IN THE COURT OF APPEALS OF IOWA

FILED
MAR 27 1996
CLERK SUPREME COURT

No. 6-072 / 95-0053

JOHNNY D. NEVILLS,

Appellant,

000089

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Scott County, Bobbi Alpers, Judge.

Johnny D. Nevills appeals a denial of his application for postconviction relief.

AFFIRMED.

Randy J. Hohenadel, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, William E. Davis, County Attorney, and Donald E. Frank, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

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HUITINK, J.

Johnny D. Nevills appeals the district court's denial of his application for postconviction relief. We affirm.

In 1991 Johnny Nevills was charged with one count of third-degree sexual abuse and one count of lascivious acts with a child. The trial information alleged Nevills had sexually abused thirteen-year-old J.H. in 1991 and engaged in a lascivious act with eleven-year-old S.H. in 1989. Both children were the daughters of Nevills' former girlfriend.

At Nevills' bench trial, J.H. and S.H. both testified about the events in 1991 and 1989. J.H. stated that in 1991 Nevills sexually abused her while he was spending the night with her mother. She testified that she was awakened during the night by Nevills touching her and attempting to penetrate her. She further stated that Nevills had similarly abused her in 1989. Nevills' lawyer objected to this testimony as irrelevant and immaterial because these prior acts had not been included in the information. The objection was overruled.

S.H. testified that on a different occasion in 1989 Nevills also awakened her in the night by rubbing her genitals through her pajamas. The children's mother corroborated this testimony, stating each of her children told her what Nevills had done to them shortly after each incident. She further testified that she confronted Nevills

about these events and that he, on more than one occasion, admitted touching the children and stated his intention to seek help.

Nevills denied J.H.'s allegations, claiming that on the night of the 1991 incident he woke up with an erection and found himself next to J.H., pushing himself against her while both were fully clothed. He further denied any lascivious act with S.H., claiming he was doing nothing more than trying to adjust S.H.'s underwear so it would cover her while she was sleeping.

Nevills was found guilty as charged and sentenced to prison terms of ten and five years. We affirmed his convictions on direct appeal. *See State v. Nevills*, No. 92-476 (Iowa App. May 4, 1993). Nevills' subsequent application for postconviction relief based on ineffective assistance of counsel was denied by the district court. Nevills appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). When, however, a postconviction petitioner asserts a violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. *Id.*

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Edman v. State*, 444

N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

Nevills first argues that his attorney was ineffective in failing to preserve error after the district court refused to allow Nevills' lawyer to cross-examine both victims and their mother regarding other allegations of sex abuse made against another man. Specifically, Nevills cites counsel's failure to make an offer of proof. We declined to consider the merits of the objection on direct appeal because counsel did not properly preserve error on this issue. *See Nevills*, No. 92-476 at p. 3.

Despite trial counsel's failure to properly preserve this issue for appeal, we find Nevills was not prejudiced by counsel's error because the testimony he sought to illicit was irrelevant. Relevant evidence is evidence which makes the existence of a material fact more or less probable. Iowa R. Evid. 401. Here, evidence that the victims and their mother had previously accused another individual of sex abuse had no bearing on their allegations against Nevills. *See State v. Alvey*, 458 N.W.2d 850, 851-53 (Iowa 1990) (previous rape allegations irrelevant to victim's credibility regarding present rape allegations). Nevills was accordingly not prejudiced by counsel's failure to preserve error on this issue.

Nevills next contends his attorney was ineffective in failing to call Dr. Linda Ozaki as a defense witness. Dr. Ozaki, a physician, would have testified that she examined S.H. and J.H. after the alleged abuse occurred and that her examination for

sexual abuse was inconclusive. At the postconviction hearing, defense counsel testified he did not call Dr. Ozaki because she had volunteered to testify and her examinations of the children were inconclusive. He therefore concluded that the value of the testimony was suspect. We find defense counsel's decision was a reasonable trial strategy rather than a breach of an essential duty. *See Fryer v. State* 325 N.W.2d 400, 413 (Iowa 1982) (where counsel makes a reasonable tactical decision court will not find ineffective assistance of counsel).

