IN THE COURT OF APPEALS OF IOWA

No. 1-444 / 00-1270
Filed September 12, 2001

FILED
SEP 12 2001
CLERK SUPREME COURT

JASON LEROY NELSON,
Appellant,

vs.

STATE OF IOWA,
Appellee.

Appeal from the Iowa District Court for Van Buren County, Daniel Morrison, Judge.

Jason Nelson appeals the denial of his application for postconviction relief.

AFFIRMED.

Thomas M. Walter of Johnson, Hester, Walter & Breckenridge, Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Crystal S. Cronk, County Attorney, and Virginia Barchman, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Jason Nelson appeals the district court ruling that denied his petition for post conviction relief. Because we find no showing that either trial or appellate counsel were ineffective, we affirm the district court.

Background Facts and Proceedings. After waiving his right to a jury, in a trial to the court Jason Nelson was convicted of second-degree sexual abuse in violation of Iowa code section 709.1 and 709.3 (1993). Nelson's four-year-old daughter, S.N., had been living with Nelson at his mother's home, after his divorce from his wife, Michelle. Following allegations Nelson had abused S.N., the child was interviewed at St. Luke's Hospital Child Protection Center. During the videotaped interview, which was admitted at trial over Nelson's objection, S.N. stated "Daddy" had placed his "pee-pee" in her mouth and anal region, and pointed out her genitals as the place where Nelson had touched her. She indicated the contact occurred when everyone else in the house was in bed.

The next day Nelson was interviewed by two agents from the Department of Criminal Investigation [DCI]. Although initially denying improper contact, in a signed statement Nelson acknowledged S.N. had climbed into bed with him and began rubbing his chest and stomach, but claimed that when she began rubbing his penis, he told her to stop. He further admitted he placed his hand under her nightgown but over her underwear, and rubbed her vagina. He maintained that S.N. then kissed his penis, and when she placed the head of his penis in her mouth, he stopped her and carried her back to her own bed. He stated he then went back to his room, thought about his ex-wife, and masturbated. He further

stated that when he awakened later that morning, he felt badly about the early-morning events, and apologized to S.N. He claimed that during this entire time he was upset and depressed due to his recent divorce.

S.N. was called to testify at trial. After answering a set of initial questions concerning her family and where she lived, S.N. answered most of the remaining questions with the answer "I don't know." In its ruling, the district court noted that, despite efforts to make her as comfortable as possible, S.N. appeared nervous and upset by her surroundings. During his trial testimony Nelson denied intentionally touching S.N. He admitted his hand was in between her legs on her genital area, but maintained it landed there while he was drifting in and out of sleep. He claimed any discrepancies between his earlier statement and his testimony at trial were due to lack of sleep and confusion during the initial interview.

After his conviction and sentence, Nelson appealed on the ground the district court erred in admitting the videotape of S.N.'s interview. This court determined the tape was properly admitted, and affirmed Nelson's conviction. Nelson then filed a petition for postconviction relief, contending trial counsel was ineffective in a number of particulars, and alleging the ineffectiveness of appellate counsel in failing to raise the issue on his direct appeal. The district court denied his petition, finding that trial counsel was not ineffective. It is from this ruling that Nelson appeals.

Scope of Review. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App. 1994).

Ineffective Assistance of Counsel. Typically, a claim of ineffective assistance of trial counsel must be raised on direct appeal, and failure to do so bars an attempt to raise the issue in the postconviction proceeding. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). Failure will not waive the claim, however, if "sufficient reason" or "cause" for the failure is shown, and actual prejudice results. *Id.* Such cause may be provided by the ineffective assistance of appellate counsel. *Id.* However, even if the record in this case establishes the ineffectiveness of appellate counsel, actual prejudice must be shown. To assess this prejudice, we necessarily look to see if trial counsel was, in fact, ineffective in representing Nelson.

Nelson has the burden of proving his attorney's performance fell below "an objective standard of reasonableness" and that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice is shown by a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Atwood,* 602 N.W.2d 775, 784 (Iowa 1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Carillo,* 597 N.W.2d 497, 500 (Iowa 1999). In alleging ineffective assistance, Nelson must overcome the strong presumption his counsel was competent. *State v. Ray,* 516 N.W.2d 863, 865 (Iowa 1994).

