IN THE COURT OF APPEALS OF IOWA

No. 6-734 / 05-1226
Filed December 13, 2006

HUSEIN CEJVANOVIC,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

The applicant appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Merrill Swartz of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Jennifer Miller, County Attorney, and Paul Crawford, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Applicant-appellant, Husein Cejvanovic, appeals from the district court's denial of his application for postconviction relief. He contends the court erred in not determining his trial counsel was ineffective. He claims trial counsel was ineffective (1) in not requesting a jury instruction on intoxication, (2) in not requesting a jury instruction on the confinement element of kidnapping, (3) in not allowing him to testify at trial, (4) in not challenging the actions of the translator, and (5) in not properly communicating the State's plea offer. We affirm.

I. Background

Appellant was convicted of kidnapping in the first degree, following a jury trial, and sentenced to life in prison. On direct appeal, he claimed *inter alia* that trial counsel was ineffective in not requesting certain jury instructions. *State v. Cejvanovic*, No. 03-0166 (Iowa Ct. App. Feb. 27, 2004). This court affirmed his conviction. Concluding counsel's decisions not to request a jury instruction on intoxication or the confinement element of kidnapping could have been strategic decisions, this court preserved the ineffective assistance claims for possible postconviction proceedings to allow counsel the opportunity to respond to appellant's claims. *Id*.; *see State v. Ruesga*, 619 N.W.2d 377, 383 (Iowa 2000).

II. Scope of review

Generally, we review postconviction relief decisions for errors at law. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). When the applicant raises a constitutional issue, however, such as ineffective assistance of counsel, our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001).

III. Claims on appeal

Applicant raised five claims of ineffective assistance of trial counsel in his postconviction hearing. He claimed trial counsel was ineffective (1) in not requesting a jury instruction on intoxication, (2) in not requesting a jury instruction on the confinement element of kidnapping, (3) in not allowing him to testify at trial, (4) in not challenging the actions of the translator, and (5) in not properly communicating the State's plea offer. On appeal from the district court's denial of postconviction relief, he contends he is entitled to a new trial for the reasons asserted in the postconviction proceeding.

IV. Discussion

To establish a claim of ineffective assistance of counsel, a defendant must show (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998). A defendant must prove both elements by a preponderance of the evidence. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). "[T]here is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). We presume competency and avoid second-guessing and hindsight. *State v. Kress*, 636 N.W.2d 12, 20 (Iowa 2001). Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. *State v. Oetken*, 613 N.W.2d 679, 683-84 (Iowa 2000); *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach-of-duty or the prejudice prong.

Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984).

A. Intoxication instruction. Trial counsel filed notice of an intoxication defense and raised the issue of the defendant's intoxication throughout the trial, questioning witnesses about the degree of his intoxication. "Evidence of temporary intoxication is simply evidence to be considered by the jury on the issue of intent." *State v. Lawrence*, 559 N.W.2d 292, 296 (Iowa Ct. App. 1996). Intoxication is a defense only when it causes a mental disability that makes the person incapable of forming the specific intent necessary for the crime charged. *State v. Collins*, 305 N.W.2d 434, 436 (Iowa 1981). The fact that a person is intoxicated neither excuses the person's act nor aggravates his or her guilt, but may be relevant in proving a person's lack of specific intent. *See* Iowa Code § 701.5 (2001). Since kidnapping in the first degree requires proof of specific intent and there was evidence of the defendant's intoxication, trial counsel could have requested an intoxication instruction.

Trial counsel testified at the postconviction hearing that he made a strategic decision not to urge an intoxication defense nor request a jury instruction on intoxication because it was inconsistent with the defense position that the kidnapping and sexual assault did not occur. Trial counsel believed the uniform jury instruction on intoxication places too much emphasis on the ability of the jury to ignore intoxication if a defendant could form the specific intent necessary to the crime. Appellant contends trial counsel's proffered reasons for the decision not to request a jury instruction on intoxication "do not jibe with [counsel] asking questions

of witnesses that had the effect of telling the jury that intoxication was a defense to the crime." He argues that it "is not reasonable trial strategy to force a jury to ignore evidence of intoxication that could have negated the specific intent necessary for a conviction."

The district court concluded trial counsel's decision not to request an intoxication instruction, given how the lack of physical evidence connecting the defendant with the crimes supported the defense's chosen theory, "was a reasonable tactical decision" and did not rise to the level of ineffective assistance.

The selection of the primary theory or theories of defense is a tactical matter. *See Schrier v. State*, 347 N.W.2d 657, 663 (Iowa 1984). Here, counsel articulated a reasonable tactical basis for his action. *See Origer v. State*, 495 N.W.2d 132, 136 (Iowa Ct. App. 1992). We conclude counsel was not ineffective in not requesting an intoxication instruction.

B. Confinement instruction. Confinement is an essential element of the crime of kidnapping. Although sexual abuse involves some degree of confinement or removal, not all sexual abuse rises to the level of kidnapping; although no minimum period of confinement is required, it must 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. Hatter*, 414 N.W.2d 333, 335 (Iowa 1987).

At trial, there was evidence the victim's removal and confinement was more than incidental to rape. The State produced evidence the defendant dragged the victim from her apartment to his, locked her inside, and held a knife to her throat,

making the risk of detection less and the risk of harm to the victim greater. *See Griffin*, 564 N.W.2d at 373. However, there also was evidence she may have been in the apartment voluntarily. The jury had to assess the credibility of the victim.

