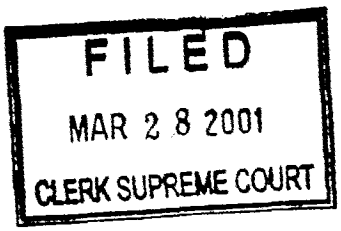
IN THE COURT OF APPEALS OF IOWA

No. 1-022 / 00-0456
Filed March 28, 2001



MONTEZ SHORTRIDGE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Montez Shortridge appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Frank Burnette of Burnette & Kelley, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Roxann Ryan and Sharon K. Hall, Assistant Attorneys General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Montez Shortridge appeals from the denial of his application for postconviction relief. He asserts claims of ineffective assistance of counsel against both his trial counsel and his appellate counsel. We affirm.

I. Background Facts and Proceedings. On the evening of April 19, 1994, Michelle Wells was killed in a motor vehicle accident in downtown Des Moines, Iowa. At the time of the accident, she was a passenger in a vehicle driven by Linda Cutler. Cutler was being chased by a vehicle driven by Shortridge at speeds in excess of ninety miles per hour through the streets of downtown Des Moines when the crash occurred. The State charged Shortridge with vehicular homicide in connection with the death of Wells.

Prior to the incident, Shortridge and Cutler had lived together for approximately fourteen months. Cutler worked as a prostitute in Shortridge's out-call business and was his girlfriend. Evidence presented at trial established a history of vicious physical abuse inflicted upon Cutler by Shortridge. The abuse resulted in several injuries, including broken ribs, crushed facial bones, and a gunshot wound inflicted less than four days before the accident. During the week before the accident, Cutler moved out of the apartment she shared with Shortridge and was hiding from him. On the evening of April 19, 1994, Cutler decided to give a friend a ride home, believing she would be safe because Shortridge was out of town. However, Shortridge was in Des Moines and had been actively looking for Cutler that day. On the way to Cutler's friend's house, Shortridge saw Cutler's car and began to follow her. Shortridge and an

acquaintance driving another car attempted to block Cutler's car from proceeding in the direction she was headed, and then got out of their cars to approach Cutler. Cutler put her car in reverse and started driving in the opposite direction toward the downtown Des Moines police station. Shortridge pursued her in his car reaching speeds of more than ninety miles per hour. Cutler lost control of her car in an intersection in downtown Des Moines when another car struck her car after she ran a red light. Cutler's car struck a telephone pole, causing fatal injuries to Wells. Witnesses at the scene testified Shortridge's vehicle came to a stop near the crash site. After stopping, Shortridge got out of his car and walked toward Cutler's car. He then got back in his car and sped away from the scene. Cutler testified Shortridge walked up to her car, punched her in the face, and called her a "stupid bitch."

A jury found Shortridge guilty of vehicular homicide on February 27, 1995. This court affirmed his convictions on direct appeal on August 30, 1996. *See State v. Shortridge*, 555 N.W.2d 843, 846 (Iowa Ct. App. 1996). Thereafter, Shortridge filed an application for postconviction relief alleging he had received ineffective assistance from both trial and appellate counsel. On February 9, 2000, the district court denied his application on all grounds. Shortridge appeals asserting the district court erred in denying his application for postconviction relief because: (1) appellate counsel was ineffective in failing to raise several issues on appeal including an ex post facto claim and the ineffectiveness of trial counsel concerning the admission of evidence of prior bad acts and opinion testimony; (2) trial counsel was ineffective in failing to preserve the ex post facto claim, failing to

preserve claims relating to the prior bad acts evidence, failing to object to opinion testimony, and failing to object to prosecutorial misconduct; (3) admission of a police officer's testimony vouching for the credibility of a State's witness was plain error; and (4) the district court used an improper standard in ruling on his application for postconviction relief.

