IN THE COURT OF APPEALS OF IOWA

No. 1999-474 (9-731) / 98-2155
Filed January 26, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT LEE STRONGHEART,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Michael S. Walsh, Judge.

Robert Lee Strongheart appeals his judgment and sentence, following a guilty plea, from the charge of kidnaping in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Mark J. Schouten, County Attorney, for appellee.

Considered by Huitink, P.J., and Streit and Miller, JJ.

STREIT, J.

A new bride barely survived the abuse of the man she once cherished. In the early hours of a midsummer's morning Robert Strongheart cut, choked, punched, kicked, and accused his new wife of being a lesbian. Strongheart pleaded guilty to second-degree kidnapping and was sentenced. Strongheart appeals his conviction, claiming his counsel was ineffective for permitting him to plead guilty. He claims the plea colloquy did not provide a factual basis as to the necessary confinement element in kidnapping and his attorney failed to intervene. Because we find Strongheart's confinement of his wife was not incidental to the underlying assault, the plea was supported by a factual basis, and counsel therefore was not ineffective. The conviction is affirmed.

I. Background Facts & Proceedings.

Becky and Robert Strongheart were newlyweds when on July 13, 1998, Becky, after spending the day with a friend, returned home to find her husband in a sour mood. Strongheart brusquely told Becky she was taking him to the Buckaroo Bar in Hudson, South Dakota. They immediately left, and upon their arrival, Strongheart began to drink heavily. At about 1 a.m. Strongheart walked up to his wife, asked her if she wanted to see how sharp his knife was, and cut her across the right hand. Becky fled the bar and waited in the car.

At closing time Strongheart told Becky to get in the backseat of the car. Strongheart drove the car a short distance outside Hudson city limits, stopped on an isolated gravel road, and ordered Becky to get out. Out of the vehicle, Robert hit his wife and accused her of being a lesbian. He forced her to remove her clothes, threatened to cut off her nipples, kicked and punched her, forced her to

masturbate, told her he was going to kill her, and said nobody would ever find her. Strongheart ordered her to leave her clothes and get back in the car. They drove off into the night.

During their journey into Iowa, Strongheart had Becky drive. When they arrived home, Strongheart's abuse further intensified. Strongheart began strangling her, hitting her with closed fists, accusing her of being a lesbian, and repeatedly forced her to masturbate. Whenever she attempted to leave the room or run from him, the beatings worsened to the extent she temporarily lost consciousness. Strongheart passed out, and Becky fled to the police station.

Strongheart was arrested but claimed to remember little about the previous evening. When confronted with his wife's statements, he acknowledged his wife does not lie and admitted to the incidents. The State charged Strongheart with first-degree kidnapping, sexual abuse in the second degree, and aggravated domestic assault. He pled to the amended charge of second-degree kidnapping, and the State dismissed the remaining charges. He was sentenced to a term not to exceed twenty-five years.

Strongheart now appeals, claiming his counsel was ineffective for permitting his guilty plea. He claims the plea colloquy did not provide a factual basis for the offense and his attorney failed to intervene.[1]

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[1] Strongheart pursues his claim under the rubric of ineffective assistance of counsel because he cannot directly attack the factual basis claim as it was not preserved for review.

II. Standard of Review.

Normally, "we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Query*, 594 N.W.2d 438, 444 (Iowa App. 1999). Claims of ineffective assistance of counsel may be resolved on direct appeal "when the record is adequate to decide the issue." *Id.* We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

III. The Merits.

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 (1984)). 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. *Risdal,* 404 N.W.2d at 131-32. The test for prejudice is whether a reasonable probability existed that the outcome of the trial would have been different but for counsel's alleged omissions. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990). Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Kane v. State*, 436 N.W.2d 624, 627 (Iowa 1989). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d. at 131.

A person commits kidnapping under Iowa Code section 710.1 (1997) by improperly confining another with the intent to inflict serious injury or sexual

abuse on that person. Although no minimum period of confinement is required, it must nonetheless exceed the incidental confinement necessary to complete the underlying assault or sexual abuse. *See State v. Griffin*, 564 N.W.2d 370, 373 (Iowa 1997); *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994); *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981). The confinement exceeds being incidental if it "substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the commission of the underlying offense." *State v. McGrew*, 515 N.W.2d 36, 39 (Iowa 1994). Merely seizing the victim during the commission of the crime does not rise to the level of confinement required for kidnapping. *State v. Mead*, 318 N.W.2d 440, 445 (Iowa 1982).

Defense counsel's performance cannot be construed as ineffective if there was a factual basis for the guilty plea. Because Strongheart's confinement of his wife stretched beyond mere incidental seizure, we dismiss any notion that defense counsel was ineffective and affirm the conviction. Strongheart appears to contend each individual assault on his wife was part of an overall assaultive situation and his confinement therefore was incidental to that situation. The trial information and Strongheart's plea colloquy, however, show the early morning hours of the abuse were pockmarked with numerous, independent assaults. When the couple first returned home, Strongheart began choking her.[2] When he stopped and she attempted to escape his wrath by going to another room, he grabbed her and began punching her. He then ordered her to masturbate and

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[2] We confine our discussion of confinement to those events occurring in Iowa as to avoid any jurisdictional entanglements.

she again tried to run, but was again stopped and beaten. Finally, he ordered her to go to an upstairs bedroom. There, he continued his assault until she ultimately lost consciousness. Strongheart's actions were not one continuous assault but a series of assaults initiated by her attempts to flee. Thus, she was not confined incidental to the overarching assaultive situation, but was confined numerous times in response to her attempts to flee individual acts of violence. Furthermore, Stongheart's confinement of his wife within their home ensured his horrific treatment of his wife would not be detected. Finally, the confinement substantially increased the harm suffered by Becky as every time she attempted to escape she was beaten into submission. As Strongheart's confinement of his wife clearly extended beyond incidental seizure, his plea was supported by a factual basis. Counsel cannot be held ineffective for failing to challenge a properly entered plea. The conviction is affirmed.

AFFIRMED.