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IN THE COURT OF APPEALS OF IOWA

No. 2-346 / 91-1590

LAWRENCE J. OAKLEY,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

The defendant appeals a judgment of the district court denying his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; Denver D. Dillard, County Attorney; and Scott Petersen, Assistant County Attorney, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

DONIELSON, P.J.

The defendant, Lawrence Oakley, was found guilty of second-degree sexual abuse following a jury trial. Oakley was sentenced to a term of imprisonment not to exceed twenty-five years. His conviction was affirmed by the Iowa Supreme Court in an unpublished opinion, State v. Oakley, No. 89-445 (Iowa Oct. 30, 1989).

Oakley was charged with sexually abusing his then three-year-old daughter, Ann,[1] by inserting his finger into her vaginal area. At trial, the district court ruled Ann was not competent to testify. The State, however, relied on statements Ann made to her great-grandmother and to an examining physician, Dr. Opdebeeck.

Oakley subsequently filed an application for postconviction relief on September 17, 1990. Oakley claimed his trial counsel was ineffective in failing to challenge the trial court's ruling that Ann was incompetent to testify and by failing to maintain his sixth amendment right of confrontation had been violated. Oakley also claimed ineffective assistance when trial counsel failed to object to several hearsay statements and also when trial counsel failed to object to the county attorney's

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1. A.O. are the child's initials. Ann is not her given name.

cross-examination of him regarding his stepdaughter, Mary.[2]

The district court denied the application on September 25, 1991. Oakley now appeals. He contends the district court erred in failing to grant him a new trial based upon his claim of ineffective assistance of counsel.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts a violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume counsel acted competently. See Risdal, 404 N.W.2d at 131.

I. **Competency of Ann as Witness.** Oakley first contends his trial counsel was ineffective in failing to assert on appeal the trial court had abused its discretion

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2. M.H. are the child's initials. Mary is not her given name.

in finding Ann incompetent to testify. He further contends his trial counsel was ineffective in failing to argue such a finding denied him his sixth-amendment right of confrontation.

We find the district court properly found Ann incompetent to testify. Generally, "competency is measured by four essential capacities--to understand, to recollect, to communicate, and to be truthful." State v. Andrews, 447 N.W.2d 118, 121 (Iowa 1989). We agree with the district court's findings that "[i]t is obvious from the transcript that [Ann] lacked the ability to understand the questions, to communicate in response to such questioning, or to demonstrate a willingness to be truthful."

As the court's ruling Ann to be incompetent was not in error, we do not find Oakley's trial counsel ineffective for failing to assert this issue on appeal. Furthermore, as Ann was properly found incompetent to testify, Oakley's confrontational rights under the sixth amendment were not violated. See Idaho v. Wright, ___ U.S. ___, ___, 110 S. Ct. 3139, 3146, 111 L. Ed. 2d 638, 651-52 (1990) (the Confrontation Clause creates a preference for face-to-face accusation unless the witness is unavailable).

II. Hearsay Statements. Oakley next contends his trial counsel was ineffective in failing to object to the hearsay statements made by Ann to her great-grandmother and to Dr. Opdebeeck regarding where she was sore. Oakley argues the State offered these statements into evidence to

prove the truth of the matter asserted and the statements were not covered by any hearsay exceptions. He further contends his trial counsel was ineffective for failing to argue the admission of these statements violated his sixth-amendment right to confrontation.

Trial counsel testified at the postconviction hearing regarding the admissibility of these statements. Trial counsel testified he did not object because he did not want the jury to assume Oakley did not want them to hear the statements, and he thought the statements were admissible pursuant to Iowa Rule of Evidence 803(4). In its brief, the State also submits the statements were admissible pursuant to Iowa Rule of Evidence 803(2), as excited utterances.

The great-grandmother's testimony included Ann's voluntary statement during a bath that her bottom hurt because "Daddy sticks his finger up me." If trial counsel had objected, the prosecution would have had valid grounds to argue this statement was admissible as a then-existing physical condition. Iowa R. Evid. 803(3). Dr. Opdebeeck testified Ann "said that Dad puts his finger in there and it hurts," pointing to her intervulva area. This statement fell within the exception for statements made for the purpose of medical diagnosis or treatment. Iowa R. Evid. 803(4). We also agree both of these statements may have also been found admissible as excited utterances. Iowa R. Evid. 803(2).

As we find any objections to the admission of these statements might have been properly overruled by several of the hearsay exceptions, we do not find Oakley's trial counsel was ineffective for the failure to object.

Furthermore, we do not find the failure to object violated Oakley's sixth-amendment right to confrontation. The Confrontation Clause prohibits the admission of certain hearsay statements, unless those statements meet the standards as set forth in Idaho v. Wright:

> First . . . the prosecution must either produce or demonstrate the unavailability of the declaration whose statement it wishes to use against the defendant. . . . Second, once a witness is shown to be unavailable, his statement is admissible only if it bears adequate "indicia of reliability."

Idaho v. Wright, ___ U.S. ___, ___, 110 S. Ct. 3139, 3146, 111 L. Ed. 2d 638, 651-52 (1990) (citations omitted).

As we have found the district court correctly ruled Ann was incompetent to testify, we find Ann was unavailable for the purposes of the Confrontation Clause. See id.; State v. Andrews, 447 N.W.2d 118, 122 (Iowa 1989). Because of the circumstances in which these statements arose, we find the statements bore adequate indicia of reliability.

III. Prosecutorial Misconduct. Oakley finally contends his trial counsel was ineffective in failing to object to the prosecutor's cross-examination of him regarding his stepdaughter, Mary. Oakley had also been charged with lascivious acts with Mary, but this charge was dismissed following Oakley's successful motion for judgment

of acquittal at the close of the State's case. The prosecutor asked Oakley during cross-examination about an incident when Mary had slept with him and found her panties down. Oakley argues these questions were prosecutorial misconduct and highly prejudicial. Oakley points out the trial court had ruled the prosecutor was to limit his scope of examination only to those charges of sexual abuse against Ann.

