

IN THE COURT OF APPEALS OF IOWA

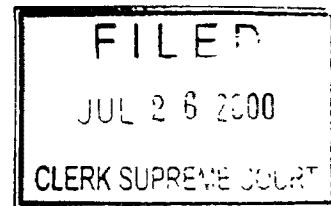
No. 0-243 / 99-0943

Filed July 26, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KOREY LYN KLAASSEN,
Defendant-Appellant.



Appeal from the Iowa District Court for Dickinson County, Frank B. Nelson, Judge.

Defendant appeals following his conviction of child endangerment, in violation of Iowa Code section 726.6 (1997). He contends he was provided ineffective assistance of counsel in a number of respects. He also maintains the court had a duty to *sua sponte* inquire directly of him whether he knowingly and intelligently waived his right to testify. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Charles N. Thoman, Assistant Attorney General, and Edward Bjornstad, County Attorney, for appellee.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

MILLER, J.

Defendant Korey Klaassen appeals his conviction of Child Endangerment, in violation of Iowa Code section 726.6 (1997), following jury trial. Klaassen contends (1) he was denied his right to effective assistance of counsel and (2) the trial court erred in not engaging in a colloquy with him to ensure he knowingly and intelligently waived his right to testify on his own behalf. We affirm.

Kyler Klaassen, the four-month-old son of Bonnie Everrets (Bonnie) and the defendant, Korey Klaassen (Korey), suffered serious brain injury while in Korey's care. Kyler is now brain dead. Korey cared for Kyler and his other son, Kameron, during the day while Bonnie worked. Bonnie testified when she left for work on March 20, 1998, Kyler showed no signs of distress or injury. Later that morning while Korey's brother, Keith, was at Korey and Bonnie's residence, Kyler fell from the couch. Kyler appeared uninjured from the fall. Bonnie came home for lunch, and observed Kyler to be awake and alert, but observed a light bruise on his head, apparently from the fall earlier in the morning.

A neighbor, April Kroeplin, stopped by the defendant's residence at about 3:00 that afternoon, and observed Kyler "was cooing and smiling at me and everything." Keith returned to Korey's residence at 3:30 that afternoon, and left approximately ten minutes later. Keith testified Kyler appeared alert, awake and content during this time. A short time later Korey went to Kroeplin's residence to call Bonnie at work and reported "something's wrong with Kyler . . . he seems to not be breathing." Bonnie called emergency personnel and left work.

The first person on the scene was Jerald Wallace, a first-responder volunteer. Wallace observed Kyler lying on the couch with his eyes open but not

moving, and that Kyler had no pulse, was not breathing and was a bluish-gray color. Wallace performed CPR. Upon Kyler's arrival at the emergency room he was pronounced brain-dead. Further relevant facts will be discussed below.

I. Ineffective Assistance of Counsel Claims

To establish an ineffective assistance of counsel claim, the defendant 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). The test of ineffective assistance of counsel focuses on whether the performance by counsel was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1994). The defendant must show that performance fell below an objective standard of reasonableness so that counsel failed to fulfill the role in the adversary process that the Sixth Amendment envisions. *Id.*

A presumption exists that counsel is competent and that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (citing *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94). The defendant must overcome this presumption and has the burden of proving by a preponderance of the evidence both of the two elements of such a claim. *Id.*; *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience does not necessarily amount to ineffective counsel. *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). To warrant a finding of ineffective assistance of counsel, the circumstances must include an

affirmative factual basis demonstrating counsel's inadequacy of representation.
Id.

While we often preserve ineffective assistance of counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). The record in this case is sufficient to address most of his claims. All others are too general in nature to allow us to address them or preserve them. Our review is de novo. *Id.* We now turn to his five claims of ineffective assistance of counsel.

A. Testimony of Dr. Wilbur Smith

Dr. Smith, who testified for the State, provided the jury a detailed description of the nature and extent of Kyler's injuries. During the course of Dr. Smith's testimony, he opined

Kyler died of severe head injury and it was a traumatic, non-accidental head injury that caused—I say died. That's not right. I mean, he's obviously alive but his brain suffered what is a terminal injury to his brain.

Klaassen contends counsel was ineffective for failing to object to Dr. Smith's opinion that Kyler's head injury was non-accidental, because that opinion is outside the proper scope of expert testimony.

"No witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible." *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942). This holding was reaffirmed in *State v. McKowen*, 447 N.W.2d 546 (Iowa App. 1989). In *McKowen*, an expert's testimony concerned battered child syndrome. *Id.* at 548. After explaining the medical evidence, the expert concluded the victim's injuries could not have been accidental, but made no statement as to the identity

of the person who inflicted the injuries. *Id.* Therefore, we held that the expert's testimony was proper because the expert did not opine on the *defendant's* guilt or innocence. *Id.* (emphasis added).