II. Standard of Review. The review of postconviction relief proceedings can be for errors at law or de novo. *Berryhill v. State,* 603 N.W.2d 243, 244-45 (Iowa 1999). When the action implicates constitutional issues, our review is de novo. *Key v. State,* 577 N.W.2d 637, 639 (Iowa 1998). When no constitutional safeguards are at issue, our review is for errors at law. *Fenske v. State,* 592 N.W.2d 333, 338 (Iowa 1999).

III. Alleged Ineffective Assistance of Counsel. An applicant alleging ineffective assistance of counsel bears the burden of proving his claim by a preponderance of the evidence. *See State v. Morgan,* 559 N.W.2d 603, 612 (Iowa 1997). Our ultimate concern is with the "fundamental fairness of the proceedings whose result is being challenged." *Strickland v. Washington,* 446 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). We must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. A defendant receives ineffective assistance of counsel when: (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely,* 562 N.W.2d 173, 178 (Iowa 1997). The applicant establishes prejudice by showing "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins,* 576 N.W.2d 374, 378 (Iowa 1998).

A. Ex Post Facto Claim. The State charged Shortridge with vehicular homicide pursuant to Iowa Code section 707.6A(1)(b) (1993).[1] Shortridge contends the district court likened his behavior on the night of the accident to drag racing, an act that was not prohibited by section 707.6A(1)(b). He argues neither the language of the statute nor any appellate court interpretation of it issued prior to the date he allegedly committed the crime, April 19, 1994, made it applicable to transactions or occurrences similar to the facts of the present case. Because Cutler and Shortridge were not engaged in drag racing at the time of the fatal crash and could not reasonably foresee the statute might be interpreted as prohibiting behavior other than drag racing, Shortridge claims the district court erred by categorizing his actions as drag racing in this case. He claims the district court "enlarged" in an unforeseeable way the universe of conduct to which section 707.6A(1)(b) applies and thereby violated the constitutional principles prohibiting ex post facto laws.

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[1] The number of the code section has caused some apparent confusion in this case. Initially, a grand jury returned an indictment under Iowa Code section 707.6A(2) (1993) for "driving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property." However, in the 1993 Code, section 707.6A(2) did not contain the "reckless manner" language, rather, section 707.6A(1)(b) did. Immediately before trial, the State amended the indictment to correct this error and to charge Shortridge under section 707.6A(1)(b). Adding to the confusion on appeal, section 707.6A was later amended and now the "reckless manner" language is contained in section 707.6A(2)(a). *See* Iowa Code § 707.6A(2)(a) (2001). All citations in this opinion are to the 1993 version of the statute as stated in section 707.6A(1)(b) (1993).

The United States and Iowa Constitutions forbid ex post facto laws. *See* U.S. Const. art. I, § 10, cl. 1; Iowa Const. art. I, § 21. "[L]aws that impose punishment for an act that was not punishable when committed or that increase the quantum of punishment provided for the crime when it was committed" violate this constitutional provision. *State v. Stoen,* 596 N.W.2d 504, 507 (Iowa 1999) (quoting *State v. Pickens,* 558 N.W.2d 396, 397 (Iowa 1997)). Shortridge cites *Bouie v. City of Columbia* in support of his contentions. *See Bouie v. City of Columbia,* 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). In *Bouie,* demonstrators at a sit-in sat down at an Eckerd's lunch counter in Columbia, South Carolina, in March of 1960. Although Eckerd's permitted black and white customers to shop in other departments of the store, it denied black people access to its lunch counter. Two black college students took seats in a booth and waited for service. An employee of the establishment then placed a "no trespassing" sign in the area where the students were seated. When the students refused to leave after being asked to do so by police officers, they were arrested and convicted of violation of a trespass statute. The South Carolina Supreme Court ruled, although the statute did not expressly authorize prosecution of one who refuses to leave a public establishment after being directed to do so, the meaning of the enactment was in fact broad enough to proscribe the defendants' behavior.

