IN THE COURT OF APPEALS OF IOWA

No. 6-724 / 96-0234

000313

DAVID L. SPILGER,

Applicant-Appellee,

vs.

STATE OF IOWA,

Respondent-Appellant.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Muscatine County, J. Hobart Darbyshire, Judge.

The State appeals from the grant of postconviction relief. **REVERSED.**

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Richard Phillips, County Attorney, and Dana E. Christiansen, Assistant County Attorney, for appellant.

Thomas G. Reidel of Conway and Reidel Law Offices, Muscatine, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ. Sackett, J., takes no part.

HABHAB, C.J.

In June 1992, David Spilger was charged with lascivious acts with a child in violation of Iowa Code section 709.8(1)(1991), indecent contact with a child in violation of Iowa Code section 709.12(1), and lascivious acts with a child in violation of Iowa Code section 709.14, for allegedly sexually abusing his stepdaughter Charissa.

At trial, Deputy Sheriff Greg Orr and child abuse investigator Dan Dorrance gave their testimonies before those of Charissa and her brother Jeremy. Deputy Orr testified about what Jeremy and Charissa's mother, Amy Brand (formerly Spilger), told him about the abuse. He also testified he believed Jeremy was "very truthful in what he told us." Mr. Dorrance testified about what Charissa said during her interview with a child protection worker. He also gave testimony regarding his conversations with Jeremy regarding Spilger's alleged abuse. Amy Brand gave testimony about her conversations with Charissa and Jeremy. Spilger's defense counsel did not object to any of the testimony as hearsay.

At the time of trial, Charissa was eight years old. She testified Spilger would "strip" her and touch her private parts. She also described his touching, when it occurred, and the number of times it occurred. Jeremy was ten years old and testified he saw Spilger "take off [Charissa's] clothes" and "touch her private zone" and this occurred "[l]ots of times."

Fred Franck evaluated Spilger in connection with his dissolution proceeding. He testified Spilger referred to Charissa in adult terms and made several inappropriate statements. Dr. Kathleen Opdebeeck testified about her examination of Charissa. She observed "bumpiness" around Charissa's hymen. She stated the bumpiness was consistent with sexual abuse, but she could not determine the cause with any certainty.

The jury returned guilty verdicts on all three charges. The court sentenced him to indeterminate, consecutive terms of incarceration. His convictions were affirmed on appeal. Spilger applied for postconviction relief arguing, among other things, his trial counsel was ineffective.

The postconviction court granted a new trial because Spilger's counsel was ineffective for failing to object to the various hearsay statements. First, it determined Deputy Orr and Mr. Dorrance's testimony about the children's statements was inadmissible hearsay, citing *State v. Mount*, 422 N.W.2d 497 (Iowa 1988). Second, the court found that neither Mr. Dorrance nor Deputy Orr specifically testified about the children's truthfulness, but they did testify about what they look for in determining whether a child witness is being truthful. Because this testimony was followed immediately with the specific statements of the children, "a jury could very reasonably conclude that each investigator had satisfied himself that the children were, in fact, telling the truth." It concluded the combined effect of defense counsel's failure to object to relevancy and hearsay was prejudicial.

The State appeals. It concedes hearsay statements were admitted, but defense counsel did not breach an essential duty as her failure to object was "purposeful and well-reasoned." Although the State disagrees with the postconviction court's conclusion that the testimony about the techniques utilized to determine truthfulness was in violation of *State v. Myers*, 382 N.W.2d 91 (Iowa 1986), it concedes (contrary to the postconviction court's finding) that Deputy Orr did testify directly about Jeremy's truthfulness and defense counsel "probably erred" in failing to object. It argues, however, Spilger failed to show a reasonable probability the outcome would have been different as there was overwhelming evidence of his guilt.

Where a postconviction applicant asserts violations of constitutional safeguards, we make our own evaluation of the totality of the circumstances in a de novo review. *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991).