Dr. Smith's testimony that Kyler's injuries were non-accidental was proper. After explaining in detail the injuries Kyler suffered, Dr. Smith opined the nature of the injuries were such that they could not have been inflicted accidentally. As in *McKowen*, Dr. Smith did not testify as to who inflicted the injuries on Kyler. Therefore, counsel did not breach an essential duty by failing to object to non-objectionable testimony. See *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (holding counsel is not ineffective when the issue counsel failed to raise has no merit).

B. Testimony of Dr. Randall Alexander

Dr. Alexander also testified for the State. The prosecutor asked a hypothetical question that asked him to assume certain facts supported by the evidence and then asked whether a fall from a certain kitchen countertop, as described by Korey to an investigator and to Bonnie, could have caused Kyler's injuries. Dr. Alexander responded that such a fall could only account for the bruise, and all the other injuries were a lot more severe than could be explained by such a fall. Klaassen contends counsel was ineffective for failing to object that the question called for an answer that was not the proper subject for expert testimony. The question asked nothing about Klaassen's guilt or innocence or about who caused Kyler's injuries. The answer stated nothing about Klaassen's guilt or innocence or about who caused Kyler's injuries. Therefore, for the

reasons stated concerning to Dr. Smith's testimony, counsel breached no essential duty by not objecting to this question.

Klaassen also contends counsel breached an essential duty by failing to object to Dr. Alexander's testimony in which he described the "mechanism of shaken baby . . . causes the injuries." Klaassen contends the testimony was objectionable because the record does not establish Dr. Alexander as an expert in the mechanism of shaking an infant and the testimony improperly indicated Klaassen shook Kyler and is thus guilty. The trial court has considerable discretion in determining whether a witness has sufficient personal experience to render an expert opinion. *State v. Taylor*, 336 N.W.2d 721, 726 (Iowa 1986). Expert opinion testimony is only admissible when it is based on the witness's special training, experience or knowledge. *See id.*

The record is clear Dr. Alexander was qualified to testify as to how shaking a baby would cause the injuries sustained by Kyler. Dr. Alexander is a pediatrician, an associate professor of pediatrics at the Moorehouse School of Medicine, and the director of the child abuse center at Moorehouse. He has conducted research on various aspects of shaken baby syndrome. He co-authored with Dr. Smith a "not yet published" study testing how long people could shake dolls of various sizes. Dr. Alexander clearly qualified as an expert who was capable of describing to a jury how shaking a baby causes injuries. Therefore, counsel was not ineffective in failing to make a meritless objection. *Westeen*, 591 N.W.2d at 207.

C. Other Claims of Ineffective Assistance

Klaassen claims trial counsel was ineffective in failing to 1) properly advise him on his right to testify; 2) present a defense that the person who earlier killed another of Everetts' children also killed Kyler; and 3) investigate with zeal and argue with zeal the prejudicial aspects that the local media had on the jury members. Klaassen requests this court preserve these three issues for a possible postconviction relief proceeding.

Where the record on direct appeal is not adequate to permit us to resolve an issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Astello*, 602 N.W.2d 190, 198 (Iowa App. 1999). However, this preference for preserving ineffective of assistance claims does not relieve Klaassen from his duty on direct appeal to state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* See also *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

Klaassen claims counsel was ineffective in failing to properly advise him concerning his right to testify. However, he does not in any manner indicate what erroneous advice, if any, he was given, or what advice he should have been given, but was not. His claim is therefore too vague or general to address on appeal or to preserve for a possible postconviction relief proceeding. See *Dunbar*, 515 N.W.2d at 15. This claim might arguably be seen as a claim trial counsel did not advise Klaassen sufficiently to allow him to make a knowing and intelligent decision as to whether to testify. However, the record is adequate to address such a claim and we find no merit to it. As shown by the record and conceded at oral argument on appeal, trial counsel and Klaassen had a reported

private conference after the State had rested. Trial counsel had made certain Klaassen was aware of and had considered numerous factors that bore on the question of whether or not he should testify. Klaassen acknowledged he and his trial counsel had talked some five to seven times about whether he should testify; had mutually decided against Klaassen testifying; and that among the strategic and tactical reasons he would not testify were 1) any testimony given by him at this trial could be used against him at any subsequent murder trial should Kyler die; 2) upon request Klaassen was entitled to an instruction concerning him not testifying, 3) Klaassen's extensive record of criminal convictions might be admitted into evidence if he testified, and 4) Klaassen's testimony would probably not add anything to the evidence already presented. The record does not support, and in fact strongly refutes, any claim of insufficient advice concerning whether or not to testify.

