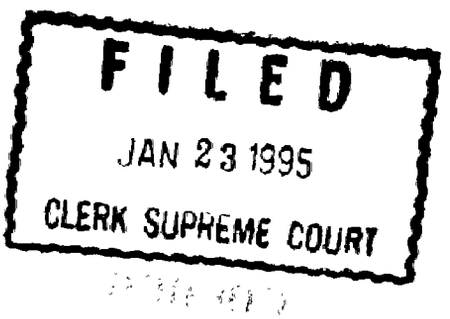
IN THE COURT OF APPEALS OF IOWA

No. 4-432 / 93-1735



STATE OF IOWA,

Appellee,

vs.

DONALD DAVID ANKENY,

Appellant.

Appeal from the Iowa District Court for Scott County, Bobbie M. Alpers, Judge.

Defendant appeals from the judgment and sentence, following bench trial, entered upon his conviction of child endangerment resulting in serious injury. **AFFIRMED.**

Donna M. Humpal of M.W. Liebbe Law Office, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, County Attorney, and Joseph A. Grubisich, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Cady, JJ.

DONIELSON, C.J.

On February 10, 1993, Sandra Minnick left her two children, ages four years and three and one-half months, in the care of her boyfriend, Donald Ankeny, while she went to school. When she returned home later that day, Ankeny told her the younger child, Jamie, had been injured when he fell from an automatic swing onto the carpeted floor. He stated he thought the injury might be serious. Minnick and Ankeny took Jamie to the emergency room at St. Luke's Hospital in Davenport.

Doctors discovered Jamie had a fresh elbow-to-shoulder spiral fracture of the left humerus. Jamie also had a periosteal injury on his right femur that was ten to fourteen days old. A periosteal injury is an injury to the membrane surrounding the bone. Jamie was kept in the hospital for further observation for about three days. He was required to have a sling on his arm for about four weeks.

Jamie's x-rays were sent to Dr. Wilbur Smith, a professor of pediatric radiology. Dr. Smith found the injuries were consistent with the type seen in physically abused children.

Ankeny was charged with child endangerment resulting in serious injury, in violation of Iowa Code sections 726.6(1)(b) and 726.6(2). Ankeny waived his right to a jury, and the case was tried before the court. At the trial, Dr. Smith testified that the spiral fracture was

probably caused by a twisting motion of considerable force. Dr. Smith testified that the injury might have resulted from falling two or three stories, but not from falling two or three feet. He opined, without objection, that the fracture was consistent with child abuse. He also stated that the fact Jamie had a preexisting leg injury only strengthened his opinion this was a case of child abuse. He stated he considered the fracture to be a serious injury.

Ankeny testified the swing was missing a screw and one of the legs had fallen off while Jamie was in the swing. He stated the swing had collapsed and somehow Jamie's arm had been hurt. Minnick testified that after Jamie was hurt, she set up the swing about thirty times, and the swing had fallen over about half of the time. Pat Fennelly, a child abuse investigator for the Department of Human Services, testified she had examined the swing at Minnick's residence and could get it to fall over only by knocking it over.

The district court found defendant guilty of the crime charged. The court found defendant's explanation for Jamie's injury to be implausible and unbelievable. The court found Jamie's arm was broken as a result of an intentional twisting injury inflicted by defendant, and not as a result of any fall from the collapse of the baby swing. The court denied defendant's motion in arrest of

judgment. Defendant was sentenced to a term of imprisonment not to exceed ten years. Defendant appeals.

I. Defendant raises three issues on appeal regarding ineffective assistance of counsel. Where a defendant asserts violations of constitutional safeguards, such as the right to counsel, 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).

To establish a claim of ineffective assistance of counsel, a defendant must show that (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent that it denied defendant a fair trial. Caldwell v. State, 494 N.W.2d 213, 214 (Iowa 1992). Representation by counsel is presumed competent, and defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. Jones, 479 N.W.2d at 272.

On the question of deficiency of performance, the ultimate test is whether counsel's performance was within the range of normal competency. Brewer v. State, 444 N.W.2d 77, 83 (Iowa 1989). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. Kane v. State, 436 N.W.2d 624, 627 (Iowa 1989).

On the question of prejudice, defendant must show counsel's failure worked to his substantial and actual disadvantage, to the end there is a reasonable probability that but for counsel's unprofessional errors, the result of

the proceeding would have been different. Brewer, 444 N.W.2d at 83.

A. Defendant first contends he did not receive effective assistance of counsel because his attorney did not raise a motion for judgment of acquittal to challenge the sufficiency of the evidence presented by the State. He claims there was insufficient evidence to show Jamie suffered a serious injury. Defendant believes Dr. Smith's statement that the injury was serious was the only evidence presented on the seriousness of the injury, and he alleges this evidence was inadmissible, and so should not be considered.

In reviewing a claim that counsel breached an essential duty by failing to move for judgment of acquittal, we consider whether the motion would be successful. See State v. Breitbach, 488 N.W.2d 444, 446 (Iowa 1992). The relevant inquiry is whether the evidence presented is sufficient to sustain a conviction of the offense in question. Id. That is, there must be presented such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id. In making this determination, we must examine the evidence in the light most favorable to the verdict. Id.