In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *Id.* To demonstrate prejudice, a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKendrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 362 N.W.2d 683, 685 (Iowa 1984).

a) Failure of Trial Counsel to Object to Hearsay Statements. In granting Spilger's application for postconviction relief, the court stated, in part:

> [B]oth Orr and Dorrance were, as a preliminary matter, interrogated generally regarding what each did, when interviewing a child, to attempt to determine whether the child was being truthful.
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> . . . .
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> Standing alone, the testimony of Orr and Dorrance regarding their child/victim interview procedures is relatively innocuous. However, because it followed immediately with each testifying specifically what the children said, a jury could very reasonably conclude that each investigator had satisfied himself that the children were, in fact, telling the truth. The testimony of Orr and Dorrance extensively related the children's versions of what occurred, and such testimony should not have been allowed. Trial counsel failed to perform an essential duty by failing to object.

At trial, Deputy Orr testified as to what Jeremy had told him regarding his observations of the alleged abuse. He also testified Ms. Brand had informed him that Charissa's demeanor had changed over the past several months.

During his testimony, Dan Dorrance read portions of another social worker's report, without objection by defense counsel. The report was promulgated by another worker who had interviewed Charissa in his presence. Mr. Dorrance testified about what Charissa had said about Spilger taking off her clothes.

Ms. Brand also testified as to what Charissa and Jeremy had told her about the alleged abuse. Defense counsel did not lodge any hearsay objection to any of this testimony.

The State has conceded hearsay objections could have been appropriately lodged at trial. It maintains, however, that as defense counsel failed to object for strategic reasons, her failure to object does not constitute a breach of an essential duty.

In our de novo review of the record, we find that although defense counsel's trial tactics appear to have been miscalculated, Spilger has not carried his burden to show that he was prejudiced thereby. Our scrutiny of counsel's performance is highly deferential, and there is a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694 (1984). At the hearing for postconviction relief, Spilger's defense counsel explained the defense employed was that no abuse occurred or, alternatively, if it did occur, Spilger was not the perpetrator. Defense counsel explained her reason for not objecting to the hearsay testimony presented.

> Q. At trial Gregg Orr, Dan Dorrance and Amy Spilger all testified, and in their testimony included statements made to them about Charissa and Jeremy; is that correct? A. Yes.
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> Q. And you'd agree with me that that would constitute hearsay; is that correct? A. Yes.
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> Q. Did you make an objection to that hearsay? A. No.

> Q. Why not? A. Because my trial strategy was that [Spilger] did not – Well let me back up. That no crime had been committed, and that if a crime had been committed, that [he] did not do it. Therefore, I wanted as much different kinds of testimony to come in about the situation as could possibly come in, as much as could muddy the waters as we could get in, so I did not object to it.
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> Secondly, the hearsay declarants were there to testify. The children were put on the stand in those particular -- and they were the hearsay declarants in those particular instances. They were there to testify themselves.
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> And, thirdly, I think when you're dealing with a situation of children with sexual maturity like this and you have a jury, that you have to be very careful about objecting too much, because I think there's a very thin line, where with too much objection they begin to worry about and wonder about as to what you are hiding.

"Improvident trial strategy, miscalculated tactics, mistakes, carelessness, or inexperience do not necessarily amount to ineffective assistance of counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981) (quoting *Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972)); *see Sallis v. Rhoads*, 325 N.W.2d 121, 123 (Iowa 1982). A defendant is not entitled to perfect representation, but rather only that which is in the range of normal competency. *Karasek v. State*, 310 N.W.2d 190, 192 (Iowa 1981). Although Spilger's defense counsel employed what may have been an improvident trial strategy, we find that Spilger has failed to show breach of an essential duty and, therefore, we reject his claim of ineffective assistance in this regard.

b) Myers Violation. Spilger also argues defense counsel should have objected to testimony regarding the truthfulness of the children on the basis of *Myers* (expert witness generally not permitted to express opinion on a witness's credibility or defendant's guilt or innocence). The State has conceded that a *Myers* violation

occurred when Deputy Orr testified Jeremy "was very truthful in what he told us." *See id.* at 95.

We note the postconviction court apparently overlooked the *Myers* violation. It did, however, find a breach of duty occurred on the part of defense counsel as the testimony given by Deputy Orr and Mr. Dorrance was followed by the recitation of the statement's made by the children. The postconviction court noted:

> The combined effect of trial counsel's failure to object to the testimony of Orr and Dorrance regarding their child/victim interview proceedings, on the grounds of relevance, and the failure to object to Orr and Dorrance's testimony relating to what the children said, or on the ground of hearsay, was prejudicial to . . . Spilger. Absent those errors, there is a reasonable probability the result of his trial would have been different.

