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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-14 / 98-2268
Filed April 12, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT LEON THOMAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelly, Judge.

Defendant appeals from the judgment and sentences entered following his guilty plea to driving while barred, and his conviction following jury trial of operating while intoxicated (third offense) and failure to report an accident. Defendant contends his trial counsel was ineffective by not objecting to opinion testimony about the veracity of defendant's prior statements. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, William E. Davis, County Attorney, and Michael Walton, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

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MILLER, J.

Defendant Robert Thomas appeals his conviction of Driving While Barred pursuant to a guilty plea, and his convictions of OWI-Third Offense and Failure to Report an Accident following jury trial. He claims trial counsel was ineffective for failing to object to certain evidence. We affirm.

If only Lee Andre had followed the slogan "Friends Don't Let Friends Drive Drunk." A jury could find the following facts from the evidence presented at trial. Beginning at about 9:30 a.m. on Thursday, July 9, 1998, Thomas and Andre began drinking beer at J.W.'s First and Last Lap in Davenport. At about 11 a.m., after drinking several beers, the two men went to Thomas's house to get his car, then went to the Valley Golf Center. There, they had one more beer, then decided they were tired. Andre lived close by, and began to walk home. Thomas began to drive home, but then decided to be a friend and pick up Andre and drive him home. Unfortunately, as Thomas pulled up behind Andre, Thomas's car hit Andre, resulting in a compound fracture of Andre's left ankle. Thomas, in the spirit of being a good friend, drove Andre to the hospital. However, he did not report the accident to authorities.

Officer Peters arrived at the hospital to investigate the accident after hospital personnel notified the police. He questioned both Thomas and Andre about the accident. Andre told the officer an unknown vehicle hit him and Thomas picked him up and drove him to the hospital. In response to a question by Officer Peters, Thomas then stated he had driven Andre to the hospital. During his interrogation of the men, Peters noticed both were intoxicated. Peters then questioned hospital personnel about any statements Thomas or Andre may

have made when they arrived. Peters tried to relocate Thomas, but was unsuccessful. Peters drove to Thomas's house, and spoke with his mother. There, Peters determined the make, model and color of the car Thomas owned. Peters returned to the hospital, where he found Thomas and interrogated him further. Peters testified as to that conversation as follows:

> Q: Did you ask Mr. Thomas about the accident at that time? A: Yes, I did. I explained to him that I didn't believe the story that I had gotten from them, and I was trying to determine how it happened and what had happened, and to go after this supposed hit-and-run driver I needed some additional information, and Mr. Thomas told me he didn't know anything about the accident.
>
> Q: Did you ask him about—did you ask him anything else at that time? A: Yes I did.
>
> Q: And what was that? A: I asked him specifically, again trying to question him about the accident and how they had gotten there. He denied having driven there. When I asked him if he owned a vehicle, he denied having a vehicle. At that point I basically knew he was lying to me as far as the information I had and I felt that I needed to take him down to the station to try to further question him about the accident.

(Emphasis added.) No objection was made to the testimony. Thomas did not testify, was found guilty, and sentenced. Thomas appeals, claiming trial counsel was ineffective for not objecting to the above-emphasized testimony of Officer Peters. Thomas claims the testimony is impermissible opinion evidence as to the veracity of a criminal defendant, citing *State v. Myers*, 382 N.W.2d 91, 95 (Iowa 1986), which holds "expert opinions on the truthfulness of a witness should generally be excluded. . . ."

To establish an ineffective assistance of counsel claim, the applicant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). The test of ineffective assistance of counsel focuses on whether the performance by

counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The applicant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The applicant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Id.*

While we often preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). The record in this case is sufficient. Our review is de novo. *Id.* Although this scope contemplates review of the entire case, such review is confined to those propositions relied on by each party for reversal or affirmance; errors or propositions not assigned will not be considered on appeal. *United Properties,*

Inc. v. Walsmith, 312 N.W.2d 66, 70 (Iowa App. 1983) (citing *Rector v. Alcorn*, 241 N.W.2d 196, 200 (Iowa 1976)).

We may affirm Thomas's convictions based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *State v. Query*, 594 N.W.2d 438, 445 (Iowa App. 1999). The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Id.* (quoting *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997)).

Thomas's claim that trial counsel was ineffective for not objecting to the evidence noted above has nothing to with his conviction of Driving While Barred, which was entered pursuant to a guilty plea. We conclude that conviction should be affirmed. The remained of our discussion relates only to his convictions of OWI-Third Offense and Failure to Report an Accident.

Prejudice is not established by the admission of objectionable evidence where substantially similar evidence has been admitted without objection. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996); *State v. Gilmore*, 259 N.W.2d 846, 858 (Iowa 1977). In earlier testimony Officer Peters had stated, "I didn't believe the stories that I had gotten from both Mr. Andre and Mr. Thomas." At a later point in his testimony, but still before the testimony to which Thomas now claims trial counsel should have objected, Officer Peters testified, "I explained to [Thomas] that I didn't believe the story that I had gotten from them...." In neither

instance was an objection lodged, and Thomas makes no claim trial counsel was ineffective for not objecting. In both instances Officer Peters's testimony was substantially similar to the testimony to which Thomas now claims trial counsel should have objected. Thomas has not carried his burden of proving a reasonable probability that but for trial counsel's failure to object to the evidence in question the result of the proceeding would have been different. We therefore affirm.

AFFIRMED.

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