

IN THE COURT OF APPEALS OF IOWA

No. 6-522 / 95-1515

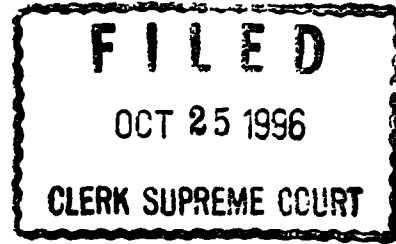
STATE OF IOWA,

Plaintiff-Appellee,

vs.

KEVIN WILLIAM CLARK,

Defendant-Appellant.



Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell,
Judge.

Defendant appeals from his conviction of second-degree sexual abuse in
violation of Iowa Code sections 709.1(3) and 709.3(2) (1993) following a bench trial.

AFFIRMED.

Shelley A. Horak of Baron, Sar, Goodwin, Gill, Lohr & Horak, Sioux City, for
appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and James Katcher, Assistant County
Attorney, for appellee.

Considered by Sackett, C.J., and Habhab and Vogel, JJ.

HABHAB, J.

Kevin Clark was charged with second-degree sexual abuse after his five-year-old son, G.C., accused Clark of sexually fondling him. At trial, Robert Ameen testified about his investigation into the accusations. Ameen testified Clark admitted he touched and fondled his son's penis in a sexual manner and that Clark was sexually aroused at the time. Ameen also testified, without objection, that the boy told him his father had touched his genitalia while they slept in the same bed and when they were in the bathtub together. Ameen also testified, again without objection, about statements he heard during the child's interview at the Child Protection Center. G.C. testified his father had touched his genitalia in the bathtub and in bed. Clark gave a videotaped statement to police which included incriminating comments.

Clark was convicted as charged and now appeals. He contends his trial counsel should have objected to the admission of several hearsay statements made by Ameen. He also contends his trial counsel should have argued that the court could consider lascivious acts with a child as a lesser-included offense. He asserts his trial counsel was ineffective in failing to do so.

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice a

defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKendrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

a) Failure to Assert Lascivious Acts as Lesser-Included Offense. We reject defendant's claim of ineffective assistance of counsel on the basis of his trial counsel's failure to argue that lascivious acts with a child, a class D felony under Iowa Code section 709.8, is a lesser-included offense of sexual abuse in the third degree. Counsel has no duty to request lesser-included offenses where such a request would be inappropriate. *State v. Capper*, 539 N.W.2d 361 (Iowa 1995). Our supreme court has held that lascivious acts with a child under Iowa Code section 709.8 is not a lesser-included offense of sexual abuse in the third degree. *See id.*

Lascivious acts with a child under section 709.8 requires that the defendant "act with the specific intent to arouse or satisfy sexual desires, an element not required to prove the greater offense of sexual abuse." *Id.* Therefore, the greater

offense, sexual abuse, can be committed without also committing the lesser offense. *See id.*; *see also State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). As counsel did not breach an essential duty in failing to assert lascivious acts as a lesser-included offense, we find defendant's trial counsel was not ineffective in this regard.

b) Failure to Object to Hearsay. Defendant asserts his trial counsel was ineffective in his failure to object to various hearsay statements made during the testimony of Department of Human Services Investigator Robert Ameen. Defendant asserts hearsay objections should have been made by his trial counsel to preclude Ameen from testifying regarding conversations he conducted with G.C. and conversations he overheard during an interview the department had with G.C. Defendant also maintains his attorney should have objected to Ameen's testimony regarding conversations between Ameen and Dr. Jung regarding defendant's alleged abuse of G.C., as well as portions of Ameen's child abuse report which also contained hearsay statements.

In evaluating an ineffective assistance of counsel claim, we look to see whether, under all the circumstances, the performance of counsel fell below the normal range. *State v. Keeseey*, 519 N.W.2d 836 (Iowa App. 1994) (citing *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993)). With respect to evidentiary objections, counsel need not take advantage of every opportunity to object in order to satisfy the standard of normal competency. *Id.*

We need not address the hearsay issue for we find there is no reasonable likelihood the portions of Ameen's report and testimony referenced by defendant affected the outcome of the trial. The State's case against defendant was strong. The victim, G.C., gave a detailed testimony at trial which was consistent with other evidence submitted by the State. Defendant made incriminating statements to Officer Rhode in a videotaped interview. Ameen also testified defendant had admitted to him that he had touched G.C.'s penis in a sexual manner and that he was sexually aroused at the time. Defense counsel's failure to object to this testimony and evidence was not prejudicial as it did not undermine confidence in the outcome of the trial.

In our de novo review of the evidence, we find defendant has not met his burden of establishing his attorney failed to perform an essential duty resulting in prejudice and, as such, defendant's attorney did not render ineffective assistance in his defense.

AFFIRMED.