

IN THE COURT OF APPEALS OF IOWA

No. 1-542 / 00-1543
Filed December 28, 2001

KIMMI LYNN HARDY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Lee (South) County, R. David
Fahey, Judge.

Defendant appeals from the district court ruling dismissing her application
for postconviction relief. **AFFIRMED.**

Alfredo Parrish and Ivy Ross Rivello of Parrish, Kruidenier, Moss, Dunn,
Montgomery, Boles & Gribble, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Michael Short, County Attorney, and Bruce McDonald, Assistant County
Attorney, for appellee.

Heard by Sackett, C.J., and Eisenhauer, J., and C. Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206
(2001).

SACKETT, C.J.

Petitioner-appellant Kimmi Lynn Hardy was tried and convicted following a jury trial of first-degree murder in violation of Iowa Code section 702.2 (1997); kidnapping, in violation of section 710.3; and child stealing, in violation of section 701.5. Hardy's convictions were affirmed by this court on appeal in an unpublished decision. *State v. Hardy*, No. 8-197/97-0636 (Iowa Ct. App. June 24, 1998). Hardy subsequently filed this application for postconviction relief contending her trial attorney was not effective in failing to object to certain testimony given by her husband Robert and in failing to raise defenses of insanity and diminished responsibility. We affirm.

The State's theory was that Hardy faked a pregnancy, befriended the pregnant victim, Teresa Lund, murdered her several months after Lund's baby was born and took the baby, Paul, to raise, representing to others that Paul was born to her.

Hardy claimed she was not guilty of the charges leveled contending that she purchased Paul from Anthony Matrona for \$1,500 and two guns. She said Matrona sent two Mexican men to her home with the child and she left them alone there for an hour. She said Lund's body was then put in a crawl space under the Hardy home, but she did not learn of this until the next day. She further said that she and her husband Robert Hardy later disposed of Lund's body to avoid being implicated in her death. Lund's body was found in a Missouri field. Lund had been shot twice in the head. At least one of the bullets was identified as coming from a Lorcin .380 semi-automatic handgun. There was testimony Hardy bought such a gun and ammunition on July 31, 1996, and that a

witness saw the gun at Hardy's home and Hardy explained she was filing off the serial numbers. Based on information provided by Robert Hardy, Lund's body and the handgun that killed her were located.

Hardy contends that her trial attorney was not effective in (1) failing to object to certain testimony given by her husband Robert as being inadmissible under the marital privilege, and (2) in failing to pursue an insanity or diminished responsibility defense.

We may review postconviction relief proceedings for errors at law or de novo. If the petitioner makes constitutional claims our consideration is in the nature of a de novo review. *Key v. State*, 577 N.W.2d 637, 639 (Iowa 1998). When no constitutional safeguards are at issue, our review is for errors at law. *Fenske v. State*, 592 N.W.2d 333, 338 (Iowa 1999). Any claim not properly raised on direct appeal may not be litigated in a postconviction relief action unless sufficient reason or cause is shown for not previously raising the claim, and actual prejudice resulted from the claim of error. *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998); *Jones v. State*, 479 N.W.2d 265, 271 (Iowa 1991). The rule requiring claims to be raised at trial or on appeal is not absolute. It is not applied if sufficient reason can be shown for not raising the claim at trial or on appeal. Yet, the circumstances which will permit an ineffective assistance of trial counsel claim to be raised for the first time in a postconviction relief petition are circumscribed. Ineffective assistance of appellate counsel may provide sufficient reason. *Jones*, 479 N.W.2d at 271. Furthermore, factual or legal matters, which were excusably unknown at the time of the trial and appeal, may be properly asserted on postconviction relief. See *Stanford v. Iowa State Reformatory*, 279

N.W.2d 28, 33-34 (Iowa 1979); *Edwards v. State*, 249 N.W.2d 851, 852 (Iowa 1977).

Both claims of ineffective assistance of trial counsel raised by Hardy were preserved by this court on direct appeal for postconviction proceedings. *State v. Hardy*, No. 8-197/97-0636 (Iowa Ct. App. June 24, 1998).

To prevail on a claim of ineffective assistance of counsel Hardy must demonstrate both ineffective assistance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000); *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). Both elements must be proven by a preponderance of the evidence. *State v. Ramirez*, 616 N.W.2d 587, 593 (Iowa 2000); *Oetken*, 613 N.W.2d at 683. Yet both elements do not always need to be addressed. If Hardy's claims lack prejudice, they can be decided on that ground alone without deciding whether the attorney performed deficiently. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995); *State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990); *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

To establish the first prong, Hardy must demonstrate her trial attorney performed below the standard demanded of a reasonably competent attorney. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94; *Artzer*, 609 N.W.2d at 531. We measure the attorney's performance against "prevailing professional norms". *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694; *State v. Risdal*, 404 N.W.2d 130, 132 (Iowa 1987). There is a presumption the attorney performed competently. *Strickland*, 466 U.S. at 689,

104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95; *Oetken*, 613 N.W.2d at 683. The claim is reviewed in light of the totality of the circumstances. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94. The inquiry is an individualized fact-based analysis. *Williams v. Taylor*, 529 U.S. 362, 391, 120 S. Ct. 1495, 1512, 146 L. Ed. 2d 389, 416 (2000). Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. *Wissing*, 528 N.W.2d at 564 *Caldwell v. State*, 494 N.W.2d 213, 214 (Iowa 1992).

