IN THE COURT OF APPEALS OF IOWA

No. 8-074 / 97-152

STATE OF IOWA,

Appellee,

vs.

BYRON MORALES,

Appellant.

FILED
APR 24 1998

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Byron Morales appeals from his first-degree murder conviction. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, John Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Huitink, and Streit, JJ., but decided en banc.

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CADY, C. J.

Byron Morales appeals the judgment and sentence following his conviction of first-degree murder. He claims the district court erred by denying his request for cross-examination regarding the state medical examiner's status as the husband of an assistant county attorney, and by admitting rule 404(b) "other acts" evidence into evidence. He additionally maintains he received ineffective assistance of counsel. We affirm.

Byron and Karina Morales were the parents of Kevin. Kevin was born February 3, 1993. The family resided in Polk County.

The exact sequence of events giving rise to this case are disputed. On November 10, 1995, Byron called the paramedics after he noticed Kevin experiencing difficulty in breathing. Byron told the paramedics Kevin fell down the basement stairs. He claimed he had not noticed any injuries, but Kevin had complained of being tired. Byron stated he then put Kevin in his bed where he remained until he noticed Kevin's breathing difficulty. Later that same day, Kevin died during surgery at a hospital. Dr. Thomas Bennett, the Iowa State Medical Examiner, subsequently performed an autopsy on Kevin. Dr. Bennett concluded Kevin's injuries were not accidental.

In addition to Dr. Bennett's testimony that Kevin's injuries were not accidental, five other doctors gave testimony in support of his conclusions. Dr. Charles Jennissen concluded Kevin's skull fracture, subdural hematoma, and

subarachnoid hematoma were classic symptoms of a child suffering from shaken/slammed baby syndrome. Dr. Dominic Frecentese further testified that based on the swelling and the subdural collection of fluid, a fall down stairs would be unlikely to cause Kevin's injuries. Dr. Thomas Carlstrom agreed the conditions found in Kevin would be like those suffered from a major fall from a multi-story building or a major car crash. He also concluded Kevin's injuries were unlikely caused by a fall down stairs. Dr. Chris Ellerbroek concluded Kevin's condition stemmed from an inflicted injury and Kevin was slammed against something or violently struck. Finally, Dr. Donald Moorman concluded Kevin's injuries were not consistent with a fall down stairs.

In addition to the testimony given by the State's doctors, testimony from two of Byron's doctors confirmed much of what the State's doctors found. Byron's doctors indicated the injuries suffered by Kevin could have come from a fall down stairs, but admitted they were not usually caused in that way.

Byron was charged with first-degree murder under the alternative theories of felony murder and killing with malice aforethought while committing child endangerment. At trial, the State moved in limine to prevent Byron from eliciting testimony that Dr. Bennett was married to assistant Polk County attorney, Melodee Hanes. The trial court sustained the motion. Dr. Bennett testified the cause of death was a blunt, severe trauma to the head, symptomatic of shaken/slammed baby

syndrome. The jury found Byron guilty of first-degree murder and the district court sentenced him to life imprisonment.

On appeal Byron claims the trial court erred by denying his request to cross-examine Dr. Bennett's status as the husband of an assistant county attorney, and by allowing the State to introduce evidence of "other acts." Byron also asserts he received ineffective assistance of counsel by counsel's failure to: (1) make an adequate record for appeal; (2) timely object to the rule 404(b) "other acts" evidence; and (3) object to the jury instructions.

I. Evidentiary Issues

A. Cross Examination of State Medical Examiner

The confrontation clause of the Sixth Amendment secures a defendant's right to cross-examine a witness. *See State v. Brodene*, 493 N.W.2d 793, 795 (Iowa 1992). A reasonable latitude must be accorded the person cross-examining, but the scope of the subject of the inquiry rests generally in the trial court's discretion. *See State v. Damme,* 522 N.W.2d 321, 324 (Iowa App. 1994). The trial court's discretion should not be exercised so as to exclude matters vital and proper to the defense of one accused. *See State v. Veal*, 564 N.W.2d 797, 811 (Iowa 1997).

