No. 98-393. [9-244] STATE v. MACLIN

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge. **AFFIRMED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Huitink, P.J. (9 pages $3.60)

James L. Maclin, Jr. appeals his conviction and sentence, following a jury trial, for domestic abuse assault. In October 1997 James Maclin, Jr. resided with Gretchen Hague and Jennifer Mittan in a duplex in Cedar Rapids, Iowa. At trial, Hague testified that on the evening of October 3, 1997, Maclin became angry with her because he was running out of cigarettes. Hague testified Maclin struck her on the back of her neck with a video game system, poured a can of beer over her head, and threw water in her face. She further testified Maclin hit her in the face twice and threw her on her bed. Maclin also allegedly knocked her to the floor in the kitchen, kicked her in the ribs and slapped her face against his knee. Hague testified Maclin then sat her on the couch, held her arms and legs with his shins, and cut off her shoulder-length hair with scissors. Maclin raises three issues on appeal: (1) the district court erroneously allowed the State to call Mittan as a rebuttal witness; (2) the district court refused to admit opinion testimony regarding Hague's honesty; and (3) Maclin contends he was denied effective assistance of trial counsel when his attorney failed to request a proper marshaling instruction for the offense of domestic abuse assault. **OPINION HOLDS:** *Rebuttal Testimony.* As part of his case in chief, Maclin presented the testimony of his friend Larry Van Damme, who testified Maclin was with him most of the day. Van Damme stated they returned to the duplex at approximately 9:30 p.m. to retrieve cigarettes. Van Damme claimed that upon their arrival, Hague became angry and accused Maclin of having an affair with their companion, Molly Barger. He testified Hague threw an object at Maclin and stated

she was going to cut her hair short, brandishing a pair of scissors. Van Damme testified he did not see Maclin strike Hague or cut her hair. On rebuttal, the State called Mittan as a witness to counter the testimony of Van Damme. Maclin asserts the trial court erred in permitting Mittan to give testimony on rebuttal which was actually proof of the State's case in chief. The record discloses, however, that Mittan's testimony tended to impeach and contradict Van Damme's testimony regarding Maclin's whereabouts on the evening of October 3, 1997. Even though Mittan's testimony might also have been given in the State's case in chief, this did not render it inadmissible on rebuttal, since it contained elements of rebuttal. We find no abuse of discretion. *Opinion Testimony Concerning Hague's Veracity.* Maclin claims the district court erred in not allowing defense counsel to question defense witness Mary Jackson concerning her opinion of Hague's honesty. We find no abuse of discretion concerning this issue. Our review of the record indicates defense counsel failed to lay a proper foundation concerning Jackson's ability to give opinion testimony regarding Hague's truthfulness. *Ineffective Assistance of Counsel.* The jury was instructed on the elements of assault causing bodily injury as well as the lesser-included offense of assault. The jury was also provided with a special interrogatory supplemental to the jury instructions, which read: "If you find the defendant JAMES LEE MACLIN, JR. guilty of Assault Causing Bodily Injury or Assault, please answer the following interrogatory: 'Do you find that the defendant and Gretchen Hague were cohabiting at the time of the assault?'" The jury returned a verdict finding Maclin guilty of the lesser-included offense of assault. The jury also answered the special interrogatory in the affirmative, thus finding Maclin and Hague were cohabiting at the time of the assault. In accordance with the jury's findings, the district court sentenced Maclin to an enhanced five-year indeterminate term of incarceration reflective of a third or subsequent domestic abuse assault conviction. Maclin maintains his counsel was ineffective for failing to object to the court's jury instruction as to the elements of domestic abuse assault. He contends that as a result of his counsel's deficient representation, the jury was not properly instructed on all the elements of domestic abuse assault, specifically that cohabitation is a necessary element of the offense. We do not believe, based upon our review of the entire record, that a marshaling instruction including the required cohabitation element and defining cohabitation would have resulted in a different outcome. The jury could have reasonably found Maclin was cohabiting with Hague in response to the special interrogatory. Maclin has failed to demonstrate he was prejudiced by his trial counsel's failure to lodge a proper objection to the district court's instruction of the jury.