IN THE COURT OF APPEALS OF IOWA

No. 1999-458 (9-715) / 98-1965
Filed December 27, 1999

FILED
DEC 27 1999
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SEAN PATRICK O'GEARY,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

Defendant appeals following his conviction for first-degree murder. **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

000641

HUTTINK, P.J.

I. Background Facts and Proceedings.

Sean Patrick O'Geary was charged with first-degree murder following the death of two-year-old Mercedes Blough on January 6, 1997. Under the State's theory, Mercedes was the victim of shaken baby syndrome and died of resulting brain trauma.

At trial the State offered multiple expert witnesses whose testimonial opinions were consistent with the State's theory of shaken baby syndrome. These experts unanimously rejected any notion that Mercedes's head and brain injuries were the result of an accidental fall.

The State presented evidence indicating O'Geary had physically abused Mercedes on other occasions. This evidence included a large number of bite marks on Mercedes's body, welts on her buttocks, and bruises on her head and chest. The State's case also included testimony from hospital personnel and investigators concerning facts and statements gathered in the course of their inquiries into the cause of Mercedes's injuries.

O'Geary denied responsibility for Mercedes's injuries or death. He claimed Mercedes's injuries were accidentally sustained when she either fell from her crib or down the stairs of the residence O'Geary shared with her mother, Jessica Blough. Testimony from O'Geary's medical experts contradicted claims made by the State's experts that Mercedes's head and brain injuries were exclusively nonaccidental. O'Geary's attempt to implicate maternal neglect as a possible cause of Mercedes's

injuries through testimony from Jessica's former roommate, Gina Johnson, was denied by the district court's ruling excluding Johnson's testimony. O'Geary and Jessica Blough both testified Mercedes fell down the steps on the night before she died.

O'Geary initially denied but later conceded responsibility for the bite marks found on Mercedes's body. He also acknowledged spanking and bruising Mercedes's buttocks but claimed his actions were justified by her misbehavior.

O'Geary was convicted as charged and sentenced accordingly. On appeal O'Geary contends: (1) the verdict was contrary to the weight of the evidence; (2) his Fifth Amendment right to remain silent was violated by a testimonial reference to his exercise of that right; (3) he was denied effective assistance of counsel when his attorney failed to move for a mistrial after the testimonial comment on his silence; (4) he was denied due process when the court excluded the testimony of Gina Johnson; (5) he was denied his right to a fair trial when the court admitted expert testimony that was unduly prejudicial; (6) his due process rights were violated when the court, rather than the court reporter, reread the prosecutor's questions; (7) he was prejudiced by prosecutorial misconduct; (8) his Sixth Amendment rights were violated when the court overruled his posttrial request to allow him to undergo a polygraph exam; and (9) the cumulative effect of all the errors was so prejudicial he was denied a fair trial.

II. O'Geary's Fifth Amendment Claim.

We review this constitutional claim de novo. *State v. Baccam*, 476 N.W.2d 884, 885 (Iowa App. 1991). When constitutional safeguards are involved, the court is obliged to make its own evaluation of the totality of the circumstances under which rulings on those rights were made. *Id.*

O'Geary argues his Fifth Amendment right to remain silent was violated when the court overruled his objection to the testimony of Detective Slezak. Slezak testified:

> Q: Now did you also make an attempt to contact the Defendant, Sean O'Geary? A: Yes, I did.
>
> Q: Where you able to talk to him directly? A: No, I was -- I called his mother's residence and spoke with his mother, Nancy.
>
> Q: What were you told about being able to interview him any further?
>
> DEFENSE: Excuse me, Your Honor. Calls for a hearsay exception.
>
> COURT: It's overruled. You may answer.
>
> A: I was told that he was being represented by Steve Jackson, and that any contact with Sean would first have to be approved by him.

Defense counsel then asked the court to approach the bench, and an off-the-record discussion occurred. The court then gave the jury the following admonition:

> Ladies and gentlemen of the jury, your are instructed to --first of all, the witness's last answer is stricken from the record. You are instructed to disregard that answer in its entirety and do not give it any consideration or weight whatsoever.

Although not included in the initial objection to Slezak's answer, the Fifth Amendment violation upon which O'Geary now relies was raised in the sidebar colloquy with the court. The sidebar record also indicates the remedial action taken

by the district court was precisely that requested by O'Geary's counsel. Under similar circumstances our supreme court has held:

> Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of trial court.

State v. Wade, 467 N.W.2d 283, 285 (Iowa 1991). Even if we were to find the Fifth Amendment violation claimed, the district court's prompt remedial action was sufficient to prevent any resulting prejudice. *Id.* O'Geary's derivative ineffective assistance of counsel claim citing counsel's failure to move for a mistrial based on Slezak's answer fails for the same reason. O'Geary simply cannot meet his burden to show counsel breached an essential duty by failing to make a meritless motion for a mistrial, nor can he show any resulting prejudice. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (defendant has burden to show counsel failed to perform an essential duty and prejudice resulted).

