IN THE COURT OF APPEALS OF IOWA

No. 8-639 / 97-2237

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DARRELL WILLIAM STARKEY,

Defendant-Appellant.

FILED
JAN 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Montgomery County, Charles L. Smith III, Judge.

Darrell Starkey appeals from his convictions for second-degree murder and child endangerment causing serious injury. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Christopher Cooklin, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and Bruce E. Swanson, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

SACKETT, C.J.

Defendant-appellant Darrell William Starkey appeals from his convictions for second-degree murder and child endangerment causing serious injury. Defendant contends his trial counsel was not effective after he (1) failed to object to what defendant terms repeated acts of misconduct by the prosecutor, and (2) failed to make the proper objections to a jury instruction that allowed the jury to infer malice. We affirm.

Defendant was charged with first-degree murder and child endangerment following the death of five-month-old Josh Renn. Defendant had been living with the child's mother, Becky Renn, the victim, and his brother, four-year-old Caleb.

Defendant watched the children while Renn worked. On June 6, 1997, Renn went to the neighbors, leaving Josh in the care of defendant. About fifteen minutes later, defendant went to the neighbors and told them to call 911 because Josh was not breathing. Defendant tried to revive Josh using CPR. Josh died on June 20.

The State charged defendant contending Josh was the victim of shaken or slammed baby syndrome and defendant was the preparator.

Defendant claimed Josh was injured falling off a bed. At trial, the State presented expert testimony Josh's injuries did not result from a fall from a bed. The experts opined Josh suffered severe head trauma caused by violent shaking.

The jury returned guilty verdicts to second-degree murder and child endangerment resulting in serious injury. *See* Iowa Code §§ 707.3, 726.6(1)(b)

(1997). Defendant's motion for new trial was denied. The court sentenced defendant to concurrent, indeterminate fifty-year and ten-year prison terms.

Defendant advances on appeal objections not made at trial. He contends he can raise the issues on direct appeal because he claims his trial attorney provided him with less than effective representation. To succeed on this claim, defendant must show his trial attorney was not effective. To prevail on a claim of ineffective assistance of counsel, defendant must show a specific act or omission where (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984).

To establish prejudice, defendant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Wright-Bey v. State*, 444 N.W.2d 772, 776 (Iowa App. 1989).

Defendant contends his trial counsel was ineffective for failing to object and move for a mistrial after he contends the State improperly elicited evidence assassinating his character. Defendant points to questions by the prosecutor to Becky Renn that elicited the response she did not love defendant and her mother did not like defendant because he did not have a job. Defendant additionally complains of testimony from the victim's maternal grandmother she did not have a close relationship with defendant, she had only seen her grandson three times because she

was uncomfortable around defendant, and she had concerns about Caleb being around defendant because she feared Caleb was afraid of defendant and she did not trust defendant. The victim's maternal grandfather gave similar testimony.

The State does not advance the questions were proper. Rather, the State argues there was overwhelming evidence of defendant's guilt; consequently, the elicited remarks were not prejudicial.

The State also advances defense counsel did object to some of the challenged testimony and the district court ruled on those objections. Additionally, the State contends improper questions (to which the court overruled objections) do not automatically constitute bad faith conduct by the prosecutor.

A defendant should be tried on the facts, not on his or her character. *See State v. Roghair*, 353 N.W.2d 433, 434-35 (Iowa App. 1984). However, a prosecutor's misconduct will not warrant a new trial unless the conduct was "so prejudicial as to deprive the defendant of a fair trial." *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989); *State v. Deases*, 479 N.W.2d 597, 601 (Iowa App. 1991).

To gain relief on a claim of ineffective assistance of counsel, a convicted person must prove he or she was prejudiced by trial counsel's alleged breach of an essential duty. *See Morgan v. State*, 469 N.W.2d 419, 426 (Iowa 1991); *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990); *State v. Poppe*, 499 N.W.2d 315, 319 (Iowa App. 1993). Trial counsel did object to some statements. A tactical decision could have been made on the part of defendant's trial counsel not to make further objections and call the jury's attention to the testimony.

However, as the State advances, there was overwhelming evidence of defendant's guilt in this record. Josh was fine when left with defendant. Fifteen minutes later Josh was unconscious. Defendant told two stories of Josh falling out of bed. A witness outside defendant's apartment at the time of the alleged incident testified to hearing a baby cry, a man saying "shut up," and then silence. Medical witnesses testified Josh's injuries were too severe to have come from a fall off the bed and the child had no red area or bruise as would be expected from a fall. They further testified the child's death was the result of violent shaking. Therefore, we fail to find defendant showed prejudice by the admission of the challenged evidence.

Defendant next objects to the district court's submission of an instruction designated for trial purposes as Instruction Number 23. The instruction stated, "Malice may be inferred from the commission of Child Endangerment which results in death." Defendant contends his trial counsel did not advance a correct objection to the instruction. He says though his trial counsel did object, the objection lodged was not correct and too general to preserve the error he now argues on appeal. Defendant contends one of the State's experts testified only one out of five cases of shaken baby syndrome results in death. Therefore, he advances the jury should not be allowed to infer malice in situations where death is not "more likely" to occur. He contends with permissive presumptions there must be a rational connection between the basic facts the prosecution proved and the ultimate fact presumed. He advances there is a permissive inference in that part of the challenged instruction which says, "Malice may be inferred from the commission of Child Endangerment which results

in death." He argues proof of the proven fact (child endangerment resulting in death) allowed the jury to presume an ultimate fact (that is, malice -- an element of second-degree murder).

Defendant contends if only one death in five results from the act of shaking a baby, there was no evidence malice accompanied the act of shaking; rather, such deaths are often unintended and the issue of malice aforethought is a disputed element in many cases and the inference is not justified.

The State responds defendant's reliance on the one-death-in-five-shakings is misplaced as the jury was allowed to infer malice only because a death had occurred. The State further advances defendant is erroneously equating malice with specific intent to kill. The State argues the jury was permitted to infer the former, not the latter, from the act of child endangerment which resulted in death.

With permissive presumptions there must be a rational connection between the facts the State proved and the ultimate fact presumed. *See Ulster County Court v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777, 791 (1979). Also, it must be more likely than not for the ultimate fact presumed to flow from the facts proved. *See id.*

We agree with the State that defendant is erroneously equating malice with specific intent to kill. We affirm.

AFFIRMED.