

IN THE COURT OF APPEALS OF IOWA

No. 6-421 / 05-0992
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIM MICHAEL MARK,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Kim Michael Mark appeals his conviction for third-degree kidnapping, a class C felony. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Matthew Wilber, County Attorney, for appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

Kim Michael Mark appeals his conviction for third-degree kidnapping, a class C felony, in violation of Iowa Code section 710.4 (2003). He argues the district court erred in failing to grant a mistrial when a witness mentioned taking a polygraph test. He also argues he received ineffective assistance of counsel when his attorney failed to object to testimony concerning a polygraph test, drugs, and Mark's sexual history. We affirm.

I. Background Facts and Proceedings

Kim Michael Mark and Dean Gunderson met at a homeless shelter in Council Bluffs. Mark introduced himself to Gunderson as "Pastor Mike," and offered to give him a ride to and from work. On or around July 22, 2004, at approximately 11:00 pm, Mark met Gunderson outside his job. Gunderson had agreed to a ride home, but Mark told him he needed to meet friends to pick up "drugs or stuff." The two drove to Big Lake Park. When they got out of the car, Mark came from behind Gunderson and tackled him. He told Gunderson he had a knife, and proceeded to tie his arms behind his back. Gunderson tried to get up and walk away, but Mark grabbed him. Gunderson tripped and fell down a hill. Mark followed. He then struck Gunderson in the chest fifty to one hundred times. Mark told Gunderson not to tighten his muscles and to take it like a man. He also told Gunderson that he was trying "toughen [him] up". Mark then asked Gunderson if he had ever "experienced anything with a man or a guy." Mark pulled Gunderson's pants down and fondled him. When he finished, he untied Gunderson, helped him find his clothes, and drove him home. Mark threatened

to kill Gunderson if he told anyone of the incident. He also offered, if Gunderson wanted, to toughen him up again.

Gunderson reported the beating, but not the alleged sexual assault, to his wife, father, and neighbors. Several months later, he reported the entire incident to the police. He and his wife were able to pick Mark's photo out of a photo line-up.

On February 25, 2005, the State charged Mark with first-degree kidnapping in violation of Iowa Code section 710.2. The State also alleged Mark was subject to a sentence enhancement pursuant to section 901A.2(3) based on a 1981 conviction for second-degree sexual abuse. A supplemental trial information was filed, however, without the sentencing enhancement. Another supplemental trial information was later filed changing the dates of the alleged incident.

Gunderson testified at Mark's trial. He claimed he went with Mark to the park because he did not think Mark's errand to pick up drugs from some friends would take long. Gunderson also inadvertently testified he had taken a polygraph examination. First, on cross-examination, he was asked when he first reported the incident to his probation office:

Q: Do you recall, was it January, February, July, June?
When was it? A: I'm not sure what month, but I—I did—it was Bob Sutherland, and I did take the lie detector, and that's when I got that answer wrong.

Defense counsel returned to the subject later in the cross-examination:

Q: Is the first person you told about the fondling Bob Sutherland? A: Yes, sir. That's when it came up with the lie detector.

Following cross-examination, a hearing was held outside the presence of the jury. Gunderson testified the prosecutor had instructed him not to mention the polygraph, but that he made a mistake. The State moved for a mistrial, and defense counsel requested that, if a mistrial was granted, it be with prejudice. Defense counsel, however, did not join in the motion for mistrial.¹ The court overruled the State's motion.

On direct examination, the prosecutor asked the investigating police officer about Mark's sexual orientation:

Q: Okay. And the final question—you asked him a question about basically his sexuality. What did he report to you about that?

A: He has had four male partners.

A jury found Mark guilty of the lesser-included offense of third-degree kidnapping on May 20, 2005. On June 2, 2005, Mark was sentenced to a term not exceeding ten years and fined \$5000. Mark appeals his conviction.

II. Standard of Review

We review the grant or denial of a mistrial for abuse of discretion. *State v. Piper*, 663 N.W.2d 684, 901 (Iowa 2003). We will not disturb the court's ruling unless it is based on clearly untenable or clearly unreasonable grounds. *Id.*

¹ Following the State's motion for mistrial, the court asked defense counsel for his response:

THE COURT: Do you want to respond to the motion at all?

DEFENSE COUNSEL: My position would be that it's the State's mistake, and based on the record the State made, if there is a mistrial, that it be with prejudice.

Later, in making its ruling, the court specifically mentioned that defense counsel was not moving for mistrial, and asked if counsel had further record to make. Counsel corrected the court on another statement it had made during the ruling, but did not tell the court he was joining in the motion for mistrial.