Nevills also claims he was prejudiced by trial counsel's failure to make a proper objection when J.H. testified to an earlier incident of sex abuse involving Nevills. He contends this testimony was inadmissible prior bad act evidence which should have been excluded. We disagree.

Iowa Rule of Evidence 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to prove the defendant acted in conformity with the character the acts may tend to show. Iowa R. Evid. 404(b). This evidence, however, may be admitted for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* In sex abuse cases, testimony regarding similar acts of abuse may be relevant to prove the identity of the defendant as the same person who committed both crimes. *State v. Cott*, 283 N.W.2d 324, 328 (Iowa 1979). If this evidence is found to be relevant, we then consider

whether its probative value is outweighed by its prejudicial effect. *State v. Richardson*, 400 N.W.2d 70, 73 (Iowa App. 1986).

We find J.H.'s testimony regarding Nevills' past sexual abuse was relevant to show his identity and absence of mistake. Our review of the record reveals the earlier incident described by J.H. was remarkably similar to the events underlying the charges in this case. Though the incidents occurred three years apart, both happened at the home where Nevills was living and occurred at night when J.H. was sleeping. In both cases, other people were present in the room with Nevills and J.H. while the abuse occurred. Each time, Nevills first touched J.H.'s vagina with his hand and then placed his penis between J.H.'s legs or penetrated her. Finally, in both incidents, Nevills spoke to himself while abusing J.H. and asked God to forgive him for his actions.

Based on these striking similarities, we find J.H.'s testimony regarding prior abuse by Nevills was relevant to establish his identity as the perpetrator of the abuse. Moreover, this evidence was also relevant to rebut Nevills' claim that his abuse of J.H. was accidental and occurred while he was sleeping. Moreover, any danger of unfair prejudice was minimized because it is unlikely the court, as fact finder, would be unduly influenced by the evidence of a prior bad act. *See State v. Casady*, 491 N.W.2d 782, 786 (Iowa 1992) (prejudicial effect of other crimes evidence is reduced in the context of a bench trial). As a result, we find any objection to J.H.'s testimony would not have been sustained. Counsel breached no essential duty by failing to object to this

evidence. *See Schrier v. State*, 347 N.W.2d 657, 665 (Iowa 1984) (counsel's failure to object to admissible testimony was neither breach of essential duty nor prejudicial).

Finally, Nevills argues he was prejudiced by his trial counsel's failure to file a motion to sever the two charges against him. He claims the two incidents involved were not closely linked in time, place, and circumstances and accordingly should have been tried separately. *See State v. Bair*, 362 N.W.2d 509, 511-12 (Iowa 1985). On direct appeal, we found a properly made motion to sever would have been sustained. *Nevills*, No. 92-476 at p. 6. We must therefore determine whether Nevills was prejudiced by his attorney's failure to file this motion.

Our review of the record reveals substantial evidence supporting Nevills' guilt to both the sexual abuse charge involving J.H. and the lascivious acts charge involving S.H. The record shows Nevills' own testimony corroborated that of both victims and their mother and, accordingly, would have supported his conviction on each count if tried separately. Finally, because this matter was tried before to the court rather than to a jury, the danger of unfair prejudice was minimized. *See State v. Geier*, 484 N.W.2d 167, 172-73 (Iowa 1992) ("in a benchtrial case . . . there is less likelihood that a failure to sever has prejudiced the defendant than in a trial to a jury"). We cannot say Nevills was prejudiced by his attorney's failure to move to sever these charges.

In summary, we find Nevills has not shown he was prejudiced by his trial counsel's failure to perform an essential duty. Accordingly, we conclude he was not denied effective assistance of counsel and affirm the district court in its entirety.

AFFIRMED.