

IN THE COURT OF APPEALS OF IOWA

No. 3-167 / 10-2016
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ADYM RAY BARTH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

Adym Barth appeals following his conviction of third-degree sexual abuse, alleging his trial counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

Adym Barth challenges his conviction for third-degree sexual abuse. During trial, the prosecutor asked him about his silence when interviewed by police and commented during the rebuttal closing argument on his girlfriend's belief he needed an attorney. On appeal, Barth alleges his trial counsel was ineffective for failing to object.

Given the strength of the evidence of Barth's guilt, we find no reasonable probability of a different outcome had counsel lodged objections. Accordingly, his ineffective-assistance-of-counsel claim fails, and we affirm.

I. Background Facts and Proceedings.

Adym Barth was staying with a friend's family in late 2009 while he looked for a place to live. Barth was nineteen years old. One night in early December 2009, Barth was watching the show Family Guy on a computer in his room with fourteen-year-old M.R. and her stepbrothers. Eventually the stepbrothers drifted to other parts of the house, leaving Barth and M.R. alone together.

Barth and M.R. began kissing on the bed. When M.R. asked Barth what would happen if someone walked in on them, Barth responded by locking the bedroom door. They resumed kissing, and Barth tried to remove M.R.'s pants. M.R. told Barth to "wait" and explained she had been shaving her pubic area earlier, had cut herself, and had not finished shaving. Barth said "fine" and continued to take off her pants. He then inserted his finger into her vagina.

When Barth asked M.R. “how far” she wanted to go, M.R. replied, “I don’t know.” Barth then put on a condom and inserted his penis into M.R.’s vagina. M.R., who never had intercourse before, found it to be painful. She pushed Barth away and told him, “I want to be done.” Barth stopped, but asked M.R. if she wanted to “start back up.” M.R. said she did not, pulled her pants on, and left the room. She called her friend, Lucy, and told her that she and Barth had sex.

The next day M.R. told another friend, Lacey, she and Barth had sex. Lacey wrote M.R. a note telling her how dangerous the situation was. M.R.’s mother discovered the note a few weeks later and confronted M.R. At first M.R. denied having sex with Barth because she was afraid her mother would be angry. Eventually M.R. began crying and acknowledged what happened. M.R.’s parents reported the incident to police. An officer took M.R.’s statement and referred her to the emergency room for a sexual assault examination. The examination revealed M.R.’s hymen was not intact.

Waterloo Police Officer Jason Chopard called Barth for an interview at the police station. Officer Chopard did not reveal he was investigating an alleged sexual assault. When Barth arrived the officer advised him of his *Miranda* rights. Without being prompted by Officer Chopard, Barth brought up the incident in early December when he was watching Family Guy with M.R. and her stepbrothers. Barth said he was rarely alone with M.R. In the conversation with police Barth did not admit or deny having sex with M.R.

The State charged Barth with sexual abuse in the third degree. Following a September 2010 trial, a jury found Barth guilty as charged. The court entered

judgment under Iowa Code section 709.4(2)(c)(4) (2009) and imposed an indeterminate ten-year sentence in prison with three to five years of probation. The court also ordered Barth to register as a sex offender, undergo lifetime supervision, and have no contact with the victim for five years.

II. Scope and Standard of Review.

We review ineffective-assistance-of-counsel claims de novo. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007). Although we generally preserve claims of ineffective assistance of counsel for postconviction relief actions, we will consider their merits on direct appeal if the record is adequate. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

III. Analysis.

To prove his claim of ineffective assistance of counsel, Barth must show: (1) counsel failed to perform an essential duty and (2) prejudice resulted from that failure. See *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006). If he falls short on either prong, the ineffective-assistance-of-counsel claim must fail. See *State v. Hallock*, 765 N.W.2d 598, 602 (Iowa Ct. App. 2009). To satisfy the first prong, Barth must show counsel did not act as a “reasonably competent practitioner” would have. See *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). On the prejudice prong, Barth must show a reasonable probability that “but for counsel’s unprofessional errors, the results of the proceeding would have been different.” See *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Barth argues his trial attorney failed to perform an essential duty when she failed to object to cross-examination questions regarding his silence when being

interviewed by police and to the prosecutor's related reference during closing argument.

Barth testified in his own defense. During direct examination, his attorney asked what occurred when he was questioned by Officer Chopard.

