

IN THE COURT OF APPEALS OF IOWA

No. 4-094 / 93-105

FILED

APR 26 1994

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

WAYNE HARRIS ANDERSEN, SR.,

Appellant.

Appeal from the Iowa District Court for Pocahontas
County, Kurt L. Wilke, Judge.

Wayne Harris Andersen, Sr., appeals his conviction,
following a jury trial, for sexual abuse in the second
degree, in violation of Iowa Code section 709.3 (1989).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Andi S.
Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Julie H. Brown,
Assistant Attorney General, and Ann Beneke, County
Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink,
JJ. Cady, J., takes no part.

HUITINK, J.

On July 2, 1992, Wayne Harris Andersen, Sr., was charged with sexually abusing his ten-year-old goddaughter, Lisa, while she visited his family on their farm during the summer of 1989.

At trial in October 1992, Lisa testified Andersen had sexually abused her on one occasion at his home when he pulled down her pants and underwear and inserted his finger into her vagina. Lisa testified she screamed and cried for him to stop and finally managed to get away. She stated Andersen threatened if she spoke to her mother about the incident her mother would hate her.

The State presented evidence showing Lisa was admitted to the hospital twice, complaining of abdominal pain, after returning home. Dr. Sturdervant, a pediatrician, testified Lisa's condition appeared to be psychogenic in nature and was consistent with sexual abuse. There were no physical findings of sexual abuse.

Lisa's grandmother, Irene Dicus, testified Lisa went home with her from the hospital. Lisa screamed and cried at the hospital that she did not want to go home with her mother (she testified she was scared her mother would hate her). Dicus, a retired psychiatric nurse, testified Lisa finally confided in her about the sexual abuse in late October 1989. Lisa's mother and therapist were immediately informed. The therapist reported the incident to the police. Sergeant Sunclades testified he interviewed Lisa in November 1989.

Andersen denied he sexually abused Lisa. He presented evidence suggesting Lisa fabricated the story because she was angry for not being allowed to stay at the farm. He also suggested Lisa's mother may have initiated the fabrication because she had been fired from Andersen's business just before the allegations were made.

Andersen was found guilty of second-degree sexual abuse. His motions in arrest of judgment and for a new trial were denied. He was sentenced to a term of imprisonment not to exceed twenty-five years.

Andersen appeals. He claims his trial counsel was ineffective for: (1) failing to file a motion to dismiss based on prosecutorial delay; (2) introducing prior bad act evidence; and (3) failing to properly investigate and prepare for trial. Andersen outlines several additional ineffective assistance claims which he argues need to be preserved for postconviction proceedings.

Our ultimate concern in claims of ineffective assistance 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.

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 131-132. Because a defendant must prove both incompetent representation and prejudice before succeeding on a claim of ineffective assistance of counsel, a reviewing court can affirm a conviction on direct appeal if the defendant has failed to prove prejudice without deciding whether counsel's representation was incompetent. See State v. McKettrick, 480 N.W.2d 52, 56 (Iowa 1992).

Andersen contends his trial counsel was ineffective for failing to file a motion to dismiss based on prosecutorial delay. In order to prevail on a motion to dismiss for this reason, counsel was required to show (1) the delay was unreasonable and without justification and (2) the delay resulted in actual prejudice to the defendant's defense. State v. Williams, 264 N.W.2d 779, 783 (Iowa 1978). Mere general claims of prejudice are insufficient. Id.

Upon our review of the record, we conclude Andersen has established neither of these requirements. Nothing in the record suggests the two-and-one-half-year delay was intended to gain a tactical advantage against Andersen. Rather, the record reflects the difficulty the State encountered in its attempts to locate Andersen because he traveled extensively.

Moreover, defense counsel could not have proved actual prejudice caused by the delay. Andersen claims the delay

affected the abilities of witnesses to recall the events surrounding the abuse and its reporting, but the record indicates Lisa's statements concerning the incident have been consistent.

Andersen's trial counsel filed pretrial and posttrial motions on the prejudicial effects of the prosecutorial delay. In both instances the district court determined, after hearings on the motions, no prejudice resulted from the delay. There was no reasonable probability for believing a motion to dismiss would have resulted in a different outcome.

Based upon the foregoing, we conclude Andersen was not prejudiced by the failure of his trial counsel to file a motion to dismiss based on prosecutorial delay. Accordingly, we hold Andersen was not denied effective assistance of counsel due to this omission.

The remainder of Andersen's complaints against trial counsel concern primarily matters of professional judgment and trial strategy. To preserve these claims of ineffective assistance of counsel for postconviction review, Andersen must make some minimal showing from which this court can assess the potential viability of his claim. See State v. Wagner, 410 N.W.2d 207, 215 (Iowa 1987). Such a showing should not only demonstrate some need for further development of the record, but should indicate why the challenged actions are believed to have been ineffective and what prejudice is likely to have resulted from them. Id.

We conclude there is an inadequate record for us to adjudicate the remainder of Andersen's claims without trial counsel's explanation for her conduct. We therefore preserve Andersen's claims his trial counsel was ineffective for (1) introducing prior bad act evidence and (2) failing to properly investigate and adequately prepare for trial in order to allow trial counsel an opportunity to defend the charge. See State v. Fox, 480 N.W.2d 897, 898 (Iowa App. 1991). In addition, we preserve the additional ineffective assistance claims which are raised by Andersen in his brief. Because we find no prejudice as to Andersen's claim of ineffectiveness of counsel for failing to file a motion to dismiss based on prosecutorial delay, we do not preserve it for a possible postconviction relief proceeding.

For the above-stated reasons, we affirm the judgment and sentence of the district court.

AFFIRMED.