IN THE COURT OF APPEALS OF IOWA

No. 0-602 / 99-1578
Filed November 8, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN EDWARD MICHAEL,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Leo. F. Connolly, Judge.

Defendant appeals from his conviction for aggravated domestic assault. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Richard Crowl, County Attorney, and Christine M. DeLorme, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Hecht, JJ.

HECHT, J.

The defendant-appellant, Brian Michael, appeals his conviction for domestic abuse assault. He claims the court erred in allowing the State to amend the trial information after the close of all evidence. He also claims he received ineffective assistance of counsel because his lawyer did not object to part of a marshalling instruction to the jury. We affirm.

I. District Court Proceedings. The defendant was charged with domestic abuse assault with the intent to inflict serious injury in violation of Iowa Code sections 708.1(1)[1] and 708.2A(2)(c)[2] (1999). The State alleged he drove his van toward his former spouse, Peggy Rose, while she was walking, and she had to run off the side of the road to avoid being injured. After the close of the evidence, the State moved to amend its trial information to allege the use or

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Iowa Code section 708.1 provides, in pertinent part:

> A person commits an assault when, without justification, the person does any of the following:
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> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> 2. Any 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.
>
> 3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1 (1999).

[2] Iowa Code section 708.2A(2)(c) provides, in pertinent part:

> 2. On a first offense of domestic abuse assault, the person commits:
>
> * * *
>
> c. An aggravated misdemeanor, if the domestic abuse assault is committed with the intent to inflict a serious injury upon another, or if the person uses or displays a dangerous weapon in connection with the assault.

Iowa Code § 708.2A(2)(c).

display of a dangerous weapon, the van. The court allowed the amendment over the defendant's objection. In instructing the jury, the court gave a marshalling instruction which included alternative formulations of assault: (1) the defendant did an act which was intended to place Rose in fear of immediate physical contact or (2) defendant did an act intending to cause serious injury or displayed a dangerous weapon to Rose.

The jury found him guilty of aggravated domestic assault. The court denied his motion for a new trial or judgment of acquittal and sentenced him to a term of incarceration not to exceed two years.

II. Claims on Appeal. On appeal, the appellant claims the court erred in allowing the State to amend the trial information to add a wholly new or different offense. The State responds its amendment merely alleged a different means of committing the same offense. The appellant also claims his trial counsel was ineffective in failing to object to the domestic abuse assault marshaling instruction. He argues the first element of the instruction (act intended to place person *in fear of* immediate physical contact) corresponds with the definition of assault found in Iowa Code section 708.1(2) which was not charged in either the original or amended trial information.

III. Amendment of the Trial Information. The supreme court succinctly set forth the two-part scope of review of a district court's allowance of amendments to a trial information under Iowa Rule of Criminal Procedure 4(8):[3]

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[3] Although the language of this rule specifically refers to indictments, "all provisions of law applying to prosecutions on indictments apply also to informations, except where otherwise provided. . . ." Iowa R. Crim. P. 5(5).

Iowa Rule of Criminal Procedure 4(8) governs amendments to trial informations. It provides in part:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new or different offense is charged.

Iowa R. Crim. P. 4(8)(a). The first part of the rule is discretionary: the district court may order amendment so as to correct errors or omissions that either are or are not substantive. Iowa Code § 4.1(30) (provides that word "may" in statute confers a power). Our review up to this point of the rule is therefore for abuse of discretion. We find an abuse of discretion only when the party claiming such shows that the court exercised the discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Vanover*, 559 N.W.2d 618, 627 (Iowa 1997).

The second part of the rule limits the district court's discretion: The district court must not allow the amendment if the amendment prejudices substantial rights of the defendant or the amendment charges a wholly new or different offense. Thus, our review is for correction of errors at law for this part of the rule. *State v. Sharpe*, 304 N.W.2d 220, 223 (Iowa 1981) (holding it was error to allow State to amend indictment charging second-degree murder by substituting first-degree murder because the amendment charged a wholly new and different offense); *see* Iowa R. App. P. 4.

