

IN THE COURT OF APPEALS OF IOWA

FILED

MAY 28 1985

CLERK SUPREME COURT

STATE OF IOWA,	)	441
Plaintiff-Appellee,	)	Filed May 28, 1985
vs.	)	5-127
DUKE KEVIN CROWELL,	)	84-448
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Lee County - John C. Miller, Judge.

Defendant appeals from his conviction of third degree sexual abuse.
AFFIRMED.

Charles Harrington, Appellate Defender, and Fern S. Shupek, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Defendant was convicted of third degree sexual abuse in Lee County. He admitted having intercourse with the woman, but contended the act was consensual. At trial during the State's presentation of evidence, one of the jurors became sick and was replaced by the only alternate juror. Shortly thereafter, the proceedings were interrupted by another juror, Elmer Brotherton. Out of the presence of the other jurors, Mr. Brotherton informed counsel and the court that he knew the victim, she had been to his place and to his boy's place, and "she is a real nice girl." In referring to defendant, Brotherton indicated, "I'm also a friend of him, too. I have knowed him for years, the boy." A picture of a young boy, brother of the victim, had also been admitted as Exhibit 1. Brotherton informed the court and counsel that his son had an identical picture.

There was evidence in the record that defendant's trial counsel was extremely concerned with Brotherton's knowledge obtained out of court. However, counsel had also attempted to discredit the victim's testimony by use of the picture, Exhibit 1. Defendant claimed the victim had given him the picture evidencing their friendship. Counsel feared that a mistrial would allow the prosecutor to prepare his witness before the next trial, and the effect of the picture would be lost.

Trial counsel and defendant eventually agreed to go ahead with the trial. The court instructed the juror he was not to consider anything he had learned outside of trial, and he was not to tell the other jurors of his knowledge. Brotherton assured the court he would not.

As the trial continued, however, Mr. Brotherton had a difficult time remaining silent. During the testimony of a police officer, involving a diagram of the crime scene, this dialogue occurred:

WITNESS: There is an old vacant house, as I recall. There was a house that burnt there to the west and there is nobody occupying these houses right here, nor has there been for quite some time.

JURY MEMBER BROTHERTON: They are torn down.

WITNESS: Right.

Later, as the defendant testified about the same diagram, this testimony was received:

Q. I See.

Defendant's answer: And I said he had this backwards.

Q. In other words, my drawing isn't as good as it should be?

Defendant's answer: No. It's just backwards.

JUROR BROTHERTON: I agree with that.

No one objected to Brotherton's remarks.

Following the guilty verdict, defendant filed an appeal claiming ineffective assistance of counsel deprived him of his constitutional right to be tried by a fair and impartial jury. Our review is de novo on the totality of the circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

A defendant claiming ineffective assistance of counsel must show:

- (1) that counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and
- (2) That the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984). See also Strickland v. Washington, ___ U.S. ___, ___, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984).

Defendant has the burden to prove both of these elements by a preponderance of the evidence. Taylor, 352 N.W.2d at 685.

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.

Id. Counsel is presumed effective; Id., and where his or her actions are based on

reasonable trial strategy and tactics, we will not find that performance ineffective. See State v. Wilkens, 346 N.W.2d 16, 18-19 (Iowa 1984).

At the time the juror first told of his out-of-court knowledge, trial counsel decided not to ask for a mistrial presumably because the picture's surprise effect on the victim would be lost in the next trial. Counsel relied on the court's instruction and the juror's assurance to eliminate any error caused by Brotherton's knowledge. Defendant agreed to waiver of a mistrial at this time, and we find no error.

As the trial progressed and Juror Brotherton had difficulty remaining silent, counsel was once again forced to weigh any prejudice of those comments to his client against the loss of the picture's effectiveness in a new trial. At this point, once again defendant's counsel waived the right to a mistrial by failing to request one. Counsel determined that to continue with the trial as the best course of action, and we find this was not unreasonable trial strategy under the circumstances.

Counsel's performance at trial was clearly not deficient. We need not, however, determine its deficiency to decide defendant's claim. That claim must also fail on the prejudice component of his ineffectiveness challenge. See Taylor, 352 N.W.2d at 685. The second requirement of an ineffectiveness claim is that:

[T]here 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, ___ U.S. at ___, 104 S.Ct. at 2069, 80 L.Ed.2d at 699. Defendant has failed to provide any evidence of misconduct by the juror which would undermine confidence in the jury verdict. Likewise, we are unable to find a reasonable probability of a different result in our de novo review.

Defendant's request for a new trial is denied and his conviction affirmed.

AFFIRMED.

All judges concur except Schlegel, J., who specially concurs.

SCHLEGEL, J. (specially concurring)

I concur in the affirmance of the conviction, but would preserve Crowell's right to raise the ineffective assistance of counsel claim in a postconviction proceeding because the record on appeal does not contain sufficient evidence to determine whether counsel was ineffective. See State v. Allen, 348 N.W.2d 243, 248 (Iowa 1984); State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

If Crowell did indeed decide to go ahead with the trial despite juror Brotherton's improper conduct, the conviction must be affirmed and his ineffective assistance of counsel claim must fail. However, if the decision to go ahead with trial was made only by Crowell's counsel, the ineffective assistance of counsel claim has merit.

The decision to go ahead with trial, even if made for tactical reasons, is not simply a matter of trial tactics. Both the United States and Iowa constitutions give a defendant in a criminal prosecution the right to have his case decided by an impartial jury. See Sims v. State, 295 N.W.2d 420, 425 (Iowa 1980). Thus, the decision to not request a mistrial on the basis of Brotherton's presence on the jury rises to a constitutional level. Counsel alone could not waive Crowell's right to an impartial jury. Cf. State v. Foster, 318 N.W.2d 176, 178 (Iowa 1982) (counsel cannot waive defendant's right to be present at proceedings discussing a jury communication).

It is undoubtedly an essential duty of counsel to preserve his client's constitutional right to an impartial jury. Crowell's right to an impartial jury appeared to be in jeopardy when Brotherton showed himself incapable of acting properly. At that time, I believe that Crowell's counsel had a duty, at the very least, to consult with Crowell and decide whether to continue or move for a mistrial. The evidence on record does not show whether such a consultation was held, or whether Crowell had affirmatively indicated to counsel that he wanted the trial to continue despite Brotherton's presence. These factual issues should be decided at an evidentiary hearing.