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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
WILLIAM A. SCHATZ,	)	8-685 88-20
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Dallas County (9896), James W. Brown, Judge.

The defendant appeals his conviction by a jury of second-degree sexual abuse. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant State Public Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats, Assistant Attorney General; and Joseph Weeg, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

OXBERGER, C.J.

The defendant, William C. Schatz, appeals his conviction by a jury of second-degree sexual abuse. He contends there was insufficient evidence to support the verdict; that the trial court abused its discretion in denying his motion for a new trial based on newly-discovered evidence; and he was denied effective assistance of counsel. Our review is for the correction of errors at law except with respect to the constitutional issue of ineffective assistance of counsel where our review is of the totality of the circumstances. State v. Johnson, 395 N.W.2d 661, 663 (Iowa App. 1986). We affirm.

I. Sufficiency Of Evidence

A jury found William Schatz guilty of second-degree sexual abuse after hearing testimony that he anally raped a six-year-old boy. On appeal Schatz first contends the verdict was not supported by sufficient evidence. He states the alleged victim was extremely hesitant on the witness stand and suggests that the injuries he suffered were caused by his sitting on a bicycle seat post after the seat had fallen off.

When reviewing the sufficiency of evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa

1984). A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Id. Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id. (Citations omitted.) Direct and circumstantial evidence are equally probative and either is sufficient to support a conviction. Iowa R. App. P. 14(f)(16). However, the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, and conjecture. Blair at 420-21.

The evidence adduced at trial established the following. On the night of June 15, 1984, defendant and Donna Schatz, defendant's cousin and girlfriend, were taking care of Donna's sister and brother, B.S. and R.R., and the defendant's four children. Sometime during the evening defendant took B.S. and his four children upstairs and locked them in a bedroom. He kept R.R. downstairs with him and Donna. B.S. testified that she heard R.R. screaming and telling them to stop.

R.R. testified he was six years old during the summer of 1984. He further testified he was in a downstairs bedroom with defendant and defendant asked him to take his pants off. R.R. testified defendant did not have pants on, that defendant got upon the bed and had R.R. sit on his penis, that defendant put his penis in R.R.'s anal opening and moved it in and out.

On June 20 Diane Schatz, R.R.'s mother, heard R.R. crying in pain as he tried to go to the bathroom. R.R. told her that defendant had hurt him. Upon inspection Diane noticed bruises and a little tear around R.R.'s rectum and called the doctor.

Dr. Haag testified he has seen several sexual abuse cases, many involving anal intercourse. Upon examination of R.R., Dr. Haag found a fissure (tear) in the twelve o'clock position of R.R.'s anus going through the rectal mucosa and transition tissue. Dr. Haag also noticed diffuse bruising around the anal area and resolving (healing) hematomas. Dr. Haag concluded R.R. had been sodomized or that an attempt at sodomy had been made.

Dr. Haag dismissed the defendant's suggestion that this injury could have been caused by the bicycle incident. Dr. Haag testified such an incident would result in "one area that is very bad" evidencing a direct impact. Unlike the impact injury from a bicycle post which would cause a jagged tear and direct bruising, the injuries sustained by R.R. included diffuse bruising and a clean tear caused by overdilation where the skin was stretched to the point of tearing. Further, concerning the bicycle injury, Donna Schatz testified that R.R. wore blue jeans during the accident, that the blue jeans were not torn and that nothing penetrated R.R.'s anus.

Defendant also asserts R.R. was hesitant to testify and complains of the use of leading questions in eliciting R.R.'s testimony. However, our courts have held that leading questions may be necessary where the witness is of tender age, as well as where the witness is testifying as to some form of sexual abuse. State v. Mueller, 344 N.W.2d 262, 267 (Iowa App. 1983) (citing State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978); State v. Torrence, 257 Iowa 182, 190, 131 N.W.2d 808, 812-13 (1964); State v. Shultz, 177 Iowa 321, 328, 158 N.W. 539, 541 (1916)).

