IN THE COURT OF APPEALS OF IOWA

No. 1-149 / 10-0585
Filed April 27, 2011

RAYMOND REYES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Steven J. Andreasen, Judge.

Applicant appeals the district court decision denying his request for postconviction relief from this conviction for second-degree sexual abuse. **AFFIRMED.**

Drew H. Kouris, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, Matthew Wilber, County Attorney, and Margaret Popp-Reyes, Assistant County Attorney, for appellee State.

Considered by Sackett, C.J., Potterfield, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

I. Background Facts & Proceedings.

Raymond Reyes was convicted of sexual abuse in the second degree, in violation of Iowa Code section 709.3(2) (2003). The State alleged he engaged in a sex act with his niece by marriage, A.G., when she was under the age of twelve. Based on a sentencing enhancement under section 901A.2(3), Reyes was sentenced to a term of imprisonment not to exceed fifty years. His conviction was affirmed on direct appeal. *State v. Reyes*, 744 N.W.2d 95, 104 (Iowa 2008).

Reyes filed an application for postconviction relief, claiming he received ineffective assistance due to defense counsel's failure to: (1) request a limiting instruction telling the jury that the statements and questions of police officers during an audiotaped interview that was presented as an exhibit may not be considered as evidence; (2) secure his presence while the court was considering its response to a note from the jury; and (3) object to the district court's failure to give a full colloquy during the sentencing enhancement proceeding.

After a hearing the district court denied Reyes's request for postconviction relief, finding he had failed to show he received ineffective assistance of counsel. The court specifically found Reyes's testimony in the postconviction proceeding lacked credibility. Reyes appeals the district court's decision.

II. Standard of Review.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform

an essential duty and (2) prejudice resulted to the extent it denied the applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). An applicant must show "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." *Cullen v. Pinholster*, ___ U.S. ___, ___, ___ S. Ct. ___, ___, ___ L. Ed. 2d ___, ___ (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692-93 (1984)).

III. Limiting Instruction.

Reyes was interviewed by police officers and an audiotape of the interview was submitted as an exhibit. During the interview, Reyes was asked whether he was circumcised, and then asked, "How would she know anything about whether you are or whether you aren't then?" Portions of the audiotape were redacted before it was played for the jury, but these questions by officers remained on the audiotape. In the postconviction proceeding, the parties submitted a stipulation that at no time did A.G. state that she could describe Reyes's genitalia. The officers used the questions as an interrogation technique in an attempt to get Reyes to incriminate himself. Reyes claims defense counsel should have requested a limiting instruction to tell the jurors that the questions and statements by the officers in the interview should not be considered as evidence.[1] *See* Iowa R. Evid. 5.105.

[1] Reyes relies on *State v. Esse*, No. 03-1739 (Iowa Ct. App. Sept. 28, 2005), to support his claims on this issue. This is an unpublished decision, and we note "[u]npublished opinions or decisions shall not constitute controlling legal authority." Iowa R. App. P. 6.904(2)(*c*). Furthermore, *Esse* does not present the issue as a claim of ineffective assistance of counsel.

On issues of ineffective assistance of counsel, we may address the issue of prejudice first. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). A postconviction applicant must show "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." *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). There must be a substantial, not just a conceivable, likelihood of a different result. *Cullen*, ___ U.S. at ___, ___ S. Ct. at ___, ___ L. Ed. 2d at ___.

During the criminal trial, A.G. testified that one night when she was eleven years old she was sleeping on an air mattress on the floor in the basement while visiting her grandparents and when she woke up, Reyes was on top of her engaged in sex. She struggled to get away and he told her to hold still and be quiet. After Reyes stopped she felt a liquid on her legs. He went into the bathroom, and then went into his bedroom, which was in the basement. In the interview Reyes admitted he had slept on a couch near where A.G. was sleeping on the air mattress. He stated he probably had sex with her, but he was sleeping and did not know what he was doing.

Based on this evidence, we determine Reyes has not shown it was substantially likely there would have been a different result to the trial if defense counsel had requested a limiting instruction regarding the audiotaped interview. The question implying that A.G. could describe Reyes's genitals, although untrue, is unlikely to have changed the jury's verdict. We conclude Reyes has not shown he received ineffective assistance of counsel on this ground.

IV. Jury Note.

During deliberations, the jury sent out a note, "We would like to request a copy of the transcript of the tape." The district court gave a supplemental jury instruction stating, "Members of the Jury: You have received all of the evidence in this case you will receive. You must rely on your collective memories and Exhibit 1, when deciding the factual issues presented."[2] Neither defense counsel nor the prosecutor remembered the note or discussing the situation with the judge. Reyes testified he did not know anything about the note until he was deposed for the postconviction proceedings.

Reyes asserts he received ineffective assistance because defense counsel did not secure his attendance while the court was determining its reply to the jury note. *See* Iowa R. Crim. P. 2.19(5)(*g*); *Everett v. State*, 789 N.W.2d 151, 158-59 (Iowa 2010). He has not asserted, however, how he was prejudiced by counsel's conduct. He does not allege that if he had been present a different response would have been sent to the jury, or even that a different response would have led to a different verdict by the jury. *See Everett*, 789 N.W.2d at 161 ("[T]he defendant has not shown that, had he been advised of and consulted about the jury's question, a different response would have been sent to the jury which would have resulted in a reasonable probability the outcome would have been different."). We conclude Reyes has failed to show he received ineffective assistance of counsel on this issue.

[2] Exhibit 1 was the redacted audiotape of the police officer's interview with Reyes.

V. Sentencing Enhancement.

After the jury's verdict, the district court initiated the second portion of the trial to determine whether or not Reyes would be subject to a sentencing enhancement under section 901A.2(3) based on a prior conviction of a sexually predatory offense which is a felony.[3] Defense counsel informed the court Reyes would admit to a prior conviction. The court agreed to the prosecutor's request that the court incorporate the minutes of testimony. The court then asked Reyes whether he had "a prior conviction for sexual assault or sexual abuse," and Reyes admitted he did. The court accepted the admission.

Reyes claims he received ineffective assistance because defense counsel did not object to the court's failure to engage in a more extensive colloquy prior to accepting his admission of the prior conviction. *See State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005) (finding that even when a defendant affirms a prior conviction, "[t]he court has a duty to conduct a further inquiry, similar to the colloquy required under rule 2.8(2) [regarding guilty pleas], prior to sentencing to ensure that the affirmation is voluntary and intelligent"). Reyes also states he was not informed he would have to serve eighty-five percent of the enhancement. *See* Iowa Code § 901A.2(3).

During Reyes's deposition for the postconviction proceedings, he was asked, "Do you have any problem admitting your prior conviction?" and he responded, "No, ma'am." Defense counsel also testified, "I had extensive discussions with Raymond about the enhancement. He always admitted it.

[3] The State was prepared to present evidence that Reyes had been convicted of sexual assault of a child, a felony, in Nebraska in 1987.

Never denied it, wanted to admit it, his choice." Reyes has not shown that if the court had engaged in a more extensive colloquy, he would not have admitted to the prior conviction. Also, he has presented no evidence to deny that he had a prior qualifying conviction. Furthermore, Reyes presented no evidence that he would not have admitted to the prior conviction if he had known about the mandatory minimum to the enhancement. We conclude Reyes has failed to show he was prejudiced by counsel's performance and therefore, has failed to show he received ineffective assistance of counsel.

We affirm the district court's decision denying Reyes's application for postconviction relief.

AFFIRMED.