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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 27, 1988
vs.	)	
THOMAS MICHAEL RUBERT,	)	7-399 86-1576
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Johnson County (No. 17505), Lynne E. Brady, Judge.

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

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark J. Zbieroski, Assistant Attorney General; and Linda McGuire, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J 258

Defendant appeals from his conviction of third-degree sexual abuse, claiming that (1) he was denied the effective assistance of counsel and (2) he was denied his constitutional and statutory right to attend an in-camera discussion between the attorneys and the judge concerning jury instructions. We affirm.

Defendant and the complainant had been friends for six years prior to the incident in dispute in this case. On the afternoon of the incident, defendant went to the complainant's home where the two of them then drank some alcohol. Later, the defendant made sexual advances toward the complainant. Defendant admitted the intent to engage in a sex act and the commission of a sex act, but denied that the sex act was brought about through force or assault. Following a jury trial, defendant was found guilty of third-degree sexual abuse in violation of Iowa Code section 709.4(1) (1985). New counsel was subsequently appointed, and a motion for new trial was filed, based on defendant's claim of ineffective assistance of counsel. The trial court overruled defendant's motion for new trial and sentenced defendant to an indeterminate ten-year term of incarceration. Defendant appeals.

Because defendant is asserting that his constitutional right to a fair trial was violated, we make an independent evaluation of the totality of the circumstances; this is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

I. We address defendant's first contention that he was denied effective assistance of counsel at trial. He argues that (1) his trial counsel allowed the State to repeatedly elicit irrelevant, personal information about him and (2) trial counsel permitted the State's medical expert to express an opinion that the complainant had been assaulted.

At trial, evidence was elicited that defendant had been to a motorcycle party that included members of the "Hell's Angels," that he had a tattoo, that his nickname was "Apple," and that his hair was longer at the time of the incident and he wore an earring at that time. Defendant claims that this evidence should have been excluded as prejudicial and irrelevant, especially since the crux of the case dealt with the credibility of the defendant and the complainant. The State regards the evidence as mainly cumulative and not prejudicial given the amount of corroborating evidence available.

In order to establish his claim that his trial attorney was ineffective, defendant has the burden of proving by a preponderance of the evidence counsel failed to perform an essential duty and prejudice resulted therefrom. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); State v. Yaw, 398 N.W.2d 803, 805-06 (Iowa 1987).

The proper standard for judging the performance component is that of reasonably effective assistance; defendant must show that counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689, 104 S. Ct. at 2065, 80 L. Ed. at 694. Defendant is not entitled to perfect representation, only that which is within the range of normal competency. Karasek v. State, 310 N.W.2d 190, 192 (Iowa 1981). "Improvident trial strategy, miscalculated tactics, mistake, carelessness, or inexperience do not necessarily amount to ineffective counsel." State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981) (quoting Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972)); see also Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982). More than a showing that trial strategy backfired or that another

attorney would have prepared and tried the case somewhat differently is necessary. Taylor, 352 N.W.2d at 685.

Ordinarily, except for such basic decisions as whether to plead guilty, waive a jury, or testify in his or her behalf, the accused is bound by the tactical or strategic decisions made by counsel, even those rising to constitutional dimensions. Sims v. State, 295 N.W.2d 420, 425 (Iowa 1980). Where counsel makes a reasonable decision concerning strategy, regardless of the success or failure of such strategy, the reviewing court will not interfere. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982).

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. Strickland, 466 U.S. at 694, 104 S. Ct. at 2067, 80 L. Ed. at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different, absent the errors. Id. at 696, 104 S. Ct. at 2068, 80 L. Ed. at 699. Prejudice is not established by a purely speculative assertion that the outcome of the trial would have been different but for counsel's alleged breach of an essential duty. Yaw, 398 N.W.2d at 807.

We conclude defendant cannot prevail on his ineffective assistance of counsel claim because he has not shown that his trial counsel's performance was below the wide range of representation constituting reasonable professional assistance and that the verdict reached would likely have been different absent the alleged errors. There was sufficient evidence in the record to find defendant guilty beyond a reasonable doubt of third-degree sexual abuse.

A review of the transcript discloses that the testimony of the complainant about defendant's attendance at a biker party where Hell's Angels members

attended was not elaborated upon by the State; for defendant's counsel to object would possibly have called undue attention to such evidence. In addition, defendant himself testified about being at a motorcycle drag race. Neither do we find counsel's performance was deficient in failing to object to defendant's testimony on cross-examination (1) that his nickname was "Apple," named for the cereal "Apple Jack," (2) that his tattoo of a skull and an apple was not related to his nickname, (3) that his hair was shorter on the day of trial than at the time of the incident, and (4) that he wore an earring on the date of the incident. Defendant claims all these pieces of evidence tend to paint him as a bad character. When defendant testified, his credibility could be attacked. One of the recognized areas under which a witness may be impeached is character. State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974). The fact defendant's trial counsel did not object to this testimony was within trial counsel's discretion; we do not find this amounts to ineffective assistance of counsel.

