

IN THE COURT OF APPEALS OF IOWA

No. 2-174 / 91-1144

FILED

JUN 25 1992

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

1276

vs.

STEVEN FLOYD WEBER,

Appellant.

Appeal from the Iowa District Court for Cedar County,
Max R. Werling, Judge.

Weber appeals, following a jury trial, his conviction
for one count of third-degree sexual abuse and one count of
assault causing bodily injury. **AFFIRMED.**

Bruce A. Kittle and Matthew J. Petrzela of Simmons,
Perrine, Albright & Ellwood, Cedar Rapids, and James G.
Thomas, Anamosa, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich
and Michael Wallace, Assistant Attorneys General, Lee W.
Beine, County Attorney, and Sterling L. Benz, Assistant
County Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

Defendant, Steven Floyd Weber, and Lori Weber were married in 1975. They were divorced in 1987. Following their divorce, they were separated for three months and eventually reconciled. Steven moved back into the family home with Lori and the parties' three children. They cohabited from March 1988 to January 1991. The longest period of time that Steven was not living in the house during this time frame was two months. Steven considered he was married to Lori, but she did not believe she was married to Steven.

On December 31, 1990, Steven anticipated spending New Year's Eve with Lori. When he arrived home at 5 p.m., Lori was not home. She eventually arrived at 3:25 a.m. the following morning, having spent the evening at a New Year's Eve party. At the time, Steven was drunk and angry. He accused Lori of having sex with someone else. Steven insisted Lori have intercourse with him, but Lori declined his invitation, indicating Steven was too drunk. Lori went upstairs to bed. Steven followed, jumped onto the bed, and then took his three fingers and inserted them in Lori's vagina. With his fingernails, he scraped into the walls of Lori's vagina. After inserting his fingers into Lori's vagina two additional times, Steven repeatedly hit her to the point that Lori was numb and could only "see stars." Because Steven was screaming and Lori was yelling for her teenage daughter, two of the Webers' children eventually

appeared at the open bedroom door. The children observed their nude father, angry and in shock, sitting on top of Lori, whose face was quite bloody.

Following this incident, Lori left the couple's home and called police to investigate. Based on the police investigation, Steven Floyd Weber was charged with, and was convicted by a jury, of one count of third-degree sexual abuse and one count of assault causing bodily injury. Weber appeals.

Weber argues the district court erred in denying his motion for new trial based on its conclusion he was not denied effective assistance of counsel. In addition, he claims the court erred in concluding no common-law marriage existed between him and Lori. We find the district court acted properly in both respects, and we affirm.

I.

We first address the ineffective assistance claim. We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987). The record must show two conditions before a claim of ineffective assistance is satisfied: "It must be shown that 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom." State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983) (quoting Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981)).

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is there must be a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984).

Resolution of claims of ineffective assistance of counsel is generally reserved for postconviction review. State v. Nebinger, 412 N.W.2d 180, 191-92 (Iowa App. 1987) (citation omitted). We find, however, there is an adequate record here to review the merits of Weber's claim on direct appeal. A lengthy hearing was conducted on Weber's motion for new trial, and counsel's actions were explored.

Weber claims his counsel gave ineffective assistance due to counsel's failure to interview or depose any of the

State's witnesses except the victim, Lori. Defense counsel did explain his actions at the hearing. He stated the importance of deposing Lori and noted:

[With regard to the other witnesses,] I said, "Steve, we can depose the kids, but I have a grave concern about doing that because of the fact that they be exposed to a small setting of people as opposed to a large number in front of a jury," and I basically didn't want them to practice or warm up and have a chance to feel comfortable when they testified.

In addition, defense counsel explained the prosecutor had an open file policy. The trial court found:

[Defense counsel] availed himself of that open file policy. [The prosecutor and defense counsel] testified that [defense counsel] reviewed the County Attorney's file, [and] made copies of relevant documents. [He] did take the deposition of the complaining witness, Lori Weber, and the Defendant was present during that deposition. [Defense counsel] testified that in his judgment the only deposition necessary in this case was that of Lori Weber. [He also] testified that the Defendant's version of the events were basically in accord with the Minutes of Testimony of the State's witnesses. . . . The Court does not believe that [defense counsel's] decision not to depose other witnesses is any indication of incompetent representation.

We find the record shows defense counsel made a reasonable decision in deciding to depose only the victim in this case. Counsel breached no essential duty here.

Weber next claims defense counsel gave ineffective assistance because Weber was never fully explained the consequences of refusing the plea agreement. We find Weber did have a full understanding of his situation. Before trial, the following exchange took place:

[Defense counsel]: . . . Your honor, I would advise the Court that there were prior plea

negotiations with the county attorney's Office. They were recommending to Steve to drop--or dismiss Count I of the Trial Information, which is the charge of Sexual Abuse in the Third Degree, in exchange for a plea of guilty to Count II, Assault Causing Bodily Injury. In that regard, to Count II, the State was going to recommend one year in the county jail with all but ninety days suspended. The charge in Count I is a forcible felony, which would not leave the court any leeway in sentencing. Because of that reason, I advised Steve strongly and recommended strongly that he should accept the plea agreement. He did not wish to do so, and that's why we're here today. Is that correct, Steve?

Steve Weber: Yeah, that's right.

Defense counsel: And I assume today your mind hasn't changed. You wish to proceed to trial; is that correct?

