FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-049 / 93-0368

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MERRILL LEE LEONARD,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Defendant appeals the judgment of the district court, following a jury trial, finding him guilty of third-degree sexual abuse in violation of Iowa Code section 709.4(1) (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Habhab and Cady, JJ.

HABHAB, J.

The defendant, Merrill Leonard, appeals his conviction, following a jury trial, of third-degree sexual abuse in violation of Iowa Code section 709.4(1) (1991). Leonard claims his trial counsel was ineffective because he did not object to the State's questions regarding Leonard's prearrest silence. We affirm.

Leonard was charged by trial information with first-degree burglary and third-degree sexual abuse stemming from an incident with the victim, Rosalie Luncsford, in Des Moines.

Luncsford and Leonard were residents of the same apartment complex. Luncsford stated she had lived in the building only a month, and barely knew Leonard. On the evening of April 24, 1992, between 11:00 p.m. and midnight, Leonard came to her apartment and invited her and her brother to play cards in his apartment. According to Luncsford, she drank three or four partial cans of beer during the course of the evening.

Luncsford and her brother testified no one was using drugs. The card game broke up around 4:00 a.m. Luncsford and her brother returned to her apartment. At about six in the morning, Luncsford's brother went to use Leonard's telephone to call a starting service. Luncsford asked her brother to lock the door on the way out. Luncsford stated she heard her brother lock the door. She then went to sleep. Luncsford testified the next thing she knew,

someone was on top of her having sexual intercourse with her. Luncsford testified she initially thought it was her boyfriend, Jeff.

After recognizing her visitor, Luncsford threw him off and pushed him out of the apartment. Then Luncsford ran outside to her aunt's apartment in the neighboring complex. Leonard followed her, attempting to talk her out of calling the police. Luncsford testified Leonard tried to restrain her. Upon arriving at her aunt's, she called the police.

Leonard testified he, Luncsford and Luncsford's brother were having a drug party. Leonard stated the three of them smoked crack cocaine. Leonard testified Luncsford was also drinking heavily. Leonard stated Luncsford flirted with him during the evening, but left when he would not give her any more cocaine.

Leonard next testified that later on that morning, he decided to take some cocaine over to Luncsford's apartment. According to Leonard, Luncsford invited Leonard in and they proceeded to snort several lines of cocaine. Leonard testified that they then had consensual sexual intercourse. Leonard stated he suddenly realized Luncsford was so high she did not know who she was with, and that he tried to bring her back to her senses. Leonard states it was at this point Luncsford began to yell at him and threaten to call the police. Leonard testified he did not restrain her on the way to her aunt's apartment.

The responding officer described Luncsford as visibly shaken and upset. He observed no signs of drug or alcohol intoxication. The examining physician also testified there was nothing that would indicate Luncsford was under the influence of alcohol or drugs.

Detective Follett, who spoke with Leonard about three hours after the incident, saw no indication Leonard was under the influence of drugs or alcohol. A search of Leonard's and Luncsford's apartments that evening revealed no drugs, drug paraphernalia, or drug residues.

At the close of all the evidence the State moved to amend the first-degree burglary charge to second-degree burglary. Leonard did not object and the State's motion was granted. The jury acquitted Leonard of the burglary charge, but found him guilty of third-degree sexual abuse. The district court sentenced Leonard to a term of imprisonment not to exceed ten years. Leonard appeals.

Leonard argues his trial counsel was ineffective in failing to object to Detective Follett's testimony. Detective Follett testified that during the prearrest interview, Leonard had not mentioned he and Luncsford had used drugs on the morning of the rape. Leonard contends that although this testimony did not violate his Fifth Amendment right against self-incrimination,[1] it was still

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1. In his brief defendant states, "At the outset, it is important to note that the defendant does not argue that his fifth amendment right to be free from self-incrimination was violated by the State's successful attempts to let the jury know that the defendant had

inadmissible because it was irrelevant and any probative value it might have was substantially outweighed by the danger of unfair prejudice. See Iowa R. Evid. 401, 403.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32.