Clearly untenable grounds are those which lack sufficient evidence or which are based on a misapplication of the law. *Id.*

We review claims of ineffective assistance of counsel de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

III. Merits

A. Polygraph

Mark claims that because evidence of an unstipulated polygraph is inadmissible, the court erred in failing to declare a mistrial. He argues that though Gunderson said he “got that answer wrong,” the fact that charges were nonetheless brought against Mark could induce jurors to think Gunderson ultimately passed the polygraph examination. The State argues that Mark failed to preserve the issue.²

Without deciding whether the issue is preserved, we have to conclude the trial court did not abuse its discretion in refusing to grant a mistrial. The district court determined the references to the polygraph were inadvertent and the result of the door being opened on cross-examination. The transcript supports this finding. More importantly, Gunderson’s inadvertent statements might actually have helped Mark. His counsel did not object to the testimony or request a mistrial. This is understandable since the inadvertent testimony could easily be viewed as helpful to the defendant. The only evidence of sexual assault was

² Mark’s brief and the record are both confusing on this point. In the argument concerning the mistrial issue, the brief states that the defense joined in the State’s motion for mistrial. In the argument concerning ineffective assistance of counsel, the brief states defense counsel did not object or join in the motion for mistrial, but instead made the argument for mistrial during a motion for new trial. It is clear from the record Mark did not join in the motion for mistrial.

Gunderson's allegation. Other witnesses, however, gave supporting evidence to the rest of his story: they testified to seeing bruises on his body. As a result, the jury convicted Mark of third-degree kidnapping, a crime that does not include an element of sexual assault. This would certainly seem to indicate the inadvertent testimony was beneficial to the defense. Mark cannot take advantage of such testimony at trial and then challenge it later on appeal. We therefore affirm the court's ruling on the motion for mistrial.

B. Ineffective Assistance

Mark argues that his attorney rendered ineffective assistance when he (1) failed to object or move for mistrial when Gunderson made statements about the polygraph; (2) failed to object to Gunderson's testimony that Mark was going to pick up drugs; and (3) failed to object to the police officer's testimony about Mark's sexual history. In order to show his counsel was ineffective, Mark must show not only that his counsel breached a duty, but that the breach prejudiced his defense. *Strickland v. Washington*, 433 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). We may resolve the claim on either prong. *Id.* at 697, 104 S. Ct. at 2052, 80 L. Ed. at 699. Generally, we preserve ineffective assistance of counsel claims for postconviction relief actions. *State v. Tate*, 710 N.W.2d 237, 240-41 (Iowa 2006). Where the record is sufficient, however, we may decide the issue. *Id.* at 240. The record here is adequate.

First, Mark was not prejudiced when his attorney failed to object or move for mistrial after Gunderson mentioned taking a polygraph examination. The State objected, conducted voir dire, and moved for mistrial. In fact, the State was well aware of the possible benefit the inadvertent testimony could bestow on the

defense. It would have been reasonable trial strategy for Mark's attorney to decide not to object to testimony challenging the credibility of the State's witness. See *State v. Andrews*, 705 N.W.2d 493, 497 (Iowa 2005) (refusing to allow defendant to challenge attorney's tactical decision). Further, the court allowed Mark's attorney to argue the issue of mistrial during a motion for new trial. The court considered the arguments, and rejected them. See *State v. McCurry*, 544 N.W.2d 444, 448 (Iowa 1996) (concluding counsel was not ineffective where ruling on the merits was secured). Therefore, Mark was not prejudiced by his attorney's failure to object or move for mistrial during trial.

Second, Mark's attorney had no duty to object on the basis of Rule of Evidence 5.404(b) to Gunderson's testimony about drugs.³ Gunderson was explaining how he came to be with Mark at the park: Mark told him he needed to stop to pick up drugs from friends. In this context, the drugs were not a "prior act." Further, Mark was not charged with a drug-related crime, nor were there any accusations at trial that the kidnapping of Gunderson was somehow related to drugs. The testimony could not be used to show any type of conduct in conformity. It was intrinsic testimony that showed both the ruse Mark used to persuade Gunderson to accompany him and explained Gunderson's state of mind in going to the park. Mark's attorney, therefore, had no duty to object based on rule 5.404(b).

³ Rule 5.404(b) states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such a proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Third, Mark was not prejudiced by the introduction of evidence concerning his past sexual history or his sexuality. He was convicted of the lesser-included offense of third-degree kidnapping. Third-degree kidnapping does not contain the sexual assault element found in first-degree kidnapping, the crime with which he was charged. Therefore, Mark was not prejudiced by his attorney's failure to object to the evidence concerning his past sexual partners.

IV. Conclusion

First, the district court did not abuse its discretion in refusing to grant a mistrial based on testimony about the polygraph. Second, Mark was not prejudiced when his attorney failed to object to the testimony concerning the polygraph. The court considered the argument both when the State objected and when the defense moved for new trial. Third, Mark's attorney had no duty to object under rule 5.404(b) to testimony that Mark was picking up drugs that night. He was not picking up drugs, and his comment was simply a fabrication. The "drugs" were not a prior bad act and could not have been used to show conduct in conformity. Finally, Mark was not prejudiced when his attorney failed to object to testimony concerning his sexual history. The jury did not convict him of the sexual elements of the crime charged.

Mark's conviction is affirmed.

AFFIRMED.