

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0925

STATE OF IOWA,
Plaintiff-Appellee,

vs.

AJAMU MANU EL-AMIN,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE WILLIAM KELLY, JUDGE

APPELLEE'S BRIEF

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**STATEMENT OF THE ISSUE PRESENTED FOR
REVIEW**

I. Because a Factual Basis Supported the Defendant’s Guilty Plea to Two Counts of Third-Degree Sexual Abuse, Counsel Was Under No Obligation to Challenge the Plea.

Authorities

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Iowa Code § 703.1 (2017)
1A Charles Alan Wright & Andrew D. Leipold, Federal Practice
And Procedure § 179 (4th ed. 2010)

ROUTING STATEMENT

This case does not meet any of the criteria for retention by the Iowa Supreme Court under Iowa Rule of Appellate Procedure 6.1101(2) (a)-(f). As the defendant suggests, transfer to the Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case.

Ajamu El-Amin was originally charged with one count of second-degree sexual abuse, in violation of Iowa Code sections 709.1 and 709.3(c) (2017). Trial Info.; App. 4. After beginning jury selection and pursuant to a negotiated plea, El-Amin pleaded guilty to two counts of third-degree sexual abuse, in violation of Iowa Code sections 709.1 and 709.4(1)(a) (2017). Plea Tr. p. 116, line 14 – p. 118, line 6. The charges stemmed from allegations that the defendant raped an acquaintance in an alley and then pressured another man into raping her immediately afterward. Minutes of Testimony; Conf. App. 4-18.

Course of Proceedings.

The State agrees with El-Amin's rendition of the case's procedural history. *See* Iowa R. App. P. 6.903(3).

Facts.

According to the minutes of testimony and the victim's deposition, the victim, Gina Simmons, and "A.J." El-Amin knew each other casually. Depo. of Gina Simmons, p. 6, line 24 – p. 10, line 10; Minutes of Testimony; Conf. App. 4-5, 9-10. On an April afternoon around dusk in 2017, Gina Simmons ran into two acquaintances, Paula and Eddie, as they were carrying donated items from the Catholic Workers House to Paula's house in Des Moines. Depo. of Gina Simmons, p. 11, line 24 – p. 12, line 10; Minutes of Testimony; Conf. App. 4-5, 9-10. They were in an alley near Sixth Avenue and Forest Avenue, and the three stopped to have a drink behind the Salvation Army building. Depo. of Gina Simmons, p. 11, line 24 – p. 12, line 10; p. 17, line 13 – p. 19, line 5; Minutes of Testimony; Conf. App. 4-5, 9-10. Suddenly, El-Amin appeared with another man; he was yelling at and grabbing the other man, Jonathan Campbell, and Jonathan Campbell looked afraid. Depo. of Gina Simmons, p. 20, line 5 – p. 21, line 3; Minutes of Testimony; Conf. App. 4-5, 9-10. El-Amin

was carrying a stick and told Gina Simmons that she owed him \$40 for “watching her back.” Depo. of Gina Simmons, p. 20, line 25 – p. 21, line 23; Minutes of Testimony; Conf. App. 4-5, 9-10. Gina recalled that she had seen El-Amin a few nights earlier as she was walking, and he told her he would “watch her back”; she explained that she was a former prostitute and that El-Amin probably assumed she was working as a prostitute that night and may have needed protection. Depo. of Gina Simmons, p. 21, line 7 – p. 22, line 10; Minutes of Testimony; Conf. App. 4-5, 9-10.

In the alleyway, El-Amin threatened to kill Gina Simmons and pulled her by her arm farther into the alleyway. Depo. of Gina Simmons, p. 26, line 13 – p. 28, line 18; Minutes of Testimony; Conf. App. 4-5, 9-10. Paula and Eddie disappeared. Depo. of Gina Simmons, p. 30, lines 1-22. The defendant told Jonathan Campbell to sit down. Minutes of Testimony; Conf. App. 4-5, 9-10. El-Amin forced Gina to perform oral sex on him and had intercourse with her as he positioned her over a retaining wall. Depo. of Gina Simmons, p. 32, line 1 – p. 33, line 33; Minutes of Testimony; Conf. App. 4-5, 9-10.

