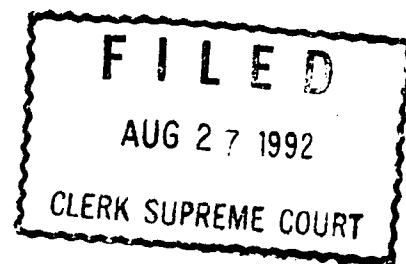


IN THE COURT OF APPEALS OF IOWA

No. 1-388 / 90-1577



RICK DEAN FOSTER,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Warren County,
M. C. Merrick, Judge.

Foster appeals from the district court's dismissal of
his post conviction relief application for ineffective
assistance of counsel. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John
Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Richard J.
Bennett, Assistant Attorney General; Kevin Parker, County
Attorney; and John A. Criswell, Assistant County Attorney,
for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.,
but decided en banc. Hayden, J., takes no part.

HABHAB, V. J.

FACTS

In 1981, a jury found Rick Foster guilty of first-degree kidnapping and second-degree sexual abuse. The two convictions arose from the same series of events. The district court later merged the sexual abuse conviction into the kidnapping conviction.

Foster filed an application for postconviction relief. Foster claimed his trial counsel rendered ineffective assistance by failing to request an instruction submitting the crime of second-degree sexual abuse as a lesser-included offense of the crime of first-degree kidnapping. On October 1, 1990, the district court entered an order denying Foster's application for postconviction relief. Foster appealed.

On October 29, 1991, we vacated the district court's dismissal of Foster's application for postconviction relief and remanded the case to the district court for further proceedings. See Foster v. State, 478 N.W.2d 884, 886 (Iowa App. 1991). The purpose of the remand was to take further evidence in the form of testimony from Foster's trial counsel to determine whether or not his failure to request second-degree sexual abuse as a lesser-included offense of first-degree kidnapping was a conscious decision made pursuant to an overall defense strategy or whether it was an omission upon which a claim of ineffective assistance of counsel can be predicated.

On March 20, 1992, a hearing was held on remand. On April 1, 1992, the district court entered a Supplemental Ruling and Order. After considering the evidence provided by Foster's trial counsel in a telephonic deposition, the court found trial counsel's failure to object to the instructions given or to propose alternative instructions was not connected to or part of any particular tactic or strategy. However, the district court held there was no reason to believe the results would have been different if second-degree sexual abuse had been classified as a lesser-included offense, as opposed to a separate offense. The district court reaffirmed its ruling of October 1, 1990, denying postconviction relief. We affirm the district court's denial of Foster's claim for postconviction relief.

ANALYSIS

Foster claims he was denied effective representation of counsel. Established principles govern our review of appellant's sixth amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial

cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "Reasonableness under prevailing professional norms" is the standard by which we measure counsel's performance. Id. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. "In examining counsel's conduct we review de novo the totality of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131. To prove the second prong of this test, appellant must show 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, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

I. Breach of Essential Duty.

The first prong of the test used to analyze a claim of ineffective assistance requires the appellant to show counsel breached an essential duty. Foster argues he was entitled to an instruction on second-degree sexual abuse as a lesser-included offense of first-degree kidnapping. He asserts his trial counsel had a duty to object to the kidnapping instruction at trial because it did not include the lesser-included offense of sexual abuse. We agree.

Second-degree sexual abuse is a lesser-included offense of first-degree kidnapping. See State v. Davis, 328 N.W.2d 301, 307 (Iowa 1982). If substantial evidence controverting the elements of the greater and lesser offenses was presented, the trial court was required to give an instruction on the lesser-included offense. State v. Sanders, 280 N.W.2d 375, 377 (Iowa 1979); Iowa R. Crim. P. 6(3); see also State v. Royer, 436 N.W.2d 637, 642 (Iowa 1989); State v. Jeffries, 430 N.W.2d 728, 737 (Iowa 1988). First-degree kidnapping is a specific intent crime. Iowa Code § 710.1 (1979). Second-degree sexual abuse is a general intent crime. Iowa Code § 709 (1979). We previously stated:

Foster was entitled to a lesser-included offense instruction on sexual abuse for the greater charge of kidnapping in the first-degree. However, it is possible his attorney had a tactical or other reason for not requesting the instruction or objecting to its omission.

