

IN THE COURT OF APPEALS OF IOWA

FILED

APR 30 1985

CLERK SUPREME COURT
352

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

MURL CHESTER BIRD,)

Defendant-Appellant.)

Filed April 30, 1985

5-59
84-988

Appeal from the Iowa District Court for Mills County - Paul H. Sulhoff,
Judge.

The defendant appeals from conviction and sentence for second-degree
sexual abuse. AFFIRMED.

Richard D. Crotty, Council Bluffs, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mickey W. Greene, Assistant
Attorney General, for plaintiff-appellee.

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

SNELL, J.

The defendant was tried for sexually abusing an eleven-year-old girl. The evidence showed that the girl accompanied her mother to a bar where they joined the defendant. Shortly thereafter, the mother left to get money. During the time she was gone, several people overheard the defendant make sexual remarks to the child. The bartender testified that she saw the defendant kiss the child; that she saw the child motion to her groin and defendant's groin in response to a question of what they were going to do; and defendant was heard telling the girl that "she wasn't just going to fondle him this time, that he was going to put it in her." After the girl became upset and began to cry, a bar patron called the authorities concerning the situation. Before the police arrived, the defendant and the girl left.

The girl testified that she and the defendant left the bar and went to her home. When they arrived, the defendant locked the door and told her to remove her coveralls. After she complied, the defendant attempted to have intercourse with her at which point she cried out in pain. When the attempt failed, the defendant placed his finger in the child's vagina.

After the police and the child's mother reached the apartment and knocked on the door, the defendant was overheard telling someone to put their pants on. When the defendant opened the door, the child was observed dressed only in a blouse and underpants. The defendant's response to what was going on was, "Strictly educational."

The defendant was convicted and sentenced to an indeterminate 25-year sentence.

On appeal, defendant asserts that: (1) there was insufficient evidence to support his conviction; and (2) he received ineffective assistance of counsel.

We reject defendant's insufficiency of evidence claim which was based on the argument that the victim was known to exaggerate and that there was no

evidence to corroborate her testimony. We find substantial evidence to corroborate the victim's testimony and no evidence, except defendant's self-serving statement, that she had a propensity to exaggerate.

In order to establish ineffective assistance, the appellant must show that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). As the Supreme Court stated in Strickland v. Washington, ____ U.S. ____, ____, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984):

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.

Appellant argues that he was prejudiced because his attorney relied on the outmoded defense that sexual penetration was a necessary element of the crime of rape and that he did not spend enough time cross-examining the State's witnesses, particularly the victim. This case was tried to the court and it could apply the correct law. We fail to find a sufficient showing of prejudice to establish ineffective assistance of counsel.

The findings of the trial court are affirmed.

AFFIRMED.