IN THE COURT OF APPEALS OF IOWA

No. 7-780 / 07-0171
Filed November 15, 2007

BEAU JACKSON MORRIS,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Beau Morris appeals the trial court's ruling denying his application for postconviction relief. **AFFIRMED.**

John Audlehelm of Audlehelm Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee State.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

Beau Morris appeals from the trial court's ruling denying his application for postconviction relief. Morris claims he was denied effective assistance of trial counsel, citing counsel's failure to (1) make an offer of proof regarding the victim's mental health records, which purportedly showed the victim suffered from prior sexual delusions, and (2) object to the no-inference-of-guilt instruction he did not request. He also claims his appellate counsel was ineffective for failing to preserve the first claim on direct appeal. We review Morris's claims de novo. *State v. Kress*, 636 N.W.2d 12, 19 (Iowa 2001).

Ineffective Assistance of Counsel

The standards for ineffective assistance of trial and appellate counsel claims are the same. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To prevail on ineffective assistance of counsel claims, the applicant has the burden of proving by a preponderance of the evidence "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). With regard to the first prong, "the [applicant] must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). With regard to the second prong, the applicant must show "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We may dispose

of ineffective assistance of counsel claims if an applicant fails to meet either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Even if we assume without deciding that trial and appellate counsel breached an essential duty in any of the particulars claimed, Morris's ineffective assistance of counsel claims fail because he cannot establish the requisite prejudice. We initially reject Morris's argument that prejudice may be presumed with regard to his second claim. Prejudice may only be presumed "where assistance of counsel has been denied entirely or during a critical stage of the proceeding" or in limited circumstances where a conflict of interest exists. *Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 1240-41, 152 L. Ed. 2d 291, 300-01 (2001). None of these situations are implicated here; therefore, Morris must prove prejudice with regard to all of his claims.

Additionally, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698. On direct appeal, we found the evidence supporting Morris's convictions for robbery in the first degree and sexual abuse in the second degree was "overwhelming," citing the following:

> On July 5, 2003, at approximately 11 p.m., Morris went to Roslyn Gunnink's condominium. Roslyn had become acquainted with Morris while he and his wife lived in the same condominium complex. Morris asked Roslyn if he could use her computer. Roslyn, who had let Morris use her computer on prior occasions, informed him he could use the computer only for a few minutes. Once Morris gained access to Roslyn's home, he displayed a knife and informed Roslyn he was going to take all of her money. Roslyn told Morris she would give him her ATM card if he would agree to leave. While Roslyn was attempting to retrieve her ATM card, Morris ordered her to take off her shirt. Roslyn resisted, but

eventually complied with the request after Morris indicated he would not hurt her if she did everything she was told. Roslyn suggested they sit down and talk. Morris agreed and gave Roslyn a pillow to cover up with. While Morris and Roslyn were talking, Morris became agitated and began making swiping motions with the knife. Eventually, he told Roslyn to take off her shorts. Roslyn, now in only her underwear, attempted to continue talking with Morris. He became angry and told her to "lay down on the floor with your arms out like Jesus Christ did on the cross." Roslyn complied. Morris then leaned over and cut her underwear off with the knife. Morris commented that Roslyn had a "beautiful booty" and ran his hand along the crack of her buttocks. While he was touching her, he made groaning noises. As Morris's hand came close to Roslyn's anus, she moved away. Morris told her to roll over. He took the knife and ran it down her body through her pubic hair. Morris forced Roslyn to stand up and again ran the knife along her body. He circled her breasts with the knife and stated "maybe I'll cut these off," but then laughed and said he would not do that because they were "too pretty."

After this incident, Roslyn and Morris sat on the couch while Morris smoked a cigarette. Morris suggested they go look at pornography on the computer. Roslyn asked if she could get dressed, which Morris permitted as long he could watch. Upon her request, Morris allowed Roslyn to utilize the bathroom. When she returned, Morris was in the kitchen. Roslyn tried to dial 911 on her cordless phone, but was unable to get through because the computer was on-line. She then ran out of her home and yelled, "Call 911. He has a knife." Some of Roslyn's neighbors were sitting outside and phoned the police. Shortly after, Morris exited the condominium and proceeded to drive away in his car. The police apprehended Morris that morning at his apartment.

. . . .

. . . Roslyn's testimony provided a detailed account of what transpired while Morris was at her home. Her testimony was corroborated by additional evidence. Police officers discovered Roslyn's underwear lying on the living room floor, her ATM card, and the soda can Morris used as an ashtray. Three of Roslyn's neighbors testified they saw Morris come to Roslyn's home [in an unusual manner, parking his car on the street even though parking spots were available in front of her home. They] observed [Roslyn] flee approximately twenty minutes later calling for help. [She was visibly shaken. They also saw Morris run part of the way from Roslyn's home to his car, speed off, and bottom out his car. Later, when he was apprehended, Morris attempted to flee from the police and resist arrest.] Further, a criminalist from the Iowa Division of Criminal Investigation testified that laboratory tests revealed Roslyn's underwear had been cut with some sort of instrument.

State v. Morris, No. 04-0201 (Iowa Ct. App. Apr. 13, 2005). We reach the same conclusion here as we did on direct appeal. Our conclusion finds additional support from the following cases: *Jeffries v. Nix*, 912 F.2d 982, 983 (8th Cir. 1990) (holding although "the victim's prior sexual delusions are not 'past sexual behavior' as defined by Iowa's rape shield law" "the exclusion of this evidence was harmless error in light of . . . the overwhelming evidence against [the defendant]"); *State v. Griffin II*, 576 N.W.2d 594, 597-98 (Iowa 1998) (holding failure to give a defendant's requested no-inference-of-guilt instruction was harmless error because the evidence against him was overwhelming).

We accordingly affirm.

AFFIRMED.