Foster v. State, 478 N.W.2d 884, 886 (Iowa App. 1991). The

hearing on remand produced evidence clearly showing trial counsel's failure to object to the instructions given was not connected to a defense tactic or strategy. In fact, trial counsel honestly stated, "I took it that those instructions were correct as given."

We find Foster was entitled to a lesser-included offense instruction on sexual abuse for the charge of kidnapping. Because trial counsel candidly admitted his failure to object was not related to a defense strategy, we conclude trial counsel failed to perform an essential duty. Therefore, we find Foster has met the first prong of the test. In our previous opinion, we left unanswered the question of whether the failure to perform the essential duty of objecting to the instructions resulted in prejudice. We address that issue in Part II of this opinion.

II. Prejudice.

The second prong of the test for ineffective assistance requires appellant to show that but for counsel's breach of duty the result of the proceeding would be different. At trial, Foster relied on a diminished capacity defense of intoxication. While intoxication is not a complete defense, it can establish diminished responsibility, thereby negating specific intent. State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986).

Foster contends he was prejudiced when the jury was not instructed on sexual abuse as a lesser-included offense of first-degree kidnapping because the kidnapping charge included a specific intent element. Foster argues that because specific intent is an element of kidnapping, but not sexual abuse, Foster's defense theory focused upon reducing kidnapping to sexual abuse by negating the element of intent.

Foster claims he was intoxicated and could not form the specific intent required in a kidnapping conviction. He relies on the victim's testimony that she smelled alcohol on Foster's breath and believed he was intoxicated at the time of the incident. We reviewed this testimony and note the victim further testified Foster had no trouble driving the car for a considerable distance into the country after he abducted her. The evidence also established Foster conversed with the victim about various matters while driving. Furthermore, when Foster finally stopped the car, he told the victim of his intention to have intercourse with her. We are unable to conclude Foster presented enough evidence to convince the jury his intoxication prevented him from forming the requisite intent.

We determine there is overwhelming evidence Foster committed the crime of kidnapping. The evidence, specifically the tactics Foster used to gain control of the victim, refutes Foster's argument he was intoxicated to the extent he was unable to form the required specific intent.

Foster initially abducted the victim by pulling his automobile over behind her parked car and approaching her. Foster told the victim she had dropped an envelope earlier when entering her car at her place of employment. Foster then grabbed the victim, choked her until she passed out, and threw her into his car. These tactics used by Foster required planning and deliberation. It is clear he had the specific intent necessary to commit kidnapping.

We hold Foster has failed to show prejudice resulted. We are unable to find to a reasonable probability that, but for trial counsel's error in not requiring the lesser-included offense of sexual abuse be included in the kidnapping instruction, Foster would not have been convicted of kidnapping. Foster has failed to meet the second prong of the test and, therefore, has failed to establish a claim for ineffective assistance of counsel. After considering all issues presented, we affirm the district court's denial of postconviction relief.

Costs of this appeal are taxed to the appellant.

AFFIRMED.

All judges concur, except Schlegel, J., and Oxberger, C.J., who dissent.

SCHLEGEL, J. (dissenting)

I respectfully dissent. I believe it is impossible for us to decide what the jury would have done had counsel not failed to perform an essential duty in requesting a lesser-included offense instruction and objecting to the instructions as given. Given the opportunity to find him guilty of sexual abuse, and given the circumstances of the case, the jury might well have concluded that Foster did not have the capacity to form a specific intent. Given the circumstances of the case, the jury had little choice but to convict him of the kidnapping charge.

This is an extremely important case. It should not be our place to substitute ourselves for the jury and decide that the jury could not have found Foster guilty only of sexual abuse or that, given the opportunity, it would have found Foster did not have the capacity to form an intent to kidnap the victim.

I do not believe we can say with assurance that the failure of counsel did not result in prejudice. I believe there is a reasonable probability that, but for counsel's breach of an essential duty, the result would have been different.

I would reverse the conviction for a new trial.

Oxberger, C.J., joins this dissent.