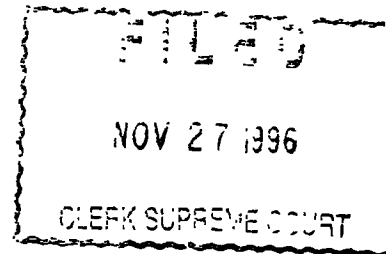


IN THE COURT OF APPEALS OF IOWA

No. 6-601 / 95-1644



STATE OF IOWA,

Plaintiff-Appellee,

vs.

DENNIS HIGGERSON,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Michael J. Newmeister, Judge.

Defendant appeals from his conviction on three counts of indecent exposure in violation of Iowa Code section 709.9 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, J. Patrick White, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee.

John Robertson, Iowa City, for appellant.

Anne M. Lahey, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Cady and Huitink, JJ.

HUITINK, J.

Defendant Dennis Higgerson appeals his conviction of three counts of indecent exposure, a serious misdemeanor, in violation of Iowa Code section 709.9. We affirm.

Higgerson's conviction arose out of the following events: On the morning of October 8, 1994, Paula McMartin and her daughter delivered the paper to the Higgerson residence. The paper was delivered to the residence every day between 5:45 and 6:00 a.m. On the morning in question, McMartin observed Higgerson standing back from the window in the hallway masturbating. She stated he may have had a towel or underwear on, but she was not sure. Her daughter in McMartin's vehicle made the same observations.

On October 10, McMartin testified she again witnessed Higgerson masturbating in the same area at the same time of day. The next two mornings her husband, Officer Edwin McMartin of the Iowa City Police Department, accompanied her on her route. The McMartins observed Higgerson masturbating on the morning of October 12. Officer McMartin testified the front door was open, and from the sidewalk where he was standing, he could see Higgerson in the same hallway. The officer went to the front door and viewed the silhouette of a naked man with an erect penis in the light and his face in the shadows.

Another witness, Margaret Mitchell, testified that she and her daughter delivered the paper to Higgerson's residence in March 1994. She observed a man through the

window on four or five different occasions standing in his underwear. On the third, fourth, and fifth occasions, she observed the man making motions like he was masturbating. At Officer McMartin's suggestion, she contacted Sergeant James Linn of the Iowa City Police Department to report the incidents. Sergeant Linn contacted Higgeson and advised him to "cease and desist".

On appeal, Higgeson asserts he was denied effective assistance of counsel by his attorney's failure to object to the State's expert testimony by Shawn Simmons, a probation and parole officer who works with sex offenders. Simmons testified about Higgeson's potential to commit future sex crimes in the absence of legal intervention.¹

¹ The following testimony was provided by Simmons as a rebuttal witness for the State:

Q: In your experience can indecent exposure lead to other kinds of more aggressive behavior sexually? A: You can't really draw a cause and effect relationship and say, well, this individual exposes himself so he will necessarily graduate into abusing children or whatever, but it's not at all uncommon to find people who have gone on to do these kinds of things that do admit that they began with voyeuristic types of things, peeking in windows, maybe progressed through some types of inappropriate touching or rubbing up against people in a public setting, on a bus, or what not, and then progressing to exposing themselves and the exposure will become a more frequent type thing and it becomes a matter where they don't get the thrill out of it that they once did, so they need more and they need to take it to a higher level, so many do go into more hands on types of offenses, but not necessarily all.

Q: Okay. In your experience does this type of behavior cease without intervention? A: From my experience it does not. Usually, legal consequences are all that — you know, it causes them to realize the inappropriateness of their behavior. Many actually exhibit some sense of relief that it's over, that the secret is finally out, because they've lived such a double life trying to maintain this high degree of secrecy and to feel this

Higgerson argues the testimony was irrelevant in determining if the elements of indecent exposure had been met, was not supported by reliable data, and was extremely prejudicial. He also contends Simmons' experience in supervising sex offenders did not qualify him to testify as an expert on diagnosing sexual offenders.²

type of compulsion to do this. There is actually some sense of relief, although it does not come at the expense of the embarrassment, humiliation, financial expense incurred with being arrested and being prosecuted.

² Q: Mr. Simmons, if a female subject on her paper route reported that a mail [sic] subject began showing up in the window area of his home where she could see him in only his undershorts and on subsequent occasions appeared each time closer to the window and then on other occasions she saw him masturbating at the window in her view, would such behavior to you signal problematic behavior? A: In my experience it certainly would. That sounds like a fairly classic example of – with slight variations of a story I've heard from a number of different expositors that started out exposing themselves less frequently and then it became a more frequent repetitive type of pattern.

Q: If the same male subject was reported by another female carrier and her daughter to be engaged in similar behavior in their presence on more than one occasion, would such behavior to you be symptomatic of problematic sexual behavior? A: That most definitely is. As it becomes an established pattern, I think it's – you know, there may be individuals that would walk by a window – you know, for whatever reason in various states of undress; but when it becomes a pattern and is specifically related to a particular time of day or, as you say, in approximately six months later this scenario, with a paper route where the potential victim could almost be counted upon to be at a certain location at a certain time, that's very much indicative of an addiction – a sexual addiction in a very established pattern of behavior.

Higgerson also cites his attorney's failure to object to the testimony of Officer McMartin. He asserts the officer provided an opinion as to Higgerson's guilt or innocence when he testified whether being seen masturbating constituted a crime.³

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow counsel an opportunity to respond. *See State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We will, however, depart from this preference because the record in this case is sufficient to dispose of Higgerson's claim. *See State v. Schoelerman*, 315 N.W.2d 192, 195 (Iowa 1982).

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

To prevail on a claim of ineffective assistance, the defendant must show (1) his counsel failed to perform an essential duty, and (2) the failure prejudiced him. *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). The defendant has the burden to prove both

³ Q: Did you have any conversations with her [Margaret Mitchell] or anybody else for that matter at the time about whether just being seen masturbating is a crime? A: When it's intentional and you know the paper is being delivered and you leave your front door open and you're at the front door masturbating, yes, it's a crime. I learned that at the police academy.

of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

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.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

On review, we may initially determine whether Higgeson was prejudiced without resolving the duty element of the foregoing test. *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992). Higgeson bears the burden to show a reasonable probability that but for his trial attorney's alleged deficiencies, the outcome of his trial would have been different. *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990); *see also State v. Vessey*, 482 N.W.2d 165 (Iowa 1991) (defendant unable to show that if evidence of police officer's testimony regarding ultimate issue of guilt or innocence on drug trafficking charges had been objected to and excluded, he would have been acquitted).

We find Higgeson has failed to meet his burden to show prejudicial error. Notwithstanding the testimony of Officers Simmons and McMartin, there was overwhelming evidence supporting the verdict. Paula McMartin testified to witnessing Higgeson masturbating on three separate occasions at the same place and time. McMartin's daughter and husband both testified to witnessing the same on two of the

three occasions. The evidence shows that the paper was delivered by the McMartins to the Higgerson residence every day at the same time. Also, testimony revealed that each time the incident occurred, the front door was open, the lights were on, and Higgerson had positioned himself in the hallway so that he could be viewed from the outside. Moreover, testimony was given by another paper carrier who witnessed identical incidents earlier that year. Thus, the jury could infer from these circumstances that Higgerson exposed himself to arouse or satisfy his sexual desires and that he knew or reasonably should have known the act was offensive to his viewers.

We conclude Higgerson has not shown a reasonable probability that but for his trial counsel's failure to object to the opinion testimony, the outcome of the trial would have been different. *See Bumpus*, 459 N.W.2d at 627. Accordingly, we affirm the conviction.

AFFIRMED.