IN THE COURT OF APPEALS OF IOWA

No. 0-143 / 98-1993
Filed April 28, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS DESHAWN HOLMES,
Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, K.D. Briner, Judge.

Defendant appeals from the judgment and sentence entered following his conviction of third-degree burglary and witness tampering. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

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HUITINK, J.

I. Background Facts and Proceedings.

Holmes was charged with third-degree burglary based on allegations that he entered Katezz Phillips's apartment and stole a stereo. Holmes was subsequently charged with tampering with a witness based on allegations that he threatened Tamera Clark, one of the State's witnesses in the burglary case against him.

At trial several State's witnesses testified concerning Clark's statements incriminating Holmes. Phillips testified Clark told her, "Thomas Holmes did it." Preston Friedly testified Clark told him Holmes committed the burglary. Police Officer Brian Corcoran testified both Friedly and Clark told him Holmes committed the burglary. Police Officer James O'Hara testified Clark told him the shirt worn by the burglar belonged to Holmes. Additionally, Police Officer Steve Frost testified Phillips's neighbor, Evelyn Kelly, described the shirt worn by the burglar and that Clark had made statements to him incriminating Holmes. All of this testimony was admitted without objection.

Clark also testified at Holmes's trial. In addition to other matters, Clark testified without objection that she dated Holmes until he "got locked up." On cross-examination Holmes sought to impeach Clark's credibility by inquiries concerning a prior theft offense. The district court sustained the State's objection to this inquiry, citing entry of a deferred judgment rather than judgment of conviction following Clark's guilty plea to theft.

On appeal Holmes contends the district court abused its discretion by precluding Clark's impeachment by her prior theft offense. Holmes also claims he was denied effective assistance of counsel, citing trial counsel's failure to object to hearsay testimony from multiple State's witnesses concerning their conversations with Tamera Clark and Clark's testimony indicating Holmes got "locked up."

II. Clark's Impeachment.

On this issue, we review for an abuse of discretion. *State v. Roby*, 495 N.W.2d 773, 775 (Iowa App. 1992). In order to show an abuse of discretion, one generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

The State argues the trial court properly disallowed Clark's impeachment because a judgment of conviction was deferred in the underlying criminal case against Clark. Since Holmes's trial and filing of the parties' briefs, our supreme court has resolved this issue against the State. In *State v. Birth*, 604 N.W.2d 664, 665 (Iowa 2000), the court held evidence of a guilty plea is appropriate impeachment under Iowa Rule of Evidence 609(a) until such time as the relevant deferred judgment is expunged. The district court erred by concluding otherwise. However, even though the trial court should have allowed Clark's impeachment, we nevertheless find this error was harmless. When an alleged error is not of constitutional magnitude:

> The test of prejudice [for harmless error purposes] is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice.

State v. Tarwick, 468 N.W.2d 452, 454-55 (Iowa 1991). When the error is of constitutional dimension, the State must show beyond a reasonable doubt the error did not result in prejudice. *State v. Boley*, 456 N.W.2d 674, 678 (Iowa 1990).

The record indicates Holmes was allowed to question Clark regarding her probation in the underlying theft case. In addition, Clark testified she had received a deferred judgment. Counsel also cross-examined Clark regarding her arrest and conviction for shoplifting and harassment after the burglary. We conclude further cross-examination of Clark regarding her prior theft offense was cumulative to other offenses with which she was successfully impeached and any error in the district court's preclusion of further impeachment was harmless beyond a reasonable doubt. We affirm on this issue.

III. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). We find the record insufficient to resolve Holmes's claims and preserve them in their entirety for postconviction relief.

AFFIRMED.