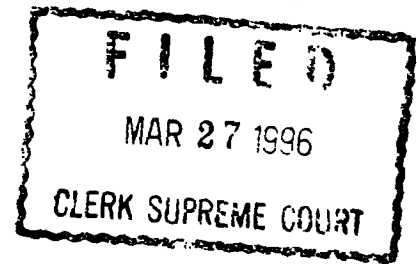


IN THE COURT OF APPEALS OF IOWA

No. 6-017 / 95-0130

000249



STATE OF IOWA,

Appellee,

vs.

JOHN J. HOYNE,

Appellant.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan,
Judge.

John Hoyne appeals his conviction and sentence for second-degree criminal
mischief and tampering with a witness. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney
General, Fred H. McCaw, County Attorney, and Mark Hostager, Assistant County
Attorney, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ.

HUITINK, J.

John J. Hoyne appeals his conviction and sentence for second-degree criminal mischief and tampering with a witness in violation of Iowa Code sections 716.1, 716.4 and 720.4 (1995). We affirm.

John Hoyne was charged by trial information with second-degree criminal mischief (count I) and tampering with a witness (count II) following an incident in which a boat owned by Steven and Marcia Hahlen was sunk while docked in a marina in Bellevue. At the time of the incident, Marcia Hahlen was serving as an intermediary in a disagreement between Hoyne and his ex-wife, Elizabeth, and it was alleged Hoyne sank the Hahlens' boat in an effort to harass and intimidate Marcia.

Hoyne is a self-employed general contractor. While he was in jail awaiting trial, he wrote a letter to his assistant, John Meier. The letter was addressed to Meier at Hoyne's residence and was confiscated by Dubuque County Jail officials. That letter reads as follows:

Jon,

I want you to call on this young couple who have expressed a special interest in having me re-do their home (I love the location easy to get at).

When calling them, call about 9 p.m. ask for the girl by name, (She's the one who has to make the decision). Explain that in your offer this is a one time chance and that she should share its content with nobody (total confidential) since were [sic] giving them this opportunity to improve their lively hood [sic] at such a cheap price.

Tell her she witnessed the quality Ive [sic] done in her neighborhood and that she will get the same treatment.

Tell her we have a very large crew and that we can take care of all her relatives [sic] and friends when its [sic] not possible to work on her stuff.

Tell her I'm qualified to make major modification on everything from automobiles to their home to their lives (I should have been a Doctor dont [sic] you think).

Leave no doubt in her mind that once I start a project -- I never stop working on it til it's done -- and nobody can stop me because I enjoy what I'm doin[g]. I would love doing this job myself but I am currently being detained, I hope you can do this favor for me -- If you need an advance just ask -- you know I have, -- and would do the same for you.

Here the most important thing to remember [is] High Pressure tactics to ensure we get the Job. Tell them (her) she's got 24 hour[s] no more to decide and that you will call back tomorrow at same time. Also important have her call the other contractor she contacted (I dont [sic] get along with them, they stink like pigs) and tell them she didn't see enough of their project that night because it was [too] rainy and dark and that her conscense [sic] is not satisfied to make a good judgment at this time so she is not going to be any help to them. Well this is going to be a one time chance. Write your little presentation out so that you cover all the areas I've pointed out -- Make sure to make a good first impression and I believe they will go along with my plans. Young people like to be heros [sic] and when the[y] find out their [sic] in over [their] head they find that being a hero is no good. Thanks.

John

Prior to Hoyne's trial, defense counsel moved in limine to exclude the letter as irrelevant and unduly prejudicial. The State argued in response that the letter, although written in **general** terms, was an effort to intimidate two eyewitnesses to the incident from **testifying** at trial. As a result, the State argued that the letter was relevant to show a consciousness of guilt and that the letter, when read in context, constituted an admission by Hoyne to having been at the marina and responsible for sinking the Hahlens' boat.

At the start of Hoyne's trial, the court initially sustained the motion in limine on the basis it was character evidence as to the charge of witness tampering. The court later overruled its initial decision on the motion, determining the letter was admissible as an admission regarding the criminal mischief charge. As a result, the court admitted the letter for the limited purpose of showing an admission to criminal mischief and prohibited the State from using the evidence to support the witness tampering charge.

The jury found Hoyne guilty of criminal mischief and tampering with a witness. The district court sentenced Hoyne to two concurrent prison terms not exceeding five years (count I) and two years (count II), ordering them to run consecutive to any other sentences he may receive. Hoyne appeals.

Hoyne contends the district court abused its discretion by admitting the letter into evidence. He argues that the letter was both irrelevant and highly prejudicial.

Our review is for correction of errors of law. Iowa R. App. P. 4. On this evidentiary issue, we review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

Iowa Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence.

The test for relevancy is whether a reasonable person might believe the probability of the consequential fact to be different if he or she knew of the proffered evidence. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988).

Applying this standard, we find Hoyne's letter was relevant because it allowed the jury to infer Hoyne's consciousness of his guilt to criminal mischief. When read in context, the letter suggests Hoyne's intention to intimidate Laura Kelley and Lloyd Herman who witnessed the boat-sinking incident and were, presumably, the "young couple" referred to in Hoyne's letter. Based on Hoyne's apparent intention to intimidate Kelley and Herman, the letter would allow the jury to conclude Hoyne was aware of his guilt and sought to eliminate eyewitness testimony implicating him.

Hoyne's letter was also relevant because it was an implied admission of his guilt to criminal mischief. An admission is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his or her guilt. *State v. Olson*, 260 Iowa 311, 149 N.W.2d 132, 136 (Iowa 1967). Hoyne's letter stated: "Tell her she witnessed the quality work Ive [sic] done in her neighborhood and that she will get the same treatment." When this statement is read in context, a reasonable juror could interpret Hoyne's words as an acknowledgment that he was responsible for damaging Hahlens' boat and that he was threatening Laura Kelley with "the same treatment."

Notwithstanding the letter's relevance, Hoyne contends the district court should not have admitted the letter because it was unduly prejudicial. *See* Iowa R. Evid. 403. We, however, disagree. As stated above, Hoyne's letter was highly probative of his guilt to the criminal mischief charge and could have been construed as an admission to sinking the Hahlens' boat. At the same time, the letter's prejudicial effect was minimal because it was admitted for the limited purpose of showing Hoyne's admission to criminal mischief. The district court specifically prohibited use of the letter as character evidence or as evidence supporting the witness tampering charges. In light of these limitations, we conclude the letter's probative value outweighed any resulting prejudice to Hoyne.

Hoyne further contends he was denied effective assistance of counsel. He argues his trial counsel was ineffective because he failed to file a notice of alibi defense, failed to undergo an adequate explanation, failed to request a limiting instruction with regard to Hoyne's letter, and elicited evidence of a nonimpeachable felony from Hoyne during direct examination. Because Hoyne's ineffective assistance claim implicates his constitutional right to counsel, we review it *de novo*. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980).

Hoyne's ineffective assistance of counsel claims come to us on direct appeal. Generally, we will not decide such claims on direct appeal as we prefer to reserve them for postconviction proceedings where counsel has an opportunity to respond. *State v.*

Taylor, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference if the record is adequate to evaluate appellant's claims. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982). Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claims for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We find that the record is inadequate for us to fully evaluate Hoyne's claims absent counsel's explanation for his conduct. Accordingly, we preserve Hoyne's ineffective assistance claims for postconviction proceedings. We affirm the decision of the district court.

AFFIRMED.