IN THE COURT OF APPEALS OF IOWA

No. 5-726 / 95-0401

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee.

vs.

VINCENT ANTONE JOHNSON,

Appellant

Appeal from the Iowa District Court for Jones County, L. Vern Robinson, Judge.

Vincent Johnson appeals his conviction and sentence for assault with intent to commit sexual abuse without injury. **AFFIRMED.**

Thomas J. O'Flaherty of the O'Flaherty Law Firm, Cedar Rapids, and Vincent Johnson, pro se, for appellant.

Thomas J. Miller, Attorney General; Robert P. Ewald, Assistant Attorney General; and Connie S. Ricklefs, County Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Defendant, Vincent Johnson, appeals his conviction of assault with intent to commit sexual abuse without injury. Defendant was a prisoner at the Iowa Men's Reformatory at Anamosa. He was alleged to have attempted to sexually abuse his cellmate. Defendant claimed his cellmate made up the charge in order to create a basis upon which he could sue the prison.

In his brief, appellant's counsel concedes no substantial errors have been preserved for direct appellate review, and he argues only that Johnson's trial counsel was ineffective. Filing his own appellate brief, Johnson raises additional issues for consideration on appeal. Having reviewed the arguments raised by both appellate counsel and Johnson, we affirm on all issues except one which we preserve for postconviction proceedings.

I. Ineffective Assistance of Trial Counsel--Standards.

Appellate counsel claims Johnson's trial counsel was ineffective. A defendant bears the burden of proving by a preponderance of the evidence he received ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995). He must prove two elements: 1) counsel failed to perform an essential duty; and 2) he was prejudiced by counsel's omission. *Id.* at 563-64. The test for the first element is whether the attorney's performance was outside the range of normal competency. *Id.* at 564. The test for the second element is whether there is a

reasonable probability that but for his trial attorney's unprofessional errors, the resulting conviction and sentence would have been different. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* Our review is de novo based upon an evaluation of the totality of the circumstances. *Davis v. State*, 520 N.W.2d 319, 321 (Iowa 1994).

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Capper*, 539 N.W.2d 361, 367 (Iowa 1995). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.*

II. Arguments of Appellant's Counsel.

The first claim of ineffective assistance relates to the failure of defense counsel to file a written motion and offer of proof pursuant to Iowa Rule of Evidence 412. Johnson apparently wanted to introduce evidence of the victim's sexual preference in order to refute the charge he had attempted to sexually abuse him while they shared a prison cell. In ruling on the State's motion in limine to exclude evidence of the victim's sexual preference, the trial court specifically asked defense counsel if defendant was making a claim that a consensual sexual act had occurred. Defense

counsel confirmed no such defense was going to be made. Under these circumstances, trial counsel was not ineffective for declining to file a rule 412 motion and an offer of proof.

It is also argued the "door had been opened" on the subject of the victim's sexual preference after he testified other prisoners had made comments about him being "young and pretty." Given this testimony, appellant's counsel argues trial counsel should have sought reconsideration of the court's ruling. We disagree. The testimony in question did not open the door on the topic of the victim's sexual preference. Defense counsel had no duty to seek reconsideration of this issue.

Appellate counsel claims trial counsel was ineffective in failing to raise an Iowa Rule of Evidence 404(b) objection to the testimony of a correctional officer. The officer had described the section of the prison in which Johnson and the victim lived as the section where "bad acting inmates" were housed. Trial counsel had no duty to object to this testimony. The testimony did not specifically refer to Johnson or contain any specific allegations of prior bad acts he was alleged to have committed. Furthermore, any negative inference which can be drawn from the testimony would reflect equally upon Johnson and his victim as both were housed on the third floor of the prison. Defense counsel had no duty to raise an objection to this testimony.

It is argued trial counsel was ineffective in failing to object to an alleged misstatement made by the prosecutor during her opening argument. The prosecutor referred to the victim's injury as a "tear around the anal opening." The medical evidence offered at trial indicated the injury was merely an abrasion or scrape. Johnson does not explain how this one mischaracterization of the injury was prejudicial, especially given the subsequent undisputed medical testimony which established the minor nature of the injury. The jury was instructed the opening statements were not to be considered as evidence, and we presume a jury follows its instructions. *State v. Simpson*, 438 N.W.2d 20, 21 (Iowa App. 1989). Absent evidence of prejudice, there was no breach of an essential duty in not objecting to the prosecutor's statement.

