IN THE COURT OF APPEALS OF IOWA

No. 6-031 / 95-665

000379

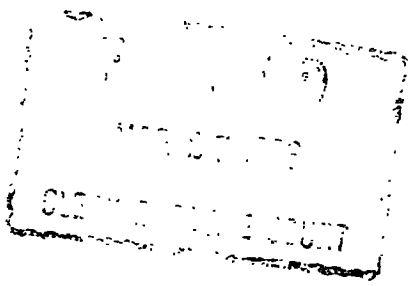
STATE OF IOWA,

Appellee,

vs.

BRIAN K. SULLENDER,

Appellant.



Appeal from the Iowa District Court for Jefferson County, Dan F. Morrison, Judge.

Brian K. Sullender appeals from his convictions, following a jury trial, for third-degree sexual abuse and second-degree burglary, in violation of Iowa Code Sections 709.4(2)(a), 713.1 and 713.5 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and John Morrissey, County Attorney, for appellee.

Considered by Sackett, P.J., Cady, J., and Peterson, S.J.*

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court.

CADY, J.

Brian Sullender appeals his conviction and sentence for sexual abuse in the third-degree and burglary in the second-degree. He contends he was denied effective assistance of counsel. We disagree and affirm his conviction.

Marion Borden, a seventy-four year old woman who suffered from Alzheimer's disease, was attacked and sexually abused in her bedroom. Her apartment was connected to the residence of her son and daughter-in-law, Charles and Constance Borden. Due to Borden's illness, Sullender's wife, Misty, was hired to provide care for Borden during the daytime and Magda Bagova provided care overnight. Bagova was sleeping in Borden's apartment, in a separate room with an intercom, when the attack occurred. She awoke to heavy breathing and struggling sounds emanating from Borden's bedroom, and she went to Borden's doorway. She saw a partially naked man on top of Borden, and, in fear, returned to her room. As the man was leaving the apartment, Bagova asked him who he was and what he was doing in the apartment. The assailant responded "Misty's boyfriend, I checked Marion." Bagova stated she did not recognize the man, but was able to see his face. The man left the apartment a short time later.

Bagova promptly contacted Charles and Constance, who came to the apartment. After Charles left a message on Misty Sullender's answering machine, the police were summoned. Brian Sullender then called the apartment, but Charles did not tell him what had happened. Sullender then appeared at the apartment. Police

officer Bart Richmond, who had arrived at Borden's apartment, recognized Sullender and inquired how he got to the apartment since he believed Sullender did not have a valid driver's license. Sullender informed Richmond he had driven to the apartment. Bagova recognized Sullender while he was at the apartment and told officers he was the same man she had seen in Borden's bedroom. While officers questioned Sullender, Charles contacted Misty by phone and told her about the assault.

Sullender was charged with operating while intoxicated (OWI), third-degree sexual abuse, and second-degree burglary. The OWI charged was later severed from the proceeding.

At the sexual abuse and burglary trial, Bagova testified about her observations and conversation with the assailant. Richmond testified about his inquiry to Sullender about how he got to Borden's apartment. Misty Sullender also testified about her conversation with Charles. The crux of her testimony was after Charles informed her Borden had been sexually assaulted Misty responded "Who was it? Brian?" The State provided further testimony from a DNA expert that tests could have been performed on the seminal fluid which would have identified a donor with a probability of one in one hundred to one in ten thousand. No DNA tests were requested by counsel for Sullender prior to trial.

The jury found Sullender guilty of second-degree sexual abuse and third-degree burglary. The district court sentenced him to two concurrent ten-year terms.

At the sentencing hearing counsel for Sullender requested and was allowed to run tests on blood and semen samples taken from Borden.

Sullender appeals contending his trial counsel rendered ineffective assistance by failing to object to the testimony of Magda Bagova, Bart Richmond, and Misty Sullender, and by failing to obtain DNA testing on the State's evidence prior to trial.

I. Standard of Review

Claims of ineffective assistance of counsel are not ordinarily adjudicated on direct appeal, but are preserved for postconviction relief proceedings. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). We resolve ineffective assistance claims on direct appeal only when the record adequately presents the issues. *Id.* at 853.

Representation by counsel is presumed competent, and a defendant bears the burden of proving, by a preponderance of the evidence, counsel rendered ineffective assistance. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). To prevail on a claim of ineffective assistance, a postconviction applicant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced applicant. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989).

