IN THE COURT OF APPEALS OF IOWA

No. 9-259 / 07-0699
Filed May 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY JOSEPH CURCE,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Charles H. Pelton, Judge.

Defendant appeals from judgment and sentence entered upon his conviction of third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephen J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael L. Wolf, County Attorney, and Ross J. Barlow, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

Anthony Joseph Curce, following jury trial, appeals from judgment and sentence imposed upon his conviction of third-degree sexual abuse. Curce's appellate counsel argues Curce's trial counsel was ineffective in failing to move for mistrial; the district court abused its discretion in allowing the State to offer foundational evidence for a videotape during the defendant's case in chief; and Curce's conviction is not supported by substantial evidence. In a pro se brief, Curce also claims his statements to law enforcement should have been suppressed. We affirm.

I. Background Facts and Proceedings.

On February 25, 2005, the State charged Anthony Curce by trial information with sexual abuse in the third degree. The State alleged Curce performed a sex act upon a fourteen- or fifteen-year-old female who was not his spouse when he was four or more years older than the female.

The jury could have found the following facts from the evidence presented at trial: The victim, A.M., began "dating" Curce on October 11, 2004. At that time, A.M. was fourteen and Curce was twenty-three. (A.M. was born in June 1990 and Curce was born in August 1981.) A.M. had sexual intercourse with Curce more than twenty times during the period of time they dated. The encounters occurred at Curce's house, A.M.'s grandmother's house, and a friend's house. A.M.'s friend, B.B., testified she saw A.M. having sexual intercourse with Curce on five or six occasions.

The last time Curce had sexual intercourse with A.M., it occurred in an abandoned house after A.M. had run away from home. Curce and A.M. were

found by the police in a closet of the house. When the police apprehended Curce, he was only wearing a tank top and underwear or shorts. His jeans and shoes were somewhere else in the house.

When he was interviewed by the police, Curce denied he had sexual intercourse with A.M.; however, he told the police he had lied about some things. Curce told the interviewing officer that if the officer had heard things from A.M., they were probably true because she would not lie. At the time Curce was interviewed, he was wearing a friendship ring given to him by A.M.

Curce wrote a letter to A.M. the first time she was caught running away. The letter stated, "I'm miserable without you, Baby," and "I could not love you too much." The letter also stated, "I'm sorry all this happened. It's all my fault. I should have ended it as soon as I saw all this trouble coming."

At trial Curce testified he did not have sex with A.M. He claimed he and A.M. were just friends. He stated the purpose of the letter he had written to A.M. was "to cheer her up." The evidence presented at trial included videotape clips of an interview a police officer conducted with the defendant.

The jury asked the court three questions during its deliberations. First, the jury asked how they should treat evidence of events that occurred outside the time period the crime was to have occurred. The court, the State, and the defendant agreed to an answer directing the jury to reread and abide by the court's original instructions. Second, the jurors asked if they could see a letter A.M. had written to Curce when she was in a shelter and if they could have a VCR to view the videotaped police interview with Curce. The court and both parties agreed to instruct the jury that the letter was not in evidence and a

transcript was not available. The parties also agreed the jury should be provided with the requested audiovisual equipment so the jurors could watch the videotaped interview, which had been admitted as State's Exhibit 1.

The jury's final question stated:

> We reviewed the entire video. There was more information and more video on the tape not presented in court. That information has influenced our decision. May we consider the information on the tape not shown in court, but that was on the video entered as State's Ex. No. 1?

The record reveals the district court, prosecutor, defense counsel, and the defendant met to discuss the jury's question and to consider an appropriate response. After discussing the matter at some length, the court proposed the following response be made to the jury:

> Only consider the portions of the videotape shown in open court. If there is something else on the tape that you are fairly certain was not shown in court, please disregard it, as it was not intended to be evidence for your consideration.

After defense counsel spoke with Curce concerning the proposed instruction, he told the court, "That instruction is fine, Your Honor." The court's response was then provided to the jury.

The jury returned a guilty verdict on October 19, 2005. Curce filed a combined motion in arrest of judgment and motion for new trial on October 26. The motion for new trial accused the county attorney's office of "prosecutorial misconduct which denied the Defendant a fair and impartial trial" for failing to properly prepare and review the videotape. It also stated Curce was willing to "[a]ssum[e] the submission of the unoffered, unadmitted video portion(s) was wholly accidental." Later, defense counsel orally amended the motion to add a

claim of "jury misconduct" based on the jury's consideration of extraneous material. Before Curce's motion for new trial was heard, the court directed the State to transcribe all the clips on the videotape that the jury viewed during its deliberations. A segment of the videotape, which begins approximately 165 seconds after the last clip shown at trial, can be seen and was transcribed. Following a hearing, the district court concluded the jury saw a portion of the tape that was not in evidence and granted Curce's motion for new trial.

The State appealed, contending the district court erred in granting a new trial on the basis of a ground made known to all the parties during jury deliberations. On appeal, this court reversed and remanded for sentencing. We concluded:

> The record reveals Curce was given several opportunities to move for a mistrial. Instead, he chose to gamble on a not guilty verdict. A defendant is not permitted to withhold an objection or motion for mistrial on an error known to the defendant before the jury reaches a verdict, gamble on a not guilty verdict, and later raise the same issue as a ground for a new trial. *See State v. Wells*, 629 N.W.2d 346, 356-57 (Iowa 2001) (holding that when a defendant made a belated claim of juror misconduct that was observed before the verdict, the court would not reward him for making a losing bet on his own conviction by granting him a new trial). We conclude Curce waived his claim of error and the trial court abused its discretion in granting his motion for new trial.

