FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

297

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

KURTIS BRADHAM,)

Defendant-Appellant.)

Filed January 29, 1986

5-575
84-1793

Appeal from the Iowa District Court for Hamilton County, David L. Hansen, Judge.

Defendant appeals from his conviction of third-degree sexual abuse asserting that his trial counsel was ineffective. **AFFIRMED.**

Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; and Elizabeth E. Ciebell, Assistant Attorney General; and J. L. Greenley, County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

The defendant has appealed his conviction of sexual abuse, contending his counsel was ineffective. We affirm.

The defendant was charged with sexual abuse arising out of an incident which occurred on April 13, 1984. At the start of trial the court stated that on the basis of opening statements to the jury, the issues of identity and the fact of the sexual act were established. The court found the issue to be tried by the jury was whether or not the sex act was accomplished by force or against the will of the complaining witness. Defendant, Kurtis Bradham, was found guilty of third-degree sexual abuse.

The victim testified that three days before the incident she was followed to work by a red Vega. The prosecution claimed defendant was checking her work schedule. Defendant testified that he did not follow her to work that day and his brother testified he had access to the red Vega and could have parked across the street from where the victim worked.

The State presented the victim's employer as rebuttal witness. Her testimony consisted of statement she had seen the red Vega, that the person inside seemed to look at the victim's car, and gave a description of the person in the Vega. She did not identify the defendant as this person.

A closed hearing was held to determine whether or not the witness would be allowed to testify. Defense counsel objected to the State's failure to give notice of the testimony, and to the fact the witness had been in the courtroom while testimony was given, although other witnesses were sequestered. The court overruled the objections and allowed the witness to testify.

Bradham now says his counsel was ineffective for failing to object to the testimony on the ground it was beyond the scope of rebuttal.

The defendant must show by a preponderance of the evidence that counsel failed to perform an essential duty and prejudice resulted from the omission. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984); Sallis v. Rhoads, 325 N.W.2d 121, 122 (Iowa 1982). The prejudice to the defendant must be of the magnitude that there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. Strickland v. Washington, ____U.S. ____, ____, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). The duty which counsel neglected must be an essential duty. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983).

Rebuttal testimony is that which explains, repels, controverts or disproves evidence produced by the other side. State v. Bakker, 262 N.W.2d 538, 543 (Iowa 1978). The decision as to whether rebuttal testimony should be allowed is within the sound discretion of the court. Id.

Defendant claims that the rebuttal testimony did not explain or disprove any statement made by the defendant or his brother. The rebuttal testimony tended to confirm the victim's statements and give credibility to her statements. While this is true, it could also be found that the description of the person inside the car was helpful to the jury in determining whether it was the defendant who drove the car.

Further, the fighting issue in this trial was consent. The statements of the witness in confirming the victim's testimony are not of such a magnitude that the outcome would likely have been different. Any prejudice to the defendant was minimal. We affirm his conviction.

AFFIRMED.