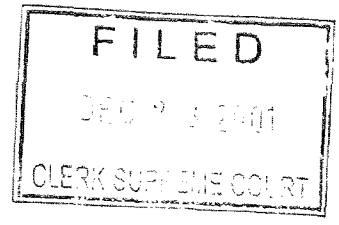
IN THE COURT OF APPEALS OF IOWA

No. 1-701 / 01-0230
Filed December 28, 2001



EARL LEROY KIRKLIN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Earl Leroy Kirklin appeals the district court order denying his application for postconviction relief. **AFFIRMED.**

Jon Kinnamon of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd Tripp, Assistant County Attorney, for appellee.

Considered by Hayden, Peterson, and Harris, Senior Judges.*

*Senior Judges assigned by order pursuant to Iowa Code section 602.9206 (2001).

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PETERSON, S.J.

Earl LeRoy Kirklin appeals from the denial of his application for postconviction relief. Kirklin was convicted of sexual abuse in the second degree in violation of Iowa Code section 709.3(1). The conviction was affirmed on appeal. The amended application for postconviction relief contends his trial counsel and his appellate counsel were ineffective by failing to find and object to fundamental errors in the final jury instructions. After hearing thereon the trial court considered the claims and denied the application. The issues are now before this court, and we affirm the decision of the trial court.

To establish a valid claim of ineffective assistance of counsel, Kirklin must prove by a preponderance of evidence (1) that counsel's performance was deficient in that counsel failed to perform an essential duty, and (2) that prejudice resulted "to the extent that but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington,* 466 U.S. 668, 687, 194 S. Ct. 2052, 2059, 180 L. Ed. 2d 674, 698 (1984). The same standard for evaluating trial counsel is applicable for measuring the effectiveness of appellate counsel. *Luke v. State,* 465 N.W.2d 898, 901 (Iowa Ct. App. 1990). The ultimate concern is the fundamental fairness of the proceedings whose result is being challenged. *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. We must consider whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result. *Id.* at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. The applicant bears the burden of proving by a preponderance of the

evidence that counsel failed to perform an essential duty and that prejudice resulted from that failure. *State v. Risdal,* 404 N.W.2d 130, 131 (Iowa 1987).

To "assert a claim of ineffective assistance of trial counsel in a postconviction proceeding, an applicant . . . ordinarily must show that his claim was preserved for review by being made on direct appeal." *Collins v. State,* 477 N.W.2d 374, 376 (Iowa 1991). Otherwise, the applicant must show sufficient reason, such as ineffective assistance of appellate counsel, why it was not raised on appeal. *LeGrand v. State,* 540 N.W.2d 667, 668 (Iowa Ct. App. 1995).

Kirklin asserts two grounds as a basis for the failure to raise the claims presented in these proceedings on direct appeal: (1) that the claims are so novel that failure to raise them is excusable, and (2) that appellate counsel was constitutionally ineffective by failing to raise these claims.

The Iowa Supreme Court has not adopted the "novelty" exception as a basis for sufficient reason for the failure to raise a claim in a prior proceedings. *See Waterbury v. State,* 387 N.W.2d 309, 311 (Iowa 1986). We will not depart from that determination.

One of Kirklin's claims of ineffective assistance of trial counsel and appellate counsel is premised upon the failure of trial counsel to challenge the trial court's instructions which omitted the defense of insanity or the defense of diminished responsibility in the marshalling instructions. Kirklin contends second-degree sexual abuse as charged by the prosecutor in this case is a specific intent crime, and as such, he is entitled to an instruction on the defense of diminished responsibility on the charges of second-degree sexual abuse and

third-degree sexual abuse. The supreme court has defined these crimes as general intent crimes. *Lamphere v. State,* 348 N.W.2d 212, 217 (Iowa 1984). Kirklin does not convince this court by his argument that this position should be modified. Neither trial counsel nor appellate counsel was ineffective for failing to request a specific intent instruction as an element of the crimes of second-degree sexual abuse or third-degree sexual abuse.

Kirklin contends his trial and appellate counsel failed to challenge the jury instructions which failed to include a requirement he possessed the prerequisite general criminal intent to commit the crimes of second-degree sexual abuse or third-degree sexual abuse. It has been stated that it is error for the court not to submit general criminal intent as an element of the crime of sexual abuse in the marshalling instruction. *Id.* Trial counsel may be found to be ineffective if he or she fails to object to the omission of an element of the crime in the marshalling instruction. *State v. Goff,* 342 N.W.2d 830, 837-38 (Iowa 1983). However, even if there was a failure of a fundamental duty to Kirklin to object to the omission, Kirklin must establish by a preponderance of the evidence that the court's confidence in the outcome of the trial is undermined. *Strickland*, 466 U.S. at 686, 104 S. Ct. at 264, 80 L. Ed. 2d at 692-93.