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 differently. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Out of the presence of the jury the following exchange took place.

> [PROSECUTOR]: When [Detective] Follett is questioning the defendant at the hospital, the

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refused certain comment when confronted by the police." We therefore need not address whether the Fifth Amendment, as applied to the states through the Fourteenth Amendment of the United States Constitution, has been violated.

defendant gives answers up to a point and then because he is on probation, I think, when the officers asked him, "Were you using drugs or alcohol" the defendant says, "I want to talk to a lawyer." I would ordinarily instruct the witness not to mention that part about "I want to talk to a lawyer" because I think that is commenting on his right to remain silent. But I think in this case they should be allowed to at least say he made no mention of drugs or alcohol.

THE COURT: Well, I guess, Mr. Cook [defense counsel], I guess I don't have a problem with them saying that. I'm not sure about asking for a lawyer, but if you want --

[DEFENSE COUNSEL]: Judge, I don't have any problem with them saying that at that point Mr. Leonard asked for a lawyer. But I do have a problem with any mention of the drug dog. There is nothing in the minutes. We did depositions in this case six months ago. I made it known that we were going to take the position they were doing cocaine since the time that motion was filed way back in . . . in June.

* * *

THE COURT: At least at this point you have agreed not to bring up, during your case in chief, the use of the drug dog. You will be allowed to ask the officers about questions they asked the defendant concerning drug and alcohol use and the response that he wanted to talk to a lawyer. [Defense counsel] has no objection to that.

When Detective Follett testified the following exchange occurred:

PROSECUTOR: Did you ever ask [the defendant] if there were any drugs or marijuana involved? A. Yes.

Q. And what did he say? A. That was the end of our conversation.

Q. He didn't want to talk to you about that; is that correct? A. That is correct.

Q. At any time during the course of your investigation, when you talked with Merrill Leonard, did he ever indicate to you that

> cocaine or drugs were involved or that he or Rosalie Luncsford had been using drugs? A. No.

On cross-examination the defense counsel asked the detective the following:

> Q. Officer Follett, is it fair to say that Mr. Leonard talked with you about the alleged rape when you interviewed him? A. Yes.
>
> Q. And is it fair to say that when you tried to question him about drugs he stopped the conversation? A. Yes.
>
> Q. Did that have any implication in your mind? A. It left open the possibility that drugs may have been involved.
>
> Q. Well, if an individual is willing to talk about an alleged offense, but is not willing to talk about another, does that indicate anything to you about which -- concern for which offense he was worried about? A. If he were willing to talk to me in length, I could draw a more firm valence [sic]. Our conversation was extremely brief, but I would agree that the indications to the extent that I can draw them, would be that he didn't want to talk about drugs.

Later, when Leonard took the stand, he told the jury why he refused to talk to the police about his drug usage.

> [DEFENSE COUNSEL]: Detective Follett said that you stopped answering questions when he questioned you about drug usage; is that correct? A. Yes, that is correct.
>
> Q. Were you concerned about your -- the drug usage? A. Very much so. At that time I had a really good job, I didn't, you know, didn't look good if I had them find out I did cocaine. At that point I wanted -- I said at that point I wanted to talk to a lawyer.

Leonard's trial counsel did not object to Detective Follett's tesimony because he believed it supported Leonard's version of what happened on the morning in question. Leonard's defense to the rape charge was

consent. He stated he and Luncsford were having a drug party prior to the incident. He also testified that because of the drugs, Luncsford had wrongfully accused him of rape. We find Leonard's trial counsel's decision not to object to this portion of Detective Follett's testimony was trial strategy which was within the normal range of competency. Because our answer on this issue is dispositive, we need not address whether this testimony was also admissible under Iowa Rules of Evidence 401 and 403.

AFFIRMED.