

IN THE COURT OF APPEALS OF IOWA

No. 3-331 / 10-2124
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN WAYNE KARHOFF,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

A defendant appeals his conviction for sexual abuse in the third degree.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa K. Taylor, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., Tabor, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.**I. Background Facts & Proceedings.**

On March 6, 2010, John Karhoff and his wife attended a party at a friend's house. Eventually several people at the party left to go to a club, and the only people left at the house were Carlton Crayton, Marion Lane, J.B., and Karhoff. J.B. had become intoxicated and had laid down in a bedroom for a period of time. When she got up she vomited in the hallway, then went into the bathroom where she went down on her hands and knees in front of the toilet and continued to vomit. Karhoff, who was a friend and former co-employee of J.B., cleaned up the hallway. He then went into the bathroom and closed the door. At this time, sex acts occurred which were allegedly done by force or against the will of J.B.

Karhoff was charged with sexual abuse in the third degree, in violation of Iowa Code section 709.4(1) (2009). A jury returned a verdict finding Karhoff guilty of third-degree sexual abuse. He was sentenced to a term of imprisonment not to exceed ten years. Karhoff appeals his conviction, claiming he received ineffective assistance of counsel.

II. Standard of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa

2010). In order to show prejudice, a defendant must show that, but for counsel's breach of duty, the result of the proceeding would have been different. *State v. Brubaker*, 805 N.W.2d 164, 174 (Iowa 2011).

III. Merits.

Karhoff contends he received ineffective assistance because his defense counsel did not file a motion for a new trial. He claims the jury's verdict was not supported by the weight of the evidence and asserts if defense counsel had filed a motion for a new trial, it would have been successful. He claims the weight of the evidence supports his claim he engaged in consensual sex acts with J.B.

In a claim of ineffective assistance of counsel, both of the elements must be proven by a preponderance of the evidence. *State v. Voll*, 655 N.W.2d 548, 550 (Iowa Ct. App. 2002). In order to show prejudice, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012). "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

On our de novo review, we do not believe Karhoff has shown a reasonable probability that if defense counsel had filed a motion for a new trial it would have been successful. A motion for new trial may be granted when a verdict is contrary to the weight of the evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The weight of the evidence in this case supports the jury's verdict that Karhoff performed a sex act against the will of the other person. See Iowa Code § 709.4(1). We first note that at the time Karhoff wanted to engage in

sex with J.B. she was on her hands and knees in front of a toilet vomiting. J.B. testified she did not agree to Karhoff's actions and she told him she could not engage in sex with him. Lane's wife testified J.B. told her that J.B. had told Karhoff to stop. Additionally, Crayton actually heard J.B. tell Karhoff "stop" twice. Finally, Karhoff admitted he knew what he was doing was wrong.

We conclude even if defense counsel had filed a motion for a new trial, it would have been unsuccessful. Karhoff has not shown he received ineffective assistance of counsel. We affirm his conviction for third-degree sexual abuse.

AFFIRMED.