El-Amin then ordered Jonathan Campbell to have sex with Gina on the ground. Depo. of Gina Simmons, p. 32, lines 1-24; Minutes of

Testimony; Conf. App. 4-5, 9-10. She saw El-Amin grab the other man's pants and remove the wallet from the pocket before handing Campbell his pants. Depo. of Gina Simmons, p. 41, lines 11-24. After both men raped her, she ran away, crying and vomiting. Depo. of Gina Simmons, p. 42, line 23 – p. 45, line 5; Minutes of Testimony; Conf. App. 4-5, 9-10. Although the victim did not believe the men wore condoms, condoms containing their DNA were later discovered in the alley. Depo. of Gina Simmons, p. 32, line 8 – p. 34, line 19; p. 54, lines 17-25.

Gina Simmons reported the rape the next day after a friend encouraged her to contact the police. Depo. of Gina Simmons, p. 46, line 20 – p. 48, line 20. A few weeks later, she ran into Jonathan Campbell near the Bethel Mission. Depo. of Gina Simmons, p. 44, lines 3-25. He approached her and apologized, adding that El-Amin stole his wallet that night and left him in a cab without the ability to pay the fare. Depo. of Gina Simmons, p. 45, line 1 – p. 46, line 9.

As noted, El-Amin eventually pleaded guilty to two counts of third-degree sexual abuse. He admitted that he forced Gina Simmons to have sex and he intimidated “the other guy” into having sex with

her that night. Trial/Plea Tr. p. 116, lines 7-9. Additional facts will be discussed as relevant to the argument below.

ARGUMENT

I. **Because a Factual Basis Supported the Defendant’s Guilty Plea to Two Counts of Third-Degree Sexual Abuse, Counsel Was Under No Obligation to Challenge the Plea.**

Scope of Review.

Although “[r]eview of a lack-of-a-factual basis challenge to a guilty plea is usually on error,” the court’s review is *de novo* here because El-Amin’s claim is presented under the rubric of ineffective assistance of counsel. *See State v. Doggett*, 687 N.W.2d 97, 99 (Iowa 2004).

Preservation of Error.

Error preservation is unnecessary in the context of an ineffective assistance of counsel claim. *State v. Stallings*, 658 N.W.2d 106, 108 (Iowa 2003).

Merits.

Ajamu El-Amin raises one claim on appeal. He contends his lawyer was ineffective in allowing him to plead guilty to two counts of third-degree sexual abuse. El-Amin argues that a factual basis was

lacking to support the sexual abuse count involving Jonathan Campbell and the victim, Gina Simmons. This court should find, to the contrary, that a factual basis supported El-Amin's plea.

To prevail on an ineffective assistance claim involving complaints of specific acts or omissions, the defendant must show that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Fountain*, 786 N.W.2d 260, 266-67 (Iowa 2010). Ultimately, the test of ineffective assistance of counsel rests on whether counsel's performance was reasonably effective; the defendant must show that the performance fell below an objective standard of reasonableness such that his lawyer was not functioning as "counsel" as guaranteed by the sixth amendment. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Judicial scrutiny of counsel's performance is highly deferential, and this court indulges in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689. A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *See State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). "Improvident trial strategy, miscalculated

tactics, [or] mistakes in judgment do not necessarily amount to ineffective assistance of counsel.”¹ *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 2008).

Iowa Rule of Criminal Procedure 2.8(2)(b) requires that a guilty plea be supported by a factual basis in the record. “Where a factual basis for a charge does not exist, and trial counsel allows the defendant to plead guilty anyway, counsel has failed to perform an essential duty [and] [p]rejudice in such a case is inherent.” *State v. Schminkey*, 597 N.W.2d 785, 788 (Iowa 1999).

