

IN THE COURT OF APPEALS OF IOWA

No. 7-097 / 06-0660
Filed March 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT HARRY HARKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Cedar County, J. Hobart Darbyshire, Judge.

Defendant appeals his conviction for sexual abuse in the third degree.

AFFIRMED.

Patricia Reynolds, Acting Appellate Defender, and James G. Tomka, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, and Lee W. Beine, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

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

On August 27, 2005, Robert Harkins went out drinking with some friends. The group ended up at the home of Nichol. After a short period of time most of the group left, except for Derrick, Trisha, Harkins, and Nichol. Derrick, who was Nichol's former boyfriend, passed out on the couch. Trisha went to sleep in one of the bedrooms. Harkins laid down in Nichol's bedroom in all of his clothes. Nichol stated she believed Harkins was sleeping or passed out, so she laid down to sleep on the other side of the bed.

Nichol testified Harkins rolled over on top of her, and she told him to get off. Harkins pinned Nichol down and pulled her clothing off. Nichol testified she repeatedly told Harkins no, stating, "I told him no. I told him to stop." Harkins proceeded to engage in sexual intercourse with her. When Harkins stopped she kneed him and pushed him off, then screamed at him that she had said no. Trisha heard Nichol say, "No, I said no." Trisha went to investigate, and met Nichol coming out of her bedroom, clad only in a blanket and crying hysterically. Trisha stated she saw blood on Nichol's bed. Harkins then left the home.

Trisha and Nichol called the police, and deputy sheriff Kevin Knoche responded to the call. Deputy Knoche also saw blood on Nichol's bed. Deputy Knoche found Harkins sleeping at the home of a friend. Harkins was not wearing his underwear, but it was stuck in the fly of his pants. Harkins denied having sex with Nichol and stated he could not recall anything like that occurring.

Nichol was taken to a hospital for a physical examination. Nichol had three tears, which were bleeding, in the area of the perineum. Nancy Downing, a registered nurse, testified she did not usually find tears that were that large or bleeding at the time of the exam. Downing testified Nichol's injuries were consistent with forced sexual intercourse.

Harkins was charged with third-degree sexual abuse, in violation of Iowa Code section 709.4 (2005). At the trial Harkins testified he remembered everything about the evening in question. He stated he and Nichol had engaged in consensual sex. He stated that in the middle of having sex, he found out Nichol had recently had sex with Derrick, and he made a derogatory comment to her. He stated Nichol got mad and threw him out.

A jury found Harkins guilty of third-degree sexual abuse. Harkins was sentenced to a term of imprisonment not to exceed ten years. He now appeals, claiming he received ineffective assistance of counsel.

II. Standard of Review

Our review of claims regarding ineffective assistance of counsel is de novo. *Berryhill v. State*, 603 N.W.2d 243, 244-45 (Iowa 1999).

III. Merits

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 defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). We presume that counsel is competent and that

the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

We may first examine the prejudice component of a defendant's claim of ineffective assistance of counsel. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). In order to prove the prejudice component of an ineffective assistance claim, a defendant must show that but for the alleged errors of counsel the result of the proceeding would have been different. *State v. Reynolds*, 670 N.W.2d 405, 415 (Iowa 2003).

A. The minutes of testimony state Nichol would testify "that the defendant pinned her legs down and started to undress her and she began to claw and bite at him." Harkins claims he received ineffective assistance because his defense counsel did not question Nichol about this statement on cross-examination. Harkins believes Nichol's testimony on this issue would have been important because deputy Knoche was later asked if he saw any bite marks or scratches on Harkins, and deputy Knoche replied, "No, not that I visually saw myself, no." Harkins asserts that deputy Knoche's testimony would have impaired Nichol's credibility.

The initial problem Harkins faces here is that it would not have been appropriate to examine Nichol on the statement in the minutes of testimony concerning her reaction to Harkins's attentions. The statement in the minutes is not Nichol's. She didn't author it; the prosecutor did in drafting the minutes. See *State v. Bishop*, 387 N.W.2d 554, 559-60 (Iowa 1986) (holding proper to deny attempt to impeach witness on statement in minutes attributed to her as it was

prosecutor's statement, not witness's). We are left to speculate as to what, if anything, Nichol actually said on this subject.

Additionally, even if we assume Nichol made such a statement, we conclude no prejudice has been demonstrated. That the deputy did not observe visible marks on Harkins does not establish Nichol consented to intercourse with Harkins. Given the great weight of the evidence of Harkins's guilt, we cannot conclude the result would have been different if Nichol had been questioned about the statement. Nichol testified she did not consent to sex with Harkins and repeatedly told him no. Trisha testified she heard Nichol say, "No, I said no." Trisha stated Nichol was crying hysterically as she came out of her bedroom. Trisha and deputy Knoche saw blood on Nichol's bed. Nurse Downing testified Nichol's injuries were consistent with forced sexual intercourse. Harkins first denied having sex at all with Nichol; at trial he testified he recalled all that happened and that the two had consensual sex. Harkins has not established the prejudice component of his ineffective assistance of counsel claim on this issue.

B. During the cross-examination of deputy Knoche, the following exchange occurred:

Q. Did she indicate to you during your investigation if she resisted physically the alleged perpetrator?

PROSECUTOR: Objection. Hearsay.

THE COURT: Sustained.

Harkins asserts he received ineffective assistance because defense counsel raised no argument about the hearsay objection and did not make an offer of proof. Harkins states the question was not designed to prove the truth of the matter asserted, but was actually trying to prove the opposite, that Nichol had

stated she had physically resisted, but deputy Knoche did not see any marks on Harkins.

Under Iowa Rule of Evidence 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.” *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). Contrary to Harkins’s arguments, the question presented to deputy Knoche sought to establish the truth about whether Nichol made statements to him about physically resisting Harkins. The district court properly sustained the hearsay objection. Defense counsel did not breach an essential duty by failing to make an offer of proof. *See State v. Hoskins*, 586 N.W.2d 707,709 (Iowa 1998) (no duty to pursue meritless issue)

We conclude Harkins has failed to show he received ineffective assistance of counsel. We affirm his conviction.

AFFIRMED.