JAN 20 '97
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 6-717 / 96-0091

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JEFFREY JOE GRIMES,

Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Richard J. Vogel, Judge.

Jeffrey Grimes appeals from his convictions, following a jury trial, for third-degree kidnaping, domestic assault with a dangerous weapon, and two counts of domestic assault with intent to inflict serious injury in violation of Iowa Code sections 710.4 and 708.2A(2)(c) (1995). **AFFIRMED.**

R.E. Breckenridge and Thomas M. Walter of Johnson, Hester, Walter & Harrison, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Victoria Siegel, County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Jeffrey Joe Grimes appeals his conviction, following a jury trial, for third-degree kidnaping in violation of Iowa Code section 710.4 (1995), domestic assault with a dangerous weapon, and two counts of domestic assault with intent to inflict serious injury in violation of section 708.2A(2)(c) (1995). We affirm.

Grimes was convicted of the foregoing charges based on the following evidence: Tracy Reed, Grimes' live-in companion, testified that on February 10, 1995, Grimes severely beat her about the head and face, put his knee on her throat, and kicked her in the head. There is evidence Reed sustained bruises all over her body, was bleeding from both ears, and was experiencing dizziness as a result of this abuse.

Reed described another incident occurring on February 22, 1995. She testified Grimes forced her to lay on her stomach, bound her wrists and ankles, and physically abused her for several hours. There is also evidence Grimes threatened Reed with a knife and cut across her hand injuring her fourth finger while she was lying on the floor bound at the wrists and ankles.

William Appel was appointed as Grimes' defense counsel. The court granted Grimes' application for a psychiatric evaluation to determine if he was competent to stand trial. Appel was permitted to withdraw as counsel at Grimes' request and attorney Michael Neary was appointed in his place. In August 1995, Grimes requested that Neary be removed and that he be allowed to proceed pro se. Shortly

thereafter, he asked that Appel be reappointed. Appel declined, and in September 1995, the trial court reappointed Neary.

At a hearing to dispose of all pending motions, Grimes withdrew his application for a psychiatric evaluation and withdrew his earlier speedy trial waiver. On November 2, 1995, Neary took Reed's deposition. The following day Grimes moved to continue the trial set for November 7. The district court denied the motion citing the length of time this case was pending. Prior to jury selection, the State moved to amend the kidnaping count to the lesser-included offense of kidnaping in the third degree. The motion was granted and the case proceeded to trial.

Grimes moved for a directed verdict on the kidnaping and burglary counts at the close of the State's case. The motion was denied as to the kidnaping count and granted as to the burglary counts. At the close of all the evidence, Grimes renewed the motion for directed verdict and the court denied it. Grimes was found guilty of all remaining charges and was later sentenced to a total of sixteen years imprisonment.

On appeal Grimes assigns numerous errors attributable to ineffective assistance of trial counsel. He asserts trial counsel failed to complete meaningful discovery by neglecting to depose the victim until five days before trial. At that deposition, he argues, the victim's story contradicted her previous deposition testimony thus forcing defense counsel to seek a continuance. Grimes further complains trial counsel did not explore the defense of diminished responsibility but instead withdrew the application

for a psychiatric evaluation. Grimes also contends his trial counsel failed to file appropriate pretrial motions in limine to exclude evidence concerning his prior criminal record, prior instances of domestic abuse, threats, and evidence suggesting that he had a "mistress" while living with the victim. Finally, Grimes asserts his attorney's performance at trial was deficient due to his failure to object to the presentation of some of the foregoing character evidence.

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow counsel an opportunity to respond. *See State v. Taylor,* 310 N.W.2d 174, 179 (Iowa 1981). We will, however, depart from this preference because the record in this case is sufficient to dispose of Grimes' claim. *See State v. Schoelerman,* 315 N.W.2d 192, 195 (Iowa 1982).

Our ultimate concern in claims of ineffective assistance of counsel 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). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

To prevail on a claim of ineffective assistance, the defendant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*,

352 N.W.2d 683, 685 (Iowa 1984). 000417

> The defendant 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 v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

We are unable to find Neary breached any essential duty by failing to conduct meaningful discovery. In addition to discovery Appel completed prior to his withdrawal, Neary filed a comprehensive request for production and inspection of the State's evidence. He also deposed Reed a second time and discovered that her version of events had substantially changed since her first deposition. Neary successfully impeached Reed with her inconsistent testimony. Contrary to Grimes' contentions, there was nothing to be gained by further discovery as a result of Reed's changed testimony. Neary had no duty to conduct discovery beyond that completed as of the trial date. *See Heaton v. State,* 420 N.W.2d 429, 431 (Iowa 1988) (counsel's duty to investigate and prepare defense does not require counsel pursue each possible avenue or witness that may lead to exculpatory evidence).

We are also unable to find any breach of essential duty resulting from Neary's withdrawal of Grimes' earlier granted request for a psychiatric examination. The stated purpose of this examination was to determine if Grimes was competent to stand trial. There is no indication in Grimes' application for this examination that he claimed any mental or psychological condition implicating a diminished

responsibility defense. Moreover, there is no evidence indicating Neary was or should have been aware of any circumstance implicating these defenses *at the time the application was withdrawn.* (Emphasis supplied.) Neary had no duty to pursue the defenses Grimes now asserts under these circumstances. *See State v. Ray,* 516 N.W.2d 863, 866 (Iowa 1994) (ineffective assistance of counsel may not be predicated on filing of meritless action).

We find Grimes has failed to meet his burden to show he was prejudiced by the remainder of counsel's unprofessional errors. These allegations notwithstanding, there is overwhelming evidence supporting the verdict. Reed provided testimony detailing the extreme abuse she was subjected to throughout the entire ordeal. Reed told the jury Grimes kept her tied and bound in her living room for approximately seven to eight hours. She also testified to being threatened with a knife and cut across her hand when she attempted to defend herself. Grimes continued to threaten her with the knife throughout the next day. Reed was not able to escape and seek help until the morning of February 24. The State offered fifteen exhibits depicting the extent of her injuries. Furthermore, the emergency room physician who treated Reed testified she sustained contusions and bruises over her entire body.

Based on the testimony and evidence in the record, we conclude Grimes has failed to show that but for his counsel's alleged errors, the outcome of his trial would have been different. We affirm his conviction in its entirety.

AFFIRMED.