In order to find defendant guilty of the crime of felony child endangerment, there must be sufficient evidence in the record to show the child suffered a serious

injury. Child endangerment which results in serious injury is a class "C" felony, while child endangerment which does not result in serious injury is an aggravated misdemeanor. I.C. §726.(2),(3). "Serious injury" is defined in section 702.18:

> "Serious injury" means disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Defendant believes the only evidence showing Jamie's injury was serious was Dr. Smith's statement to that effect. Defendant claims his counsel failed to perform his constitutional duty because he did not object to Dr. Smith's testimony that the spiral fracture to the humerus was a serious injury. Defendant believes this statement goes beyond the permissible limits of expert testimony. An expert opinion is not admissible if it essentially passes on the guilt or innocence of defendant. State v. Myers, 382 N.W.2d 91, 95 (Iowa 1986).

Here, Dr. Smith was not testifying that defendant caused serious injury to Jamie. We conclude his statement was admissible. Furthermore, even if Dr. Smith's testimony was inadmissible, we find there was sufficient other evidence in the record to show the injury was serious. A harm which substantially interferes with a bodily member's function meets the statutory test. State v. McKee, 312 N.W.2d 907, 913 (Iowa 1981). The spiral fracture from Jamie's shoulder to elbow substantially interfered with the

functioning of his arm, and we conclude this is sufficient evidence to show it was a serious injury.

We conclude there is sufficient evidence in the record to support defendant's conviction. A motion for acquittal would have been denied. We conclude defendant has failed to show that but for his counsel's failure to move for judgment of acquittal the result would have been different.

B. Defendant contends he received ineffective assistance of counsel due to his counsel's failure to object to Dr. Smith's statement that the fracture was consistent with child abuse. Defendant believes this testimony also goes beyond the permissible limits of expert testimony. As noted above, an expert opinion is not admissible if it essentially passes on the guilt or innocence of defendant. Myers, 382 N.W.2d at 95.

A similar issue was raised in State v. Akright, 506 N.W.2d 465, 469 (Iowa App. 1993), where an expert testified a child died of starvation, and this was in the form of child neglect. We determined the statement was admissible because the expert did not testify as to the guilt of any person, nor did he state that the child was the victim of felony child endangerment. Id.

We determine Dr. Smith's testimony in this case was admissible. Dr. Smith did not testify defendant committed child abuse or that he was guilty of child endangerment. We determine defendant has failed to show he received

ineffective assistance of counsel due to his counsel's failure to object to this evidence.

C. Defendant contends he receive ineffective assistance of counsel due to his attorney's failure to object to Dr. Smith's testimony concerning the prior periosteal injury to Jamie's femur. Dr. Smith testified that the fact Jamie had a preexisting leg injury only strengthened his opinion Jamie had been abused.

The United States Supreme Court has held that when offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries. Estelle v. McGuire, 502 U.S. ___, ___, 112 S.Ct. 475, 480, 116 L.Ed.2d 385, 396 (1991). Such evidence is probative to show the child's injuries were the result of an intentional act by someone, and not an accident. Id. at ___, 112 S.Ct. at 480, 116 L.Ed.2d at 397.

We determine Dr. Smith's testimony concerning the prior injury was relevant to show the spiral fracture to Jamie's humerus was the result of an intentional act and not an accident.

Defendant claims that even if the evidence is relevant, its prejudicial nature outweighs its probative value. Under Iowa Rule of Evidence 403, evidence which is relevant may nevertheless be excluded if its probative value is outweighed by its potential prejudice. State v. Wade, 467

N.W.2d 283, 284 (Iowa 1991). We find defendant has failed to show prejudice here because there was no testimony he had previously injured Jamie. Dr. Smith's testimony was admissible evidence.

Defendant has not shown he received ineffective assistance of counsel due to counsel's failure to object to Dr. Smith's testimony concerning the prior injury to Jamie's leg. Counsel's failure to make an objection which would have been denied does not constitute incompetency. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982).

II. Defendant claims the district court abused its discretion by denying his motion in arrest of judgment. He believes the motion should have been granted because there was not substantial evidence which would prove his guilt beyond a reasonable doubt.

We note that a motion in arrest of judgment may not be used to challenge the sufficiency of evidence. State v. Oldfather, 306 N.W.2d 760, 762 (Iowa 1981). Thus, there was no abuse of discretion in the district court's denial of defendant's motion, which was based on a claim the evidence was insufficient.

III. Finally, defendant raises an additional nine issues in which he claims he received ineffective assistance of counsel. Defendant asks us to preserve these issues for postconviction review.

The State contends defendant's claims of ineffective assistance should not be preserved because he has not

sufficiently disclosed the grounds or described the situations that support his claim of ineffective assistance.

A reviewing court should be provided at a minimum with enough information to make an initial assessment of defendant's contentions. State v. White, 337 N.W.2d 517, 519 (Iowa 1983). Whether a specific issue can be disposed of on appeal or must be reserved for resolution in postconviction proceedings is a determination that should be made by the appellate court, not counsel. Id.

We conclude defendant has sufficiently disclosed the grounds to support his claim of ineffective assistance. We determine his claims should be reserved for postconviction review.

We affirm defendant's conviction for child endangerment causing injury. Costs of this appeal are assessed to defendant.

AFFIRMED.