The United States Supreme Court reversed the state supreme court's decision on the ground the narrow and precise language of the statute had been unforeseeably and retroactively expanded by judicial construction in violation of

the Due Process Clause. *Id.*, at 362, 84 S. Ct. at 1707, 12 L. Ed. 2d at 904-05. The Court noted the statute expressly prohibited only "entry upon the lands of another . . . after notice from the owner . . . prohibiting such entry . . . ." *Id.*, at 349-50, 84 S. Ct. at 1700, 12 L. Ed. 2d at 897. The Court stated, "There was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave." *Id.*, at 355, 84 S. Ct. at 1703, 12 L. Ed. 2d at 898. The prior decisions of the state supreme court likewise provided no warning for they had consistently required proof of notice to the defendant *before entry* in order to sustain a conviction. *Id.*, at 356, 84 S. Ct. at 1704, 12 L. Ed. 2d at 901 (emphasis added). Moreover, the Court reasoned: (1) the students were not warned before entry that their entrance was prohibited by the proprietor; and (2) the statute's narrow and precise language did not give "fair warning" the students' refusal to leave the lunch counter after being requested to do so was prohibited by the statute. *Id.*, at 361, 84 S. Ct. at 1707, 12 L. Ed. 2d at 904.

In the present case, Shortridge was charged with violation of Iowa Code section 707.6(1)(b), which provided in relevant part:

> 1. A person commits a class "C" felony when the person unintentionally causes the death of another by either of the following means:
> *****
> *b.* Driving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property, in violation of section 321.277.

Iowa Code § 707.6A(1)(b). Shortridge contends the statute failed to give him fair warning, consistent with the rule promulgated in *Bouie*, that his conduct on the

evening of April 19, 1994, was illegal. We disagree. The State presented evidence Shortridge recklessly drove his vehicle at speeds in excess of ninety miles per hour through the streets of downtown Des Moines while pursuing another vehicle. Additional evidence established his conduct was willful, including evidence he was driving around the city in search of Cutler, he had attempted to block Cutler's route and stop her from getting away from him, he forced his passenger in the car to stay with him while he was in pursuit of Cutler, and he instructed an acquaintance of his to follow him in another car in search of Cutler. His passenger testified Shortridge brought a hammer and a knife with him during his search for Cutler in order to break her car windows and slash her car's tires when he found her. Cutler testified Shortridge approached her vehicle and punched her before leaving the scene of the crash without giving aid to the victims. We reject as frivolous the assertion Shortridge's conduct was not in wanton disregard for the safety of all motorists using the city streets at the time and place of the incident and, as such, was illegal pursuant to the provisions of section 707.6A(1)(b).

Shortridge also contends he was not given fair warning because the decisions of the Iowa appellate courts had not applied Iowa Code section 707.6A(1)(b) in situations similar to the one presented here. We first note our appellate courts have applied the statute in several contexts. *See State v. Hubka*, 480 N.W.2d 867 (Iowa 1992) (involving an intoxicated driver convicted of vehicular homicide after causing an automobile collision in which two children were killed.); *State v. Wullner*, 401 N.W.2d 214 (Iowa Ct. App. 1986) (concerning

a driver who was under the influence of alcohol convicted of vehicular homicide after collision resulting in the death of a cyclist.). Shortridge cannot succeed on his claim he did not have fair warning his conduct was illegal at the time he committed the crime. The district court's characterization of the incident as drag racing, even if it was a mistaken characterization, does not make Shortridge's conduct any less reckless, willful, or wanton. We conclude trial counsel was not ineffective for failing to raise a frivolous claim that Shortridge's conviction resulted in a violation of the ex post facto clause of the Iowa and United States Constitutions. Because we have determined trial counsel was not ineffective for failing to raise the issue, we also conclude appellate counsel was not ineffective for failing to raise the same issue on direct appeal.