Whenever witnesses testify, their credibility is placed in issue. *See Brodene*, 493 N.W.2d at 796. Consequently, a witness may be cross-examined to show bias stemming from emotional influences such as kinship, hostility to another, or motives

of pecuniary interest. *See State v. Carney*, 236 N.W.2d 44, 46 (Iowa 1975); Iowa R. Evid. 611(b).

The scope of cross-examination of a State's witness should be extended liberally on behalf of a defendant charged with a grave offense. *Damme*, 522 N.W.2d at 325. Where a case is close on the facts, we have held the failure to allow questions relating to the witness' credibility must be presumed prejudicial. *See State v. Chambers*, 370 N.W.2d 600, 603 (Iowa App. 1985). Conversely, when a case is not factually close, we have held a trial court ruling excluding credibility questions did not constitute reversible error. *See State v. Clark*, 325 N.W.2d 381, 383 (Iowa 1982). The issue in each case ultimately rests with the particular circumstances of the case.

Byron maintains he should have been able to cross-examine Dr. Bennett regarding his marital status to assistant Polk County attorney Melodee Hanes. Specifically, he asserts this questioning would have established Dr. Bennett's bias in favor of the State.

Byron should have been able to question Dr. Bennett regarding his marriage to Hanes and any potential bias it might engender. This questioning was particularly relevant because assistant county attorney Hanes participated in a child death review team that gathered and analyzed evidence in cases of suspected child abuse resulting in death. However, we note the trial court would have discretion to limit such questioning pursuant to Iowa Rule of Evidence 403. Nevertheless, Dr. Bennett's

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testimony was cumulative and the State presented overwhelming evidence of its case. We therefore find the failure to allow Byron to cross-examine Dr. Bennett regarding his marital status was not reversible error. *See Clark*, 325 N.W.2d at 383 (ruling on credibility evidence was not reversible error where the case was not close on the facts).

B. Rule 404(b) Evidence

Byron claims the district court erred by admitting evidence of three separate incidences of injuries suffered by Kevin. The first incident occurred on May 9, 1995, when Kevin fell in the parking lot of a grocery store, resulting in a broken leg. The second occasion concerned a fall down stairs during June 1995 which caused Kevin to need stitches in his mouth. The third incident took place in September 1995, and involved another fall down a set of stairs. This fall resulted in stitches to Kevin's head. Byron contends the "other acts" evidence portrayed him as a bad person, and did not establish the lack of accident intended under rule 404(b).

Byron's motion in limine addressed the admissibility of Kevin's fall in the grocery store parking lot. The only reference in the motion in limine to the second incident concerned testimony from a nurse that Kevin was unusually cooperative and Byron was anxious. The third incident of Kevin's falling down stairs was only addressed to the extent Byron objected to testimony indicating he left Kevin at the hospital with someone and returned to work. Byron did not request exclusion of testimony concerning the second and third incidents themselves. An issue which is

not raised at the trial court may not be raised for the first time on appeal. *See In re N.W.E.*, 564 N.W.2d 451, 455 (Iowa App. 1997); *State v. See*, 532 N.W.2d 166, 168 (Iowa App. 1995) (failure to raise a timely objection constitutes a waiver of the objection). Consequently, Byron failed to preserve error on the second and third incidences he now objects to.

The trial court denied Byron's motion in limine concerning the third injury, but determined Dr. Bennett would not be testifying Kevin's broken leg was a result of child abuse. Byron claims Dr. Bennett's testimony concerning the leg fracture led the jury to conclude child abuse occurred. At trial, however, Byron did not object to Dr. Bennett or Karina's testimony regarding this issue. Consequently, he has failed to preserve error on this claim. *See State v. Latham*, 366 N.W.2d 181, 183 (Iowa 1985) (defendant's failure to object to prosecutor's questioning which violated a motion in limine constituted a waiver of error). However, even if Byron had preserved error on his claims, the "other acts" evidence he complains of was admissible in this case to prove absence of mistake or accident pursuant to Iowa Rule of Evidence 404(b).

