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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-518 / 88-1558

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WILLIAM F. DAVIS,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

Defendant appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and William E. Davis, Scott County Attorney, for appellee.

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

OXBERGER, C.J.

Petitioner, William Davis, appeals from the district court's denial of postconviction relief. He was convicted following a jury trial of first-degree kidnapping and second-degree sexual abuse stemming from the abduction and rape of a young Davenport woman in 1980. Davis was sentenced to life imprisonment and to a term not to exceed twenty-five years. The Iowa Supreme Court affirmed Davis' kidnapping conviction in State v. Davis, 328 N.W.2d 301 (Iowa 1982), but nullified the sexual abuse conviction.

Petitioner contends he was denied effective assistance of counsel. He contends that his trial counsel was ineffective in failing to: (1) pursue an intoxication defense at trial; and (2) object to and request appropriate jury instructions regarding the confinement and removal requirements applicable to kidnapping.

Defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987). We presume counsel was competent and a postconviction petitioner has the burden of establishing by a preponderance of the evidence that trial counsel was ineffective. Id. To establish an ineffectiveness claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performing [sic] prejudiced the defense. This

> requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Cuevas, 415 N.W.2d at 632 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984)). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective counsel. Hinkle v. State, 290 N.W.2d 28, 34 (Iowa 1980). The litmus test for determining whether specified errors of counsel have resulted in required prejudice is a defendant must show there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

Davis contends that his trial counsel was ineffective in failing to pursue an intoxication defense at trial. Davis argues that the night he kidnapped his victim and raped her, he had been drinking and had been under the influence of a controlled substance the entire weekend. Davis therefore argues that the jury could have found diminished capacity thereby negating specific intent to commit the crime.

At the postconviction hearing Davis' trial counsel testified that he had not pursued an intoxication or diminished capacity defense because he had problems verifying Davis' intoxication. He further stated that he consulted and discussed the matter with Mr. Davis and

determined that it would be wiser to defend this case upon the facts and identification rather than use the defense of diminished responsibility which would require Mr. Davis to testify and possibly admit certain facts and elements and thus being able only to argue intent. Trial counsel testified it was his strategy to pursue a misidentification defense.

We find that Davis' trial counsel's decision to pursue a misidentification defense to be a reasonable strategical decision. We find that the defendant has failed to meet the burden on this issue.

Davis additionally contends that his trial counsel was ineffective in failing to submit to the jury an instruction regarding confinement or removal necessary for kidnapping as compared to sexual abuse. Davis asserts that his forcing the victim to drive to a wooded area in Illinois was incidental to the acts of sexual abuse and were taken to lessen the risk of detection. See State v. Rich, 305 N.W.2d 739 (Iowa 1981). Davis contends that these acts were less than the confinement required to find someone guilty of kidnapping. If the jury had been instructed as such, Davis asserts that the jury might have acquitted him of the kidnapping charge and also believes that the jury would have been able to consider whether the risk of harm to the victim and the risk of detection was enhanced by the confinement of the victim.

In State v. Rich, 305 N.W.2d 739 (Iowa 1981), the Iowa Supreme Court held that the confinement or removal necessary for kidnapping required more than that which was merely incident to the attendant sexual abuse. The court stated "[s]uch confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense." Id. at 745.

At the postconviction hearing Davis' trial counsel testified that he was not sure if he was aware of the Rich case but does recall reviewing this area of the law and the confinement issue. Counsel testified that his review of the facts indicated that the State had demonstrated more confinement than was necessary for sex abuse and that he felt there was no merit in such an argument. It is well settled that the decision not to assert a particular defense is a strategic decision which does not provide grounds for a reversal. State v. Wilkens, 346 N.W.2d 16, 19 (Iowa 1984); State v. Killpack, 276 N.W.2d 368, 372 (Iowa 1979). We agree with the district court that "this decision was one of strategy, and failure to request the suggested instruction does not amount to ineffective assistance."

The record does not support petitioner's claim his trial counsel failed to perform an essential duty. There was no prejudice amounting to a denial of petitioner's due process right to a fair trial. Petitioner has failed to show counsel's performance was outside the range of normal competency. We affirm the decision of the district court.

AFFIRMED.