B. Prior Bad Acts Claim. Shortridge contends appellate counsel was ineffective for failing to raise evidentiary errors made by the district court during the criminal trial. He points to the admission of evidence he was a pimp and had engaged in prior assaultive conduct against Cutler, who worked for him as a prostitute. The applicable authorities require us to first analyze whether the challenged evidence was relevant; and, if relevant, whether it should nonetheless be excluded because its probative value is outweighed by the prejudice it engenders. *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994). The evidence Shortridge had functioned as Cutler's pimp was relevant to prove the relationship between them and Shortridge's motive for pursuing her at high speed just prior to the fatal crash. Similarly, evidence tending to prove Shortridge had brutally beaten and shot Cutler during the month before April 19, 1994, was relevant to

prove why he was again chasing her at the time of the crash. In addition, both the evidence Shortridge was Cutler's pimp and evidence he had recently brutally beat her was relevant to establish a factual basis for her fear of Shortridge and her reasons for fleeing from Shortridge on the evening in question. Trial counsel objected that the evidence violated Iowa Rule of Evidence 404(b). The district court ruled the evidence was admissible to establish the legitimacy of Cutler's fear and gave a limiting instruction consistent with the ruling. This evidence was clearly relevant to issues in the case.

Shortridge next contends the proof of the prior bad acts was not sufficient to justify admission in evidence. Commission of the prior acts need not be established beyond a reasonable doubt, but "clear proof the individual against whom the evidence is offered committed the prior crime" is required. *State v. Roth*, 403 N.W.2d 762, 765 (Iowa 1987). The purpose of the clear proof rule is to prevent jury speculation or inference drawn on mere suspicion. *State v. Alderman,* 578 N.W.2d 255, 258 (Iowa Ct. App. 1998). Shortridge specifically asserts Cutler was motivated to lie about the beatings at trial in order to receive a favorable plea bargain with the State and was less likely to be telling the truth about the abuse. Additionally, before trial during her visits to the hospital for the injuries, she never indicated to her health care providers she was a victim of domestic violence and usually told them she had caused the injuries to herself. Corroboration of other crimes, wrongs, or acts is not required. *State v. Jones,* 464 N.W.2d 241, 243 (Iowa 1990). The evidence Shortridge was a pimp was testified to by several witnesses, including Cutler and a former client of

Shortridge's out-call business. Cutler testified in detail regarding the injuries she sustained while living with Shortridge. She indicated because of the injuries, she was extremely afraid of him. In addition, she testified she lied to medical care providers about the injuries because Shortridge told her he would harm her family if she reported the abuse. In many instances, Cutler indicated Shortridge drove her to the hospital after beating her and waited outside in his car until she came out in order to prevent hospital personnel from apprehending him if Cutler told them of the abuse. Other witnesses also testified as to the injuries they observed on Cutler during her relationship with Shortridge. We conclude there is clear proof of both the evidence Shortridge was Cutler's pimp and he abused her causing multiple injuries during the course of their relationship.

Our inquiry does not end with this determination. As noted, we must also determine whether the probative value of the challenged evidence substantially outweighs its potential for unfair prejudice. Iowa R. Evid. 403; *State v. Casady,* 491 N.W.2d 782, 785 (Iowa 1992). In making this determination we consider the following factors:

> (1) the actual need for the evidence in view of the issues and the other available evidence, (2) the strength of the evidence showing that the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and (4) the degree to which the jury will probably be roused by the evidence improperly.

State v. Howell, 557 N.W.2d 908, 912 (Iowa Ct. App. 1996). "[R]ule 403 does not provide protection against all evidence that is prejudicial or detrimental to one's case; it only provides protection against evidence that is *unfairly* prejudicial." *State v. Plaster,* 424 N.W.2d 226, 231 (Iowa 1998) (emphasis in original).

The State had an actual need for the pimping and domestic abuse evidence against Shortridge. The evidence was necessary to refute Shortridge's defense his actions were not the proximate cause of Wells's death and his assertion Cutler actually caused the death by her reckless driving alone. The pimping and abuse evidence establishes a factual basis for Cutler's fear and her reasons for driving in an unsafe manner. As discussed above, strong evidence in the record proved Shortridge committed acts of violence against Cutler and acted as her pimp. This evidence tended to prove the legitimacy of Cutler's fear and Shortridge's motive for pursuing her at extreme speed. We agree with Shortridge that this evidence is certainly provocative and damaging to his defense. However, we find the probative value of the evidence was not substantially outweighed by the prejudice to Shortridge from its admission.

