FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 29, 1985
vs.	)	
RALPH LYTLE,	)	4-542 84-618
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Fremont County - Leo Connolly, Judge.

Defendant appeals his conviction and sentence for third degree sexual abuse in violation of Iowa Code section 709.4 (1983). AFFIRMED.

Charles Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Schlegel, JJ.

SCHLEGEL, J.

Defendant, Ralph Lytle, appeals his conviction and sentence for third degree sexual abuse in violation of Iowa Code section 709.4 (1983). His sole claim is that he was denied effective assistance of counsel when trial counsel failed to challenge a marshalling instruction that omitted the core elements of the charges against him.

Ralph Lytle lived with Virginia Marshman, her daughter Daniella, and other family members for a period of about four years. The testimony of Daniella was that she commenced having sexual relations with Ralph when she was about thirteen years of age. She testified that she had sexual intercourse with Ralph in Mills County, Iowa, at age fourteen and also in Fremont County, Iowa at age fifteen. The record shows without dispute that Ralph was over forty years of age during all this time. There was also evidence from Daniella and her mother that there were threats and acts of violence against them by the defendant, and that Daniella participated in the acts of sexual intercourse and failed to tell her mother about them because of fear of the defendant. Finally, Daniella testified that she married the defendant only because she was afraid of him.

In instructing the jury, the court set out several alternative ways in which sexual abuse in the third degree could be committed, as follows:

INSTRUCTION NO. 7

> The law provides that a person commits sexual abuse in the Third Degree when a sex act is performed:
>
> 1. By force or against the will of another; or
>
> 2. When the accused is in a position of authority over the other person and uses this authority to coerce the other person to submit; or
>
> 3. When the other person is 14 years; but not yet 16 years of age, and the accused is a member of the same household as to the other person; or
>
> 4. When the person is six or more years older than the other participant, and that other participant is 14 or 15 years of age.

The court went on to give a marshalling instruction which failed to set out any of the alternative manners in which it had indicated sexual aubse in the third degree could be committed. The marshalling instruction was as follows:

INSTRUCTION No. 8

> You must find the defendant not guilty of sexual abuse in the third degree unless the state proves by evidence beyond a reasonable doubt each of the following elements:
>
> 1. That within three years prior to December 27, 1983, the defendant performed a sex act with Donella [sic] Marshman in Fremont County, Iowa.
>
> 2. That the defendant was not at the time of the sex act living with the victim as husband and wife.
>
> If you find the State has proved beyond a reasonable doubt each and all of the elements, then you will find the defendant guilty of Sexual Abuse in the Third Degree. But, if you find the State has failed to prove beyond a reasonable doubt one or more of the above elements, then you shall find the defendant not guilty.

Defendant contends that this marshalling instruction failed to state all the elements of the crime because it did not specify any of the alternative elements of section 709.4, Iowa Code (1983), which were contained in instruction number 7. He claims that since instruction number 8 failed to specify the circumstances or conditions which criminalize sexual conduct, it relieved the State of its burden of proving the elements of the charge. Trial counsel for the defendant took no exception to these instructions. Defendant claims this failure is a denial of effective assistance of counsel, entitling him to a new trial.

I. Standard of Review. When a defendant relies on a specific act or omission to prove ineffective assistance, he must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted therefrom. State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984). We examine both aspects below.

II. Failure to Perform an Essential Duty. The proper standard for attorney performance was discussed in the United States Supreme Court case Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Court stated that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at ___, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. Counsel's performance, to be effective, must be "within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

> In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland, ___ U.S. at ___, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. These general guidelines must be applied to "the facts of the particular case, viewed as of the time of counsel's conduct." Id.

Defendant cannot demonstrate that counsel's failure to except to the marshalling instruction in its final form caused counsel's performance to fall below an objective standard of reasonably effective service. To be sure, the instruction is deficient, see State v. Goff, 342 N.W.2d 830, 837 (Iowa 1983), but it was well within the trial counsel's strategic discretion to leave the instruction alone rather than emphasize issues upon which the evidence seems quite clear. See Sims v. State, 295 N.W.2d 420, 425 (Iowa 1980) (listing cases in which strategic decisions did not constitute ineffective assistance). Defendant's defense was a denial of the sex acts rather than any claim that his age or that of Daniella failed to meet the proscribed limits. Under the circumstances, it cannot be said that counsel's failure to except to the instruction was unreasonable or below the range of normal competency.

III. Prejudice. In State v. Miles, 344 N.W.2d at 234-35, the Iowa Supreme Court adopted the standard for prejudice set forth in United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982). Essentially, the

Frady standard requires the defendant to demonstrate not only "a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. (emphasis in original). The Miles court quoted with approval the fifth circuit's application of this standard in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982).

On review of the fifth circuit's decision in Strickland, the United States Supreme Court enunciated a test for prejudice that was more stringent than the standard employed by the fifth circuit. The Court first stated that the benchmark for judging any claim of ineffectiveness is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, ___ U.S. at ___, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. The Court then stated the test:

> 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 confidence in the outcome.

Id. at ___, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Applying the Strickland standard, we cannot conclude that counsel's failure to except to the marshalling instruction was prejudicial to defendant. It does not appear that the inclusion of the alternative elements of section 709.4, Iowa Code (1983), would have changed the decision in this case. As set out above, there was no dispute as to defendant's age or the age of Daniella at the time the acts complained of were alleged to have occurred. The elements omitted were without dispute. The fighting issue had to be whether the sex acts occurred. The inclusion of the elements in the marshalling instruction would not likely have resulted in a reasonable probability of a change in the outcome of the trial. Moreover, the elements of the crime were given to the jury in instruction number 7. Thus, this case is like the Miles case. In Miles the supreme court held that an absence, in the marshalling instruction, of instruction on an issue which was not a fighting

issue is not prejudicial when a separate instruction correctly informed the jury of the elements that must be proved. 344 N.W.2d at 235.

Defendant has failed to show that the failure to except to the marshalling instruction was prejudicial. The conviction for third degree sexual abuse must be affirmed.

AFFIRMED.