

IN THE COURT OF APPEALS OF IOWA

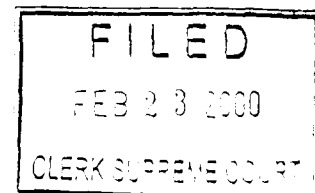
No. 1999-528 (9-789) / 98-1406

Filed February 23, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN DAVID PRITCHARD,
Defendant-Appellant.



Appeal from the Iowa District Court for Guthrie County, Gregory A. Hulse,
Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of third-degree sexual abuse in violation of Iowa Code section 709.4 (1997). He contends (1) the trial court erred in denying his motion for substitute counsel after trial had commenced, and (2) he was denied effective assistance of trial counsel when counsel failed to call certain defense witnesses, failed to cross-examine State's witnesses regarding inconsistent statements, and failed to **object** to improper cross-examination of him. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Mary L. Benton, County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

~~Defendant~~-Appellant Benjamin Pritchard appeals following his conviction of third-degree sexual abuse in violation of Iowa Code section 709.4 (1997). He contends (1) the district court erred in denying his request during trial for a different attorney and (2) that his trial attorney was not effective. We affirm.

Defendant was nineteen when he and a number of other young people drove to a cemetery outside Casey, Iowa, one evening allegedly to watch the lightening flash. Defendant, driving his pickup with the twelve-year old alleged victim and her brother as passengers, was the first to arrive at the cemetery. The balance of the group arrived later in a second vehicle. At the cemetery the victim, who had just finished drinking three or four cans of beer that the defendant admitted he gave her, got out of the pickup to go to the bathroom, and defendant followed her. At that point the victim and defendant's version of the events conflict. The victim said defendant told her to get on the tailgate of his truck, and when she did he removed her shorts and underpants and licked her genitals. The defendant denied he took off her clothes or licked her genitals.

Meanwhile, the second vehicle had parked down the road from defendant's pickup. Josh Clark and Brett Penton, two of the six people in the second car, walked towards defendant's pickup. They both told of seeing silhouettes near it. Penton testified he told Clark to wait as he approached the pickup. Penton testified he then saw the victim naked and laying on the tailgate with defendant's head between her legs. Penton testified he carried the crying victim to the car and ultimately took her to one of the passenger's home.

Although there was testimony from the victim's brother and the other passengers in the car verifying the event leading up to the group's arrival at the cemetery, the only testimony actually verifying the victim's version of the incident that formed the basis of the charge came from Penton.

Defendant was arrested the morning after the event after the county sheriff's office received a telephone call at the sheriff's office reporting the alleged assault and identifying defendant as the perpetrator. At that time clothing the victim wore the night of the alleged incident was collected but not tested prior to trial.

An attorney was appointed to represent defendant and pretrial discovery was conducted. Defendant's position is that there was no sexual encounter and that the victim lied about the sexual contact because she feared her drinking would get her in trouble and she wanted to divert attention from it.

Defendant first contends he should have been provided with a different attorney as he had requested after a day of trial and jury selection. The request was also renewed later. After defendant's requests were made the district court, addressing the matter outside the jury's presence, questioned both defendant and his attorney attempting to determine the reasons for defendant's request.

Defendant told the district court he and his family had asked the deputy sheriff who arrested him the morning after the event to obtain a sexual assault kit, but it was not done. Defendant had wanted his attorney to ask the deputy sheriff on cross-examination about this fact. The attorney did not do so.

Defendant also advances his attorney should have asked another witness to testify at trial who had previously testified in deposition that he did not hear defendant tell Penton that if he said anything he would roll him. Such testimony would have been contrary to that of Penton.

Later defendant told the court his attorney failed to tell him of key facts concerning the case and was concerned she had a conflict of interest.

Defendant's attorney told the court communications had broken down and there was distrust and lack of credibility on the part of her client and herself. She also said there was a conflict as to what needed to be done and that they could not effectively communicate. She further related she had withheld things from defendant and he did not trust her. She also told the court she felt there was a conflict of interest, and then said, "I'm not sure what more would be helpful to the Court without attorney-client privilege being broken."

The district court denied defendant's requests finding he had failed to show prejudice.

After defendant was convicted he hired another attorney who filed a motion for new trial, again alleging among other things defendant's initial complaints about his trial attorney. Before the hearing defendant moved to have tests done on the victim's underwear. The district court ordered it tested at the state's expense.

A hearing was held on the motion. Defendant's trial attorney testified. A report of tests of seven pieces of the victim's underwear was introduced. According to the report, "DNA profiles developed on the cutting of the underwear

show the presence of DNA from more than one individual. Assuming that the victim is a partial DNA contributor and that there is only a single additional source of DNA, the following can be concluded: (1) the profiling results developed on the underwear stains could be explained as a mixture of DNA from the victim and defendant; (2) defendant cannot be eliminated as a possible contributor to the DNA profile developed on the underwear stains; and (3) the frequency of Caucasian individuals who could be possible contributors to the DNA profile observed is approximately 1 out of 12,000."

