

IN THE COURT OF APPEALS OF IOWA

No. 0-544 / 09-1261
Filed August 25, 2010

MICHAEL KELLY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Michael Kelly appeals from the district court order denying his application
for postconviction relief. **AFFIRMED.**

Matthew L. Noel of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant
County Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes
no part.

DOYLE, J.

Michael Kelly appeals from the district court order denying his application for postconviction relief. He contends he was denied effective assistance of counsel in several respects. We affirm.

I. Background Facts and Proceedings.

From the evidence presented at trial, a jury could have found the following facts: On the evening of December 4, 2004, N.B. attended a party at her coworker's apartment. Michael Kelly, an acquaintance of N.B.'s, also attended. N.B. drank heavily at the party to the point of extreme intoxication. When N.B. began to stumble about and pass out, N.B.'s friends put her in a bedroom to sleep, alone.

N.B. awoke the next morning confused, hung-over, in pain, and lying next to Kelly. N.B. became aware she had had sex the night before. N.B. also determined she was missing about eighty dollars from her pants pocket. She asked Kelly what had happened the night before, and he responded: "Don't you remember?" N.B. then said to Kelly, "I'm not a virgin anymore, am I?" Kelly answered: "Shit happens." Kelly told her he would help her get her money back. N.B. then drove home.

Kelly called N.B. later to tell her he had gotten her money. The two met at a convenience store, and Kelly gave N.B. the money. Kelly and N.B. exchanged a kiss, which N.B. described as a "peck." Later in the evening, after talking to family, friends, and a victims' hotline, N.B. went to the hospital and reported she had been raped.

Kelly was charged by amended trial information with sexual abuse in the third degree as a sexual predator in violation of Iowa Code sections 709.4 and 901A.2(3) (2005). A jury trial was held. In his opening statement, Kelly's trial counsel set forth the defense's trial strategy, stating: "We're not saying there wasn't sex. We're not here today to deny that [Kelly] had sex with [N.B.]. The question is whether it was consensual sex" N.B. testified that she was incapable of consenting to the sex act due to her extreme intoxication. Kelly did not testify.

The jury found Kelly guilty as charged. His conviction was affirmed by this court in November 2006. *State v. Kelly*, No. 05-2078 (Iowa Ct. App. Nov. 16, 2006).

On October 29, 2007, Kelly filed an application for postconviction relief alleging his appellate counsel was ineffective in failing to raise the issue of trial counsel's ineffective assistance on direct appeal. He alleged trial counsel was ineffective in fifteen respects. The district court denied Kelly's application.

Kelly now appeals. He contends he was denied effective assistance of counsel in several respects, and as a result, the district court erred in denying his application for postconviction relief. We review Kelly's ineffective assistance claims de novo. See *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

II. Discussion.

To establish an ineffective-assistance-of-counsel claim, a postconviction applicant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The burden of proving both

elements by a preponderance of the evidence falls upon the applicant. *Ledezma*, 626 N.W.2d at 142, 145. “However, both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently.” *Id.* at 142.

“An attorney fails to perform an essential duty when the attorney ‘perform[s] below the standard demanded of a reasonably competent attorney.’” *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008) (quoting *Ledezma*, 626 N.W.2d at 142). The applicant must overcome a strong presumption of counsel’s competence and has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Id.* Moreover, “[t]rial counsel has no duty to raise an issue that has no merit.” *Millam*, 745 N.W.2d at 721-22 (quoting *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003)).

To show prejudice, the petitioner must demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

A. Ineffective Assistance of Trial Counsel.

1. Missing Money Evidence.

Kelly first argues his trial counsel was ineffective in failing to attempt to exclude evidence that Kelly was involved with the money missing from N.B.'s pants pocket. We disagree.

Kelly's trial strategy was that the sex was consensual. Kelly's trial attorney explained that he wanted the money evidence admitted to explain later events; specifically, N.B. meeting with Kelly later that day at the convenience store to get the money and then kissing Kelly. Kelly's trial attorney's argument was that these actions by N.B. were not the actions of someone that had just been raped, but instead demonstrated the parties had a romantic relationship and the sexual encounter was thus consensual.

The district court concluded trial counsel did not err in admitting the evidence, explaining:

[T]he missing money evidence did not point to [Kelly] as the individual who caused the money to be missing. Rather, that line of evidence tended to place [Kelly] in a more favorable light, because he secured the money for [N.B.] within a matter of hours. In addition, the money issue was necessary to explain the kiss between [N.B.] and [Kelly] at the convenience store.

We agree. We therefore find Kelly's trial counsel made a reasonable tactical decision in deciding to allow the evidence, and accordingly did not breach an essential duty.