> 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.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

II. Bagova's Testimony

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. *State v. Fingert*, 298 N.W.2d 249, 251 (Iowa 1980). Extrajudicial statements, however, are not considered hearsay and can be used against a declarant if the declarant is a party-opponent in a suit. Iowa R. Evid. 801(d)(2).

Bagova testified as to the statements made by the assailant as he was leaving the apartment. She later identified Sullender's face to be the face she saw of the man who uttered the statements. We find the statements fall within Iowa R. Evid. 801(d)(2) and are not hearsay.

We find Sullender's counsel did not have a duty to make a hearsay objection to Bagova's testimony concerning the statement, "Misty's boyfriend, I checked Marion," made by the assailant. Since counsel possessed no duty to object, we conclude Sullender's counsel did not render ineffective assistance. We also find, in light of Bagova's identification of Sullender as the assailant, Sullender suffered no prejudice as a result of the admission of these statements.

III. Richmond's Testimony

The statements made by Richmond concerned Sullender's method of traveling to Borden's apartment at the time of the investigation, not at the time of the assault.

Moreover, when the conversation took place, Sullender was not a suspect, as Bagova had not identified Sullender as the assailant. We find the questioning was not "custodial interrogation" requiring Sullender's counsel to file a motion to suppress or lodge an objection. As such, counsel for Sullender was not ineffective in failing to file the motion or to object to the statements on the grounds it violated his *Miranda* rights.

Evidence which is not relevant is inadmissible at trial. Iowa R. Evid. 402. Due to the severance of the OWI charge, the statements by Richmond concerning the manner in which Sullender came to Borden's home during the time of the investigation were not relevant to his sexual abuse and burglary trial. As such, the counsel for Sullender did possess a duty to object to the admissibility of the statements.

Notwithstanding, we find the statement made by Richmond did not prejudice Sullender. The evidence against Sullender was overwhelming. Richmond at no time mentioned the OWI charge or whether or not he cited Sullender for driving without a license. No reasonable probability exists that, but for counsel's failure to make a relevancy objection, the result of the proceeding would have been different. We find counsel for Sullender did not render ineffective assistance.

IV. Misty Sullender's Testimony

It is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor*,

352 N.W.2d at 685. Instead, we may affirm a conviction if the applicant has failed to prove prejudice, without deciding whether there was a failure of duty.[1] *See Taylor*, 352 N.W.2d at 685.

Upon a review of the record in this case, we determine applicant failed to satisfy the prejudice component of an ineffectiveness claim. Medical evidence indicated Borden had been sexually abused. At both the investigation and trial stages, Bagova identified Sullender as the man who had been in Borden's bed. She also identified Sullender's boots as to have the same distinctively grooved soles as those she saw being worn by the man in Borden's bed. Counsel's failure to object to the utterances by Misty Sullender "Who was it? Brian?" on either hearsay or relevancy grounds would not have reasonably altered the outcome of the proceedings.

V. DNA Tests

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[1] We acknowledge Misty Sullender's statement was hearsay. There is no recognized exception to the rule against hearsay simply because the out-of-court declarant is testifying at trial and is subject to cross-examination. *United States v. Palacious*, 556 F.2d 1359 (5th Cir. 1977). The general rule against hearsay provides that a prior statement of a witness is inadmissible as substantive evidence. There is an exception or exclusion, of course, which allows the admission of a prior statement of a witness under certain circumstances. Iowa R. Evid. 801(d)(1). Only part of this exclusion, however, is met when the witness and declarant are the same person. Prior statements are excluded from the hearsay rule only if the witness is available for cross-examination and one of the three specific circumstances of Rule 801(d)(1) are satisfied. We further note statements which are nonassertive utterances fall outside the realm of hearsay. *State v. Jones*, 271 N.W.2d 761, 767 (Iowa 1978). We, however, find the Misty's statement, to be more than a mere utterance, but makes an assertion, and as such constitutes hearsay.

Counsel for Sullender did not request DNA samples to be taken prior to trial. However, at the sentencing hearing, counsel requested and was granted an order requiring DNA testing to be done on the blood and semen samples taken from the victim.[2] We find counsel's failure to request DNA tests prior to the verdict to be a strategic and tactical decision to avoid obtaining more evidence which could potentially inculpate Sullender. A reasonable strategic decision does not constitute ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 414 (Iowa 1982). We find counsel did not render ineffective assistance to Sullender.

AFFIRMED.

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[2] The record does not reveal the results of the testing.