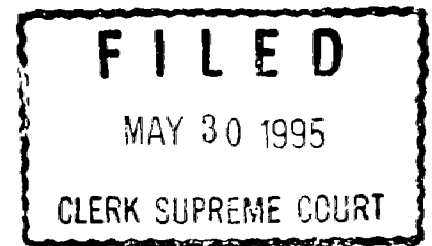


IN THE COURT OF APPEALS OF IOWA

No. 5-216 / 94-721



STATE OF IOWA,

Appellee,

vs.

ARTHUR CLINTON DOWNS,

Appellant.

Appeal from the Iowa District Court for Marshall County, Timothy J. Finn and
Carl E. Peterson, Judges.

Downs appeals his conviction, following a jury trial, for assault with intent to
commit sexual abuse causing bodily injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney
General, James DeTaeye, County Attorney, and Paul Crawford, Assistant County
Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

HUITINK, J.

Arthur Clinton Downs appeals his conviction of assault with intent to commit sexual abuse. We affirm.

At trial, Downs and Goodrich, the victim of the assault, both testified they had met in a bar and gone to Goodrich's house and had a drink there. However, Goodrich testified Downs left after one drink and she went to bed. Goodrich stated Downs returned as she was about to fall asleep, got on top of her, and sexually fondled her. A struggle broke out with Goodrich grabbing Downs' hair and hitting his head on the floor a few times. According to Goodrich, Downs then punched her, followed her into the bathroom, and shoved her onto the floor kicking her all over her body and finally beating her face into the toilet. Goodrich managed to escape and ran to neighbors screaming for help. Goodrich used a neighbor's phone to call a friend. Her friend summoned the police. Goodrich did not seek or receive medical treatment for her injuries.

Downs, on the other hand, testified he and Goodrich engaged in kissing and fondling at the bar and that once they were in the apartment this continued with Goodrich changing into an open gown under which she was nude. According to Downs, Goodrich began yelling and hitting him when he refused to engage in sexual intercourse. Goodrich allegedly pushed Downs onto the ground, grabbed his head, and struck it against the floor. In his attempt to leave, Downs pushed Goodrich against the

wall and then left. He returned for his coat at which time Goodrich struck him with a rod.

Downs was found guilty as charged and was sentenced to a five-year prison term.

On appeal Downs contends the evidence does not support his conviction because any sexual touching that possibly occurred was reasonably believed by him to be invited by Goodrich. He asserts any subsequent touching of Goodrich by him was justified. Downs also contends his trial counsel was ineffective for failing to object to the introduction of a prior crime and a witness's inappropriate testimonial conclusion that Goodrich's condition on the night in question constituted a bodily injury.

I. Sufficiency of the Evidence.

Our standard of review for a sufficiency of the evidence challenge is well settled. A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). Evidence which

merely raises suspicion, speculation, or conjecture is not substantial. *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981). Direct and circumstantial evidence are equally probative in this determination. *Id.*

The State was required to prove Downs assaulted Goodrich with intent to commit sexual abuse and Goodrich suffered a bodily injury as a result. The facts an altercation occurred and Goodrich was injured are undisputed.

Goodrich and Downs each blamed the other for initiating their physical altercation. Since there were no other witnesses to this event, the dispositive question on this issue was witness credibility. The jury was free to believe Goodrich's versions of this event and reject Downs' claim his use of force was justified. *State v. Blair*, 347 N.W.2d 416, 418-19 (Iowa 1984). Our limited review of the record indicates there is substantial evidence supporting the conclusion Downs assaulted Goodrich.

Downs also claims the element of intent to commit sexual abuse lacks sufficient evidentiary support. Specific intent may be established by circumstantial evidence and by inferences drawn from the conduct of the defendant in light of human behavior and experience. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). The defendant's intent to commit sexual abuse may be inferred from his declarations, from the acts done, and the manner in which his acts were performed. *State v. Radeke*, 444 N.W.2d 476, 478 (Iowa 1989) (citing *State v. Maynard*, 379 N.W.2d 382, 383 (Iowa App. 1985); *State v. Ramsdell*, 242 Iowa 62, 65-66, 45 N.W. 503, 505-06 (1951)).

