IN THE COURT OF APPEALS OF IOWA

No. 9-688 / 97-1646
Filed February 9, 2000

STATE OF IOWA,
Plaintiff-Appellant,

vs.

JUAN LEDESMA,
Defendant-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Defendant appeals the judgment and sentence entered upon a jury verdict finding him guilty of first-degree murder, child endangerment, neglect of a dependent person, assault while participating in a felony, and willful injury. **AFFIRMED.**

J. William Gallup, of Gallup & Schaefer, Omaha, Nebraska, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Jill M. Pitsenbarger, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Habhab, S.J.*

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1999).

HABHAB, S.J.

Defendant Juan Ledesma appeals his convictions for first-degree murder, in violation of Iowa Code sections 707.1 and 707.2(5) (1995); child endangerment, in violation of sections 726.6(1)(a), (b), and (2); neglect of a dependent person, in violation of section 726.3; assault while participating in a felony, in violation of sections 708.1 and 708.3; and willful injury, in violation of section 708.4. He claims he received ineffective assistance of counsel because defense counsel had a conflict of interest. We affirm on appeal.

In January 1997, Ledesma was living with his girlfriend, Mirta, and her daughter, Karen, who had been born in May 1995. Defendant was not Karen's father. On the morning of January 28, 1997, Mirta left with a neighbor to go job-hunting. Defendant was sleeping. Karen was in her crib. When Mirta returned a few hours later, Karen was lying in the crib with blood and vomit around her mouth, and she was having a seizure. Defendant was in bed. Mirta ran to the neighbor's house to get a ride to the hospital. The child had suffered a large skull fracture and had numerous bruises. Karen died as a result of her injuries.

Ledesma was arrested and charged with first-degree murder, child endangerment, neglect of a dependent person, assault while participating in a felony, and willful injury. At the time of his arrest he denied any knowledge of Karen's injuries. He admitted no one else had entered the apartment.

While in prison, Ledesma wrote letters to Mirta. He stated the injuries to Karen were an accident; that the baby fell from his hands and hit her head. He also stated:

> I told the attorney the truth and he told me that I shouldn't tell anyone and that is why I hadn't done it But I owe you the truth because you deserve it more than anything I gave the attorney a letter with my whole confession for you he said that after everything was over . . . was going to give it to you because in it I tell you everything exactly how it happened I would like to tell you everything in person so you can see that you shouldn't judge person before you know the truth . . . I hope that one day the attorney will give you my confession or that I one day will tell you everything on my knees and ask you for forgiveness for being such a coward and not having told you the whole truth . . .

These letters were admitted into evidence with no objection by the defense.

During the trial, Ledesma testified Karen's injuries were an accident. He testified Karen woke up while Mirta was gone. He became angry because she was making noise. He pushed her down in the crib, causing her to fall against the side and cry. Defendant picked her up and put her on the bed. He testified that while he was getting a tissue for her, she slipped off the bed and hit her head on a chair. The medical evidence, however, showed a great deal of force had been used to cause the child's injuries.

A jury found defendant guilty of all counts charged against him. He was sentenced to life in prison on the count of first-degree murder. He was sentenced to ten years in prison on each of the other counts, the sentences to run concurrently. Ledesma appealed, claiming he received ineffective assistance of counsel.

Our review of an allegation of ineffective assistance of counsel is de novo. *Cox v. State,* 554 N.W.2d 712, 714 (Iowa App. 1996).

Defendant contends he received ineffective assistance of counsel because his attorneys had a conflict of interest. He claims once the letters he

wrote to Mirta while in prison were admitted into evidence, defense counsel had an actual conflict of interest. He points out the letters state he had given a written "full confession" to his attorneys. He asserts defense counsel became potential witnesses, able to corroborate or refute his testimony at trial. Defendant claims defense counsel should either have taken steps to prevent the letters from being admitted into evidence, or once the letters were admitted, to withdraw as counsel.

Generally, a defendant alleging ineffective assistance of counsel under the Sixth Amendment must show not only that counsel's performance fell below minimum professional standards, but also that counsel's failure was so prejudicial it probably changed the outcome of the trial. *Strickland v. Washington,* 466 U.S. 668, 691-96, 104 S. Ct. 2052, 2066-69, 80 L. Ed. 2d 674, 695-99 (1984). However, a different standard applies in those cases in which an alleged conflict of interest provides the predicate for the ineffective assistance claim. *Id.* at 691-92, 104 S. Ct. at 2067, 80 L. Ed. 2d 695-97. Prejudice is presumed when counsel is burdened by an actual conflict of interest, which involves a breach of the duty of loyalty, one of counsel's most basic duties. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 1718-19, 64 L. Ed. 2d 333, 346-48 (1980).

The facts in *Cuyler* involved two attorneys who together represented three criminal defendants. In *Cuyler,* the Supreme Court first considered whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection. *Id.* at 345, 100 S. Ct. at 1716, 64 L. Ed. 2d

at 344-45. The Court concluded the trial court had no affirmative duty to inquire into the propriety of multiple representation. *Id.* at 348, 100 S. Ct. at 1718, 64 L. Ed. 2d at 348. The present case does not involve multiple representation and no claims were brought under the first prong of *Cuyler.*[1]

Under the second issue presented in *Cuyler,* the Supreme Court determined that in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate an actual conflict of interest adversely affected his lawyer's performance. *Id.*, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346-47. The Supreme Court stated:

> We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Id. at 350, 100 S. Ct. at 1719, 64 L. Ed. 2d at 348.

