

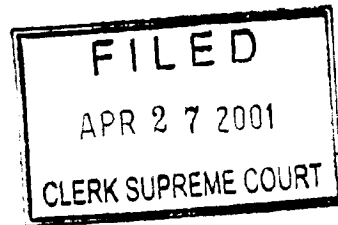
IN THE COURT OF APPEALS OF IOWA

No. 1-165 / 00-575
Filed April 27, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

HARLAN MOTT, JR.
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,
Judge.

Defendant appeals his conviction for assault by use or display of a
dangerous weapon. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, John P. Sarcone, County Attorney, and James Ward, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

ZIMMER, J.

Harlan Mott, Jr. appeals his conviction for assault by use or display of dangerous weapon in violation of Iowa Code sections 708.1 and 708.2(3) (1999). On review, Mott argues the record contains insufficient evidence to support the conviction and that trial counsel was ineffective in failing to object to testimony regarding his prior assaultive behavior. We affirm.

I. Background Facts and Proceedings. The defendant, Harlan Mott, and Clifford Baker were both employed at Custom Auto in Des Moines and lived in apartments in the Custom Auto building. On the night of October 8, 1999, Mott entered an office of Custom Auto where Baker was seated at a desk watching television. Baker testified that Mott was upset and was asking for the whereabouts of his girlfriend, Terry Hobbs. Baker told Mott he did not know Hobbs's location. He testified that Mott was speaking loudly, cussing, and appeared to believe Baker was withholding information.

While Baker was seated at the desk, he noticed Mott carrying a knife in his hand. Mott stabbed an adding machine with the knife and broke it. Mott also stabbed a desk, leaving a hole and a scratch mark. Baker testified that during this time, Mott appeared to be angry. Baker was scared by Mott's conduct.

Mott used the telephone in the office. When he was finished, Baker testified that he appeared to have calmed down. Mott then left the office. Baker did not call the police. Another employee of Custom Auto contacted the police after Baker told her what had happened.

Based on this incident, the State charged Mott with going armed with intent, assault while participating in a felony, and third-degree criminal mischief.

The trial information was later amended to charge him with assault by use or display of a dangerous weapon and fifth-degree criminal mischief. Following a jury trial, defendant was found guilty as charged. The court sentenced Mott to a term not to exceed two years on the assault charge, and thirty days for criminal mischief. Mott does not challenge his conviction for criminal mischief on appeal.

II. Sufficiency of the Evidence. Mott challenges the sufficiency of the evidence to convict him of assault by use or display of a dangerous weapon in violation of Iowa Code sections 708.1 and 708.2(3). The State argues Mott failed to preserve error on this issue.

At the close of the State's case, the defendant made a motion for judgment of acquittal. Defendant's counsel based this motion on the fact that "any temper flare-up that took place was directed at the calculator and a desk," and not Baker. On appeal, Mott argues the State failed to prove he intentionally displayed the knife toward Baker. Additionally, Mott contends there is no evidence he had the specific intent of placing Baker in fear of immediate contact. We find Mott's motion for judgment of acquittal adequately preserved these issues for appeal.

We review challenges to the sufficiency of the evidence for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will affirm a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* We view the evidence in the light most favorable to the State, but consider all of the evidence, not just the evidence that supports the verdict. *State v. Jacobs*, 607 N.W.2d 679, 682 (Iowa 2000). Circumstantial and

direct evidence are equally probative. *State v. Boley*, 456 N.W.2d 674, 679 (Iowa 1990).

Iowa Code section 708.1 allows a conviction for assault where a person "displays in a threatening manner any dangerous weapon toward another." Iowa Code § 708.1(3). Alternatively, a conviction for assault may stand where one commits "[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act." Iowa Code § 708.1(2). Both theories were submitted to the jury. Mott appeals his conviction under both.

We first address Mott's argument that the State failed to prove he intentionally displayed the knife toward Baker in a threatening manner. At trial, Baker testified as follows:

Q. He didn't display that knife at you in any manner, did he? A. No. He stabbed the desk and the adding machine and the desk. He had it in his hands, you know. No, he did not touch me with the knife or nothing.

Q. Or point it at you? A. He didn't come up to me or nothing.

Based on this testimony, Mott concludes a reasonable jury could not find his actions were directed at Baker. We disagree.

Baker testified that Mott was angry when he came in to the office demanding to know the location of Hobbs. Baker denied any such knowledge, but testified he believed Mott assumed he would know where Hobbs was. Mott then stabbed a calculator with a knife he was carrying. Mott kept the knife out while walking around the office. He then stabbed a desk that was not by where Baker was sitting. Afterwards, Mott continued to persist in his questions regarding the whereabouts of his girlfriend. His actions scared Baker. Based on

these circumstances, a reasonable jury could find Mott displayed a weapon in a threatening manner toward Baker. The fact that he did not touch Baker with the weapon or hold it directly to him is not dispositive.

Because there is sufficient evidence to convict Mott of assault by use of display of a dangerous weapon under the first theory, we need not address Mott's arguments that he did not specifically intend to place Baker in fear of immediate contact.

III. Ineffective Assistance of Counsel. Mott next contends that trial counsel was ineffective for failing to object to testimony regarding his prior assaultive behavior.

To succeed with a claim of ineffective assistance of counsel, a claimant must prove two elements. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). First, he must show that counsel failed to perform an essential duty. *Id.* Second, he must prove he was prejudiced by counsel's error. *Id.* We can affirm on appeal if either element is lacking. *Id.* A presumption exists that counsel is competent and that counsel's conduct falls within a wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). We will not second guess reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). The second prong of the test is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Davis v. State*, 520 N.W.2d 319, 321 (Iowa Ct. App. 1994) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1994)).

We review claims of ineffective assistance of counsel *de novo*. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978); *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999).

Mott called his girlfriend, Terry Hobbs, to testify on his behalf. During cross-examination, the prosecutor asked Hobbs if Mott ever got physical when he was upset. Mott's counsel did not object. Hobbs then denied that Mott became physical. The State went on to question and impeach Ms. Hobbs with specific incidents of prior assaultive behavior that she alleged against Mott in an application for a no contact order. In response, Hobbs testified her previous allegations against Mott were untrue.

Mott contends his right to effective assistance of counsel was violated when his counsel failed to object to the prosecutor's line of questioning. He argues the testimony should have been objected to as prior bad acts testimony under Iowa Rule of Evidence 404(b). In the alternative, he claims the evidence was inadmissible under Rule 403 because its probative value was outweighed by its prejudicial effect.

Iowa Rule of Evidence 404(b) states:

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.

When determining the admissibility of evidence under Rule 404(b), the key question then is whether the evidence is relevant and material to some legitimate issue other than the defendant's general propensity to commit wrongful acts. *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992).

The State submits the testimony was not 404(b) evidence because it was not offered as substantive evidence. The State maintains the testimony was actually impeachment under Rule 607 and that the prosecutor's questions were directed to establishing any motive or incentive Hobbs had for falsifying testimony.

We conclude the record before us does not provide a sufficient basis for determining counsel's effectiveness or his rationale for allowing admission of the evidence now challenged by Mott. Furthermore, the record does not fully disclose the defendant's participation in those decisions. Therefore, we decline to consider defendant's ineffective assistance of counsel claim on direct appeal.

For these reasons, we affirm Mott's conviction and reserve his ineffective assistance of counsel claim for a postconviction relief proceeding, if any is brought.

AFFIRMED.