Defendant also argues that the crux of the defense was the denial of assault, yet trial counsel permitted the State's medical expert to express his opinion that complainant had been assaulted, and possibly sexually assaulted. Defendant argues that the commission of an assault is a legal question to be determined from all of the facts. We find that the medical expert gave an opinion that went to an element of the crime charged. The expert's statement that a "possible sexual assault had occurred" went to the force element of sexual abuse. See Iowa Code § 709.4(1) (1985) (force alternative). The record does not reveal that the expert gave an opinion as to the ultimate fact of the accused's guilt or innocence. State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975). Rather, the testimony expressed an opinion as to the ultimate fact of whether force was used. We do not find counsel's performance was deficient in failing to object to such testimony. Furthermore, other testimony and evidence corroborated

the complainant's allegations of a sexual assault so that the result of the proceedings would not have been different.

II. Defendant claims that he was denied his constitutional and statutory rights in that he was not present when counsel discussed jury instructions with the judge in chambers. Plaintiff argues that a purely legal discussion concerning jury instructions is not a stage of the trial requiring defendant's presence.

A criminal defendant in this state has a constitutional and statutory right to be present at every stage of his criminal trial, from the impaneling of the jury to the return of the verdict. See U.S. Const. amends. V, VI, and XIV; Iowa Const. art. I, §§ 9 and 10; State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). Iowa Rule of Criminal Procedure 25(1) provides:

> In felony cases the defendant shall be present at the arraignment and plea, . . ., at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. In other cases the defendant may appear by counsel.

Iowa Rule of Civil Procedure 196[1] provides, in part, that "Before jury arguments, the court shall give to each counsel a copy of its instructions in their final form . . . and [grant] reasonable time for counsel to make objections, which shall be made and ruled on before arguments to the jury." The question of whether discussing possible jury instructions is a stage of the trial requiring the presence of the defendant has not been presented to this court before.

In ascertaining whether a pretrial proceeding is a stage of the trial requiring the defendant's presence, the supreme court in State v. Foster, 318 N.W.2d 176, 179 (1982), found that such proceedings are a stage of the trial when fact issues are presented or when their disposition will be significantly aided by defendant's presence. The State argues that this standard should apply here

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[1]*Civil procedure rules relating to instructions of juries also apply to trials* of criminal prosecutions. See Iowa R. Crim. P. 18(5)(f).

and contends jury instructions are legal and not factual in nature and the defendant had ample time in court to examine the jury instructions before they were given to the jury. The defendant argues that jury instructions are critical to defendant's eventual fate thereby requiring his presence.

We are in agreement with the trial court that defendant's absence in chambers during discussion on the jury instructions did not deprive defendant of his right to a fair and impartial trial. In line with the analysis outlined in Foster, since jury instructions are legal in nature rather than involving fact issues and because defendant could not significantly aid in the disposition of the instructions, we find his presence was not required.

This view is supported by other authority interpreting the federal counterpart to Iowa Rule of Civil Procedure 25(1), i.e., Federal Rule of Criminal Procedure 43. Fed. R. Crim. P. 43(c)(3) (defendant need not be present "[a]t a conference or argument upon a question of law"); United States v. Graves, 669 F.2d 964, 972 (5th Cir. 1982) (defendant does not have a constitutional or statutory right to attend a conference concerning the purely legal matter of determining what jury instructions the trial court will issue); United States v. Gregorio, 497 F.2d 1253, 1260 (4th Cir.), cert. denied, 419 U.S. 1024, 95 S. Ct. 501, 42 L. Ed. 2d 298 (1974) ("defendant has no right founded in the common law or in the constitution to be present in chambers while jury instructions are formulated by counsel and the trial judge"); United States v. Lewis, 420 F.2d 686, 687 (5th Cir. 1970) (per curiam) (in-chambers conference concerning proposed jury instructions was not a stage of the trial requiring defendant's presence); Root v. Cunningham, 344 F.2d 1, 4-5 (4th Cir.), cert. denied, 382 U.S. 866, 86 S. Ct. 135, 15 L. Ed. 2d 104 (1965) (permissible for judges and counsel to discuss in conference proposed instructions out of the presence of the defendant).

In addition, we note the record is devoid of defendant's expressing a desire to attend the discussion of the jury instructions, nor did he object at the time. Defendant fails to point to anything in the conference that may have prejudiced him. We also note that defendant testified as follows at his hearing on his request for new counsel:

> Q. You were present when we were all in this courtroom and read the jury instructions when the jury wasn't here, were you not? A. Must have been. I was here all the time.

We find defendant's second contention is without merit since jury instructions involve questions of law and defendant's presence would not have significantly aided in the disposition of the conference. Moreover, the defendant was present when the court gave each counsel a copy of its instructions in their final form and gave them reasonable time to make objections before arguments to the jury.

In sum, defendant did not have a statutory or constitutional right to attend the in-camera conference concerning the purely legal matter of formulating what instructions the trial court would issue to the jury.

We affirm the conviction.

AFFIRMED.