IN THE COURT OF APPEALS OF IOWA

No. 6-244 / 95-825

FILED
MAY 31 1996
CLERK SUPREME COURT

GARY DEAN SNOW,
Appellant.

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Winneshiek County, John Bauercamper, Judge.

Appeal from denial of application for postconviction relief. **AFFIRMED.**

Andrew P. Nelson of Meyer, Lorentzen & Nelson, Decorah, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Andrew Van Der Maaten, County Attorney, for appellee.

Considered by Habhab, P.J., Cady, J., and Hayden, S.J.* Vogel, J., takes no part.

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

HAYDEN, S.J.

Gary Snow appeals from the denial of his application for postconviction relief. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). Snow has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice Snow must prove there is a reasonable probability but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Finding a lack of prejudice, we affirm the denial of Snow's application.

Snow was charged with five counts of sexual abusing his step-daughter. Three of the counts were alleged to have occurred in Winneshiek County and two in Allamakee county. He was convicted on all of the counts. The child had told her mother of the abuse, but the mother did nothing to stop further abuse from occurring. The mother pled guilty to child endangerment and was a witness on Snow's behalf at trial.

Snow's brief sets forth several allegations of ineffective assistance including: failure to object to venue; failure to move to sever; failure to object to evidence of the wife's guilty plea; failure to object to evidence of the wife's opinion testimony; failure to object to a marshaling instruction; failure to have the discussion regarding

invocation of the fifth amendment occur outside the presence of the jury; and failure to object to the State's cross-examination of the defendant on the grounds of prosecutorial misconduct.

A review of the evidence offered at the postconviction proceeding reveals several of the matters of which the defendant now complains were the result of well-considered and deliberate strategic choices made by trial counsel. Those issues include the decision not to move to sever the counts, to use the defendant's wife's testimony despite her entry of a guilty plea and her prior statements regarding the truthfulness of her daughter, and the discussion of the defendant's fifth amendment rights in front of the jury.

Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Trial counsel was confronted with a difficult case. The victim's testimony was persuasive and the medical evidence substantiated the allegation the victim had been repeatedly sexually abused. Given these circumstances, trial counsel's strategic decisions were reasonable and do not rise to the level of ineffective assistance.

With respect to Snow's remaining claims of ineffective assistance, we note a reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352

N.W.2d 683, 685 (Iowa 1984). Snow argues that when considered in the aggregate, his allegations of ineffective assistance rise to the level of constitutional error. We disagree. *See e.g., Hamann v. State*, 324 N.W.2d 906, 916 (Iowa 1982) (totality of circumstances did not rise to requisite level of materiality to be constitutional violation).

Even if Snow's counsel was deficient as alleged by Snow, there was no prejudice. The testimony of the victim and the expert medical evidence were sufficient to prove Snow's guilt beyond a reasonable doubt. There is no reasonable likelihood the jury's verdict would have been different absent the claimed errors. Snow has failed to demonstrate prejudice, and we affirm the denial of his application for postconviction relief.

AFFIRMED.