1. Failure to conduct discovery. Nelson complains his trial counsel failed to depose both S.N. and the DCI agents, as the former deposition would have allowed him to challenge S.N.'s testimonial competency and uncover

exculpatory evidence, and the latter would have allowed him to uncover information demonstrating the involuntary nature of his statement. He also contends his defense was impaired by his attorney's failure to review or to timely review the videotaped interview of S.N.[1] None of these claims are persuasive.

S.N.'s competence was tested at trial and found sufficient, and there is no indication deposing her would have produced information or answers above and beyond what was already available to Nelson in the form of the videotaped interview, particularly given the child's inability to provide cogent testimony in response to legal questioning. Nor can Nelson demonstrate that deposing the DCI agents would have produced any information sufficient to exclude his statement from the trial. As will be discussed in the next section, even after Nelson was given an opportunity to attack the circumstances of the DCI interview, he failed to put forth sufficient indicia of involuntariness.

Finally, while there is no proof Nelson's attorney viewed the videotape, there is also no proof the attorney failed to view the videotape. The record is completely silent on the issue. At best, the record establishes the videotape was not in the attorney's possession until five to seven days prior to the trial date, with a resulting inference that the tape was not viewed any sooner than a week prior to trial. This alone does not establish ineffective assistance of counsel. The

---

[1] The only reference to the record in support of this proposition is in Nelson's summation of fact, citing to his own testimony at the postconviction hearing. At that time Nelson stated his attorney brought him in to view the videotape a week before trial, and that he watched the tape alone. He further stated his attorney informed him the tape had been received "[s]hortly before that . . . two days [before], I guess. I am not sure exactly when he received it." No other portions of the record were noted, and no reference to the record was made in connection with the argument on this issue. Factual assertions are necessarily diminished when no direct link to the record is provided.

minutes of testimony contained a sufficient description of the tape's contents to allow defense preparation to go forward. As the burden is on Nelson to show deficient performance, this claim must necessarily fail.

2. Failure to file a motion to suppress the DCI statement. Nelson also claims trial counsel was ineffective in failing to move for suppression of the statement he gave during his interview with the DCI agents. He claims the record demonstrates a substantial probability his waiver of *Miranda* rights and subsequent statement were both involuntary. Typically, when a defendant challenges the voluntary nature of his statement, we do first look to see whether a *Miranda* warning was necessary and, if so, whether it was properly given. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997). Here, although Nelson alleges the waiver was involuntary, he puts forth no specific assertions in support of this allegation, and we find no supportive facts in the in the record.

We therefore turn to his next contention: that his statement to the DCI agents was not voluntary. In reviewing voluntariness we look to see if the preponderance of the evidence demonstrates, under the totality of the circumstances, that the statement was the result of "an essentially free and unconstrained choice, made by the defendant whose will was not overborne or whose capacity for self-determination was not critically impaired." *State v. Payton*, 481 N.W.2d 325, 328 (Iowa 1992). We find that it does.

At the time of the interview Nelson was twenty-seven years old with two years of college courses. He voluntarily drove his own vehicle to and from the interview site and was given two breaks during the five-hour interview. While

initially complaining of the interview's violent atmosphere, he later admitted this "violence" was only a brief period of "aggressiveness on one of the DCI agent's parts when he raised up his hand and slammed his hand on the table and started yelling . . . ." Nelson also admitted that no deceptive practices were employed. Although contending he was very tired, due to a lack of sleep, he conceded he had no trouble staying awake during the interview. *See Countryman*, 572 N.W.2d at 559 (suspect impaired by drugs could still give voluntary statement where responsive to questioning, conscious of her statements, and in physical control of her person). When the statement was reduced to writing by one of the agents, Nelson was allowed to read it, then initialed and signed it. All of the foregoing demonstrate the statement was voluntarily given, and thus trial counsel had no duty to move for its suppression.