To determine whether a factual basis exists, the court considers “the entire record before the district court at the guilty plea hearing, including any statements made by the defendant, facts related by the prosecutor, and the minutes of testimony.” *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001). While the sources to which the Iowa

¹ While recent legislation defers the resolution of ineffective assistance claims from direct appeal to postconviction proceedings, the Iowa Supreme Court has concluded that the newly enacted provision does not apply to cases pending on July 1, 2019. *See State v. Macke*, 933 N.W.2d 226, 235 (Iowa 2019); *State v. Terry*, 2019 WL 6894260, *2 (Iowa Ct. App. Dec. 18, 2019). El-Amin pleaded guilty and was sentenced on May 9, 2019. May 6, 2019 Order; App. 6-10. Therefore, the court can decide El-Amin’s ineffective assistance claim on direct appeal.

appellate courts look to determine a factual basis are well-settled, the quantum of evidence necessary is less clear. According to one national treatise, “the quantum of evidence needed to supply a factual basis is not specified in the rule, but it is clear that it takes less evidence than would be needed to sustain a conviction at trial.” 1A Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure* § 179 (4th ed. 2010). At most, however, evidence sufficient to withstand a motion for a judgment of acquittal should suffice for a factual basis. *See Schminkey*, 597 N.W.2d at 789 (looking to facts and circumstances in the record and drawing inferences to provide the factual basis).

Here, the defendant pleaded guilty to two counts of third-degree sexual abuse. That statute provides that a person commits sexual abuse in the third degree when he performs a sex act “by force or against the will of the other person, whether or not the other person is the person’s spouse or is cohabitating with the other person.” A “sex act” is defined, among other ways, as “sexual contact” between the genitals of two people or between the genitals of one person and the mouth or anus of the other person. Iowa Code § 702.17 (2017).

At the guilty plea proceeding in this case, the defendant admitted to two counts of sexual abuse:

THE COURT: Can you tell me in your own words exactly what you did to commit those two charges?

THE DEFENDANT: Forced Gina to have sex and then intimidated that other guy and made sure he had sex with her too.

THE COURT: All right. I'm going to break it down a little bit more. So can you tell me where you were at when you were engaging in a sex act, by force, with Gina.

THE DEFENDANT: In the alley behind South -- in the alley behind St. Vincent de Paul.

* * *

THE COURT: And would you agree you did engage in a sex act against the will of Gina?

THE DEFENDANT: Yes.

THE COURT: And you had another gentleman that was there with you?

THE DEFENDANT: Yes

THE COURT: Do you remember his name?

THE DEFENDANT: Jonathan Campbell.

THE COURT: All right. What did you do to Mr. Campbell?

THE DEFENDANT: Intimidated him to have sex, too.

THE COURT: And who did he have sex with?

THE DEFENDANT: Gina Simmons.

THE COURT: It was in the same alley, in Des Moines, Iowa?

THE DEFENDANT: Yeah.

THE COURT: In Polk County, Iowa?

THE DEFENDANT: Yep, right by Sixth Avenue.

THE COURT: And can you tell me how you used intimidation to get him to do that.

THE DEFENDANT: He says it was a knife, but it wasn't a knife. It was a stick. A stick – a thick one, like Gina said it was. He said a knife. Gina said a stick. It was a stick.

THE COURT: All right. So you have a big stick. And what was -- what were you doing with the big stick?

THE DEFENDANT: Threatening him with it, to have sex with her. Like, I was going to poke him with it.

THE COURT: And did he in fact have sex?

THE DEFENDANT: Yes.

THE COURT: And did you in fact have sex with Gina?

THE DEFENDANT: Yes.

Trial/Plea Tr. p. 116, line 14 – p. 118, line 6.

On appeal, El-Amin contends that because there is “no indication that [he] performed a sex act upon Jonathan Campbell,” defense counsel should not have permitted him to plead guilty to a crime he did not commit. Defendant’s Brief, pp. 20-21. While it is true that El-Amin did not engage in a sex act with Jonathan Campbell, he did aid and abet the non-consensual sex act that Jonathan Campbell performed on Gina Simmons. In establishing a factual basis for the second count of third-degree sexual abuse, El-Amin admitted that he “intimidated that other guy and made sure he had sex with her too;” as indicated, he conceded that he threatened Jonathan Campbell with a stick and ordered him to have sex with the victim after El-Amin had forced her to engage in a sex act. Plea Tr. p. 116, line 4 – p. 118, line 6.

