FILED
JUN 4 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **CHARLES E. BOTTORFF,** | ) | |
| Petitioner-Appellant, | ) | Filed June 4, 1986 |
| vs | ) | 37 |
| **STATE OF IOWA,** | ) | 6-112<br>85-747 |
| Respondent-Appellee. | ) | |

Appeal from the Iowa District Court for Warren County (No. PCR 20468) - M C Herrick, Judge.

Petitioner appeals a denial of postconviction relief, asserting that he was denied effective assistance by trial counsel's failure to object to questioning alleged to constitute impermissible prosecutorial comment on his exercise of his right to remain silent. **AFFIRMED.**

James P. Piazza and John J. Piazza of Piazza, Holmes & Beery, Des Moines, for petitioner-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attorney General; and John W. Criswell, County Attorney, for respondent-appellee.

Considered by Snell, P.J., and Hayden and Sackett, JJ.

**SNELL, P.J.**

On May 29, 1984, appellant Charles E. Bottorff was charged with two counts of sexual abuse in the third degree in violation of Iowa Code sections 709.4(3) and 709.4(1) and/or (5). The victim of the alleged sexual abuse was Bottorff's wife's sister, who was thirteen years old.

At trial, the victim, Julie Putney, testified regarding a series of sexual contacts initiated by Bottorff over a period of nine months, including two incidents of sexual intercourse. She claimed that she had not reported the crimes until three months after the most recent occurrence because she was afraid she would hurt her sister's marriage. The only other evidence offered against Bottorff was the testimony of Julie's parents that they believed their daughter. Bottorff testified, denying that he had any sexual contact with Julie.

During Bottorff's cross-examination, the following colloquy occurred without defense objection:

> Q. Did Julie Putney give a deposition in this case? A. Yes, she did.
> Q. On or about June 15, 1984? A. Yes, she did.
> Q. In the courtroom here? A. Yes.
> Q. You were present? A. Yes.
> Q. Your attorney was present? A. Uh-huh.
> Q. Julie Putney was obviously present? A. Yes.
> Q. And was she sworn under oath? A. Yes.
> Q. Did she give a statement? A. Yes.
> Q. She was asked questions by your attorney? A. Yes.
> Q. And she gave answers to those questions? A. Most of them as long a she understood the question.
> Q. Basically similar to the questions and answers that were elicited from her today? A. Yes.
> Q. At least to the same subject matter? A. Yes.
> Q. Did you hear all her answers? A. Yes.
> Q. Did you give such a deposition? A. No, I did not.

Bottorff was convicted as charged and sentenced to ten years in prison. No direct appeal was taken. The present appeal follows the dismissal of Bottorff's subsequent application for postconviction relief.

Bottorff's application raises one issue--whether his trial counsel's failure to object to the prosecution's question regarding whether Bottorff gave a deposition constitutes ineffective assistance of counsel. Bottorff claims that this question was an impermissible comment on Bottorff's fifth amendment right to remain silent.

"[I]f a defendant fails to raise the issue of ineffective assistance of trial counsel on direct appeal, he has the burden of showing sufficient reason for that failure or he is barred from asserting the claim in postconviction proceedings." Washington v. Scurr, 304 N.W.2d 231, 235 (Iowa 1981). "A postconviction proceeding is not an avenue for litigating issues that were not properly preserved for our review on direct appeal." Id.; see also State v. White, 337 N.W.2d 517, 519-20 (Iowa 1983). Because Bottorff failed to raise this issue on direct appeal and offers no reason for his failure to do so, he has waived the right to challenge his trial counsel's effectiveness.

Even were we to consider Bottorff's claim, we would conclude that Bottorff has failed to show he was prejudiced by his counsel's failure to object to the prosecutor's question. When a defendant relies on specific omissions to prove ineffective assistance of counsel, two conditions must be demonstrated:

> (1) counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment, and
>
> (2) the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial.

State v. Losee, 354 N.W.2d 239, 243 (Iowa 1984) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)).

"The defendant must show that there is 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

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the confidence in the outcome." Id. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). The defendant must satisfy this burden by a preponderance of the evidence and rebut the presumption of counsel's competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983).

Initially, we determine the prosecutor's question did not invade Bottorff's fifth amendment rights. "A statement is deemed to be an impermissible reference to defendant's silence if either (1) the prosecutor manifestly intended to refer to the defendant's silence, or (2) the jury would 'naturally and necessarily' interpret the statement to be a reference to the defendant's silence." State v. Hutchison, 341 N.W.2d 33, 39 (Iowa 1983) (quoting Catches v. United States, 582 F.2d 453, 458 (8th Cir. 1978). The prosecutor's question here evinces no intentional, inexcusable, or gross attempt to improperly influence the jury. It does not show a manifest intent to refer to Bottorff's silence. In fact, the prosecution's stated purpose for the cross-examination was to show that Bottorff had previously heard the victim's testimony and thus could conjure up a defense, while the victim had no similar opportunity. Nor do we find that the jury would naturally interpret this question and answer to be a reference to Bottorff's post-arrest silence.

Additionally, prejudice ordinarily results from persistent efforts by the prosecution to inject prejudicial matter before the jury. State v. Sallis, 262 N.W.2d 240, 247 (Iowa 1978); State v. Johnson, 222 N.W.2d 483, 488 (Iowa 1974) ("County attorney's persistent interrogation and remarks implying defendant was engaged in other criminal activity, in the face of repeated adverse trial court rulings, deprived defendant of a fair trial."). We agree with the postconviction court that this "single, unemphasized and unobjected to question and answer at the close of the State's cross-examination of the Petitioner" demonstrates no prejudice. The prosecutor's single question was not the kind of comment

that would cause the jury to improperly dwell on Bottorff's pretrial silence. See State v. Johnson, 219 N.W.2d 690, 697-98 (Iowa 1974) (mistrial not warranted on basis of prejudicial effect on defendant's right against self-incrimination by reason of prosecutor's question on cross-examination of defendant regarding whether he had even given a statement to law enforcement officials and defendant replied no). Furthermore, it is not clear that Bottorff ever invoked his right to remain silent. He took the stand at trial to testify on his own behalf and during direct examination was asked what he told the police after his arrest.

We conclude for all of the above-cited reasons that the postconviction court properly denied Bottorff's application for postconviction relief.

**AFFIRMED**[1].

[1]We refer appellant's counsel to Iowa Rule of Appellate Procedure 16(a), which provides in pertinent part: "The appendix and briefs shall be printed or duplicated on both sides of the sheet . . . the cover of the brief of appellant should be blue; . . ." (emphasis added). This rule shall be followed in all future submissions appellant's counsel makes to this forum.