FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-015 / 93-1956

STATE OF IOWA,

Appellee,

vs.

EVERETT BART LARSON,

Appellant.

Appeal from the Iowa District Court for Montgomery County, Charles L. Smith, Judge.

Everett Bart Larson appeals the judgment and sentences entered upon his convictions, following jury trial, of second-degree sexual abuse and indecent contact with a child. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and Bruce E. Swanson, County Attorney, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Everett Bart Larson appeals the judgment and sentences entered upon his convictions, following jury trial, of second-degree sexual abuse and indecent contact with a child. We affirm.

Larson was charged with sexually abusing K.N. and S.N., the nine- and ten-year-old daughters of his fiance on the morning of April 9, 1993. He was tried before a jury in October 1993.

At trial K.N. testified she was awakened by Larson about 5:30 a.m. on April 9. Larson took K.N. downstairs to use the bathroom because she had a bed wetting problem. He told her that his counselor said he should "do it" with her. K.N. talked Larson into going upstairs to S.N.'s room. K.N. woke her sister and told her what was happening. The girls tried to pretend they were asleep and then attempted to escape to a closet. However, Larson pulled them onto the bed, took his pants off, pulled K.N. under him and tried to insert his penis in her vagina.

Dr. Rizwan Shah testified she examined K.N. on the afternoon of April 9. Shah found injuries on K.N.'s bladder opening and hymenal membrane. Shah stated that the vaginal injuries could have been caused by a finger but not an erect penis. Shah concluded the injuries to the bladder and hymenal openings were less than twenty-four hours old.

Shah also found a cut on K.N.'s anus. Shah stated the anal injury had been caused by an object larger than an

adult's finger. The injury to the anus was less than three weeks old.

Linda Sawyer, an analyst with the division of criminal investigations, testified that she found sperm on rectal swabs taken from K.N.'s sexual assault evidence collection kit. No sperm was found on the vaginal swabs.

The jury found Larson guilty as charged. Larson was sentenced to a term not to exceed twenty-five years for his conviction of second-degree sexual abuse and to a term not to exceed two years for his conviction of indecent contact with a child. Larson appeals, claiming only that his trial counsel was ineffective for failing to object to certain evidence.

Specifically Larson alleges that trial counsel's failure to object to evidence of the rectal injury was a failure to perform an essential duty. He claims the evidence of the rectal injury was not relevant to the specific charge he faced because that injury did not occur on April 9. Larson argues prejudice resulted because had this evidence not been allowed, he would not have been convicted based on the remaining testimony and evidence. We disagree.

Ordinarily ineffective assistance of counsel claims are preserved for postconviction proceedings. State v. Buck, 510 N.W.2d 850, 853 (Iowa 1994). They may be resolved on direct appeal, however, when the record is adequate to address the contentions asserted. Id. Larson and the

State submit that the record is sufficient to address Larson's specific instance of alleged ineffective assistance. This is his only issue on appeal.

Our ultimate concern in claims of ineffective assistance is with the "'fundamental fairness of the proceeding whose result is being challenged.'" State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131.

The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. Id. at 131-32. It is not necessary to determine whether counsel failed to perform an essential duty before examining the prejudice prong of an ineffectiveness claim. State v. McKettrick, 480 N.W.2d 52, 56 (Iowa 1992).

The record reveals the girls provided detailed and consistent testimony as to the incident on April 9. K.N. recalled Larson licking his finger before inserting something in her vagina. She testified she felt pain in her vagina when this occurred. S.N. also testified Larson licked his finger and she heard K.N. cry out.

Dr. Shah testified K.N.'s vaginal injury was consistent with digital penetration. She further testified the injury was also of the appropriate age.

Larson's testimony also corroborates several aspects of the girls' testimony, including the fact that the girls asked him to leave S.N.'s room. In addition, Larson's own behavior was suspicious as he himself called 911 on the morning of April 9 and reported the girls were being abused.

Our de novo review of the record leads us to conclude the result of the proceeding would not have been different had Larson's counsel objected to evidence of the rectal injury. Even if this evidence had been excluded there was sufficient evidence to show that Larson abused K.N. by inserting his finger into her vagina. Therefore Larson fails to show prejudice resulted, and his ineffective assistance of counsel claim must fail.

Accordingly, Larson's convictions are affirmed.

AFFIRMED.