The parties in this case specifically contemplated a theory of aiding and abetting. *See* Plea Tr. p. 79, line 22 – p. 114 – line 14. Iowa law provides that those who aid and abet in the commission of a public offense “shall be charged, tried and punished as principals.” Iowa Code § 703.1 (2017). To sustain a conviction under a theory of aiding and abetting, “the record must contain substantial evidence the accused assented to or lent countenance and approval to the

criminal act by either actively participating or encouraging it prior to or at the time of its commission.” *State v. Hearn*, 797 N.W.2d 577, 580 (Iowa 2011); *State v. Ramirez*, 616 N.W.2d 587, 591–92 (Iowa 2000) (*overruled on other grounds by State v. Reeves*, 636 N.W.2d 22, 25–26 (Iowa 2001)). “Knowledge is essential; however, neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting.” *State v. Barnes*, 204 N.W.2d 827, 828 (Iowa 1972). While presence alone is not enough, evidence of a defendant’s “presence, companionship, and conduct before and after the offense is committed may be enough from which to infer a defendant’s participation in the crime.” *Hearn*, 797 N.W.2d at 581; *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994); *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984).

In this case, it is uncontested that El-Amin “intimidated,” in his own words, another man into sexually assaulting the victim, and the other man did so only at El-Amin’s behest. He aided and abetted the second incident of sexual abuse that Gina Simmons was forced to endure. He actively encouraged and directed Jonathan Campbell’s sexual abuse of Gina Simmons.

Although the sentencing order in this case listed Jonathan Campbell as a “victim,” the unusual facts of the case put him somewhere between a victim and a perpetrator. That he was referred to as a victim is inconsequential given that the trial court, the defendant, and the prosecutor were all aware of the theory of the prosecution and the factual basis for the plea. While El-Amin’s actions may not have risen to a compulsion defense for Jonathan Campbell, El-Amin was clearly responsible as an aider and abetting in orchestrating a non-consensual sex act between Jonathan Campbell and Gina Simmons. *See State v. Finnegan*, 478 N.W.2d 630, 632-33 (Iowa 1991) (court rejects defendant’s argument that she could not be held responsible as a principal for the second-degree sexual abuse of her daughter when she threatened and directed the victim to have sex with her husband but did not engage in the sex acts themselves; the court also notes that there is no distinction between principals and aiders and abettors); *see also State v. Christensen*, 2010 WL 4792120, at *2-5 (Iowa Ct. App. Nov. 24, 2010) (affirming the defendant’s second-degree sexual abuse conviction by aiding and abetting when the defendant sat near the victim while his friend and co-worker sexually abused her, and the defendant “shushed” her, held her hand,

and stroked her hair during the rape); *State v. Thompson*, 2016 WL 6440564, at *5-6 (N.C. Ct. App. Nov. 1, 2016) (court affirms aiding and abetting first-degree sexual offense conviction when the defendant “knowingly advised, instigated, encouraged, procured, and aided [another person]” by telling him “you know what you should be making her do” and positioning the victim’s body but not personally engaging in a sex act with her).

Here, El-Amin admitted that he threatened and intimidated Jonathan Campbell into having sex with Gina Simmons in the alleyway immediately after raping her himself. He is thus accountable for both crimes. The factual basis requirement for the guilty plea was satisfied. Counsel was effective and under no duty to challenge the underlying facts supporting both counts of third-degree sexual abuse. El-Amin’s contention to the contrary should be rejected, and his convictions for third-degree sexual abuse should be affirmed.

CONCLUSION

For the reasons discussed above, the State respectfully requests that the court affirm Ajamu Manu El-Amin's convictions for two counts of third-degree sexual abuse.

REQUEST FOR NONORAL SUBMISSION

The defendant has requested nonoral submission. The State agrees that the issues presented are fully addressed in the briefs and can be decided without further elaboration. In the event that the court grants the defendant argument, however, the State asks to be heard as well.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,816** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

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