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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-246 / 90-130

STATE OF IOWA,

Appellee,

vs.

RONALD R. TRACY,

Appellant.

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Appeal from the Iowa District Court for Jackson County, James E. Kelley, Judge.

The defendant appeals his conviction for third-degree sexual abuse. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Kjas T. Long, County Attorney, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

Ronald Tracy was accused of sexually abusing his sixteen-year-old stepdaughter, Kim. The stepdaughter initially reported sexual abuse but later denied that it occurred. Tracy was charged with sexual abuse in the third degree, and a jury found him guilty of the same. He appeals the conviction.

Tracy contends the district court erred by admitting hearsay evidence. The alleged hearsay consisted of testimony by a school nurse, a child abuse investigator, and an employee from the sheriff's office concerning Kim's unsworn statement describing the abuse. Tracy argues this testimony was hearsay because it was offered to prove the truth of the matter asserted, namely the stepdaughter's reports of abuse. The State responds the testimony was offered only to impeach Kim's trial testimony denying abuse had occurred.

Tracy argues his trial attorney rendered ineffective assistance by failing to object to expert testimony concerning the theory of sexual abuse accommodation syndrome. This theory posits that sexual abuse victims sometimes accommodate their abusers or themselves by denying the abuse. The State presented this expert testimony in an attempt to explain Kim's inconsistent reports.

Tracy contends his trial attorney rendered ineffective assistance also by failing to object to a doctor's

testimony that Kim was not a virgin. He argues this testimony was irrelevant and highly prejudicial.

Finally, Tracy states his trial attorney rendered ineffective assistance by failing to request an instruction that out-of-court unsworn statements can be used only for impeachment. The unsworn statement in question is Kim's statement describing the abuse, made before her later denials that abuse occurred.

During the pendency of this appeal, the Iowa Supreme Court ordered a limited remand to allow the district court to make a record on the performance of Tracy's trial attorney. After a hearing the district court found Tracy's trial attorney had performed adequately and had rendered effective assistance of counsel. The order is now challenged in the present appeal, along with the conviction itself.

I.

A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial,

not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Tracy contends testimony describing Kim's story of sexual abuse contained in an unsworn statement was hearsay and, thus, improperly admitted. Tracy feels the trial court erred in admitting the testimony of the school nurse, investigator, and sheriff's aide. The trial court admitted this testimony based on Iowa Rule of Evidence 801(d) which provides:

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him . . . .

(emphasis added). We believe this is an improper basis for admitting the testimony. The statements made by Kim to these three witnesses were not made under oath. We can, however, affirm the trial court ruling on any ground. See State v. Clark, 325 N.W.2d 381, 383 (Iowa 1982) (quoting Campbell v. Collins, 133 Iowa 152, 155, 110 N.W. 435, 436 (1907)); State v. Oshinbanjo, 361 N.W.2d 318, 322 (Iowa App. 1984). We find the testimony is allowed as impeachment of Kim. See Iowa R. Evid. 607. Once she recanted her accusation of sexual abuse the State could impeach her with her inconsistent statements. Iowa R.

Evid. 613. The evidence was not hearsay under those conditions.

We conclude the purpose of the testimony was to impeach the victim on her trial testimony. The evidence shows the victim told at least two different versions of the facts. See State v. Hill, 243 N.W.2d 567, 570 (Iowa 1976) ("A prior, inconsistent, out-of-court statement, offered for impeachment purposes, does not come within the definition of hearsay. . . .[T]he use of prior self-contradictions to discredit is not obnoxious to the hearsay rule.") (citing in part 3A Wigmore, Evidence § 1018, at 996 (1970)). This evidence was properly admitted; we affirm the trial court on this issue.

II.

Tracy claims his trial counsel was ineffective for several reasons. 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.

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require the defendant to show counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is that the defendant must show there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 697 (1984).

First, it was proper for the State to introduce evidence of the sexual abuse accommodation syndrome through expert testimony. The defendant tried to defend on the basis of the victim's recantation, so this expert testimony was admissible. See State v. Dodson, 452 N.W.2d 610, 612 (Iowa App. 1989) (evidence of child sexual abuse accommodation syndrome admissible for "rehabilitative functions"). We are troubled, though, by the testimony of the expert that "there probably are no more than two or

three children per thousand who come forth with such a serious allegation who are found later to be dishonest." This testimony seems to be violative of State v. Myers, 382 N.W.2d 91, 97-98 (Iowa 1986) (expert testimony relating to truthfulness of complaining witness improper). After an extensive review of the record, however, we find the jury was presented with evidence of sexual abuse from several different sources (including an eyewitness account from Kim's sister), so this testimony was not prejudicial to Tracy.

Second, the testimony of the doctor who conducted a physical exam of Kim was relevant. Kim had previously stated she and the defendant had had sexual intercourse. Any objection by Tracy's counsel would have been meritless.

Third, we find the lack of particular instruction making reference to Kim's unsworn prior inconsistent statements unimportant. Trial counsel may have felt as a strategical matter it would be best to not comment on the prior accusatory statements in the instructions so as to not emphasize them. We also cannot find that any failure to request such an instruction would have affected the outcome of the case. Counsel's actions with regard to his strategy were well within the range of reasonable professional competence.

We affirm the trial court on its ruling that trial counsel was effective. We do not believe the outcome would have been different had the objections or requests been

made. Because there is substantial evidence to support the charge, we affirm Tracy's conviction for third-degree sexual abuse.

AFFIRMED.