In view of our finding objections to the evidence under Iowa Rules of Evidence 404(b) and 403 would have had no merit, we conclude Shortridge was not prejudiced by appellate counsel's failure to raise the evidentiary issues on direct appeal. We affirm the district court on this issue.

C. Prosecutorial Misconduct Claim. The prosecutor's closing argument analogized Shortridge's treatment of Cutler to the mistreatment inflicted by slave owners upon their slaves in ancient Egypt, Israel, Greece, and in nineteenth century America. The prosecutor noted when slaves in those societies attempted to escape, their owner would repeatedly bring them back and inflict injury on them. Trial counsel interposed no objection to this argument but responded to it in his own closing argument. Shortridge contends trial counsel

was ineffective for failing to object at trial and appellate counsel failed in an essential duty by not raising the issue on appeal.

Closing arguments allow counsel to draw conclusions from the evidence introduced at trial and argue all permissible inferences derived from such evidence. *State v. Phillips,* 226 N.W.2d 16, 19 (Iowa 1975). Counsel should be given latitude to make comments and arguments within the framework of the legal issues and evidence. *See State v. Thornton,* 498 N.W.2d 670, 676 (Iowa 1993). On the other hand, counsel has no right to create evidence by argument or express personal beliefs. *State v. Melk,* 543 N.W.2d 297, 301 (Iowa Ct. App. 1995). Prosecutorial misconduct warrants a new trial when it is "so prejudicial as to deprive the defendant of a fair trial." *State v. Pace,* 602 N.W.2d 764, 774 (Iowa 1999) (quoting *State v. Lyons,* 210 N.W.2d 543, 549 (Iowa 1973)). To prevail on a prosecutorial misconduct claim, the petitioner must prove misconduct and that he was prejudiced by it. *Wycoff v. State,* 382 N.W.2d 462, 466 (Iowa 1986). Whether the incident was isolated or one of many is relevant; prejudice results more readily from persistent efforts to place prejudicial evidence before the jury. *State v. Greene,* 592 N.W.2d 24, 32 (Iowa 1999). When determining whether any prejudice resulted from the prosecutorial misconduct, such that the defendant was deprived of a fair trial, we "consider the whole trial, including the court's admonition to the jury." *State v. Anderson,* 448 N.W.2d 32, 33 (Iowa 1989). We also consider whether the evidence against the defendant is strong. *See id.*

In the present case, although we do not encourage the type of comment made by the prosecutor, the remarks were isolated within the closing argument and not indicative of a continuing effort throughout the entire trial to inject prejudicial material before the jury. It is permissible for counsel to indulge in illustrations and metaphorical allusions during closing arguments. *See State v. Blanks,* 479 N.W.2d 601, 604 (Iowa Ct. App. 1991). The statements concerning Shortridge's treatment of Cutler and its similarity to the treatment of slaves had a foundation in the evidence and were relevant on the issue of Cutler's fear of Shortridge and his motive in chasing her on the night of the accident. *See State v. Trudo,* 253 N.W.2d 101, 106 (Iowa 1977). Shortridge has not shown any prejudice resulting from the prosecutor's statements deprived him of a fair trial.

IV. Admission of Police Testimony. Shortridge contends both trial and appellate counsel were ineffective for failing to challenge the district court's admission of the testimony of Douglas Harvey, a police officer who investigated the shooting of Cutler, which occurred less than four days before the incident in question. Harvey testified during his investigation of the shooting, Cutler told him she had accidentally shot herself in the shoulder while playing with a gun. At trial, she testified instead that Shortridge shot her, and conceded her earlier story about an accidental shooting was false. Without objection by Shortridge's trial counsel, Harvey testified after investigating the shooting, he did not believe Cutler's story about an accidental shooting. He further testified without objection, in his opinion, Shortridge inflicted the gunshot wound.