Once Hardy proves ineffective assistance, she must also show that the error caused prejudice. *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067, 80 L. Ed. 2d at 697; *State v. Westeen*, 591 N.W.2d 203, 211 (Iowa 1999). To sustain this burden, Hardy must demonstrate “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different”. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; see *Artzer*, 609 N.W.2d at 531; *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. In making the decision whether there is a reasonable probability that the result of the trial would have been different, the burden of proof is on the defendant to establish this standard by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

We first address Hardy's contention that her trial attorney should have objected to certain testimony from Robert Hardy, Kimmi's husband, as being in violation of the marital privilege found in Iowa Code section 622.9 (1997). The

primary question is whether a properly lodged objection to Robert's testimony would have been sustained.

Our standard of review of the statutory privilege is for correction of errors at law. Iowa R. App. P. 4; *State v. Anderson*, ____ N.W.2d ____, ____ (2001); *State v. Richmond*, 590 N.W.2d 33, 34 (Iowa 1999). Yet the standard of review for the admissibility of evidence alleged to be privileged is for an abuse of discretion. *Richmond*, 590 N.W.2d at 34; *State v. Alspach*, 524 N.W.2d 665, 668 (Iowa 1994).

The marital exception is one of several privileged communications that exist to promote defined confidential relationships and encourage candid communications between the parties to those relationships on the premise that society is better protected by the privilege than by the value of the testimony. See *Anderson*, ____ N.W.2d at ____.

The privilege for marital communications is recognized in Iowa by statute. Iowa Code section 622.9 provides:

Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

This privilege is not absolute. *Id.* There are both common law and legislative exceptions. *Id.* See also *State v. Klindt*, 389 N.W.2d 670, 675-76 (Iowa 1986). Yet statutes creating privileges are to be liberally construed. *State v. Bedell*, 193 N.W.2d 121, 124 (Iowa 1971).

Hardy contends her trial attorney should have objected to testimony from Robert that he learned from her, his wife, a smell from their basement came from

other than the sewer backing up, and when he went to investigate the smell he had an understanding from her as to the source of the smell. Hardy contends this testimony was prejudicial because it implied she knew about the body concealed in their basement.

Robert further testified that Hardy, his wife, gave him an explanation that caused him to believe the body in the basement was Lund's and the child living with them was Lund's son. Hardy contends this evidence branded her as one who did not tell the truth and who was a bad person.

Robert also testified that he made statements to the police that he had helped deliver a baby from his wife and that he was told by Hardy to say those things. Hardy contends that this testimony indicated she directed Robert to lie, undercutting her defense. Hardy also contends that because of Robert's testimony she was required to testify.

The State contends the marital privilege does not apply in this case. The State first argues without authority the testimony of Robert at trial did not refer to private communications between the Hardys made in the context of their marriage. We find no reason to accept this part of the State's argument.

The State next argues the decision not to object to the testimony was strategic and the testimony was not prejudicial to Hardy's defense because it corroborated aspects of the case Hardy did not deny. The State further contends that even if the statements were not admissible, they did not adversely affect Hardy's defense because they were corroborative and cumulative in nature. The State further contends Hardy was not prejudiced because of the strength of the State's case.

Hardy has failed to show the required prejudice to succeed on this claim. Hardy has failed to show the decision to allow Robert to testify was not based on reasonable professional judgment. Successful objection to Robert's testimony in open court could, as Hardy's trial attorney reasoned, suggest to the jury that his testimony would implicate Hardy in the murder. Hardy's attorney correctly concluded Robert's testimony basically corroborated and did not contradict Hardy's version of events that she bought the baby, Lund was murdered by Matrona, and she learned the day after she got the baby that Lund's body was in her basement.

The statement that the smell in the basement may not have been sewer gas was not prejudicial and was consistent with Hardy's statements indicating she knew the body was there the day after she got the baby. And while the statement Hardy told Robert to say, that he helped deliver the baby, impacted on Hardy's truthfulness, it supports her representation that she was pregnant and delivered the child. Hardy has failed to prove her trial counsel was ineffective or that she was prejudiced by the errors she alleges. We affirm on this issue.

Hardy also contends that her trial attorneys were ineffective in not seeking to raise a defense of insanity or diminished capacity.

Hardy was examined by psychiatric experts for both the defense and the State. Hardy's trial attorney contacted the State Public Defender's office for suggestions for psychiatrists who might make an evaluation favorable to her. Defense counsel discussed the cases with three or four of the people whose names were provided him before choosing Dr. Loren Olson. Olson, who evaluated Hardy for the defense, told her trial attorney that while Hardy was a

"little bit different" she did not meet the standards for the insanity or diminished responsibility defense. Hardy has failed to show her trial counsel was ineffective on this issue. There is no basis to Hardy's claim that the cumulative effect of alleged errors were so prejudicial that she was denied effective assistance of counsel.

AFFIRMED.