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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 26, 1986
v.	)	6-316 85-1315
ROBERT NATHAN SMITH, SR.,	)	316
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Clarke County (No. 3148) - Theodore H. Miller, Judge.

Defendant appeals from judgment and sentence entered upon jury verdicts finding him guilty of assault without intent to inflict serious injury and third-degree sexual abuse. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Assistant Attorney General; and Gary G. Kimes, County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J. 317

Defendant appeals from judgment and sentence entered upon jury verdicts finding him guilty of assault without intent to inflict serious injury in violation of Iowa Code section 708.2(2), and third-degree sexual abuse in violation of Iowa Codes section 709.4(4). Defendant contends he was denied his constitutional right to the effective assistance of counsel when his trial attorney failed to object to: (1) comments made by the prosecutor during his opening statement; (2) questions posed by the prosecutor to a witness concerning the witness's conversations with the victim; (3) questions posed by the prosecutor to a child abuse investigator concerning the percentage of investigations in which the investigator recommended the filing of criminal charges; (4) the prosecutor's cross-examination of defendant's psychiatrist; and (5) the prosecutor's cross-examination of the defendant concerning his personal history. Defendant contends the cumulative effect of the alleged prosecutorial misconduct and the alleged ineffective assistance of trial counsel deprived him of his right to a fair trial. The State contends that the defendant's claim of ineffective assistance of counsel should be reserved for postconviction proceedings.

On April 3, 1985, fourteen-year-old Bobby Smith the son of defendant Robert Nathan Smith, Sr., was treated at the Clarke County Public Hospital for injuries he received when his father struck him with a cane and sprayed him with a deodorant-type chemical. The attack was allegedly provoked by Bobby's refusal to engage in sexual activity with his father. On April 10, 1985, Robert Smith, Sr., was arrested and charged with assault with intent to inflict serious injury and third degree sexual abuse.

A jury trial commenced on July 15, 1985. During opening statements, the prosecutor stated that he was prevented from telling the jurors what Bobby had said to a child abuse investigator because the statements were hearsay.

Defendant's counsel failed to object to the prosecutor's comments. Defense counsel also failed to object: (1) when the prosecutor questioned a witness about a conversation which the witness had with Bobby while at the hospital on April 3, 1985, concerning Bobby's "gentle nature"; (2) when a child abuse investigator testified that she recommended that criminal charges be filed in ten percent of the child abuse and sexual abuse cases she investigated; (3) when the prosecutor cross-examined the defendant's psychiatrist concerning specific incidents in the defendant's life; and (4) when the prosecutor cross-examined the defendant concerning defendant's personal history, including his precustodial contact with his children, his weight, his prior marriages, and his use of prescriptions drugs.

At trial Bobby testified that his father had sexually abused him on several occasions prior to April 3, 1985. The defendant admitted that he struck Bobby with a cane and sprayed him with a chemical, but denied sexually abusing him or intending to harm him.

Before the case was submitted to the jury, the trial court granted the state's motion to amend the information to allege assault without intent to inflict serious injury. On July 17, 1085, the jury returned verdicts finding the defendant guilty of assault without intent and third-degree sexual abuse. On August 7, 1985, defendant was sentenced to concurrent terms of imprisonment not to exceed one year on the assault conviction and not to exceed ten years on the third-degree sexual abuse conviction.

When a criminal defendant claims that he was denied a fair trial due to ineffective assistance of counsel, we must make an independent evaluation of the totality of the relevant circumstances. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). The party claiming that his trial counsel was ineffective, depriving him of his sixth amendment right to counsel, must show that (1) counsel

failed to perform an essential duty, and (2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). In deciding the first component, whether trial counsel's performance was deficient, we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. Hinkle v. State, 290 N.W.2d 28, 30-31 (Iowa 1980). The petitioner must overcome a presumption that counsel is competent. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065-66, 80 L.Ed.2d 674, 693-94 (1984). The ultimate test is whether under the entire record and totality of the circumstances, counsel's performance was within the range of normal competency. Henderson v. Scurr, 313 N.W.2d 522, 524 (Iowa 1981).

Concerning the prejudice component of an ineffective assistance of counsel claim, we require the claimant to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage, thereby constituting a denial of the claimant's due process right to a fair trial, fundamental miscarriage of justice, or equivalent constitutional deprivation. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test for determining whether specified errors resulted in the required prejudice is whether there is a probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 699. A reasonable probability is sufficient to undermine confidence in the outcome. Id. We need not determine whether counsel's performance was deficient before examining the prejudice component of an ineffectiveness claim. Id. at 697, 104 S.Ct. at 2070, 80 L.Ed.2d at 700.

When examining a claim of ineffective assistance of counsel, we must consider the totality of the circumstances and determine whether counsel's performance was within the normal range of competence. Meier v. State,

337 N.W.2d 204, 206 (Iowa 1983). The record before this court is not adequate for making this determination. We are hesitant to make what would amount to an ex parte decision. An ineffective assistance of counsel issue ordinarily requires an evidentiary, adversary hearing. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980). Defendant's counsel's competence is more properly presented on an application for postconviction relief. State v. Poyner, 306 N.W.2d 716, 719 (1981). Such a proceeding would allow opportunity to more fully develop the record to show all circumstances, including any not in the record, concerning strategy and reasons involved in counsel's performance. State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979), cert. denied, 446 U.S. 921, 64 L. Ed. 2d 277, 100 S. Ct. 1854 (1980).

The record is insufficient for this court to entertain an ineffective assistance claim. We affirm and preserve the issue for postconviction relief proceedings.

AFFIRMED.