Defendant first contends he should be granted a new trial because his requests for substitute counsel during trial were denied. District court rulings regarding disqualification of attorneys are subject to appellate review for abuse of discretion. *State v. Atley*, 564 N.W.2d 817, 830 (Iowa 1997). An abuse of discretion occurs only when the discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* A trial court's discretion is especially broad when, as happened here, the motion seeking disqualification arises during trial. See *Killian v. Iowa Dist. Ct.*, 452 N.W.2d 426, 428 (Iowa 1990). *Atley*, 564 N.W.2d at 830.

Defendant must demonstrate sufficient cause to warrant the appointment of substitute counsel. *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994). Sufficient reasons include a conflict of interest, an irreconcilable conflict with the client, or a complete breakdown in communications between the attorney and the client. *Id.* at 828. A defendant must ordinarily show prejudice, unless he has been denied counsel or counsel has a conflict of interest. *Williams v. Nix*, 751

F.2d 956, 960 (8th Cir.1985). Defendant claims a conflict of interest. If he succeeds on his conflict of interest claim, he need not show prejudice. To succeed on his other claims he must. See *State v. Brooks*, 540 N.W.2d 270, 272 (Iowa 1995).

Defendant claims his trial attorney had a conflict of interest. He supports his contention that he has that conflict with evidence that his attorney lied to him, subjecting her to possible disciplinary proceedings.

When asked about defendant's allegation defendant's trial attorney said she thought there was a conflict of interest and told the court she withheld things from him including evidence and defendant did not feel he could trust her. At this time she also told the court that the attorney client privilege precluded her from saying more. The district court found there was not a conflict of interest, rather that the matters at issue pertained to trial strategy.

This is a close question. The district court observed the defendant and his attorney at trial and he carefully questioned both the defendant and the attorney. To succeed on this issue defendant is required to establish an actual conflict of interest that adversely affected his lawyer's performance. See *Cuyler v. Sullivan*, 446 U.S. 335, 350; 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333, 348 (1980). The defendant has failed to show the district court abused its discretion in denying defendant's request for a new trial on the basis of a conflict of interest.

We next address defendant's claim he should have a new trial because his trial attorney was ineffective.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 570 N.W.2d 371, 373 (Iowa 1998). To prevail on such a claim, defendant must prove his or her counsel failed in an essential duty and that prejudice resulted. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Defendant has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). In doing so, defendant must overcome the strong presumption that his attorney's actions were reasonable under the circumstances. *State v. Schumpert*, 554 N.W.2d 250, 254 (Iowa 1996). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). The ultimate test is whether under the entire record and totality of the circumstances, counsel's performance was within the normal range of competency. *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983).

Defendant contends his trial attorney did not make an adequate investigation. In making this argument he points out that the focal issue at trial was whether to believe him or to believe the victim, and Penton was the only other person to testified to witnessing the event. Consequently, defendant advances Penton's credibility was also a focal issue.

Defendant in his brief only makes a very general statement indicating that his attorney should have called defense witnesses who he requested be called. However, defendant's brief fails to specify those witnesses he claims should have been called and does not explain how their testimony would have been

likely to change the result of the trial. At oral argument on rebuttal the defendant for the first time on appeal contended that his trial attorney should have called Judi Zimmerlne. We do not address issues presented for the first time at oral argument.

We next examined defendant's specific claims his trial attorney should have done more to cross-examine witnesses. He contends that witness Crystal Nelson, one of the passengers in the car, should have been cross-examined because her testimony did not agree with that of the other passengers in the car. Defendant's trial counsel successfully objected to allowing Nelson to testify to prejudicial hearsay. The district court found and we agree that it was a reasonable tactical decision not to cross-examine Nelson as it could have opened the door for the prejudicial hearsay.

Defendant also contends that Josh Clark should have been cross-examined so as to bring into evidence statements he made in a deposition concerning the victim's intoxication. Defendant asserts these statements would have bolstered his argument that the victim made up the story of sexual abuse to take the focus away from her drinking. We have examined Clark's deposition testimony and while it did indicate the victim had been drinking heavily it does nothing to bolster the defendant's claim the sexual abuse was invented by the victim to take the focus from her drinking. We agree with the district court that it was a reasonable tactical decision of trial counsel and that further cross-examination of Clark would not further defendant's cause.

Defendant next contends that his trial attorney was ineffective because she ~~did not~~ object to certain questions asked him in cross-examination. **Defendant** asserts it was improper for the prosecutor to discuss his hepatitis; whether he was fired from a job; and whether his current employment involved a special interest in old people. We agree with the defendant that certain of the challenged questions may have been asked merely to embarrass him and if an objection had been made it may well have been sustained. However, defendant has failed to show that but for the challenged cross-examination the result of the trial would have been different.

Defendant also contends his trial attorney was ineffective in allowing the prosecutor to question him as to whether other witnesses had lied. The issue of whether this is improper cross-examination of a defendant in a criminal trial has not been decided in Iowa. See *State v. Boyles*, 551 N.W.2d 600, 610 (Iowa App. 1996). Even if an objection to the cross-examination would have been sustained, defendant has not shown the necessary prejudice to succeed on this issue.

AFFIRMED.