IN THE COURT OF APPEALS OF IOWA

No. 8-134 / 97-0158

CARL E. RUPE, JR.,

Applicant-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

FILED
JUL 31 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, William J. Pattinson, Judge.

Carl Rupe, Jr. appeals from the district court's denial of his application for postconviction relief. **AFFIRMED.**

Ryan B. Moorman, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Mary E. Richards, County Attorney, for appellee.

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

PER CURIAM.

Applicant-appellant Carl Rupe, Jr. appeals from the district court judgment dismissing his application for postconviction relief following his conviction of two counts of sexual abuse of a child. He contends the court erred: (1) in finding his trial counsel was not ineffective in failing to object to testimony of his stepchildren; and (2) in not holding the State was precluded from bringing the charge because the statute of limitations in place at the time of the offense had run and the application of a later amendment to extend the time for filing was improperly applied in violation of Rupe's constitutional rights. We affirm.

Rupe was convicted of sexually abusing his stepdaughters Brandi and Angela. The abuse occurred after Rupe moved in with the girls' mother, Diana, in 1987. At the time, the girls were nine and five years of age. Rupe moved out of the home in 1989. In 1994, Brandi reported the alleged abuse to authorities. Charges were filed on March 21, 1994.

At trial, Brandi, Angela, and their brother Bradley testified without objection Rupe had been physically abusive to them. On direct appeal, Rupe raised the issue his trial counsel was not effective for not objecting to this testimony. The supreme court affirmed the conviction, preserving Rupe's claim of ineffective assistance for postconviction relief. *State v. Rupe*, 534 N.W.2d 442, 445 (Iowa 1995). The trial court denied Rupe's claim for postconviction relief.

Rupe first contends his trial counsel was not effective when he failed to object to the testimony Rupe physically abused the alleged victims. Rupe contends this testimony was not relevant and its admission was prohibited by Iowa Rule of Evidence 404(b). Rupe contends his counsel should at the least have requested a cautionary instruction limiting the jury's consideration of the testimony. Rupe's brief fails to advise what limiting instruction would have been appropriate.

In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). 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. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

At the hearing, Rupe's trial attorney testified he allowed the challenged testimony to be admitted without objection and did not seek a cautionary instruction because the testimony formed the basis for his defense, that is, the victims sought revenge for the physical abuse Rupe inflicted on them. Defense counsel, in opening statements and closing argument, advanced the allegations of sexual abuse were concocted by the children in retaliation for Rupe's harsh discipline.

Rupe's trial counsel utilized a plausible defense theory. The fact it failed does not mean Rupe did not have effective legal assistance at trial. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to

ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Trial counsel's decision to allow the testimony to support his theory the children were angry with Rupe was reasonable. We are unable to determine what limiting instruction would have changed the result of the trial. We affirm on this issue.

Rupe also claims the statute of limitations had run on the charges when they were filed. The events occurred in 1987. At the time, the statute of limitations was four years. The statute was amended in 1990 to extend the limitation time to six months beyond the child's eighteenth birthday. These charges were filed March 21, 1994.

Rupe challenges that his constitutional rights were violated because the amendment violated the ex post facto clause.[1] The amendment does not implicate the ex post facto clause because the statute of limitations had not run on Rupe's acts at the time the statute was amended. *See United States v. Madia*, 955 F.2d 538, 539 (8th

---

[1] At the time Rupe committed the acts in 1987, Iowa Code section 802.2 contained a four-year limitation for filing an indictment or trial information:

> An information or indictment for sexual abuse in the first, second or third degree committed on or with a child under the age of ten years shall be found within four years after its commission.

Iowa Code § 802.2 (1987).

As amended, effective July 1, 1990, the statute required an indictment or trial information within six months after the child became eighteen:

> An information or indictment for sexual abuse in the first, second or third degree committed on or with a child under the age of twelve years shall be found not later than six months after the child attains eighteen years of age.

1990 Iowa Acts ch. 1066 (1990).

Cir. 1992). In *State v. Schultzen*, 522 N.W.2d 833 (Iowa 1994), the court rejected a similar claim where, as here, the original statute had not yet run at the time of the amendment. *Id.* at 834-35.

AFFIRMED.