Weber: Yeah.

Court: So the record is clear, you understand that the--the impact of a forcible felony is that if you are convicted of Sexual Abuse in the Third Degree the Court's without discretion, you will go to the penitentiary?

Weber: Yeah.

We find Weber had an opportunity to have the charges against him and their consequences clarified.

Furthermore, the trial court was in the best position to judge the credibility of Weber and other witnesses. The trial court found Weber's subsequent claims of ignorance to be unpersuasive in light of the testimony of the original trial judge, the prosecutor, and the defense lawyer, and the inconsistencies in Weber's own testimony at hearing. The court found Weber's testimony was "conflicting and not credible on this issue." We conclude Weber was fully and

accurately informed as to the nature and consequences of the charges against him.

Weber also claims his defense counsel gave ineffective assistance due to his failure to make an opening statement. The supreme court has stated that the decision to give an opening statement is a "matter[] of professional judgment about which experienced trial lawyers frequently disagree. [It] does not reflect on competency nor [does it] indicate ineffectiveness." Karasek v. State, 310 N.W.2d 190, 191 (Iowa 1981).

Defense counsel explained his actions stating he initially reserved his opening statement because he wanted the jurors to keep open minds and not know from the outset what the defense would claim, especially because the State's opening statement was quite lengthy and the defense's statement might look weak in comparison. He testified that after the State rested, the trial had been going on for some time and the jurors looked tired. Counsel then made the tactical decision to forego an opening statement and begin the presentation of evidence. We find no breach of duty occurred when counsel waived his opening statement. See id.

Weber also seems to claim defense counsel rendered ineffective assistance because he did not investigate into Lori's whereabouts that evening or who she might have been with at the party. Weber states "[e]vidence that would establish that Lori Weber had had some other sexual contact

on December 31, 1991, would have created doubts as to the cause of the scratches to the vagina walls, and the failure to make such an investigation prejudiced Mr. Weber by removing any possibility of this evidence from being admitted, which could have mitigated the evidence on the use of force by Mr. Weber."

We find no merit in this contention. The emergency room physician who treated Lori testified Lori had abrasions "involving the mucosa on the exterior surface of the vaginal wall." He noted that one would not expect to find this condition during a normal pelvic examination, and that sexual intercourse would not be likely to cause these abrasions. He further testified Lori's scratches were fairly new and were linear, which was "compatible with what you might see with a fingernail." On all of the above claims, we find defense counsel breached no essential duty and thus do not address the issue of prejudice.

II.

Weber's second complaint on appeal is that the court erred in finding he had not established the existence of a common-law marriage. Our review of this issue is de novo. In re Marriage of Winegard, 257 N.W.2d 609, 615 (Iowa 1977). The three elements necessary to establish a common-law marriage are (1) intent and agreement to be married, (2) continuous cohabitation, and (3) public declaration of the parties that they are husband and wife. In re Marriage of Winegard, 278 N.W.2d 505, 510 (Iowa 1979) (citing In re

Estate of Fisher, 176 N.W.2d 801, 805 (Iowa 1970)). The burden of proof is on the party attempting to establish a common-law marriage. Id.

Weber would like to establish a common-law marriage because he believes it would change his sentence. Previously, third-degree sexual abuse could not be committed against one's spouse. Iowa Code § 709.4 (1989). The statute was amended to specifically include spousal sexual abuse, Iowa Code § 709.4 (1991), but that crime was then exempted from the list of forcible felonies to which mandatory incarceration provisions apply. Iowa Code §§ 702.11, 907.3 (1991). Weber's claim is that if the trial court had found a common-law marriage, he could have received a more lenient sentence.

The trial court found Weber failed to establish a common-law marriage. We agree. The parties did not establish continuous cohabitation. The evidence establishes they lived together, were separated, and then lived together again. Based on this evidence, in addition to all the other evidence, we find a common-law marriage has not been established.¹

1. On the issue of present intent and agreement to be married, the trial court relied on the fact that Lori did not believe the parties were married. Iowa courts, however, have interpreted this intent prong to be satisfied when only one of the parties has the belief that the two were married, provided the conduct of the other justifies that belief. In re Marriage of Winegard, 257 N.W.2d 609, 616 (Iowa 1977). We do note the trial court found correctly Weber had failed to establish continuous cohabitation and sufficient public declaration.

In addition, even if we were to find the court erred in finding no common-law marriage, Weber would still be unentitled to relief. Weber cannot show he was prejudiced by the court's finding. At Weber's sentencing hearing, the trial court found:

The reasons for this sentence, Mr. Weber, include the nature and circumstances of this case. Now, let me tell you, Mr. Weber, that I have found that there is not a common law marriage. Let me also tell you that if it were my discretion to sentence you in this matter, the sentence would be the same. You, by indication of your testimony and in the presentence investigation, apparently don't believe that you did anything wrong in this particular instance. Sexual abuse is a crime of violence and it is recognized by the law as being one in which the Court certainly has the ability to sentence you to jail. Under the facts in this particular case, the Court believes that that is appropriate.

Weber's sentence would have been the same regardless of the trial court's finding on the issue of common-law marriage.

We affirm the convictions for third-degree sexual abuse and assault causing bodily injury.

AFFIRMED.

Habhab, J., concurs; Sackett, J., specially concurs without opinion.

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