2. Convenience Store Video and Witness Testimony.

Kelly next contends his trial counsel was ineffective in failing to attempt to include video evidence from the convenience store showing the kiss between the

parties, and in failing to include two witnesses that “could have rebutted” some of N.B.’s testimony. The district court disagreed, finding:

[T]he value of the videotape evidence was to show that [Kelly] and [N.B.] kissed at the convenience store. . . , after the sexual abuse occurred. [N.B.] acknowledged the kiss and described the kiss during her testimony. The fact that the parties kissed was not in dispute at all.

Regarding the two witnesses’ testimony, the district court also found no error, explaining:

Counsel’s trial strategy was to make sure that there was enough evidence in the record to establish a familiarity between the parties. The record clearly did establish that. . . . [T]he significant aspect of [the witnesses’ potential testimony] from the standpoint of the defense was that [N.B.] was willing to have contact with [Kelly] after the incident, which can be argued is inconsistent with a nonconsensual sex act occurring shortly before that. The jury was presented with such evidence, and trial counsel did argue that point to the jury. In any event, the critical issue involved was not whether [N.B.] and [Kelly] were acquaintances, familiar with each other, friends, or even involved romantically. The critical issue is whether [Kelly] had sexual intercourse with [N.B.] while she was incapacitated.

We agree with the district court on both counts. Accordingly, we find Kelly’s trial counsel did not breach an essential duty in not attempting to admit the video and two witnesses’ testimony.

3. Intoxication Defense.

Kelly argues his trial counsel was ineffective for failing to raise an intoxication defense. We disagree.

Sex abuse in violation of Iowa Code section 709.4 is a general intent crime. See *State v. Christensen*, 414 N.W.2d 843, 845-46 (Iowa Ct. App. 1987); see also Iowa Code § 709.4; *State v. York*, 293 N.W.2d 13, 14 (Iowa 1980). Intoxication is allowed as a defense only for specific intent crimes. See *State v.*

Fountain, ___ N.W.2d ___, ___ (Iowa 2010) (citing *State v. Heard*, 636 N.W.2d 227, 233-34 (Iowa 2001) (Neuman, J., concurring)). As a result, an intoxication defense was unavailable to Kelly. Thus, Kelly's trial counsel had no duty to raise the defense.

4. Failure to Object to Certain Testimony.

Kelly claims his trial attorney should have objected to certain testimony. Specifically, he asserts his attorney should have objected to N.B.'s testimony about a telephone conversation with the victims' hotline worker, who said what happened to N.B. was wrong, and to a nurse's testimony that a vaginal examination can be uncomfortable. The district court disagreed, finding that Kelly's trial counsel had no reason to object to N.B.'s testimony regarding the telephone conversation with the hotline worker because a hearsay exception applied. We agree with the district court.

Because Kelly's defense was that the sexual encounter was consensual, it was necessary for the State to explain why N.B. waited until the following evening to go to the hospital and report the rape. With this testimony, N.B. was explaining her mental process for the delay. Thus, the hotline worker's statement, that what happened to N.B. was wrong, was not offered for the truth of the matter asserted. See Iowa R. Evid. 5.801(c) ("Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). Consequently, Kelly's trial counsel had no duty to object on that ground and raise a meritless claim.

The district court also found that Kelly's trial counsel did not err in not objecting to the nurse's testimony regarding discomfort and insertion during a vaginal examination. The district court explained: "[t]he solicitation of that testimony did nothing more than state the obvious." We agree. We find Kelly's trial counsel had no duty to object to the nurse's testimony, and the testimony did not result in any prejudice to Kelly.

5. State's Closing Argument.

Finally, Kelly argues his trial counsel was ineffective in failing to object to the State's closing argument and rebuttal. Specifically, Kelly maintains his trial counsel should have objected when the State, in its closing argument, "told the jury that the defense failed to present evidence and again when the [State] told the jury that the portion of [Kelly's] right to a fair trial had ended." The district court found no prejudice to Kelly, and we agree.

Here, both of the comments cited by Kelly consist of isolated statements that were not severe or pervasive within the entire context of the trial. Moreover, there was abundant evidence that N.B. was incapable of consenting to the sex act. We find Kelly has not satisfied his burden of showing a reasonable probability the outcome would have been different if his trial counsel had objected to the prosecutor's comments. We therefore find no prejudice resulted to Kelly.

B. Ineffective Assistance of Appellate Counsel.

Kelly argues his appellate counsel was ineffective for failing to raise his ineffective assistance of trial counsel claims on direct appeal. However, our supreme court has recently ruled that defendants are no longer required to raise

ineffective-assistance claims on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). Regardless, we have already concluded Kelly's ineffective assistance of trial counsel claims are without merit. We therefore find no error here.

III. Conclusion.

Because we find Kelly's trial counsel either had no duty to raise Kelly's asserted claims or no prejudice resulted to Kelly, we conclude his trial counsel did not render ineffective assistance. We therefore find the district court did not err in denying Kelly's application for postconviction relief. Accordingly, we affirm the decision of the district court.

AFFIRMED.