Shortridge contends Harvey's testimony was inadmissible "vouching" which "directly bore upon guilt or innocence." He further claims the testimony was particularly prejudicial because it was offered to support the weak testimony of Cutler whose testimony was substantially impeached on cross-examination. Although trial counsel did not object to the testimony, Shortridge claims his appellate counsel should still have raised the issue under the "plain error" rule. He acknowledges our court does not recognize this rule to excuse the failure to preserve even constitutional issues. *State v. McCright,* 569 N.W.2d 605, 607 (Iowa 1997).

In order to succeed on his claims of ineffective assistance of counsel, Shortridge must show he was prejudiced as a result of the failure of counsel to perform an essential duty. *See State v. Wemark,* 602 N.W.2d 810, 815 (Iowa 1999). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Query,* 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). Even if we assume for the purposes of analysis trial counsel had a duty to object to Harvey's testimony, and his appellate counsel had a duty to raise trial counsel's failure to object as a ground of ineffectiveness, Shortridge's claim fails because he has not shown the requisite prejudice. Several witnesses, including Cutler, testified as to Cutler's various injuries during the course of her relationship with Shortridge. The witnesses testified they believed Shortridge was responsible for inflicting those injuries. The evidence of Shortridge's guilt of the charged crime was overwhelming. After a thorough review of the record, we find no reasonable probability, but for trial and appellate counsel's claimed errors,

the result of the proceeding would have been different. Accordingly, we affirm on this issue.

V. Standard for Postconviction Relief. Shortridge contends the district court erred in concluding he must prove his claim for postconviction relief by a preponderance of the evidence. He urges us to correct this error on de novo review by finding he met his burden to prove by a reasonable probability the result of the criminal trial would have been different or our confidence in the outcome is sufficiently undermined.

We agree with Shortridge's assertion the United States Supreme Court has delineated the burden of proof when considering the prejudice prong of an ineffective assistance of counsel claim as follows:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L. Ed. 2d at 698. However, Shortridge's assertion this standard applies to both prongs of an ineffective assistance of counsel claim is mistaken; the standard only applies to the prejudice prong. Although the United States Supreme Court expressly rejected the preponderance of the evidence standard for evaluating the prejudice prong in *Strickland*,[2] our supreme court has repeatedly held a postconviction relief applicant has the burden to prove both prongs of an ineffective assistance of counsel claim by a preponderance of the evidence. *See Collins v. State,* 588 N.W.2d 399, 402 (Iowa 1998); *Irving v. State,* 533 N.W.2d 538, 540 (Iowa 1995);

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[2] *See id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989); *Hall v. State*, 360 N.W.2d 836, 838 (Iowa 1985); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984); *State v. Miles*, 344 N.W.2d 231, 233-35 (Iowa 1984). In its order denying Shortridge's application for postconviction relief, the district court concluded he had failed to prove either prong by a preponderance of the evidence, which is consistent with Iowa law. We conclude Shortridge cannot prevail on his claim because, under either the "preponderance of the evidence" standard or the "reasonable probability" standard, he has not shown the result of the proceedings against him would have been different. Therefore, we affirm the district court's denial of Shortridge's application for postconviction relief.

AFFIRMED.

Streit, P.J., concurs; Vaitheswaran, J., concurs in part and dissents in part.

VAITHESWARAN, J. (concurring in part and dissenting in part)

I respectfully dissent from that portion of the majority's opinion holding Shortridge was not prejudiced by appellate counsel's failure to challenge the admission of prior bad acts evidence. The evidence was of two types: (1) evidence Shortridge physically abused Cutler and (2) evidence Shortridge was Cutler's pimp. While I agree with the majority that this evidence was relevant to establish a factual basis for Cutler's fear of Shortridge, I disagree that the probative value of most of the evidence outweighed its prejudicial effect.