III. Exclusion of Gina Johnson's Testimony.

On evidentiary issues, we review for an abuse of discretion. *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). In order to show an abuse of discretion, one must show the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Bayles*, 551 N.W.2d 600, 604 (Iowa 1996).

According to O'Geary, "Johnson was called by the defense for the purposes of impeaching the character of Jessica Blough, . . . and for the purpose of attacking the State's theory of the case."

The record on this issue provides:

> MR. DILLARD [State]: . . . My motion is that the testimony of Gina Johnson, if based upon the matter shown in State's Exhibit 75, be excluded, that the defense not be allowed to call Gina Johnson as a witness if it's based upon the information in State's Exhibit 75 because it's clearly character evidence and remote in time. It indicates knowledge of Jessica Blough, who was her roommate shortly after the birth of Mercedes Blough, and that that testimony would relate to that time frame. It certainly is uncomplimentary of Jessica Blough in a number of different respects, but it would all amount to character evidence. It is not proper impeachment of her credibility. It rather has to do with her behavior and it would be used I think only--the only possible way that the jury would consider that testimony was to see Jessica Blough in a bad light and to look at her as the person responsible for the death of Mercedes Blough, it doesn't add anything to the evidence of defense during which the record shows this child was injured. It would have no probative value. It would be very misleading and prejudicial.
>
> Mr. HAMMOND [Defense]: . . . Now, at the heart of it seems that the State doesn't want us to introduce this evidence because it might tend to show that Sean O'Geary is not guilty. I don't think we're under any such limitation, Your Honor. In fact, I think that's our obligation. And in fact, I think it's quite permissible. Under the State's theory there is only two people in this house when these events occurred, and that's adopting any time line put forward by the experts. If the time line goes back far enough, it would include Sean O'Geary, Jessica Blough, perhaps Kyle Jahnel. Otherwise, really the focus is on two people. My client is charged with doing an act of child endangerment. The intent requirement is that he acted with extreme indifference to human life. Is it relevant then that the only other person in the house at this time had an attitude of indifference toward the child's life. We think the evidence from this witness would tend to show that she acted with indifference toward the child's well-being. This witness will testify that this is a 15-year-old mother at the time she knew her, whether she was attentive to her needs or not, whether she

[redacted] medical needs or not, whether she acted lovingly toward [redacted] during that time or not. The jury should be allowed to hear [redacted] evidence because it assists them in determining whether it is more or less likely that Sean O'Geary committed the act with which he's charged. Thank-you.

Finally, with regard to character evidence, these are going to be statements of fact, what did you see, what did you do, what did you witness. However, even if it were character evidence, there is some relevant character traits such as inattentiveness, for example if that was a character matter, would not fall within the Court's prior ruling. The Court has not limited character evidence of anyone else. This is a time before she even knew the Defendant. So it certainly doesn't open any doors in that regard. Thank you.

The district court adopted the State's reasoning and sustained the objection.

O'Geary's argument on appeal is:

> The State's theory of the case placed Blough and Defendant in the home at the time of the injuries. This clearly would have given Blough the opportunity to place the injuries on the child and therefore make Johnson's testimony relevant and admissible under Iowa Rule of Evidence 404(b).

Iowa Rule of Evidence 404(b) reads in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident.

Rule 404(b) is equally applicable to the accused and witnesses called to testify in criminal trials. *See State v. Roth*, 403 N.W.2d 762, 765 (Iowa 1987).

Because Johnson's testimony was offered for the express purpose of attacking Blough's character, its admissibility hinged on its use for the "other purposes"

permitted by rule 404(b). By adopting the State's reasoning the district court implicitly determined no permissible purpose was served by its admission.

The record discloses abundant support for the district court's ruling. There was no link between the desired inference that Blough somehow injured Mercedes and O'Geary's accidental injury defense. Moreover, the remoteness of Johnson's experience with Blough diminished the probative value of her testimony. When compared to the risk of confusion or other misuse of this evidence by the jury, the probative value of Johnson's testimony is clearly outweighed by its prejudice. The district court did not abuse its discretion by excluding it.

O'Geary's due process challenge to the district court's ruling excluding Johnson's testimony is also without merit. Evidentiary rulings do not implicate the augmented standard of review for due process claims unless the allegedly erroneous ruling goes to the heart of the defendant's case. *See State v. Traywick*, 468 N.W.2d 452, 455 (Iowa 1991). The district court's rule based evidentiary ruling was correct and, in any event, did not go to the heart of O'Geary's case.

IV. Expert Testimony.

Issues involving the admission of expert testimony are generally within the trial court's discretion. We review for errors of law, and the trial court's decision will not be overturned unless there has been an abuse of discretion. *State v. Rains*, 574 N.W.2d 904, 916 (Iowa 1998).