Defendant must show his counsel actively represented conflicting interests. *Id.* at 349-50, 100 S. Ct. at 1718, 64 L. Ed. 2d at 346-47. To establish an actual conflict it must be demonstrated that the attorney made a choice between alternative courses of action. *State v. Thompson,* 597 N.W.2d 779, 785 (Iowa 1999) (citing *Stevenson v. Newsome,* 774 F.2d 1558, 1561-62 (11th Cir. 1985)). If the attorney did not make such a choice, the conflict remained hypothetical. *Id.* A hypothetical conflict is not sufficient to satisfy the *Cuyler* standard. *Id.* Under *Cuyler,* the possibility of conflict is insufficient to impugn a

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1. We note that in Iowa, the *Cuyler* standard has not been limited to cases where there is an alleged conflict of interest based on multiple representation. *State v. Thompson,* 597 N.W.2d 779, 784 n.1 (Iowa 1999).

criminal conviction. *Cuyler,* 446 U.S. at 350, 100 S. Ct. 1719, 64 L. Ed. 2d at 348.

Ledesma contends his situation is similar to that presented in *State v. Vanover,* 559 N.W.2d 618 (Iowa 1997). In *Vanover,* defense counsel Dean Stowers obtained statements from co-defendants. *Vanover,* 559 N.W.2d at 623. In order to admit the co-defendant's statements, the State listed Stowers as a witness in the case. *Id.* The district court determined Stowers should withdraw as defendant's attorney because he had a conflict of interest. *Id.* at 624-25. On appeal, the Iowa supreme court determined that once Stowers learned the State intended to call him as a witness, he was obligated to withdraw if it appeared his testimony was or might be prejudicial to defendant.[2] *Id.* at 629.

Vanover also discusses DR 5-102(A). The pertinent portion of this rule provides:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a member of the firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial, and the firm, if any, shall not continue representation in the trial . . .

DR 5-102(A).[3]

If an attorney's testimony could be significantly useful to his client he ought to be called as a witness. *Vanover,* 559 N.W.2d at 632 (citing *MacArthur v. Bank of New York,* 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981)). All doubt is

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[2] This is because as a witness, Stowers's credibility could be called into question and this would likely prejudice defendant's cause in the eyes of the jury. *Vanover,* 559 N.W.2d at 631. Stowers would then have an incentive to conduct the trial in a manner which would minimize his own exposure at his client's expense. *Id.*

[3] There are certain exceptions to this rule which do not apply here.

resolved in favor of the attorney's testimony and against the attorney's representation. *Id.* If Stowers had remained as defense counsel in *Vanover,* he would have had to impeach a co-defendant's testimony with the statement he took. *Id.* at 633. Instead, he was able to become defendant's star witness. *Id.*

The situation in this case is distinguishable from that presented in *Vanover.* Here, there was no indication either party intended to call defense counsel as witnesses. Also, it is not clear defense counsel ought to have been called. Defendant has not alleged how defense counsel's testimony would have been significantly useful. There is no showing as to what defense counsel's testimony would have been if they had been called. *See Humphrey ex rel. Minnesota v. McLaren,* 402 N.W.2d 535, 541 (Minn. 1987) (an attorney may not be disqualified as counsel unless the record shows his or her testimony is necessary, which may not be established without any indication of what the testimony might be). We do not know whether or not there actually was a written confession. If there was a confession, we do not know what it said. Furthermore, we do not know what, if anything, defense counsel would have been able to testify about it.[4]

Because there was no indication defense counsel might be called, or should have been called, as witnesses, there was no conflict between defense counsel attempting to act as counsel and witnesses. Defense counsel was not forced to choose between the roles of witnesses or counsel. They were not struggling "to serve two masters" in completing representation of defendant. *See*

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[4] Defense counsel may well have been prohibited by the attorney-client privilege from testifying about the confession, if indeed, there was one.

Thompson, 597 N.W.2d at 785. We conclude defense counsel was not obligated to withdraw due to a conflict of interest.

In the present case, the conflict remained hypothetical. Defendant's brief stated:

> As soon as these exhibits and the statements by defendant contained in them were placed before the jury, defense counsel was [sic] forcibly shoved from their roles as advocates into a spotlight of speculation as to the extent of their special knowledge. Counsel became *potential* participants in events rather than mere advocates in the trial.

(Emphasis added).

As noted above, a hypothetical conflict is not sufficient to satisfy the *Cuyler* standard. *Id.* The United States Supreme Court in *Cuyler* notes, the possibility of conflict is insufficient to impugn a criminal conviction. *Cuyler,* 445 U.S. at 350, 100 S. Ct. at 1719, 64 L. Ed. 2d at 348.

Furthermore, we note the letters, taken as a whole, are consistent with defendant's theory of defense. The statements in the letters are similar to defendant's statements at the trial--he admitted he struck the child, but stated the extent of her injuries was accidental. The letters show a great feeling of remorse. Defendant states again and again he did not mean to kill the child and felt sorry for what had happened. Thus, the letters provided support for defendant's testimony during the trial. Defense counsel's failure to object to the admission of the letters into evidence was consistent was zealous and effective representation. Defendant has not shown his attorneys' performance was adversely affected by a conflict of interest.

Defendant had failed to demonstrate an actual conflict of interest adversely affected his lawyer's performance. Therefore, he has not met the second prong of the *Cuyler* test. Defendant has not shown he received ineffective assistance of counsel due to a conflict of interest.

We affirm defendant's convictions.

AFFIRMED.