IN THE COURT OF APPEALS OF IOWA

No. 6-140 / 95-0249

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STATE OF IOWA,

Appellee.

vs.

EARL LEROY KIRKLIN,

Appellant.

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

Kirklin appeals his conviction, following a jury trial, of second-degree sexual abuse. **AFFIRMED.**

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

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

Considered by Sackett, P.J., and Huitink and Streit, JJ.

HUITINK, J.

Earl Leroy Kirklin appeals his conviction, following a jury trial, of second-degree sexual abuse. We affirm

Kirklin was charged with second-degree sexual abuse following allegations he sexually abused L.F. while she was jogging late at night. At trial L.F. testified Kirklin started chasing her while she was running, tackled her, and laid on top of her with his hand over her mouth while twisting her neck. She also testified that Kirklin threatened to break her neck if she screamed, tried to escape, or resisted the multiple sex acts he forced on her. Her testimony further indicates that Kirklin abruptly ended his assault and apologized to L.F., telling her he did not know why he felt compelled to attack her. The State's evidence also included statistical D.N.A. evidence indicating there was a one in twenty million chance that semen samples obtained by the State could be attributed to someone other than Kirklin.

Kirklin did not deny he assaulted L.F. or otherwise dispute her version of the details of this offense. Kirklin instead asserted an "insanity and diminished capacity defense." He offered evidence that he suffered from paranoid schizophrenia which prevented him from distinguishing right from wrong at the time he assaulted L.F. Kirklin's psychiatric expert, Dr. Shultice, testified that Kirklin suffered from this condition for many years and his failure to take medication as directed caused Kirklin

to become delusional and psychotic. Dr. Shultice opined that Kirklin was insane at the time he sexually assaulted L.F.

Dr. Fredrickson, the State's psychiatric expert, testified he did not believe Kirklin was insane. Dr. Fredrickson based his opinion on several factors. These included an interview with Kirklin following this assault and his prior evaluation of Kirklin in connection with 1982 allegations Kirklin had physically assaulted another woman. Fredrickson's trial testimony indicates he also relied on L.F.'s version of events in reaching this conclusion. He testified:

> The fact that the witness was jogging in a locked track field late at night and that she had made, I believe, just one lap and someone came running at her and tackled her, and she said she tried to run or scream or was yelling for help, and the person who she said attacked her told her that if she tried to run or scream again, he would break her neck. That was probably one of the main things. A second one would be that after the alleged rape occurred, the Defendant said he was sorry, which I think is probably the main thing that indicates to me that he had a sense of right from wrong at the time. And then lastly, when he told the victim or tried to talk her into promising not to tell anyone indicated to me that all of this was goal-oriented directed behavior and rational behavior.

Kirklin's attorney unsuccessfully sought to exclude any reference to the 1982 assault allegations by filing a motion in limine prior to trial and objecting to Dr. Fredrickson's testimonial reference to them at trial. The district court overruled Kirklin's objection and stated that evidence of the 1982 assault allegations was limited to Kirklin's insanity defense and that it was not evidence of his propensity to commit the offense. Reference to the 1982 assault was also included in Dr. Fredrickson's

written report introduced by the State without any objection or request for a separate limiting instruction by Kirklin's trial counsel.

Kirklin's motion for judgment of acquittal at the close of the State's evidence was denied. This motion made no reference to Kirklin's insanity defense, and there is no record indicating Kirklin moved for judgment of acquittal on this or any other ground at the close of all of the evidence. The jury found Kirklin guilty as charged, and he was sentenced to a term not to exceed twenty-five years.

On appeal Kirklin first argues the district court erred in admitting evidence concerning the 1982 assault charge. On evidentiary issues, we review for an abuse of discretion. *State v. Casady* 491 N.W.2d 782, 785 (Iowa 1992). We will only reverse for an abuse of discretion if we find the district court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

Evidence showing the commission of crimes, wrongs, or acts other than the one at issue is inadmissible to prove a defendant acted in conformity with the character the acts may tend to show. Iowa R. Evid. 404(b); *State v. Cott*, 283 N.W.2d 324, 326 (Iowa 1979). Such evidence is ordinarily irrelevant and may create an illegitimate inference of guilt in the minds of jurors. *State v. Mendolia*, 360 N.W.2d 780, 782 (Iowa 1985). This evidence, however, may be admitted for other purposes such as

proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Iowa R. Evid. 404(b). Evidence of other crimes is always prejudicial: to require exclusion, however, the prejudicial effect of the evidence must outweigh its probative value. Iowa R. Evid. 403; *State v. McDaniel*, 512 N.W.2d 305, 308 (Iowa 1994).

