IN THE COURT OF APPEALS OF IOWA

No. 2-588 / 91-1441

FILED
DEC 29 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

BOUACHANH PHALAKHONE,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

The defendant appeals the judgment and sentence entered upon his conviction for second-degree sexual abuse in violation of Iowa Code sections 709.1(1) and 709.3(3) (1989). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Clinton L. Spurrier, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

The defendant, Bouachanh Phalakhone, appeals his conviction for second-degree sexual assault in violation of Iowa Code sections 709.1(1) and 709.3(3) (1989). Phalakhone contends his trial counsel rendered ineffective assistance by failing to object to the introduction of a videotaped deposition of a witness.

On April 16, 1989, Terri Smith accepted a ride from three men at approximately 10 p.m. Smith knew two of the men in the automobile, Home Chanthavong and the driver, Sythoun Aphay. The defendant, Bouachanh Phalakhone, was the third man in the vehicle. At Phalakhone's trial Smith testified she accepted the ride because Chanthavong promised he would take her to her home. Smith testified after she got in the car, Aphay drove to a 7-Eleven convenience store to purchase a twelve-pack of beer. Aphay then drove to Chanthavong's home. Smith stated the four sat on the living room floor talking and drinking beer.

Smith testified the group eventually moved to an upstairs room of the house. Smith claimed Phalakhone later grabbed her hands and Chanthavong removed her clothing. Smith testified both Phalakhone and Chanthavong forced her to engage in sexual intercourse with them. Smith stated Aphay did not participate in these events.

In contrast, Phalakhone testified when the four arrived at the house he stayed in the car for several minutes. He stated everyone was already upstairs when he entered the

house. Phalakhone further testified he proceeded upstairs and found Smith in one of the bedrooms with Aphay and Chanthavong. Phalakhone stated Smith did not have on any clothes. He claimed he had sexual intercourse with Smith only after she requested he do so.

After the incident, the State filed a trial information charging Phalakhone and Chanthavong with one count of second-degree sexual abuse. Phalakhone filed a plea of not guilty and a notice of defense of intoxication. He also filed a motion to quash the deposition of Aphay. Phalakhone waived his right to a jury trial, and a bench trial commenced on August 6, 1991.

During the trial, the State admitted into evidence the transcripts and videotapes of the deposition of Aphay. Counsel for Phalakhone did not object to the admission of this evidence. Phalakhone was convicted, and he now appeals.

Phalakhone contends his trial counsel rendered ineffective assistance by failing to object to Aphay's deposition. Phalakhone maintains Aphay's deposition should have been excluded because the deposition was taken outside of his presence. He argues the State failed to show Aphay was unavailable as a witness and his Sixth-Amendment right to confrontation of a witness was violated. In addition, he contends Aphay's deposition was inadmissible because it contained out-of-court statements offered to prove the truth of the matter asserted.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885, 890 (Iowa 1981), cert. denied, 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982). When the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the claim for postconviction proceedings so the facts may be developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984) (citing Mulder, 313 N.W.2d at 890, cert. denied, 459 U.S. 841, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982)). We decline to address Phalakhone's ineffective assistance of counsel claim at this time because the record before us is inadequate for an informed decision. We preserve the defendant's ineffective assistance of counsel claim for possible postconviction proceedings.

AFFIRMED.