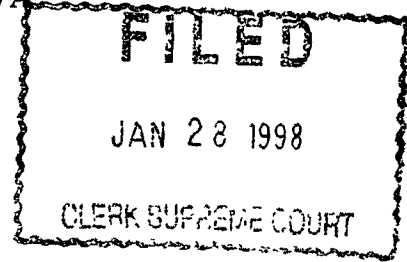


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IN THE COURT OF APPEALS OF IOWA

No. 7-534 / 96-1214
Filed January 28, 1998



STATE OF IOWA,
Appellee,

vs.

RODNEY JOHN GRAY,
Appellant.

Appeal from the Iowa District Court for Jones County, Larry J. Conmey,
Judge.

Rodney Gray appeals from his convictions, following a jury trial, for five counts of second-degree sexual abuse, in violation of Iowa Code sections 709.1 and 709.3(2) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Connie S. Ricklefs, County Attorney, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

HUTTINK, P.J.

Defendant Rodney Gray appeals from his convictions following a jury trial of five counts of second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3(2). We affirm.

I. Background Facts and Proceedings.

Gray was charged with five counts of second-degree sexual abuse, based on allegations he engaged in repeated acts of oral sex with a young boy over a period of years. At trial, the district court admitted an incriminating letter Gray wrote to a clergyperson while in jail awaiting trial. A jail administrator discovered the letter during a routine inspection of outgoing mail.

Gray was convicted on all five counts of second-degree sexual abuse. The district court entered judgment accordingly and sentenced Gray to five terms of incarceration not to exceed twenty-five years.

On appeal Gray contends the court erred in admitting the letter he wrote to a clergyperson. He argues the letter was an inadmissible privileged communication between a penitent and a member of the clergy. The State contends the letter was not confidential and, therefore, not privileged, because Gray knew the letter would be exposed to third-party monitors.

II. Standard of Review.

On evidentiary issues we review for an abuse of discretion. *State v. Archivia*, 495 N.W.2d 364, 367 (Iowa App. 1992). In order to show an abuse of discretion, one

generally must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

III. Gray's Letter.

Initially, we find Gray has not preserved this issue for review. To preserve error for appellate review, the issue must be presented to and passed upon by the district court. *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995). In *Manna*, the trial court denied the defendant's motion to suppress; however, the court addressed only one of the two grounds the defendant offered in support of the motion. *Id.* The supreme court held error was not preserved on the issue not considered by the trial court. *Id.* Careful review of Gray's motion to suppress and his counsel's supporting arguments fails to disclose reference to the privilege issue. Moreover, the district court in its ruling did not address the issue of whether Gray's letter was a privileged communication.

IV. Ineffective Assistance of Counsel.

Gray alternatively argues he was denied effective assistance of counsel based on counsel's failure to preserve the foregoing issue for appellate review.

Claims of ineffective assistance of counsel may be resolved on direct appeal when the attorney's acts or omissions cannot be explained by plausible, strategic, or tactical considerations. *State v. Goff*, 342 N.W.2d 830, 838 (Iowa 1983). "Only in rare cases may the failure to preserve error deny a defendant effective assistance of counsel." *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996)(citation omitted). Our

ultimate concern in such claims 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. *Id.* The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 131-32. It is not necessary to determine whether counsel’s performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). To establish prejudice, Gray must show counsel's failure created a “reasonable probability that but for the error the trial's result would have been different.” *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Where an applicant fails to prove prejudice, we may affirm his conviction without deciding whether counsel failed a duty. *Id.*

Gray has failed to establish any prejudice resulted from counsel’s failure to preserve error. There is substantial evidence in the record to support the jury’s verdict. The victim testified Gray sexually abused him. A police dispatcher testified Gray confessed to sexually abusing the victim while Gray was detained at the police station. Additionally, the record indicates Gray made other incriminating statements found in a journal in Gray’s cell and in another letter he wrote. The disputed letter was merely cumulative of this evidence. *See State v. Shearon*, 449 N.W.2d 86, 91

(Iowa App. 1989)(stating admission of disputed evidence is harmless error where it is merely cumulative to evidence properly admitted at trial). Gray's ineffective assistance of counsel claim must accordingly fail.

V. Fourth Amendment Right to Privacy.

Gray also asserts he had a right to privacy in his letter to Chaplain Ray, and the letter was seized in violation of his Fourth Amendment rights.

We find Gray's argument without merit. "The applicability of the Fourth Amendment depends upon whether 'the person invoking its protection can claim a 'justifiable'; a 'reasonable'; or a 'legitimate expectation of privacy' that has been invaded by government action.'" *State v. Ruan*, 419 N.W.2d 734, 737 (Iowa App. 1987)(citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220, 226 (1979)). Gray was put on notice by the *Jones County Jail Policies & Procedures Manual* that his outgoing mail would be monitored by jail employees. Accordingly, Gray had no reasonable, justifiable, or legitimate expectation of privacy in his letter to Chaplain Ray. The Fourth Amendment does not apply in this case. We affirm the district court on this issue.

AFFIRMED.