Based on our review of the record, we find the district court did not abuse its discretion in admitting evidence of Kirklin's 1982 assault charge. Because Kirklin relied on an insanity defense at trial, his mental state rather than his actions were at issue. The circumstances surrounding Kirklin's 1982 psychiatric evaluation were an essential part of his psychiatric history relied on by the State's expert and formulating the expert's opinion that Kirklin was not insane at the time he sexually abused L.F. Although the expert's testimony included reference to Kirklin's prior criminal behavior, exclusion of this evidence was not required because it was not offered to prove Kirklin acted in conformity with any characteristic revealed by the 1982 assault.

We also find the probative value of this evidence exceeds its prejudicial effect. As stated earlier, the circumstances resulting in the 1982 evaluation were an essential part of Kirklin's medical history which in part formed the basis of Dr. Fredrickson's opinion. Accordingly, its probative value was substantial. Any resulting prejudice was minimized by the court's stated limitations on the admission of this evidence. *See State v. Simpson*, 438 N.W.2d 20, 21 (Iowa App. 1989) (jury presumed to follow

instructions; cautionary instructions usually sufficient to remove any danger of prejudice). We accordingly affirm on this issue.

Kirklin next contends he was denied effective assistance of counsel. He claims that his trial counsel was ineffective because he did not move for judgment of acquittal at the close of the evidence and because he did not request a written limiting instruction with respect to admission of Dr. Fredrickson's written opinion. Because Kirklin's claim implicates his constitutional right to effective assistance of counsel, our review is de novo. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987).

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Risdal*, 404 N.W.2d at 131-32. We may affirm applicant's conviction because he has failed to prove prejudice without deciding whether there was a failure of duty. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). To establish prejudice, a defendant must show to a reasonable probability that but for counsel's alleged errors, the resulting conviction and sentence would have been different. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal* 404 N.W.2d .at 131.

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Kirklin's ineffective assistance of counsel claim comes to us on direct appeal. Generally, we will not decide ineffective assistance claims on direct appeal as we prefer to reserve them for postconviction proceedings where counsel has an opportunity to respond. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference if the record is adequate to evaluate appellant's claims. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982). Here, we find the record sufficient to resolve Kirklin's claims on direct appeal.

We conclude Kirklin was not prejudiced by counsel's failure to move for judgment of acquittal on insanity grounds. To grant such a motion, the trial court would have been required to find as a matter of law that Kirklin had met his burden of proving he was insane at the time of the assault. *See* Iowa Code § 701.4 (1993). There is no indication in the record that Kirklin would have prevailed on such a motion. Accordingly, we cannot find Kirklin was prejudiced by counsel's failure to move for judgment of acquittal on his singular defense of insanity. *See State v. Ray*, 516 N.W.2d 863, 866 (Iowa 1994) (cousel is not required to raise nonmeritorious challenges).

We further find Kirklin was not prejudiced by counsel's failure to request a written limiting instruction regarding Dr. Fredrickson's written references to the 1982 assault. The record reveals the jury was given an oral limiting instruction regarding Dr. Fredrickson's testimony about the assault and that Dr. Fredrickson's written statement contained considerably less information about the incident than did his testimony. As

a result, we presume the jury followed the oral limiting instruction with respect to both Dr. Fredrickson's oral and written opinion. *See Simpson*, 438 N.W.2d at 21. Because Kirklin has failed to show he was prejudiced by counsel's failure to request a written limiting instruction, we conclude he was not denied effective assistance of counsel.

In summary, we find the district court did not err in admitting evidence regarding Kirklin's prior assault charge. We further find Kirklin was not denied effective assistance of counsel based on his trial attorney's failure to move for judgment of acquittal on insanity grounds and failure to submit a written limiting instruction with respect to the 1982 assault. We affirm.

AFFIRMED.