3. Failure to introduce evidence regarding improper interview techniques. Nelson contends an expert should have been called to criticize the interview techniques used during the videotaped interview of S.N., which would have either impeached S.N.'s credibility or blocked the admission of the tape. However, in support of this contention Nelson presented only the opinion of a defense attorney who noted the existence of a number of experts available to testify as to the interview techniques and their impact. He did not present evidence that the techniques were in fact improper. He cannot therefore establish a duty in trial counsel to challenge those techniques.

4. Failure to properly advise as to the detrimental effects of waiving right to a jury trial. Nelson claims his decision to waive his right to a jury trial

was less than fully informed, as discussions with trial counsel regarding this decision were inadequate. However, counsel testified he and Nelson discussed the various issues associated with waiving a jury trial, and the trial court engaged Nelson in a colloquy that demonstrated a knowing and voluntary waiver of his right to a jury trial. *See State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994) (written notice of waiver plus statements by defendant that he understood the nature of the waiver and agreed to it were "overwhelming evidence" of a knowing, voluntary and intelligent waiver). In addition, submitting to a bench trial can be characterized as a strategic decision by counsel. *See Osborn v. State*, 573 N.W.2d 917, 924 (Iowa 1998) (finding a decision to waive jury to be a trial tactic "immune" from attack where nature of act and potential sentence led counsel to believe defendant would get "a fairer shake with a judge"). Finally, even if Nelson had asserted his right to trial by jury, given the evidence presented by the State, there was not a reasonable probability a jury would have returned a verdict different than that imposed by the judge.

5. Failure to make an appropriate motions for a directed verdict. Nelson argues his attorney should have been more specific in the motion for a directed verdict that was made at the close of the State's case. Nelson does not, however, identify what particular grounds or issues should have been raised, and the motion that was made by counsel touched on both key areas of dispute – the State's establishment of general intent and the credibility of S.N.'s testimony. Accordingly, Nelson can demonstrate neither deficient performance nor resulting prejudice. *See also State v. Astello*, 602 N.W.2d 190, 198-99 (Iowa Ct. App.

1999) (declining to preserve for postconviction relief general allegations of ineffective assistance that did not set forth the specifics of the alleged inadequacies or indicate how a different action would have changed the outcome of the case).

Nelson also argues the motion should have been renewed at the close of all the evidence. This does not appear to be a claim of failure to preserve error, as renewal is no longer necessary to preserve a claim of sufficiency of the evidence, Iowa R. Cr. P. 18(8)(a), and as Nelson did not challenge the sufficiency of the evidence on direct appeal. Presumably, Nelson simply contends that if the motion had been renewed after his testimony, the district court would have found the evidence insufficient for a conviction. This claim is refuted by both the nature and quality of the evidence presented by the State and by the very fact the trial judge did determine the evidence was sufficient to support a conviction. Again, Nelson can demonstrate neither unreasonable performance nor prejudice.

6. Erroneously allowing testimony in defense of the charges. Nelson's defense consisted of two witnesses who testified as to Nelson's generally depressed and despondent behavior, allegedly caused by his divorce, and Nelson's own testimony. Nelson contends the testimony as to his mental state did nothing to assist in his defense, but suggested he was using S.N. as a sexual surrogate for his ex-wife. He makes the same general complaint about his own testimony, contending it only served to solidify the State's case, adding nothing to his defense beyond what was already in the record.

In both instances, however, putting on the testimony is properly characterized as a trial tactic. A trial tactic or strategy, even if improvident or miscalculated, does not necessarily amount to ineffective assistance of counsel. *State v. Oetken*, 613 N.W.2d 679, 683-84 (Iowa 2000). In addition, no prejudice has been shown. Even if Nelson's counsel had put on no defense, the signed confession and the corroborating videotape were sufficient to support a conviction.

Conclusion. Nelson has failed to demonstrate any act by trial counsel that amounted to performance below an objective standard of reasonableness. Nor could he show that an alteration in counsel's performance would have given rise to a reasonable probability of a not guilty verdict. If trial counsel was competent, appellate counsel cannot be deemed ineffective for failing to assail that competence, nor can Nelson be prejudiced by such failure. We therefore affirm the decision of the district court.

AFFIRMED.