IN THE COURT OF APPEALS OF IOWA

No. 9-958 / 08-2048
Filed January 22, 2010

ROBERT HARRY HARKINS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Cedar County, Charles H. Pelton, Judge.

Robert Harry Harkins appeals the district court decision denying his application for postconviction relief. **AFFIRMED.**

Steven E. Ort of Bell, Ort & Liechty, New London, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, and Sterling L. Benz, County Attorney, for appellee State.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

DANILSON, J.

Robert Harry Harkins appeals the district court decision denying his application for postconviction relief. He alleges he received ineffective assistance of trial counsel. We affirm.

I. Background Facts and Proceedings.

Harkins was arrested for an incident that occurred on August 27, 2005, at the victim's residence, after a night of drinking and barhopping with a group of friends. Our March 28, 2007 ruling on Harkins's direct appeal in *State v. Harkins*, No. 06-0660 (Iowa Ct. App. Mar. 28, 2007) contains a factual background regarding the incident, which we reiterate in part:

> On August 27, 2005, Robert Harkins went out drinking with some friends. The group ended up at the home of [the victim,] 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.
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> 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.
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> 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.
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> 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 sexual abuse in the third degree, in violation of Iowa Code section 709.4 (2005). At trial, Harkins testified he remembered everything about the evening, and stated that he and Nichol had consensual sex. The jury convicted Harkins of sexual abuse in the third degree as charged. He was sentenced to a term of imprisonment not to exceed ten years, and mandatory lifetime supervision under section 903B.1.

Harkins's conviction was affirmed on direct appeal. On August 29, 2007, Harkins filed an application for postconviction relief, alleging ineffective assistance of trial counsel. Following a hearing on August 26, 2008, the district court denied Harkins's application. Harkins now appeals.

II. Scope and Standard of Review.

We review postconviction relief proceedings for errors at law. Iowa R. App. P. 6.907 (2009); *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Under this standard, we affirm if the court's fact findings "are supported by substantial evidence and if the law was correctly applied." *Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). Those claims concerning alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Id.*; *see also State v. Decker*, 744 N.W.2d 346 (Iowa 2008). We give weight to the lower court's determination of witness credibility. *Millam*, 745 N.W.2d at 721.

III. Merits.

Harkins argues his trial counsel was ineffective in (1) failing to advise him of the sentencing enhancements imposed by section 903B.1; (2) incorrectly

informing him of the results of the DNA test; (3) failing to advise him not to testify in light of the results of the DNA test; and (4) disclosing his theory of defense to opposing counsel prior to trial.

To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). A defendant's failure to prove either element by a preponderance of the evidence is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

The test for the first element is objective: whether counsel's performance was outside the range of normal competency. *Millam*, 745 N.W.2d at 721. We start with a strong presumption that counsel's conduct was within the wide range of reasonable professional assistance. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). We presume the attorney performed competently, and the defendant must present an affirmative factual basis establishing inadequate representation. *Millam*, 745 N.W.2d at 721. It is not enough for a postconviction applicant to assert that defense counsel should have done a better job. *Dunbar v. State,* 515 N.W.2d 12, 15 (Iowa 1994). Ineffective assistance of counsel claims

> involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

Ledezma v. State, 626 N.W.2d 134, 143 (Iowa 2001).

The test for the second element is whether the defendant can prove there is a reasonable probability that, without counsel's errors, the outcome of the proceedings would have been different. *Millam*, 745 N.W.2d at 722; *Ledezma*, 626 N.W.2d at 143. A reasonable probability is one that undermines confidence in the outcome. *Millam*, 745 N.W.2d at 722. To establish prejudice, the defendant must "state the specific ways in which counsel's performance was inadequate and how competent representation would have changed the outcome." *Rivers v. State*, 615 N.W.2d 688, 690 (Iowa 2000) (quoting *Bugley v. State*, 596 N.W.2d 893, 898 (Iowa 1999)).

We have carefully reviewed the record, the briefs of the parties, and the district court's succinct and well-written opinion. Under our de novo review, we find the district court addressed every issue Harkins now raises regarding ineffective assistance of trial counsel. With one exception, we agree with the district court and any further discussion of these issues by our court would add little to and not change the disposition of this case.

We do not agree with the district court that there was credible evidence that Harkins was told and knew that he was excluded as a male donor of the sperm collected by the sexual assault evidence collection kit. However, we concur that Harkins has not shown prejudice.

Even if Harkins has been advised concerning the lab report results and Harkins chose not to testify, there is not a reasonable probability that the outcome would have been different. The lab report's failure to identify Harkin as a donor of the sperm was not inconsistent with the State's evidence. The State's evidence included the victim's testimony, and the testimony of Trisha Windsor,

who heard the victim repeatedly say no, and found her in the hallway in a hysterical state of mind. Windsor also observed Harkins in the bedroom naked, and fresh blood on the bed. The existence of blood was consistent with the fact that the victim suffered large tears and bleeding in her vaginal area. Further, if Harkins had not testified to explain that he had made a disparaging remark to the victim, there would be no other plausible for the victim's state of dress and hysterical state of mind other than a sexual assault. Thus, our confidence in the outcome is not undermined, notwithstanding any error by counsel. *See Millam*, 745 N.W.2d at 722; *Ledezma*, 626 N.W.2d at 143.

Accordingly, we affirm.

AFFIRMED.