IN THE COURT OF APPEALS OF IOWA

No. 8-488 / 97-1936

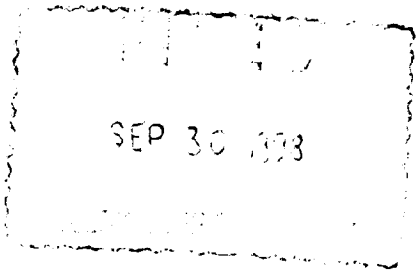
STATE OF IOWA,

Appellee,

vs.

PATRICK ELLIS,

Appellant.



Appeal from the Iowa District Court for Black Hawk County, Walter W. Rothschild, District Associate Judge.

The defendant, Patrick Ellis, appeals his conviction of assault, domestic abuse, enhanced, in violation of Iowa Code section 708.2A(3)(a) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Melissa Smith, Assistant County Attorney, for appellee.

Considered by Cady, C.J., Streit, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PETERSON, S.J.

On August 13, 1997, the defendant, Patrick Ellis, was found guilty by a jury of the offense of assault domestic abuse contrary to section 708.2A(3)(a) of the Iowa Code. He appeals that conviction contending he was denied his constitutional right to effective assistance of counsel by trial counsel's failure to request an instruction and in failing to object to the absence of an instruction on the defendant's defense of justification in defense of himself and another. We affirm.

Background and Proceedings. The incident which gave rise to the defendant's conviction occurred on the evening of March 7, 1997, and the early morning hours of March 8, 1997. At the time of the incident, Patrick Ellis was living with Barbara Saffold. However, he had previously had a relationship with Pamela Newman.

On the evening in question when Patrick Ellis did not return to the residence he was occupying with Barbara Saffold and she became concerned and began attempting to locate him at approximately 1:30 on the morning of the 8th. She drove past Patrick Ellis's ex-girlfriend's house to see if he was there, and then she drove past Patrick Ellis's mother's house to see if he was there. She then noticed Pamela Newman's vehicle in front of Patrick Ellis's father's home. She parked her vehicle and waited for a period of time.

She observed Patrick Ellis and Pamela Newman exit Patrick Ellis's father's home. She got out of her vehicle and approached the two of them.

The evidence is conflicting at that point. Barbara Saffold and Pamela Newman characterize the incident at that time as nonconfrontational. On the other hand, Patrick Ellis contends that Barbara Saffold was in a frenzy when she approached them. He contends she was cussing and was so to speak "wild." He contends that when she walked up to Pamela Newman, he did not know what she was going to do because Barbara Saffold and Pamela Newman had confrontations in the past.

Pamela Newman and Barbara Saffold contend that Patrick Ellis threw Barbara Saffold on the ground and then threw her up against the house. Patrick Ellis admits that Barbara Saffold was on the ground, but he did not throw her on the ground and that they were merely struggling up against the house.

When Patrick Ellis released Barbara Saffold, she ran to her vehicle and attempted to call 911. However, this did not result in assistance because she was unable to tell the 911 operator her location. She then drove to Pamela Newman's home and met her there, and both went to the police station to report the incident.

The trial court did not instruct the jury on the defense of justification and defense counsel did not request an instruction on that defense and did not object to the marshalling instruction which omitted the defense of justification.

Standard of Review. Ineffective assistance of counsel claims involve the violation of a constitutional right. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). It requires the totality of the circumstances relating to counsel's conduct to be reviewed, and this is a de novo review by the appellate courts. *Id.*

Ineffective Assistance of Counsel. The sixth and fourteenth amendments of the United States Constitution and Article I, Section 10 of the Iowa Constitution provide the defendant in a criminal matter is entitled to the assistance of counsel. The United States Supreme Court has held that this means the effective assistance of counsel. *Strickland v. Washington*, 446 U.S. 668, 686, 104 S. Ct. 2052, 2053, 80 L. Ed. 2d 674, 692 (1984). The test for determining the effective assistance of counsel is "whether under the entire record and the totality of the circumstances counsel's performance was within the range of normal competency." *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). When specific errors are relied upon to show the ineffective assistance of counsel, the defendant must demonstrate that counsel failed to perform an essential duty and that prejudice resulted from this failure. *Id.*

Ordinarily, the appellate courts in Iowa preserve the ineffective assistance of counsel claims for postconviction relief under Iowa Code chapter 822 to allow an opportunity to fully develop the record and provide counsel with an opportunity to respond to the claim. *State v. Goodson*, 503 N.W.2d 395, 399 (Iowa 1993). However, there are some situations where claims of this nature may be disposed of on direct appeal if the record is sufficient. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

In this situation, we have carefully reviewed the record and conclude that it is not sufficient for purposes of determining whether trial counsel was ineffective. However, we believe this issue should be preserved for postconviction relief.

Disposition. The defendant's appeal from his conviction of assault domestic abuse contrary to section 708.2A(3)(a) of the Iowa Code is affirmed; however, the defendant's claim of ineffective assistance at the trial is preserved for postconviction proceedings.

AFFIRMED.