IN THE COURT OF APPEALS OF IOWA

No. 2-025 / 91-618

FILED
MAR 2 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

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JEFFREY DENNIS ANDERSON,

Appellant.

Appeal from the Iowa District Court for Mills County, Glen M. McGee, Judge.

Anderson appeals his conviction, following a jury trial, for sexual abuse in the third degree. **AFFIRMED.**

James Martin Davis, Omaha, Nebraska, and James Thomas, Glenwood, Iowa, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, and Connie Anstey, County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Habhab, JJ.

PER CURIAM

Eighteen-year-old Jeffrey Anderson was accused of sexually abusing a fifteen-year-old girl. Anderson was charged with sexual abuse in the third degree. A jury found him guilty of that crime.

Following the jury's verdict, Anderson appeared with new counsel and moved for a new trial on the ground his prior attorney had rendered ineffective assistance. Following an evidentiary hearing on counsel's performance, the district court rejected Anderson's claims of ineffective assistance and denied his motion for a new trial. The district court convicted and sentenced Anderson for sexual abuse in the third degree. Anderson appeals, contending his trial attorney rendered ineffective assistance in several respects.

Established principles govern our review of appellant's sixth amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant

circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, Anderson must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984).

Anderson claims his trial attorney rendered ineffective assistance by: (1) failing to object to several instances of hearsay testimony, (2) failing to cross-examine the victim-witness effectively, (3) failing to object to certain rebuttal testimony presented by the State, and (4) failing to make a proper record in support of a motion for mistrial. We do not determine whether counsel failed to perform an essential duty for each claimed error because we conclude defendant has failed to prove any resulting prejudice. See Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

The record reveals the alleged hearsay was not critical to the issue of defendant's guilt or innocence. Regarding defendant's claim of counsel's failure to cross-examine the victim effectively, we find no evidence indicating what the victim's answers would have been if she had been cross-examined in the manner suggested by defendant in his brief. As such, the issue of prejudice is speculative. The rebuttal evidence presented by the State did not materially impeach defendant's alibi witnesses or his own testimony regarding his alibi. In addition, this evidence concerned a collateral issue. Finally, defendant complains counsel failed to make a record to support a mistrial motion which was premised on alleged improper comments made to the jury by courtroom spectators. Defendant failed in posttrial proceedings to present evidence proving the occurrence of such comments or their nature. We conclude defendant was not prejudiced. We affirm.

AFFIRMED.