Q. And did the officer suggest to you that there would be some difference if she consented vs. whether she didn't consent?

A. Yes.

Q. And your response to that was what? A. Um, I believe at that point I asked to use my right to speak to an attorney.

On cross-examination the prosecutor asked Barth why he did not deny having sex with M.R. after the officer disclosed the evidence against him. Barth explained: "I was told by everybody in the car on the way down that as soon as I got there to use my right to speak to an attorney because anything I said could be taken out of context and used against me." Then, when Barth said he told his girlfriend about the accusations, the prosecutor asked: "And she's one of those people who told you you need an attorney?" Barth confirmed, saying, "She told me right off the bat that when you get down there, don't say anything, just ask for an attorney."

The prosecutor persisted:

Q. And it never crossed your mind to tell the police that you didn't have sex with her? A. I just wanted to get out of there as soon as possible with saying the least amount because I didn't know what was going on and I didn't want to say anything that would end up being used out of context and I'd regret it later.

Q. And you thought somehow by telling them that, it would be used against you? A. I was just told, get in there, tell them you want to speak to an attorney and leave. Don't say anything else.

Q. Did you ever go back to the police, then, and tell them your side of the story? A. No. After telling the investigator that I was—I would be unable to afford an attorney, he then advised me to ask my father how to get ahold of one. After that I tried to get

ahold of one. . . . I wasn't able to find an attorney in time before the investigator placed a warrant for my arrest.

Defense counsel did not object to any of the prosecutor's questions regarding Barth's silence.

During rebuttal closing arguments, the prosecutor asked the jury: "And his girlfriend tells him he needs a lawyer. What does she think he needs a lawyer for?" Again, defense counsel did not object.

Barth contends the prosecutor's cross-examination and comment during closing argument violated his right to remain silent guaranteed by the Fifth Amendment to the United States Constitution. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding "the use for impeachment purposes of petitioner's silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment"). He contends his attorney should have realized the jury would have naturally and necessarily interpreted the questions and remark as a reference to his silence. *See State v. Hulbert*, 513 N.W.2d 735, 738 (Iowa 1994).

The State argues the trial prosecutor's references to Barth's pre-interview conversation with his girlfriend, and rhetorical question regarding the girlfriend's belief he needed an attorney, do not "fall within the ambit of the *Doyle* proscription against the use of a defendant's post-*Miranda* silence for impeachment purposes." The State asserts that to the extent the other contested cross-examination involved post-*Miranda* silence, Barth cannot show he suffered *Strickland* prejudice.

After reviewing the trial evidence de novo, we agree Barth cannot carry his burden to show a reasonable probability that, but for counsel's alleged omissions, the result of the proceeding would have been different. See *State v. Clay*, 824 N.W.2d 488, 496 (Iowa 2012). Barth does not need to show his attorney's deficient conduct more likely than not altered his chances for an acquittal, but he must show the probability of a different result is sufficient to undermine confidence in the outcome. See *id.*

Trial counsel's failure to object to the prosecutor's challenged statements does not undermine our confidence in the outcome of his trial. The evidence of Barth's guilt is strong. M.R. gave consistent, detailed accounts of the crime. She recounted the sex acts to two friends—one immediately after it occurred and one the following day. She tearfully acknowledged the sex act to her mother after her mother found Lacey's letter regarding the event. M.R.'s brother testified to leaving M.R. alone with Barth in his bedroom on the night in question. The sexual assault examination revealed M.R.'s hymen was not intact, which would be consistent with penetration. The physician's assistant also testified the discomfort described by M.R. would be consistent with the tearing of the hymen. For his part, Barth talked with the police about watching *Family Guy* with M.R. on the night in question, even before they specified they were interested in that event.

Given the strength of the evidence against him, it is unlikely the outcome of the case would have been altered if trial counsel had successfully objected to

the prosecutor's questions about Barth's silence. Because Barth has failed to meet his burden of proving *Strickland* prejudice, he is not entitled to a new trial.

AFFIRMED.

Mullins, J., concurs specially.

MULLINS, J. (concurring specially)

I concur in the analysis and in the result reached by the majority. I write separately only to emphasize that prosecutors should not take this as a “wink and a nod” of approval for calculated improper examination and argument that squeaks by appellate review under the *Strickland* prejudice standard.