Finally, the defendant's testimony and actions are suspect. The defendant claims that 1984 is foggy due to a car accident during August of that year. Defendant also fled the jurisdiction to Oregon at least in part because of the sex abuse charge.

The jury was instructed that in order to find the defendant guilty as charged of second-degree sexual abuse they had to find the defendant performed a sex act on the victim and the sex act was performed on the child-victim when he was under the age of twelve. Iowa Code section 709.3 (1985). We find the record replete with evidence from which a rational trier-of-fact could find the defendant guilty of second-degree sexual abuse.

II. Motion For New Trial

Defendant next argues the trial court abused its discretion in denying his motion for a new trial based on

newly discovered evidence. This refers to the discovery following the jury verdict that a rebuttal witness for the State, Ron King, had previously been charged with sexual abuse. The defendant urges that evidence of this witness's past conduct created an inference that this witness and not the defendant was the one who performed a sex act on R.R.

To prevail on a motion for a new trial based on newly discovered evidence the defendant must show that: (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. State v. Allen, 348 N.W.2d 243, 246 (Iowa 1984) (citing State v. Gilroy, 313 N.W.2d 513, 521-22 (Iowa 1981); State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975)).

The district court's order denying the motion for new trial determined the showing made by defendant failed to satisfy its materiality in the sense of affecting the outcome. Our review of that order is governed by the standards recognized in State v. Gilroy, 313 N.W.2d at 522:

> Regarding the probability of a different result if a new trial was granted, the trial judge was confronted with a problem requiring evaluation of conflicting evidence. Since he saw and heard the witnesses, he was in a superior position to make this evaluation.

There is no dispute that the evidence was not discovered until after trial and before judgment. However,

there is evidence that reveals defendant's counsel had access to the prosecutor's file on at least two occasions, thus failing to establish due diligence. Defendant proposes to use evidence of King's previous charge of sexual abuse to prove King sexually abused R.R. Nothing in the record ties King to the crime charged. Defendant has failed to prove the evidence meets the four-part test for a new trial. The trial court did not err in denying defendant's motion for new trial based on newly discovered evidence.

III. Ineffective Assistance Of Counsel

Finally, Schatz alleges he received ineffective assistance of counsel when his attorney failed to secure the presence at trial of a potential witness who would have supported testimony offered by the defense. Ineffective assistance of counsel claims are well established:

> The defendant bears the burden of proving by a preponderance of the evidence that his counsel was ineffective and must show that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See Snethen v. State, 325 N.W.2d 400, 413-15 (Iowa 1982). The United States Supreme Court has stated:
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> > Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
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> Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694-95 (1984) (citation omitted).

Heaton v. State, 420 N.W.2d 429, 431 (Iowa 1988). To establish prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2070, 80 L.Ed.2d at 698.

Defense counsel testified in his hearing on a motion for new trial that he sent one letter and made one telephone call to Oregon in an effort to get a statement from one of defendant's four children who were present in the house the night of the sexual assault. Defendant's trial counsel testified he was told the children were in a foster home and could not be contacted. An affidavit was received from James Schatz which stated R.R. did have an accident which involved sitting on his bicycle seat post. He also testified he, B.S. and the other children were not locked in the bedroom and he did not hear R.R. screaming.

Defendant is entitled to a fair trial, not a perfect trial. State v. Seiler, 342 N.W.2d 264, 268 (Iowa 1983). Defense counsel had five witnesses to testify to prove defendant was not present at the alleged assault and R.R.'s injuries resulted from sitting on a bicycle post. Under these circumstances, defendant has failed to overcome the presumption that defense counsel may have determined this to be sufficient and that not further seeking the testimony of James Schatz might be considered a strategy decision.

Due to the great weight of evidence supporting this conviction, we do not believe the testimony of James Schatz would have changed the outcome of the case. We fail to find defendant was rendered ineffective assistance of counsel.

AFFIRMED.