Downs' words and actions as detailed in the record support the inference he intended to commit sexual abuse. There is evidence he partially removed Goodrich's nightgown, fondled her breast and squeezed her thigh near her vagina. He also made sexually suggestive statements such as "I know you want it" and "Why don't you suck this, bitch," contemporaneously with the foregoing actions. We find sufficient evidence supports this element and affirm on this issue.

II. Ineffective Assistance of Council.

Downs claims he was denied effective assistance of counsel in two respects. Ordinarily, our appellate courts will not decide an ineffective assistance of counsel claim on direct appeal, as we prefer to reserve such questions for postconviction proceedings where counsel can explain his or her conduct. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference, however, in cases where the record is adequate to evaluate an appellant's claim. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982). We think the record in the present case is sufficient for our review of Downs' appeal. We therefore proceed to the merits of his claim. Our review is de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

In order to succeed on a claim that he was denied effective assistance of counsel, Downs must show that his counsel failed to perform an essential duty and that prejudice resulted therefrom. *Snethen v. State*, 308 N.W.2d 11, 14 (Iowa 1981). Downs has the

burden to prove both of these elements by a preponderance of the evidence. *Sallis v. Rhoades*, 325 N.W.2d 121, 122 (Iowa 1982).

In deciding whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. *Fryer v. State*, 325 N.W.2d 400, 413-15 (Iowa 1982). Appellants must overcome a presumption that counsel is competent. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-55, 80 L. Ed. 2d 674, 693-94, *reh'g denied* 467 U.S. 1267, 104 S. Ct. 3562, 82 L. Ed. 2d 864 (1984). Appellants must show an affirmative factual basis demonstrating counsel's inadequacy of representation. *Snethen*, 308 N.W.2d at 14. The ultimate test is whether under the entire record and totality of the circumstances counsels' performances were within the range of normal competency. *Henderson v. Scurr*, 313 N.W.2d 522, 524 (Iowa 1981).

In order to prove prejudice, appellant must show that counsel's failure to perform an essential duty worked to his actual and substantial disadvantage. *State v. Mills*, 344 N.W.2d 231, 234-35 (Iowa 1984). Specifically, appellants

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *Taylor*, 352 N.W.2d at 685.

In analyzing this claim, we note first that we need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim. *Taylor* 352 N.W.2d at 685 (Iowa 1984). We accept the counsel of the United States Supreme Court in this regard that

[t]he object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697, 104 S. Ct. at 2070, 80 L. Ed. 2d at 700; *Taylor*, 352 N.W.2d at 685.

Downs argues his counsel was ineffective because he failed to properly object to Downs' impeachment with a prior convictions for operating without owner's consent in violation of Iowa Code section 714.7 (1993). His specific complaint is counsel's objection was incomplete because it did not urge this offense is not a crime involving dishonesty or false statement.

Trial counsel's objection to this evidence was limited to its prejudicial effect. This objection is expressly contemplated by Iowa Rule of Evidence 609(a). Counsel need not make every possible objection in order to satisfy normal competency requirements. *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993). Moreover, operating without the owner's consent is arguably a theft. "Theft crimes encompass stealing in an elemental sense. Therefore they involve dishonesty." *State v. Mickens*,

462 N.W.2d 296, 297 (Iowa App. 1990); *State v. Latham*, 366 N.W.2d 181, 184 (Iowa 1985). Trial counsel apparently conceded this fact and relied on the objection contemplated by the rule. Under these circumstances, we do not believe Downs' counsel breached an essential duty by failing to include this theory in his objection.

Even if we were to find a breach of essential duty, we are unable to find prejudice. Downs was also impeached with another theft-related conviction. The resulting effect of using the challenged offense was merely cumulative.

Downs makes a similar claim concerning counsel's failure to object to a police officer's testimony that Goodrich suffered bodily injuries. He argues this is a prohibited opinion on an ultimate fact question reserved for the jury. We need not determine the merits of the proposed objection because we are unable to find the necessary prejudice. There is abundant evidence of Goodrich's bodily injuries independent of the police officer's opinion. Moreover, the fact that Goodrich was injured is not seriously disputed. Even if the officer's testimony was excluded, we do not believe there is a reasonable probability the jury's verdict would have been any different.

We have carefully considered all of Down's claims of error and find them to be without merit. The district court judgment is affirmed in its entirety.

AFFIRMED.