During its direct examination of the physician who treated the victim, the State asked the doctor if penetration was necessary for sexual abuse to occur. Appellate counsel claims this question amounted to a request for a legal opinion and his trial counsel was ineffective in not objecting to it. We disagree. During cross-examination the doctor had testified the victim was unsure if penetration had occurred. Upon redirect examination the State sought to establish penetration was not necessary for the victim to have sustained the injury he had. When read in context, it is apparent the question Johnson now finds objectionable was part of the State's attempt to clarify the victim's injuries could have been incurred without penetration. The

witness expressed no legal opinion on Johnson's guilt, but merely stated an accurate fact which is that penetration is not necessary in order for sexual abuse to occur.

It is argued Johnson's trial counsel was ineffective in failing to object to the use of the term "rape kit" by the prosecutor and the State's witnesses. It was defense counsel who first used the term during his opening statement. Johnson claims the term "rape kit" was inflammatory and "unnecessary and prejudicial to Mr. Johnson's fair trial rights."

At issue is not the use of the term "rape" but "rape kit." The latter is apparently a shorthand reference to a sexual assault evidence collection kit used to collect physical bodily evidence following an allegation of sexual assault. The use of the term "rape kit" was innocuous as evidenced by the fact both defense counsel and the State used it at trial. Given the context in which the term was used, it was neither inflammatory nor prejudicial to the defendant. Defense counsel had no duty to object to its use.

Finally, appellate counsel claims Johnson's trial counsel was ineffective for not having the closing arguments recorded. However, he does not cite any language or conduct which allegedly occurred during closing arguments which would have been prejudicial to Johnson. Defense counsel is not required to have closing arguments recorded. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). A proper objection at trial will preserve any objection involving the closing arguments. *See id.*

A party claiming ineffective assistance of counsel must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Absent a specific allegation of error in the closing arguments, Johnson's claim of ineffective assistance is too general to be preserved for postconviction proceedings.

III. Arguments of Appellant.

In his pro se brief Johnson claims the trial court should have granted his request for a change of venue "based on the lack of minority jurors and the fact that jurors were related to staff members at the Iowa Men's Reformatory." He argues the failure to grant his motion resulted in a "conviction by a prejudiced jury." We reverse only upon an abuse of discretion. *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990).

Johnson presented no evidence in support of his motion. The trial court carefully considered the dictates of Iowa Rule of Criminal Procedure 10(10)(b), and, in a detailed ruling, it addressed Johnson's claims of prejudice due to publicity, a lack of minority jurors, and potential juror familiarity with the operations of the Men's Reformatory. The trial court exercised sound judgment in denying the motion, and we find no abuse of discretion in its decision.

Johnson argues it was an error not to allow him to call a fellow prisoner, Howard Sawyer, and three correctional officers as witnesses. Johnson contends these witnesses would have testified about prior false accusations of sexual abuse which Sawyer had made against Johnson. The trial court excluded the testimony as irrelevant. We review decisions on the admissibility of evidence for an abuse of discretion. *State v. Casady*, 491 N.W.2d 782,785 (Iowa 1992).

There was no error in the exclusion of this testimony. Mr. Sawyer was not the victim in this case, and he had no personal knowledge regarding the circumstances underlying the present charge of sexual abuse. Any testimony he could offer was completely unrelated to the case at bar. This evidence was irrelevant and properly excluded. Johnson's brief suggests the testimony of the victim in this case refers to Mr. Sawer and his counsel should have objected to that testimony. We have reviewed the transcript pages cited by Johnson and find the victim made no explicit, or even arguably implicit, references to Sawyer. Trial counsel had no duty to object to the testimony.

Johnson's third argument is apparently that he did not receive a copy of a letter the victim wrote to the prosecuting attorney. The trial court record indicates defense counsel received a copy of the letter. To the extent Johnson is arguing his counsel was ineffective in failing to share the contents of the letter with him, we preserve this matter for development in postconviction proceedings.

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Johnson's final argument is difficult to discern It appears he is arguing the State influenced the testimony of the victim We have reviewed the portion of the transcript cited by the defendant and find no merit in this argument

AFFIRMED.