> We have interpreted rule 4(8)(a) to require a two-part test: A trial information, like an indictment, may be amended to correct errors or omissions of form or substance, so long as a two-pronged test is satisfied: (1) substantial rights of the defendant are not prejudiced thereby, and (2) a wholly new or different offense is not charged.

State v. Berney, 378 N.W.2d 915, 919 (Iowa 1985).

State v. Maghee, 573 N.W.2d 1, 5 (Iowa 1997).

The original trial information alleged domestic abuse assault "with intent to inflict serious injury" in violation of Iowa Code sections 708.1(1) and 708.2A(2)(c). After the close of evidence the State moved to amend the trial information "to conform to the proof," and "specifically alleging the use of a dangerous weapon

in connection with the assault." The court sustained the motion over defense counsel's objection. The appellant claims the court erred in allowing this amendment because it added "a wholly new and different offense" and because it prejudiced substantial rights of the defendant.

Iowa Code section 708.1(3) provides an assault is committed if one "displays in a threatening manner any dangerous weapon toward another." It is one of three means of committing an assault. Amending a trial information to allege "a different means of committing the crime, specified in [a] new statute as separate divisions . . . would clearly not be a 'wholly new and different offense.'" *State v. Sharpe*, 304 N.W.2d 220, 223 (Iowa 1981). Section 708.2A(2)(c) enhances the charge to an aggravated misdemeanor if one acts "with the intent to inflict a serious injury upon another, or if the person uses or displays a dangerous weapon in connection with the assault." The amendment only alleged an alternative means of committing the crime, which is set forth as an alternative in both section 708.1 and 708.2A(2)(c). We determine the amendment passes the first prong of the *Berney* test. *Berney*, 378 N.W.2d at 919.

The appellant also claims the amendment prejudiced his right to rest his defense on a lack of proof by the State of the acts originally specified in the trial information. *State v. Cooper*, 223 N.W.2d 177, 180 (Iowa 1974). He argues the amendment corrupted the purpose of the trial information, which is to apprise a defendant sufficiently of what he must be prepared to meet. *State v. Williams*, 328 N.W.2d 504, 506 (Iowa 1983). The minutes of testimony clearly showed the charge was based on driving the van toward his former spouse. The appellant

contends granting the amendment after the close of evidence eliminates the possibility of using the traditional remedy, a continuance. *See State v. Schertzi,* 330 N.W.2d 1, 2-3 (Iowa 1983). The State responds the appellant does not claim he would have changed his trial defense, which was a simple denial of the allegation. *See State v. Fuhrmann*, 257 N.W.2d 619, 624 (Iowa 1977). Indeed, to deny displaying a dangerous weapon, he would have to deny using the van. We conclude the amendment passes the second prong of the *Berney* test. Accordingly, the court committed no legal error because the amendment neither (1) charged a wholly new and different offense nor (2) prejudiced Michael's substantial rights.

Next we consider whether the court abused its discretion in allowing the amendment after the close of evidence. By its motion to amend, the State sought to correct the form and substance of the trial information to conform to the proof adduced at trial. Although the motion came after the close of evidence, it came before the instructions to the jury or submission of the case to the jury. It was made "during the trial" and was dictated into the record. Given the circumstances of the alleged crime and the general denial defense, there would be no reason to grant the defendant more time to prepare. The amendment only alleged an alternative means of committing the offense. We conclude, therefore, the court did not abuse its discretion in allowing the amendment.

IV. Ineffective Assistance of Counsel. A defendant is entitled to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674, 692 (1984). The test is "whether

under the entire record and totality of the circumstances counsel's performance was within the normal range of competence." *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). A defendant is not entitled to perfect representation, but representation which is within the normal range of competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981). To prevail on his claim, the appellant must demonstrate counsel failed to perform an essential duty, and prejudice resulted. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Prejudice is found where there is a reasonable probability that, but for counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Ordinarily, we reserve ineffective assistance of counsel claims for postconviction relief actions. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). We conclude the record is inadequate to adjudicate the appellant's claim of ineffective assistance of counsel. Accordingly, that claim is preserved for possible postconviction relief proceedings.

V. Conclusion. We affirm the appellant's conviction and preserve his claim of ineffective assistance of counsel for possible postconviction proceedings.

AFFIRMED.