Klaassen's claim counsel was ineffective in failing to present a defense that the person who murdered another child of Everetts also killed Kyler is specific enough to preserve. (We note that Kyler was in fact not killed, but was very seriously injured and rendered "brain dead".) However, the record is also adequate to address this claim on direct appeal. As pointed out by the State in its brief, a Mr. Bourgoyne was convicted of first-degree murder for the death of that child and presumably was serving a sentence for that conviction at the time of Kyler's injuries. See *State v. Bourgoyne*, 97-2107 (Iowa App. Nov. 30, 1998). Although Klaassen filed a reply brief, he does not respond to this point made by the State. Counsel was not ineffective in not presenting a defense that

Bourgoyne probably inflicted Kyler's injuries, when Bourgoyne apparently could not have done so.

Klaassen also specifically argues trial counsel was ineffective in failing to investigate with zeal the possible prejudicial aspects of local media coverage, and further argues counsel made an incomplete motion for mistrial based on the same media coverage. However, he does not identify where counsel was deficient in failing to investigate and argue with zeal. The record shows counsel moved for a mistrial and later moved for a new trial and in arrest of judgment based on media comments, and the trial court twice admonished the jury to avoid media comments during the trial and further admonished them to not talk with anyone about the case until the trial concluded. When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job. *Dunbar*, 515 N.W.2d at 15. Rather, the defendant must identify how competent representation probably would have changed the outcome in order for us to address or preserve his claim. *Id.* He does not do so. Therefore we will not address or preserve this claim.

II. *Sua Sponte* Trial Court Inquiry Into Klaassen's Waiver to Testify

Klaassen claims the trial court erred in failing to, *sua sponte*, engage him in a colloquy to ensure he knowingly and intelligently waived his right to testify on his own behalf. Without addressing the State's claim Klaassen did not preserve error by merely filing a notice of appeal, we reject Klaassen's claim on the merits.

Klaassen's constitutional right to testify on his own behalf is grounded in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. See *Rock v. Arkansas*, 483 U.S. 44, 49-54, 107 S. Ct. 2704, 2708-10, 97 L. Ed.

2d 37, 44-48 (1987). Trial counsel has the obligation to advise the defendant of his or her right to testify or not in a manner that would enable the defendant to make a knowing and intelligent choice. See, e.g., *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996).

As stated by the Iowa Supreme Court in *Schertz v. State*, 380 N.W.2d 404, 415 (Iowa 1985):

[A] trial court has no constitutional or other duty to stop the trial proceedings and determine that a criminal defendant who is represented by legal counsel has validly exercised her Fifth Amendment rights in a jury trial. The decision to testify is not at the same level as that of a plea of guilty which deprives a defendant of numerous rights. Also, a decision whether to testify is one that is considered part of trial strategy. This is a matter that the trial court should not be involved in and is better left to the criminal defendant and his or her counsel.

Schertz, 380 N.W.2d at 415. The Constitution does not require the trial court to inquire into whether a waiver of a defendant's right to testify was knowing and voluntary. We determine *Schertz* is controlling in the present case.

Klaassen recognizes *Schertz* controls, but contends the holding in *Rock v. Arkansas*, 483 U.S. 44, 49-54, 107 S. Ct. 2704, 2708-10, 97 L. Ed. 2d 37, 44-48 (1987), that a defendant has a constitutional right to testify, impacts the Iowa Supreme Court's decision in *Schertz* such that we may address the issue. However, as *Rock* made clear, a defendant's right to testify on his own behalf was well-grounded in its decisions years before the *Rock* decision. See *Rock*, 483 U.S. at 49-54, 107 S. Ct. at 2708-10, 97 L. Ed. 2d at 44-48 (citing *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S. Ct. 2525, 2533 n. 15, 45 L. Ed. 2d 562, 572 n. 15 (1975); *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507, 92 L. Ed. 682 (1948); *Ferguson v. Georgia*, 365 U.S. 570, 602, 81 S. Ct. 756, 773, 5 L.

Ed. 2d 783, 802 (1961) (Clark, J., concurring); and *Harris v. New York*, 401 U.S. 222, 225, 91 S. Ct. 643, 645, 28 L. Ed. 2d 1, 4 (1971)). Therefore, the holding in *Rock* does not impact the Iowa Supreme Court's decision in *Schertz*. We are not at liberty to overturn Iowa Supreme Court precedent. *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa App. 1990). We therefore decline Klaassen's invitation to require the trial courts to engage a defendant in a colloquy concerning a defendant's decision not to testify.

Further, as noted above, the record is clear Klaassen waived his right to testify in a knowing and intelligent manner. Therefore, even if it was error on the part of the trial court not to engage in the suggested colloquy, it is clear beyond a reasonable doubt no prejudice would have resulted, and reversal would not be warranted. See *State v. Boley*, 456 N.W.2d 674, 678 (Iowa 1990) ("An error of constitutional magnitude does not mandate a new trial if the error was harmless beyond a reasonable doubt.").

AFFIRMED.