II. Ineffective Assistance of Counsel

Byron's ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Cook*, 565 N.W.2d 611, 613 (Iowa 1997).

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994); *see also*

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State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *Ray*, 516 N.W.2d at 865. Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Byron must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). Byron must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Byron contends he received ineffective assistance of counsel based on counsel's failure to: (1) make an adequate record for appeal; (2) timely object to the introduction of "other acts" evidence; and (3) object to the jury instructions.

A. Adequate Record

Byron maintains defense counsel was ineffective by counsel's use of a professional statement rather than an offer of proof in response to the State's motion

in limine requesting no cross-examination of Dr. Bennett's marital status. Defense counsel made a professional statement indicating Dr. Bennett and Hanes were dating in November 1995. He also stated Hanes prosecutes child abuse cases and Dr. Bennett and Hanes went to the hospital together after Kevin's death. Byron claims defense counsel's professional statement does not furnish an adequate record for appeal. An offer of proof was not given.

Although an offer of proof may have been preferable to a professional statement, an adequate record nonetheless exists to evaluate Byron's claim. In light of the overwhelming evidence against Byron and because of the cumulative nature of Dr. Bennett's testimony, we find no prejudice resulted to him from the trial court's decision to exclude cross-examination of Dr. Bennett's marital status.

B. Rule 404(b) Evidence

Evidence of prior bad acts is not admissible to show a general propensity to commit wrongful acts. *See State v. Bayles*, 551 N.W.2d 600, 607 (Iowa 1996). Evidence of prior bad acts may be admitted, however, for one or more of the nonexclusive purposes listed in Iowa Rule of Evidence 404(b). *See State v. Brown*, 569 N.W.2d 113, 116 (Iowa 1997). Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

There is a two-prong analysis for admissibility: (1) the relevancy of the evidence; and (2) whether the danger of unfair prejudice substantially outweighs the probative value of the evidence. *See State v. Haskins,* 573 N.W.2d 39, 45 (Iowa App. 1997).

Byron claims he received ineffective assistance of counsel by counsel's failure to object to "other acts" evidence under Rule 404(b). While the district court denied Byron's motion in limine concerning the testimony of Kevin's fall in the grocery store parking lot, the district court did indicate it understood the State would not be introducing testimony the spiral break was child abuse. Dr. Bennett testified the spiral fracture came from a forceful, twisting force. Byron asserts Dr. Bennett's testimony could only be describing child abuse, and, consequently, defense counsel should have objected or made an offer of proof.

Byron suffered no prejudice as a result of defense counsel's failure to raise objections to Kevin's prior injuries. Even if defense counsel had objected to the State's questioning concerning the fracture, the testimony would have been admissible to show the absence of mistake or accident pursuant to Rule 404(b). It was for the jury to determine whether the prior injuries occurred as Byron explained, or whether a reasonable inference existed the fatal injuries Kevin suffered came from a pattern of abuse. Additionally, the trial court overruled Byron's motion to exclude this testimony, with the county attorney indicating the issue would come up in the context of a "pattern of abuse."

In addition to our finding Byron suffered no prejudice, we note any error would be harmless in this case due to the overwhelming evidence again Byron. Byron provided factually inconsistent explanations for the events that occurred the day of Kevin's death. He told the 911 operator he did not know what was wrong with Kevin the day of the fatal injury. He later told his wife he saw him on the bottom step after he sent Kevin to take his jacket downstairs. He also told conflicting stories regarding whether Kevin was talking after the injuries. In addition to the factual inconsistencies, the medical testimony clearly indicates Kevin was a victim of shaken/slammed baby syndrome. The State presented evidence from Dr. Bennett and five other doctors. All indicated Kevin's injuries would not likely have resulted from a fall down a flight of stairs. Consequently, when considering all of the evidence, any error from trial counsel's failure to object would be harmless in this case.

C. Jury Instructions

The State charged Byron under the alternative theories of felony murder and killing with malice aforethought while committing child endangerment. *See* Iowa Code §§ 707.2(2), (5). The jury was only presented with the felony murder charge. *Id.* § 707.2(2) (1995). The record does not explain why the jury was not presented with both charges.

