IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 9-563 / 98-0894
Filed December 13, 1999

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MILTON A. MCCLANAHAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Milton McClanahan appeals from his convictions, following a jury trial, for burglary in the second degree and sexual abuse in the third degree in violation of Iowa Code sections 713.5(2) and 709.4(1) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Fred H. McCaw, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

MAHAN, J.

Milton McClanahan appeals from his convictions, following a jury trial, for burglary in the second degree and sexual abuse in the third degree in violation of Iowa Code sections 713.5(2) and 709.4(1) (1997). McClanahan contends his trial counsel was ineffective in failing to move for suppression of evidence based on a violation of Iowa Code section 804.20. We affirm.

In the early morning hours of November 2, 1997, a sexual assault was reported and the victim was taken to a hospital where she was examined and a rape protocol kit was completed. Investigating officers listed the victim's husband's co-workers as possible suspects since they knew the husband would be out of town on the date of the assault. Officers obtained saliva specimens from the co-workers for DNA analysis and comparison with the DNA of the semen sample obtained during the processing of the rape protocol kit.

McClanahan was among the group of co-workers asked to provide a saliva specimen. McClanahan consulted with an attorney before providing a saliva specimen. The DCI Crime Lab processed the samples and found McClanahan's DNA matched the DNA from the semen sample. The officers obtained an arrest warrant and a search warrant to obtain additional specimens from McClanahan.

After the specimens were obtained by hospital personnel, McClanahan was taken to the Law Enforcement Center for questioning. McClanahan was advised of his *Miranda* rights. During the discussion, McClanahan said, "Maybe I should talk

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to an attorney." He was advised by the officers that was his decision to make. Then McClanahan requested to speak to his wife. The officers determined McClanahan's wife was also being questioned at the Center by other officers, therefore, McClanahan was told his wife was unavailable. Thereafter, McClanahan signed a waiver of his *Miranda* rights, consented to speak to the officers, and gave a detailed confession about the burglary and sexual abuse at issue.

Defense counsel filed a motion to suppress the confession alleging it was obtained in violation of McClanahan's Fifth and Sixth Amendment rights. Defense counsel did not also allege a violation of Iowa Code section 804.20. Following a hearing, the motion to suppress was overruled.

At trial, in addition to the confession, the prosector presented evidence of the DNA match on the saliva sample voluntarily provided by McClanahan. Also presented were several inculpatory statements made by McClanahan after his arrest which were overheard and documented by a deputy sheriff at the jail. In a phone call from the jail, McClanahan stated, "I did it. I did it. I am the one. I worked with her husband and knew he was gone. I went out there. I broke in. And I raped her." McClanahan testified at trial that he had consensual sex with the victim. He explained it was necessary for him to turn off power to the victim's home from the garage and take the victim's undergarments and bedding in order to try to keep the "affair" a secret from the victim's neighbors and her husband. The prosecutor also presented evidence disproving parts of McClanahan's story.

The jury convicted McClanahan of second-degree burglary and third-degree sexual abuse. He was sentenced to two indeterminate ten year terms to be served consecutively.

McClanahan appeals.

I. STANDARD OF REVIEW. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996). Ordinarily, we reserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). However, we will resolve ineffective-assistance- of-counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998). After review, we find the record in this case is adequate for us to address the merits of McClanahan's claim.

II. INEFFECTIVE ASSISTANCE OF COUNSEL. The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104

S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm McClanahan's conviction based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

McClanahan contends his trial counsel was ineffective in failing to move for suppression of evidence based on a violation of Iowa Code section 804.20.[1] We disagree. The State argues section 804.20 does not provide McClanahan an absolute right to speak with his wife, and the circumstances in the instant case must be balanced against the "practical considerations" present. *Bromeland v. Iowa Dep't of Transp.*, 562 N.W.2d 624, 626 (Iowa 1997); *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978) (citing *People v. Gursey*, 239 N.E.2d 351, 352 (N.Y. 1968)

[1] McClanahan does not appeal the district court's ruling on the motion to suppress as originally filed.

(communication allowed only if "such access does not interfere unduly with the matter at hand")). Therefore, the State contends McClanahan's right to speak with his wife had to be balanced against the fact the officers were questioning her about the case when the demand was made. Although we find the State's argument to be compelling, we conclude it is not necessary to discuss the merits of the section 804.20 argument. We conclude the case may be disposed of without deciding if counsel failed to perform an essential duty because McClanahan has failed to show prejudice. *Hoeck,* 547 N.W.2d at 863.

There was overwhelming evidence of McClanahan's guilt presented to the jury: McClanahan voluntarily gave the police a saliva sample which matched the DNA sample of semen found on the victim's abdomen and thigh; McClanahan made several inculpatory statements to relatives at the jail which were overheard and documented by a deputy sheriff; factual discrepancies between McClanahan's testimony and that of the victim; and McClanahan's own testimony at trial. Specifically, McClanahan admitted to having sex with the victim, but testified the sex was consensual. He further testified he found it necessary to turn off all power to the victim's home so neighbors would not see him enter the residence. In addition, he found it necessary to take the victim's undergarments as well as all bedding to keep knowledge of the "affair" from her husband. We find McClanahan's own testimony to be incriminating. *State v. Taylor,* 557 N.W.2d 523, 528 (Iowa 1996) (implausible story by defendant implicates the defendant in the crime).

We conclude McClanahan has failed to establish there is a reasonable probability, but for counsel's unprofessional errors, the result of the trial would have been different. *Hopkins,* 576 N.W.2d at 378. Even without McClanahan's confession, the evidence presented would have reasonably permitted the jury to reach the conclusion it did. *State v. Bayles,* 551 N.W.2d 600, 610 (Iowa 1996). McClanahan is unable to establish prejudice and his ineffective-assistance-of-counsel claim must fail. For these reasons, we affirm McClanahan's convictions.

AFFIRMED.