This court examines the record. The unchallenged testimony of the victim reflects that Kirklin chased and tackled the victim, restrained her, twisted her neck, and put his hand over her mouth. He threatened her by stating if she tried to scream or run away he would break her neck. He forced her to perform oral sex. He thereafter asserted he was "going to fuck you and let you go." He told

her he was going to use a condom and then changed his mind. He forcibly had intercourse with the victim. He then made her promise not to tell anyone before he let her leave. The evidence is overwhelming that Kirklin intended to do the act of sexual assault. It was a voluntary act on his part. He intended the natural results of the act and knew it was wrong. The failure of trial counsel and of appellate counsel to object to the omission of the general intent instruction in the marshalling instruction did not undermine the confidence in the outcome of the trial.

Kirklin contends counsel was ineffective for failing to object to the marshalling instruction which does not include a requirement that the jury consider his defense of insanity prior to a finding of guilty to the charge. Kirklin contends a separate instruction on insanity is confusing to the jury because it is not clear how it affects the outcome. *State v. McMullin,* 421 N.W.2d 517, 518-19 (Iowa 1988), concludes that the jury should first determine what crime the defendant has committed, if any, before it considers the issue if insanity. While it is a more acceptable approach to direct the jury in the marshalling instruction to consider the defense of insanity if they determine that the State has proven all the elements of the crime, the issue before this court is whether the failure to do so prejudiced Kirklin. The instruction on the defense of insanity was described in a separate instruction utilizing the language of the uniform instructions. The instructions advised the jury if "defendant has proved either of these elements [of insanity] by a preponderance of the evidence, then the defendant is not guilty by reason of insanity." There was direction to the jury to read all of the instructions

and that they were to be read together. The reported final arguments reflect that the defense of insanity was the primary issue for the defense and was urgently presented. The issue is whether Kirklin was prejudiced and whether there was a reasonable probability that, but for the failure to object to the omission in the marshalling instruction, a different result would have been likely. *Strickland*, 466 U.S. at 687, 194 S. Ct. at 2059, 180 L. Ed. 2d at 698. There is no reason to conclude that the outcome would have been different given the evidence of guilt and the absence of substantial evidence of insanity at the trial.

The trial court instructions failed to define "serious injury." Kirklin attributes prejudice to him resulting from the failure of trial and appellate counsel to raise issue with that omission. It has been held that on direct appeal failure to include an element of the offense in the marshalling instruction can result in a determination that trial counsel was ineffective. *Goff,* 342 N.W.2d at 837-38. However, failure to properly instruct on an issue for which there was overwhelming evidence of guilt does not entitle a defendant to a new trial. *State v. Seiler,* 342 N.W.2d 264, 268 (Iowa 1983). One of the essential elements of proof of second-degree sexual abuse in this case required from the State is to establish that Kirklin threatened to use force creating a substantial risk of "bodily injury . . . which causes . . . protracted loss or impairment of any bodily member or organ . . . ." Iowa Code § 702.18. There is uncontested evidence from the victim that Kirklin grabbed her neck, pulled it to one side, and said that he would break her neck if she ran or screamed. It stretches the boundaries of credulity to suggest that a jury would ponder over the issue whether the breaking of one's

neck would create a protracted impairment that would be resolved only by an instruction on the definition of "serious injury." No prejudice resulted to Kirklin.

"[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *McMullin*, 421 N.W.2d at 520 (quoting *Cupp v. Naughten,* 414 U.S.141, 146-47, 94 S. Ct. 396, 400, 38 L. Ed. 2d 368, 373 (1973). *McMullen*, quoting further from *Cupp* stated the proper analysis "is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Id.* An error in instructing the jury does not necessitate reversal unless it is prejudicial. *State v. Gibb,* 303 N.W.2d 673, 686 (Iowa 1981). Although a defendant is entitled to a fair trial, he is not entitled to a perfect trial. *State v. Freeman,* 297 N.W.2d 363, 367 (Iowa 1980).

Kirklin has failed to establish by a preponderance of the evidence that the failure of his trial and appellate counsel to raise the issues herein presented in trial or in the direct appeal would have likely resulted in a different outcome. The decision of the trial court is affirmed.

AFFIRMED.