Among the factors to be considered in weighing probative value versus prejudicial effect are (1) the need for the evidence in view of the issues and the other available evidence and (2) the degree to which the jury will probably be roused by the evidence improperly. *State v. Howell*, 557 N.W.2d 908, 910 (Iowa Ct. App. 1996). I would conclude both factors militated against admission of most of the prior bad acts evidence.

Physical Abuse Evidence. Numerous witnesses testified concerning injuries Cutler sustained at the hands of Shortridge. One woman testified Cutler had a crushed face, broken fingers and a bullet wound in her arm or shoulder. Another testified to seeing scars on her face and said he knew she had been shot and had her finger broken by Shortridge. A third testified Cutler walked with a limp, wore a cast and sustained cracked ribs. A police officer testified he observed a bullet wound on Cutler and opined Shortridge was the perpetrator. Finally, Cutler herself graphically described Shortridge's abusive tactics over the course of their fourteen-month relationship.

Considering the need for all this evidence in light of other available evidence, I agree that a limited amount of the most probative testimony of prior abuse was necessary to establish a foundation for Cutler's fear of Shortridge. The evidence that was admitted, however, went well beyond what was required for this purpose. Therefore, the first factor favors the exclusion of most of the evidence. Additionally, I believe the repeated references by numerous witnesses about severe and unpunished domestic abuse could only have inflamed the jury's passions and prompted the jury members to punish Shortridge for crimes unrelated to the crime for which he stood trial. This is precisely what rule 404(b) is designed to prevent. *See State v. Castaneda*, 621 N.W.2d 435, 439-440 (Iowa 2001). Therefore, I would find the vast majority of the physical abuse evidence should have been excluded as unfairly prejudicial.

Pimping Evidence. The record also contains repeated, graphic, and often gratuitous references to Cutler's prostitution activities and Shortridge's role as her pimp. The State argues this evidence was necessary to establish Shortridge's control over Cutler and, therefore, her fear of him. However, these facts were already established without the pimping/prostitution evidence. Cutler's testimony alone, without reference to her employment relationship with Shortridge, compellingly established Shortridge's control over her. Therefore, I believe the pimping/prostitution testimony was entirely unnecessary because it was cumulative on the issue of control.

Additionally, I would conclude the evidence only incrementally furthered the State's attempts to establish Cutler's fear of Shortridge. The State called a

customer of Cutler to testify about his experiences with her. He testified as to where he met Cutler and what he did with her, and only briefly mentioned Shortridge as a person seen exiting Cutler's motel room as he entered. The probative value of this evidence to establish control, in my view, was miniscule. The State also elicited testimony from a friend of Cutler's that the friend waited in a bathroom as Cutler performed sex in the bedroom and then flicked the blinds to signal to Shortridge that he could come and get the money. Again, this evidence, while minimally probative on the issue of control, was not needed in light of other evidence on this issue.

Balancing the limited probative value against the prejudicial effect, I would conclude the pimping/prostitution evidence should not have been admitted. While the evidence may tangentially have established Shortridge's control over Cutler, the inflammatory nature of the testimony cannot be understated. In *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995) individuals testified to the victim's extreme fear of the defendant because of his involvement with gangs and drugs. The court held the evidence should have been excluded because it appealed to the jury' s instinct to punish gang members. *Id.* at 562. I believe the same is true here. The pimping evidence could only have served to trigger the jury's instinct to punish Shortridge for an uncharged crime.

I also do not believe the court's limiting instruction cured the problem. The court admonished the jury to only consider the bad acts evidence on the issue of Cutler's fear of Shortridge. However, this evidence so permeated the trial that I believe the admonishment did not mitigate the potential that the jury would

convict Shortridge for impermissible reasons. *See State v. Alderman*, 578 N.W.2d 255, 259 (Iowa Ct. App. 1998).

For these reasons, I would conclude most of the physical abuse evidence and all the prostitute/pimping evidence was unfairly prejudicial and should have been excluded. Accordingly, I would further conclude Shortridge established his ineffective assistance of counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984).