The legislature enacted Iowa Code section 707.2(5) in 1994. *See State v. Thompson*, 570 N.W.2d 765, 767 (Iowa 1997). Iowa Code section 707.2(5) provides that a person commits murder in the first degree when:

> The person kills a child while committing child endangerment under section 726.6, subsection 1, paragraph "b ", or while committing assault under section 708.1 upon the child, and the death occurs under circumstances manifesting an extreme indifference to human life.

Byron claims because of this new enactment, when child endangerment occurs, the State is limited to using only section 707.2(5) in charging a defendant with the first-degree murder of a child, and child endangerment should no longer serve as an underlying basis for felony murder under the merger doctrine. He maintains defense counsel was ineffective for failing to make this objection.

We need not determine whether defense counsel erred by failing to object the inclusion of the felony-murder charge rather than the child endangerment charge because Byron suffers no prejudice from the jury instructions. *See State v. White*, 563 N.W.2d 615, 617 (Iowa 1997) (where State elects to proceed under only part of a statute, then what the State charges is the statute for purposes of the case); *Saadiq v. State*, 387 N.W.2d 315, 322 (Iowa 1986) (many criminal statutes are to some extent subject to charging discretion). Regardless of which charge was presented to the jury, the record contains more than ample evidence to support a finding of guilt under Iowa Code section 707.2(2) or (5). We also decline Byron's invitation to adopt the merger doctrine. *See State v. Rhode*, 503 N.W.2d 27, 39 (Iowa App. 1993); *State v. Rhomberg*, 516 N.W.2d 803, 805 (Iowa 1994).

We have considered all of Byron's claims and affirm the district court.

AFFIRMED.

All judges concur, except Sackett, J., who specially concurs.

SACKETT, J. (specially concurring)

I concur, but write separately. I agree with the majority's holding that defendant should have been allowed to cross-examine Dr. Thomas Bennett about his marriage to Polk County prosecutor Melodee Hanes. I would have allowed further cross-examination directed to the fact he and Hanes went to the hospital together the night the victim died and may have jointly been involved in search warrant proceedings in this case.

The integrity of our criminal justice system and the public's perception of it demand that we be forthright about possible biases and conflicts. The jurors asked to decide this case should have been afforded the facts to allow them to assess whether the State Medical Examiner appeared as a witness free from bias or whether his testimony may have weighed in favor of the prosecutor.

I am troubled, therefore, by the Assistant Polk County Attorney seeking a motion in limine to keep this information from the jury arguing vigorously the State's case would be unduly prejudiced should the jury know that one of the State's witnesses and an Assistant Polk County Attorney and member of the Polk County Death Review Team were married. The County Attorney's position that the State's case would be prejudiced if the jury were allowed to know these facts raises suspicion.

Bennett testified the victim suffered from shaken slammed baby syndrome, a theory yet subject to some controversy. Unlike other witnesses in the case, he

testified wearing the cloak of the State Medical Examiner, not as an outside expert specifically engaged to support the State's position. A juror would expect the State Medical Examiner to have made an unbiased analysis of the medical facts and not to be an extension of the prosecution. I note though the State Medical Examiner is currently under the Department of Public Safety, it has been advanced it should be placed under the Department of Health to erase any hint the examiner is a part of the prosecution team.

I have critically examined the State's proposition on appeal which the majority adopted to justify affirmance. That position is, in essence: (1) it does not matter what Dr. Bennett said because his evidence was cumulative; and (2) defendant could not show prejudice. After reviewing the majority's careful analysis of the medical testimony and making my own review of the medical evidence, excluding Bennett's testimony, the only conclusion I draw is that the victim suffered from the shaken slammed baby syndrome. In reaching this conclusion, I look particularly to the testimony of Dr. Thomas Carlstrom, the neurosurgeon who operated on the victim, as well as looking carefully at the medical evidence presented by defendant. Consequently, I concur with the majority that Bennett's testimony is only cumulative and defendant cannot show prejudice.