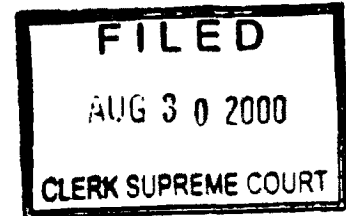


IN THE COURT OF APPEALS OF IOWA

No. 0-400 / 99-1052
Filed August 30, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

TINA L. BRYSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Story County, Timothy J. Finn,
Judge.

Defendant appeals from her convictions for prostitution and pandering.

AFFIRMED.

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

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Stephen Holmes, County Attorney, and Daniel Gonnerman, Assistant
County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

On appeal from her convictions for prostitution and pandering, the defendant claims her trial counsel was ineffective and the district court erred in instructing the jury skin-to-skin contact is not required in order to establish a "sex act." We affirm.

Tina Bryson owns Blondie's, a strip club in Ames. The club was the target of a "sting" operation by Ames police officers. Officers suspected Bryson had permitted and engaged in sex acts for money while performing "lap dances" for bar patrons.

As part of the sting operation, undercover officers were sent into Blondie's. Iowa State University Department of Public Safety Captain Eugene Deisinger, a member of the sting operation, started going into Blondie's on March 20, 1998, with the initial goal of establishing himself as a regular so the dancers and management might become familiar and comfortable with him. Deisinger was to gather information, observe whether there were any violations of the City of Ames lap dance statute, and see whether he would be solicited for prostitution.

Deisinger did not encounter Bryson at Blondie's on March 20, 1998, nor did he when he returned on March 28. However, on May 1, 1998, Bryson approached him and offered a lap dance or private dance. Deisinger accepted and followed Bryson to a curtained area where he paid \$20 for a lap dance.

Deisinger returned to Blondie's on May 8, 1998 and May 15, 1998. On May 15, Deisinger was equipped with a microphone and transmitter. He encountered Bryson, went with her to the curtained area, and paid her \$20 for a

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lap dance. Deisinger testified some small talk went on between the two of them and that "she rocked her genital region over mine. She took my hands and placed them on her breasts." After the first dance was over, Deisinger consented to a second lap dance.

During the second dance, Bryson touched Deisinger's penis on the outside of his pants. The touching continued until the song was over. At that time, Bryson asked Deisinger if he wanted her to continue. Shortly after the third song began, Bryson unzipped Deisinger's pants and put her hands inside. Deisinger described this touching as "teasing, light touching, stroking, gripping at times intermittently." According to Deisinger, after the third song ended and Deisinger paid for the additional two lap dances, the following took place:

Q: Did you ask her a question at this point? A: Yes.

Q: What was that? A: I asked her - - I was trying to clarify, "Can you do a hand job for one hundred?"

Q: And why did you say that? A: I was trying to clarify for the backup team what was going on; and what she was - - what she was communicating nonverbally.

Q: What was her response? A: As I said it, I made a gesture, "Can you do a hand job for one hundred," like this; and she reached out removed her hand from my pants for a moment, reached out and shook my right hand.

Q: And what was your response to having your hand shook? A: I asked her if she was shaking on the deal. She let go of my hand, put her hand back inside my pants, and just kind of laughed.

Q: And did she continue on physically? A: Yes. She continued with touching of my penis and testicles.

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A: I said something to the effect of I can see I was in very good hands. If what she was doing - - or, "If this was one hundred, what would one hundred and fifty be?"

Q: And what was Miss Bryson's response? A: She said, "You can touch me."

Q: And your response? A: I asked her where, saying that I had already touched her breasts. Again, I was trying to get it on tape.

Q: And what did Miss Bryson do in response? A: She moved her hand from outside of my pants, moved it near her groin area, and pointed to her G-string, to her vagina.

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Q: Did you inquire further? A: Yes. Again, I was trying to get her to be explicit verbally. So I asked, "What about for another fifty?" Or, "What could we do for another \$50?"

Q: And what was Miss Bryson's response? A: Her comment was something to the effect she didn't know or couldn't think of what we could do for two hundred."

Q: So what was your response? A: I said, "Fine. Then one hundred and fifty is good."

After Bryson took the money, Deisinger gave the signal for the backup team to come in and arrest her.

Bryson was charged with one count each of pimping and pandering, and four counts of prostitution. The trial commenced on March 2, 1999. The jury returned guilty verdicts on three counts of prostitution and one count of pandering on March 5, 1999. Bryson appeals.

I. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

Ordinarily we reserve 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. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Ame*, 579 N.W.2d 326, 329 (Iowa 1998). However, only in "rare circumstances will the trial record alone be sufficient to resolve the claim." *State v. Rawlings*, 402 N.W.2d 406, 408 (Iowa 1987).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Bryson's conviction based on her failure to prove prejudice without deciding whether her counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996). Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding

whose result is being challenged." *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa App. 1999) (quoting *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699).