O'Geary argues the court erroneously admitted testimony of the State's expert medical witnesses, Drs. Clark and Abernathy, which was unduly prejudicial and went to the ultimate issue of guilt or innocence. Dr. Abernathy was the neurosurgeon who diagnosed and treated Mercedes's injuries. Dr. Abernathy's testimony provided:

> Q: And I will ask you, Doctor, based upon your training, experience and what you observed with Mercedes Blough, what is your opinion concerning whether it was accidental trauma or inflicted trauma?
>
> DEFENSE COUNSEL. Your Honor, at this time I would interpose an objection. The witness is qualified to give opinions as to medical causes of injury within the child inside the brain. He's also a medical doctor. However, the question asked him to render an ultimate opinion which exceeds his qualifications as a doctor and asks him to make a determination of a non-medical issue. It is an improper opinion under the Rules in that it embraces the ultimate questions.
>
> COURT: The objection is overruled. You may answer.
>
> A: Based upon my experience and my training, my education, I would consider these to be inflicted injuries.

Under Iowa Rule of Evidence 702, expert testimony is admissible if it is reliable and "will assist the trier of fact in resolving an issue." *State v. Brown*, 470 N.W.2d 30, 32 (Iowa 1991). However, this rule does not permit a witness to express a direct opinion on the guilt or innocence of the defendant. *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994). Determining guilt or innocence is the exclusive function of the finder of fact and, consequently, is an improper subject of expert testimony. *State v. Oppedal*, 232 N.W.2d 517, 524 (Iowa 1975).

Dr. Abernathy's testimony did not constitute an opinion concerning O'Geary's guilt or innocence. He only opined that Mercedes's injuries were inflicted rather than

nonaccidental. He did not express an opinion on who was responsible for these injuries.

O'Geary challenges the admission of Dr. Clark's testimony for the same reason. The record, however, indicates O'Geary's trial objection was limited to Dr. Clark's qualifications to express an opinion and did not include the grounds he now raises on appeal. O'Geary has accordingly failed to preserve error on this issue. *See State v. Nimmo*, 247 N.W.2d 228, 230-31 (Iowa 1976). We find no abuse of discretion in the district court's admission of expert testimony and affirm on this issue.

V. O'Geary's Motion for a New Trial.

The court may grant a new trial when the jury's verdict is contrary to the law or evidence. Iowa R. Crim. P. 23(2)(b)(6). "Contrary to the evidence" means contrary to the weight of the evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Under the "weight of the evidence" standard, the court may weigh the evidence and consider the credibility of witnesses. *Id.* at 659. Trial courts enjoy considerable discretion in the application of this standard to motions for a new trial. *State v. LaDouceur*, 366 N.W.2d 174, 178 (Iowa 1985).

The record discloses abundant evidentiary support for the trial court's disposition of O'Geary's motion for a new trial. The State's claim that Mercedes's injuries were inflicted and nonaccidental was supported by considerable expert medical testimony. O'Geary was implicated by evidence of his relationship with

Mercedes and her mother. Moreover, O'Geary's history of physically abusing Mercedes and false statements to investigators are facts supporting inferences of guilt. *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). We affirm on this issue.

VI. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Ordinarily, we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). However, we will resolve ineffective assistance of counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Arne*, 579 N.W.2d 326, 329 (Iowa 1998).

A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). In rder to meet the first test, one must overcome the "strong presumption" that his attorney's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test, he must show, but for counsel's error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm O'Geary's convictions on

his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

O'Geary claims he was denied effective assistance of counsel because counsel failed to move for a mistrial following Slezak's testimony. He also argues counsel breached an essential duty by failing to "insist the testimony of Jessica Blough be submitted to the court by live testimony under oath on the witness stand." Because we have already resolved the first claim against O'Geary, we confine our analysis to the second.

The record indicates Blough did not testify at trial because she asserted her Fifth Amendment privilege. The court declined to compel her testimony because the State did not grant her immunity based on her trial testimony. As a result, counsel and the State agreed to read a portion of O'Geary's discovery deposition into the record at trial.

O'Geary contends counsel's failure to insist on Blough's live testimony was prejudicial because, "Many questions necessary to the defense theory of the case could have been answered by Jessica Blough without requiring her to answer any questions which would have been incriminating."

We are unable to determine which, if any, of counsel's essential duties are implicated by O'Geary's vague assertions. Moreover, we will not infer prejudice from counsel's failure to ask "many questions necessary to the defense theory"

without some showing of what the relevant inquiry should have been or would have disclosed.

O'Geary has failed to show he was denied effective assistance of counsel. We affirm on this issue.

VII. Remaining Issues.

O'Geary, in the absence of a timely motion or objection, has failed to preserve error on his claims concerning the impartiality of the trial judge, requested polygraph examination, and prosecutorial misconduct. There is additionally no merit to O'Geary's cumulative error claim. *See State v. Taylor*, 336 N.W.2d 721, 728 (Iowa 1983).

O'Geary's conviction is affirmed.

AFFIRMED.