We disagree and reverse the postconviction court's ruling. The evidence against Spilger was strong. In his own testimony he admitted he partially disrobed Charissa to "teach her a lesson."[1] He testified he touched Charissa's "groin area" after bathing

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[1] The following dialogue occurred during Spilger's direct testimony:

Q Did you ever disrobe Charissa? A. Yes. There was two times that I partially disrobed her.

Q. All right would you explain what those occasions were and why you did that? A. I was more or less doing housework. . Charissa had come up and she wanted me to shoot a moon and I told her no, I wasn't going to. So she persisted in trying to pull my pants down, and I told her to stop a couple of times. She was still persistent, and I tried to explain to her that I'm an adult. How would you like it if I tried to do that to you, and she more or less thought it was kind of funny. So I showed her.

Q. When you say you showed her, what did you do? A. Partially disrobed her.

Q. Did you leave some clothing on her? A. Yes I did . . . her underwear and her pants.

her while explaining where babies "come out" when they are born. He also described how he showed her how to "wash between her legs" by taking "the washrag and with her hand wash[ing] her groin area."

Fred Frank also testified at trial about his discussions with Spilger regarding Charissa, "When asked to describe her overall attitude with regard to any type of sexual behavior, he described her, I believe, as 'a cock-teaser.'" Spilger also stated that Charissa would "flaunt" herself in from of him while touching her vagina and that she was possibly flirtatious in dancing around in front of him and Jeremy.[2]

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[2] Spilger testified as follows:

Q. On these occasions when Charissa would remove the towel and dance around in the kitchen, what did you say to her . . ? A. Well, mainly to stop it. You know, to quit and mention to her that you don't realize what you're really doing. You think its smart, but then on the other hand there was a few times like I discussed it with Tim. He said maybe she's trying to get your attention for one reason or another, just ignore it. So I would more or less turn my head and try to ignore it.

Q. And did it finally just stop on its own or how did that -- A. Yeah, the last time was when Charissa was flaunting herself and I think she caught her hand.

Q. Caught her hand where? A. In the groin area and I got up out of my chair and told her I was going to go ahead and spank her, but I didn't.

Q. Would you be more specific how she caught her hand and where she caught her hand? A. Well, when she would more or less display herself she would take her hands and kind of spread herself apart and then, like I said, the last time she had taken her finger and more or less I think she might have hurt herself. If that was possible.

Q. She was playing with herself, is that what you're saying? A. Yes.

Q. Had that happened on more than one occasion? A. No, just mainly what she would do is just dance around and more or less just flaunt herself.

Ms. Brand testified Charissa was having behavior problems in school and had been gaining weight. She also testified Charissa complained of stomachaches and headaches and that her genitals hurt. Brand also explained Spilger had given her an audio tape. During testimony, she explained on the tape Spilger told her, "there was a problem that he thought he had licked a long time ago, and he should have told [her] before, but the problem came back . . . ."

Dr. Kathleen Opdebeeck stated Charissa's hymenal opening was enlarged and observed bumpiness around the edge of the hymen. She explained it was not consistent with what may be found in a child who has masturbated or self-manipulated. She also testified the bumpiness was not caused from a fall and it would be highly unlikely to have been caused by infection or birth defect. She stated the bumpiness was consistent with digital or finger penetration. She explained eating and behavioral problems in combination with the condition of Charissa's genitals were consistent with sexual abuse, but could not say for sure Charissa had been sexually abused.

We also note that in granting Spilger's application for postconviction relief, it appears the district court may have failed to make informed findings of prejudice. The court indicated on the record that it would be necessary for defense counsel to make specific references to the trial transcript as it did not "intend to read the entire trial transcript."

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In our de novo review of the record, we find Spilger has failed to show his defense counsel rendered ineffective assistance. Despite miscalculation and error on the part of defense counsel, we find Spilger has failed to show resulting prejudice. The evidence against him was strong. He has not met his burden of showing a reasonable probability that but for these errors the result of the trial would have been different. Our confidence in the outcome has not been undermined.

REVERSED.