Trial counsel testified he felt the prosecutor's questions "went right up to the line" of the trial court's earlier order. However, he wanted the prosecutor to bring out some testimony concerning Mary because she had admitted lying to investigators and he wanted that in the record. He also contended the prosecutor's questions gave Oakley an opportunity to diffuse and explain Mary's damaging testimony.

We agree Oakley has failed to prove he was prejudiced by the prosecutor's cross-examination. The jurors heard nothing new regarding Mary's allegations in this line of questioning and the defense was provided with an opportunity to explain the allegations. Therefore, we do not agree his trial counsel was ineffective for failing to object to this line of questioning.

The costs of this appeal are taxed to Oakley.

For all the reasons stated, we affirm the district court.

AFFIRMED.

Habhab, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

Applicant-appellant L.J. Oakley was convicted of sexually abusing his four-year-old daughter. In this appeal from an order denying postconviction relief, Oakley contends his trial court counsel was not competent in failing to raise several issues on appeal. Oakley's trial attorney represented him on direct appeal. Thus, the failure to raise these issues on direct appeal does not preclude their being raised in the postconviction proceedings.

The trial court found that Oakley's four-year-old daughter was not competent to testify, but allowed testimony from others of statements she had made.

Applicant's attorney had not challenged her competency to testify. The trial court in ruling the witness was not competent to testify found:

> (1) she was not capable of understanding the difference between telling a lie and the truth;
> (2) she was not old enough to comprehend; and
> (3) it would be traumatic for her to testify in front of a jury.

A review of the alleged victim's in-camera testimony reveals the child's testimony did not clearly indicate she had been sexually abused by her father. The young witness was not able to recall the abuse, nor did she testify to any details of the alleged abuse.

The only evidence at trial that identified Oakley as the perpetrator of the abuse was testimony of statements made by the child to her great-grandmother and Dr. Opdebeeck.

Oakley contends his trial counsel was ineffective in not objecting to the trial court decision that the alleged victim was not competent to testify and in not raising this issue on direct appeal.

My review of the alleged victim's testimony reveals she was competent to testify, but that her testimony of the alleged events was not very convincing. She gave testimony that indicated she understood the difference between the truth and a lie. Some of her confusion was a result of the way the questions she was asked were phrased Furthermore, there was no evidence that if she testified there was potential for psychological harm. I do not agree that the alleged victim should have been found not competent to testify. Oakley's trial counsel did make it known to the court that he wanted the alleged victim to testify and his client would be prejudiced by her failure to testify. He did not, however, raise this issue on direct appeal. In looking at the holding of State v. Andrews, 447 N.W.2d 118, 123 (Iowa 1989); State v. Hoversten, 437 N.W.2d 240, 242 (Iowa 1989); In re J.D.S., 436 N.W.2d 342, 345 (Iowa 1989), I am convinced this challenge would have been successful if raised on direct appeal. Consequently, I disagree with the

majority's decision that the trial court's determination of competency was correct. Furthermore, because my review of the alleged victim's testimony reveals she would not be a convincing witness, I feel Oakley was prejudiced in not having her testify and in denying him his right of confrontation.

Oakley's second contention is that his counsel was not effective in failing to object to testimony of the alleged victim's great-grandmother and Dr. Opdebeeck as to statements the alleged victim made.

The majority says the statements were admissible as excited utterances. I disagree with the majority that either statement was admissible as an excited utterance. Iowa Rule of Evidence 803, in relevant part, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
> (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The great-grandmother testified that during a bath the child said her bottom hurt. The child's great-grandmother asked, "Why does your bottom hurt, what happened?" The child stated, "Daddy sticks his finger up me."

Dr. Opdebeeck testified the child "pointed with finger into intervulva area"[1] and said, "Dad puts his finger in there and it hurts." The majority is of the opinion these statements are admissible as excited utterances. However, to be an excited utterance, a statement has to be made while [the victim] is under the stress of excitement caused by the event or condition, see State v. Brown, 341 N.W.2d 10, 13 (Iowa 1983), not a statement of memory or belief to prove the fact remembered. The rule can only "support the admission of a hearsay statement by a child of tender years in a sexual abuse case if the foundation criteria of the rule are met." Id. I distinguish this from situations where statements were made close to the time of the alleged event. See State v. Hy, 458 N.W.2d 609 (Iowa App. 1990); State v. Watts, 441 N.W.2d 395 (Iowa 1989).

The majority has also determined the statements to the great-grandmother are admissible as a then-existing physical condition. Iowa Rule of Evidence 803, in relevant part, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent,

1. The doctor defined the perineum as the area between the vagina and the vulva; and that is the area where the labia and vulva meet that is intervulva.

> plan, motive, design, mental statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

While evidence the child said her bottom hurt might be admissible under this exception, there is no basis under this section to admit evidence Oakley may have been the perpetrator. I find no basis under which the statements made by the alleged victim to her great-grandmother were admissible, and I would find that Oakley's trial counsel was not effective when he failed to object to them. The statements clearly were prejudicial, particularly on this record where there is little other evidence of abuse and no other evidence supporting the charge against Oakley.

Furthermore, because there is no other evidence to support a finding Oakley perpetrated the abuse, the evidence of the great-grandmother and Dr. Opdebeeck was evidence that was admitted for the truth of the matter asserted, "that petitioner sexually abused the child," because without this testimony, the State did not have any evidence to meet its burden of proof on this issue.

I would reverse and remand for a new trial.