Bryson claims she received ineffective assistance of counsel due to counsel's (1) questioning of a State's witness which elicited damning information, (2) failure to properly advise her with regard to testifying in her own defense, and (3) failure to preserve a lesser-included offense issue for appellate review.

Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily constitute ineffective assistance of counsel. *Johnson*, 604 N.W.2d at 673. Where counsel's decisions are made pursuant to a reasonable trial strategy, we will not find ineffective assistance of counsel. *Id.* Defense counsel's trial strategy is unclear from the record before the court. We agree with the State and conclude the record in this case is insufficient for us to address Bryson's claim in this direct appeal. Therefore, we preserve the ineffective assistance of counsel claim for possible postconviction relief action. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

II. Jury Instruction. Our review of jury instructions is for errors of law. *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992). We review to decide if the jury instructions are correct statements of the law and are supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The district court has the duty to ensure the jury understands the issues it must decide and the law it must apply. *State v. Bennett*, 503 N.W.2d 42, 45 (Iowa App. 1993). When only one instruction is challenged, it will be judged in context

with other instructions relating to the criminal charge, not in isolation. *Liggins*, 557 N.W.2d at 267. If the trial court errs in submitting or refusing to submit an instruction, we will reverse only if the error has caused prejudice. *Kessler v. Wal-Mart Stores, Inc.*, 587 N.W.2d 804, 806 (Iowa App. 1998).

At trial, the defense objected to Instruction No. 23. The instruction read as follows:

As used in these Instructions, "sex act" means any sexual conduct:

1. By penetration of the penis into the vagina or anus.
2. Between the mouth of one person and the genitals of another.
3. Between the genitals of one person and the genitals or anus of another.
4. Between the finger or hand of one person and the genitals or anus of another person.
5. By the person's use of an artificial sex organ or a substitute for a sexual organ in contact with the genitals or anus of another.

You may consider the type of contact and circumstances surrounding it in deciding whether the contact was sexual in nature.

Skin-to-skin contact is not required in order to establish a "sex act." Prohibited contact may occur even though specified body parts or substitutes are covered. In absence of skin-to-skin contact, prohibited contact occurs when specified body parts or substitutes touch, and any intervening material would not prevent participants, when viewed objectively, from perceiving they have touched.

Specifically, Bryson contends the last paragraph of Instruction No. 23 was improper because no legal precedent exists for instructing skin-to-skin contact is not required in order to establish a "sex act" in vice offenses. We find this argument without merit.

Our supreme court has held skin-to-skin contact is not required in order to establish a "sex act" under section 702.17. *State v. Pearson*, 514 N.W.2d 452,

455 (Iowa 1994). Prohibited contact may occur even though the specified body parts or substitutes are covered. *Id.* The court made no distinction as to the type of crime to which its holding would apply. The court explained:

Whether intervening material prevents contact must be determined on a case-by-case basis, considering the nature and amount of the intervening material. If the intervening material would, from an objective viewpoint, prevent a perception by the participants that the body parts (or substitutes) have touched, contact has not occurred. Thus, prohibited contact occurs when (1) the specified body parts or substitutes touch and (2) any intervening material would not prevent the participants, viewed objectively, from perceiving that they have touched.

Id.

This court has held a lack of skin-to-skin contact alone does not, as a matter of law, put defendant's conduct outside the definition of "sex act". *State v. Phipps*, 442 N.W.2d 611, 613 (Iowa App. 1989). The defendant in the *Phipps* case had placed his hand inside a fourteen year old boy's jeans, but over the boy's underwear. Similarly, in the case at bar, Bryson placed her hand on Deisinger's penis, first outside his pants and then inside his pants, but outside his underwear.

The sexual nature of the contact can be determined from the type of contact and the circumstances surrounding it. *Pearson*, 514 N.W.2d at 455. Even if we were to look at the nature of Bryson's contact with Deisinger and surrounding circumstances in the light most favorable to her, we cannot find any nonsexual purpose for the contact. The fact no nonsexual purpose for the contact was discernible also demonstrates the sexual nature of the contact. *Id.*

The purpose of section 725.1 is to prohibit the commercial exploitation of sexual gratification. *State v. Foster*, 356 N.W.2d 548, 550 (Iowa 1984). Whether the sexual gratification occurs through “skin-to-skin” contact or through a thin layer of clothing, the outcome of the act and the evil sought to be punished remain the same.

Jury instructions should state the applicable law. *State v. Engle*, 590 N.W.2d 549, 552 (Iowa App. 1998). In fashioning jury instructions, a trial judge should avoid drawing attention to specific evidence. *Id.* Reading Instruction No. 23 as a whole, it is clear the jury was properly instructed as to what constitutes a “sex act”.

We affirm Bryson’s convictions and preserve her claim of ineffective assistance of counsel for possible postconviction relief action.

AFFIRMED.

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