Trial counsel testified he made a strategic decision not to emphasize confinement or clarify the definition, hoping the jury would look at the conflict in the evidence and the lack of evidence the crime occurred and not believe the victim's version of events. He concluded the jury would find confinement occurred if it found the defendant had committed sexual abuse. If the jury believed the defendant's version of events, it would find no crime occurred.

The district court concluded trial counsel's decision not to discuss confinement with the jury or to request a confinement instruction "was a reasonable strategic choice, given the defense posture at trial." Appellant claims that "it was an unsound decision" not to give the jury the option of believing only part of the victim's version by finding there was no confinement. He argues trial counsel's decision "resulted in the probability of a verdict against Cejvanovic."

Even if, in hindsight, the decision was unwise, a strategy is not unreasonable merely because it was improvident or miscalculated. *Oetken*, 613 N.W.2d at 683-84. We conclude, under the circumstances before us, that counsel made a reasonable tactical decision that will not be second-guessed by this court. *See State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). We conclude counsel was not ineffective in not requesting a jury instruction on confinement.

C. Defendant testifying at trial. A criminal defendant has a constitutional right to testify at trial. *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S. Ct. 2704, 2708, 97

L. Ed. 2d 37, 46 (1987). It is a fundamental right that can only be waived by the defendant, and can only be waived voluntarily, knowingly, and intelligently. *Ledezma*, 626 N.W.2d at 146. The decision whether to testify is the defendant's; the role of counsel is to provide advice so a defendant can make the decision. *See Taylor v. State*, 352 N.W.2d 683, 687-88 (Iowa 1984).

Appellant contends he wanted to testify at trial, but counsel made a unilateral decision not to have him testify. The record from his criminal trial belies this contention. It contains a discussion outside the presence of the jury, during which appellant acknowledged his absolute right to testify if he wanted, trial counsel's advice against testifying, and appellant's free choice not to testify.

Counsel had good tactical reasons to advise appellant not to testify. *See State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) (noting that the decision not to call the defendant to testify generally implicates a reasonable tactical decision). Foremost, Cejvanovic insisted the State had the wrong knife in evidence. Given the defense theory that the crime had not occurred, testimony about the "wrong" knife would have implied there was a "right" knife and contradicted the defense position. It would have been a tacit admission of guilt. Counsel also was insecure in what appellant would have said in testimony if his temper flared up.

The district court concluded there were "clear strategic reasons" for appellant not to testify and that his testimony likely would have undermined and defeated the defense. We agree with the district court's analysis. Had the defendant testified as he claims he wanted to, he likely would have undermined the defense theory that the kidnapping and sexual assault did not occur. In contrast to his current assertion

that he wanted to testify but counsel would not allow it, the record suggests he voluntarily agreed after discussing his options with counsel. We find no merit in this claim.

D. Ineffective translator. Appellant contends his translator was ineffective and alleges he was "high and drunk" and fell asleep at trial. He argues trial counsel's opinion of the translator's performance is "fatally limited" because counsel does not speak the language and cannot say whether the translation was proper. At the postconviction hearing, trial counsel testified he first learned appellant was complaining about the translator at the postconviction hearing. Counsel testified the translation at trial was continuous, so the translator could not have been asleep. The length of the translation approximated the length of the statement translated. Appellant's responses were appropriate to the question or statement translated. The district court denied postconviction relief on this ground, concluding the record did not support this claim.

"A reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation." *Thongvanh v. State*, 494 N.W.2d 679, 682 (Iowa 1993) (quoting *United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990)).

> Only if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.

Id. (quoting *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989)). We find no support in the record for appellant's contention. Rather, as counsel testified,

it appears appellant and the translator were communicating well and the translations tracked well with the flow of the court proceedings. The district court properly denied relief on this claim.

E. Plea offer. Appellant contends trial counsel was ineffective in failing to inform him of a plea offer. He argues this claim should be resolved in his favor because trial counsel, who testified he discussed the plea offer, failed to produce any evidence he discussed the plea offer. Trial counsel testified he presented the offer and was so concerned about appellant's rejection, given that he faced life in prison if convicted of kidnapping at trial, that he made a record of the rejection.[1] Appellant claims the proper remedy would be either to allow him to accept the plea offer or to order a new trial. *See State v. Kraus*, 397 N.W.2d 671, 673-74 (Iowa 1986) (citing some jurisdictions that have allowed a defendant the opportunity to accept the plea bargain or have a new trial).

> No appellate response to misadvice in these circumstances is entirely satisfactory because the misadvice is less harmful to an accused who later stands trial than to an accused who is prompted to plead guilty.
>
> > There is a vast difference between what happens to a defendant when he pleads guilty as opposed to what occurs when a plea agreement is rejected. The rejection of a plea agreement, in most instances, will result in the defendant going to trial with all of the concomitant constitutional safeguards that are part and parcel of our judicial process. The defendant who pleads guilty, on the other hand, waives many of these protections.

Id. (quoting *Johnson v. Duckworth*, 793 F.2d 898, 900 (7th Cir. 1986)).

[1] The State acknowledges it has not found any reference to the plea offer in the transcripts in the record.

The district court found that counsel discussed the plea offer with appellant, who "would accept nothing less than a trial on the charged offense" and became angry when counsel recommended he accept the plea bargain. The court noted that "hindsight is 20/20" and appellant's displeasure with the outcome is understandable. The court found, however, that appellant took the risk of going to trial with full knowledge of the possible outcome. We conclude the district court properly denied relief on this claim.

We have determined appellant is not entitled to relief on any of the grounds raised. Accordingly, we affirm.

AFFIRMED.