knife from her pocket until she attempted to run away. She testified, and her counsel demonstrated, that the knife's safety button did not work and the blade would open even with the safety on. Anderson maintained she removed the knife from her pocket so she

would not cut herself in her attempt to run. She also testified that she ran from the hospital because she was scared.

Anderson appeals. She contends that in sustaining the State's motion in limine, the district court deprived her of a full defense. The State argues Anderson waived this claim of error because counsel failed to object and no offer of proof was made.

Anderson also contends trial counsel was ineffective in failing to (1) resist the motion in limine, (2) vigorously impeach a witness, (3) call a witness that would testify she was drinking heavily before the incident, and (4) object to the State's demonstration of the operation of the switchblade knife.

We review the district court's ruling on the motion in limine for an abuse of discretion. *State v. Wilson*, 406 N.W.2d 442, 447 (Iowa 1987). We will reverse only when we find a clear abuse of discretion. *Id.* Since Anderson's claims of ineffective assistance of counsel raise constitutional issues, we will review them de novo. *Grieman v. State*, 471 N.W.2d 811, 814 (Iowa 1991).

We first consider the State's argument Anderson failed to preserve any error resulting from the district court's ruling on the motion in limine. Our review of the record indicates Anderson did not resist the motion in limine nor did she make an offer of proof at trial. Error is waived unless a timely objection, or resistance to a motion, is made at trial. *State v. Winkvist*, 247 N.W.2d 256, 259 (Iowa 1976). Anderson has

therefore failed to preserve any error on this issue by failing to resist the State's motion in limine.

Ordinarily ineffective assistance of counsel claims are preserved for postconviction proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). They may be resolved on direct appeal, however, if the record is adequate to address the contentions asserted. *Id.* We find the record is sufficient to address Anderson's claims.

Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceedings whose result is challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). We review counsel's conduct keeping in mind a presumption of competency. *Risdal*, 404 N.W.2d at 131.

The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32. It is not necessary to determine whether counsel failed to perform an essential duty before examining the prejudice prong of an ineffectiveness claim. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1982).

When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. *State v. White*, 337 N.W.2d 517, 519 (Iowa 1983). The applicant must state the specific ways counsel's performance was inadequate and identify how competent representation probably

would have changed the result of the trial. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994) (citations omitted).

Based on our de novo review, we are unable to find merit in any of Anderson's claims. Counsel's failure to resist the State's motion in limine was not a breach of an essential duty. The motion sought to exclude evidence of the penalty for the offense with which Anderson was charged. This evidence is clearly irrelevant, and counsel had no duty to resist its exclusion. See *State v. Sackett*, 499 N.W.2d 312, 313 (Iowa App.1993). We fail to see how informing the jury of the penalty would have changed the outcome of Anderson's trial.

We are also unable to find any breach of an essential duty stemming from counsel's impeachment of a State's witness with the witness's prior felony convictions. The record indicates the witness was impeached by calling the witness's attention to the prior offenses and securing his acknowledgment. The scope of counsel's examination fell within the confines established by Iowa Rule of Evidence 609(a). Under these circumstances we are not required to examine the vigor with which impeachment was pursued.

Anderson offered evidence of her drug and alcohol use on the day the offense was committed. There was also evidence that another person told police Anderson had been drinking all day. Additional evidence from other witnesses regarding Anderson's use of alcohol would not have provided the jury with information that was not already

in the record. Counsel's failure to call a witness whose testimony is merely cumulative is not a breach of an essential duty. *Taylor v. State*, 352 N.W.2d 683, 687 (Iowa 1984).

We also reject Anderson's complaint regarding counsel's failure to object to the State's demonstration of the operation of a switchblade knife. Counsel has no duty to raise every conceivable objection. *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993). This demonstration was offered to contradict Anderson's claim the knife had inadvertently opened in her pocket. Even if counsel objected, there is no likelihood the trial court would have sustained the objection. Counsel's failure to object to the demonstration was not a breach of an essential duty nor has Anderson shown she was prejudiced by its admission.

We affirm the district court's judgment in all respects.

AFFIRMED.