State v. Curce, No. 06-0218 (Iowa Ct. App. Dec. 28, 2006).

On April 13, 2007, judgment was entered and sentencing imposed. Curce now appeals.

II. Discussion.

A. Ineffective Assistance of Counsel. Curce contends trial counsel was ineffective in failing to move for mistrial, and in a pro se brief, Curce also

contends[1] his trial counsel was ineffective in failing to move to suppress his statements to the police because he was not first given *Miranda*[2] warnings. We review these ineffective-assistance-of-counsel claims de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006).

To establish an ineffectiveness claim, Curce must establish that counsel's performance fell outside a normal range of competency and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We may dispose of an ineffective-assistance-of-counsel claim if Curce fails to meet either the breach of duty or the prejudice prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Curce cannot prevail on his pro se claim of ineffective assistance of counsel because he cannot establish trial counsel's performance was deficient.

Upon a Fifth Amendment challenge, a two-part test is utilized in determining whether inculpatory statements are admissible: (1) whether *Miranda* warnings were required, and if so, whether they were properly given, and (2) whether the statement was voluntary and satisfies due process. *See State v. Countyman*, 572 N.W.2d 553, 558 (Iowa 1997).

Curce came to the law enforcement center voluntarily, was interviewed for about an hour, and was driven back home at the conclusion of the interview. The

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[1] The admissibility of Curce's statements was challenged only on foundational grounds at trial. The State contends the issue was thus waived. However, Curce asserts he repeatedly urged his trial counsel to raise the issue and, therefore, we will address the claim as one of alleged ineffective assistance of counsel.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

circumstances do not indicate Curce was in custody. Nor does the record indicate his statements were not voluntarily given.

Upon our de novo review, we conclude there were no grounds upon which to challenge Curce's inculpatory statements. *Miranda* warnings were not required as the record does not contain any evidence demonstrating Curce was in custody at the time of his statements. *See id.* ("*Miranda* warnings are not required unless there is both custody and interrogation."); *State v. Pierson*, 554 N.W.2d 555, 560 (Iowa Ct. App. 1996) (noting "mere fact an individual is questioned at a law enforcement center does not render the interview a custodial interrogation").

We turn now to Curce's other ineffectiveness claim. In the earlier appeal in this case, we concluded Curce had the opportunity to move for mistrial but he chose to gamble on a not-guilty verdict. Curce now contends trial counsel was ineffective in that gamble—that is, in failing to move for mistrial.

Counsel will not be found ineffective for pursuing a reasonable strategy, even if it is a misguided one. *State v. Oetken*, 613 N.W.2d 679, 683-84 (Iowa 2000). In *Ondayog*, 722 N.W.2d at 786, the court stated:

> This case illustrates why we rarely address ineffective-assistance claims on direct appeal and instead preserve such claims for postconviction relief. Because "[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel," postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance.
>
> The fact that a particular decision was made for tactical reasons does not, however, automatically immunize the decision from a Sixth Amendment challenge. That decision must still satisfy the ultimate test: "whether under the entire record and totality of circumstances" counsel performed competently." Nonetheless, we

> do not delve into trial tactics and strategy "when they do not clearly appear to have been misguided." In other words, "we will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy, even if such judgments ultimately fail."

(Internal citations omitted.) We conclude it prudent to preserve this ineffectiveness claim for postconviction proceedings for further development of the record and consideration as to the reasonableness of counsel's trial strategy.

B. Foundational Evidence. Curce also argues the district court abused its discretion in allowing the State to offer foundational evidence for the videotape during Curce's case-in-chief. The order in which testimony is introduced lies largely in the discretion of the trial court, and a reviewing court will not reverse "unless upon the clearest showing of prejudice." *See State v. Crandall*, 227 Iowa 311, 319, 288 N.W. 85, 90 (1939) (citation omitted). We do not find this long-standing general principle altered by Iowa Rule of Evidence 2.19(1), which provides for an "order of trial and arguments." The rule itself acknowledges the broad discretion of the court in subparagraph (a)(6): "unless the court, for good reasons, in furtherance of justice, permits them to offer [rebutting or additional] evidence upon their original case." Curce has not shown he was prejudiced by the trial court's ruling that allowed the videotape's foundational evidence to be presented during the State cross-examination of defendant.

C. Sufficiency of the Evidence. Curce asserts his conviction is not supported by substantial evidence. We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 6.4. We will uphold a guilty verdict if it is supported by substantial evidence. *See State v. Robinson*, 288 N.W.2d 337, 341 (Iowa 1980). Evidence is substantial if it could convince a

rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.* at 339.

Viewing the evidence in the light most favorable to the prosecution, we conclude the testimony of A.M. and B.B., considered together with the other evidence adduced at trial, constitutes substantial evidence that Curce performed a sex act with A.M., while A.M. was fourteen or fifteen years old and Curce was four or more years older, and Curce and A.M. were not then living together as husband and wife.

III. Summary.

Curce's claim of ineffective assistance of counsel for failing to move for a mistrial is preserved for postconviction proceedings. His other claim of ineffective assistance of counsel is rejected as he cannot establish counsel's performance was deficient. The district court did not abuse its considerable discretion in the order of admitting evidence. The record contains substantial evidence supporting Curce's third-degree sexual abuse conviction. We affirm.

AFFIRMED.