

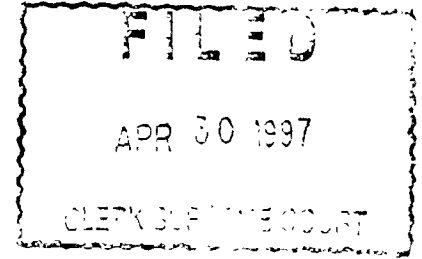
IN THE COURT OF APPEALS OF IOWA

No. 7-098 / 96-858

JOHN LELAND PARKER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.



Appeal from the Iowa District Court for Johnson County, L. Vern Robinson,
Judge.

On appeal from the denial of his application for postconviction relief, the
appellant argues he was denied the effective assistance of trial counsel and newly-
discovered evidence supports the granting of a new trial. **AFFIRMED.**

Amy L. Evenson, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, and J. Patrick White, County Attorney, for appellee.

Considered by Sackett, P.J., and Cady and Vogel, JJ.

VOGEL, J.

Following a jury trial, John Leland Parker was found guilty of two counts of second-degree sexual abuse. Parker appealed and his convictions were affirmed by this court. *State v. Parker*, No. 94-367 (Iowa App. Feb. 28, 1995). We preserved his claims of ineffective assistance of trial counsel for postconviction proceedings. Following a hearing on the issues, the trial court denied Parker's application for postconviction relief. Parker appeals.

Scope of review. Generally, we review postconviction relief proceedings for errors of law. *Carroll v. State*, 466 N.W.2d 269 (Iowa App. 1980). However, when a postconviction petitioner asserts a violation of constitutional safeguards, including ineffective assistance of counsel claims, we make our evaluation based on the totality of the circumstances, equivalent to a de novo review. *Id.* at 271; *State v. Wissing*, 528 N.W.2d 561, 563 (Iowa 1995).

Preservation of error. In preserving Parker's postconviction claims of ineffective assistance of counsel, we only preserve the specific claims made on direct appeal. See *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). However, we allow postconviction ineffective assistance of counsel claims not raised on direct appeal if the applicant establishes, by a preponderance of the evidence, there was a "sufficient reason" for his failure to raise claims on direct appeal. See Iowa Code § 822.8 (1993); *LeGrand v. State*, 540 N.W.2d 667, 668-69 (Iowa App. 1995) (citing *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991)). Parker's claims that counsel's failure

to discover and present testimony of S.L.'s brother, Justin, and friend, Shaunessy, were not raised on direct appeal, nor has Parker provided a sufficient reason for his failure to do so. Accordingly, we decline to address the issues not preserved for our review. However, several other claims have been preserved, which we address.

I. Ineffective assistance of counsel claims. Parker must prove through a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) he was prejudiced by counsel's omission. *Wissing*, 528 N.W.2d at 563-64.

First, in order to prove failure of an essential duty, Parker must show, based on the entire record and under the totality of the circumstances, his counsel's performance was not within the range of normal competency. *See Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989). Second, to prove prejudice, Parker must prove there was a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2086, 80 L. Ed. 2d 674, 698 (1984). Improvident strategy, miscalculated tactics, or mistakes in judgment do not necessarily lead to findings of ineffective assistance of counsel. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992).

A. Failure to obtain a continuance. A continuance may be granted "upon a showing of good and compelling cause." Iowa R. Crim P. 8.1(2). The record reflects trial counsel, Mr. Erdahl, made reasonable efforts to make such a showing. The deposition of the state's expert, Dr. Opdebeeck, was not taken until five days before

trial. Mr. Erdahl testified he wanted a continuance to allow time for another expert to be appointed to rebut anticipated testimony from Dr. Opdebeeck. The court denied the motion for continuance but granted Mr. Erdahl's motion in limine which satisfied his stated need for a continuance. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95. Parker has failed to establish Mr. Erdahl acted unprofessionally or failed to perform an essential duty. For Parker to argue, with no support, that his trial counsel did not have enough time to prepare following the deposition of Dr. Opdebeeck, is to raise an allegation without a showing of prejudice.

B. Failure to obtain an expert. The Iowa Rules of Criminal Procedure provide an indigent defendant with the opportunity to have an expert appointed and paid for at public expense. Iowa R. Crim. P. 19(4). Parker claims he was denied effective assistance as Mr. Erdahl did not find and present a defense expert to testify of false memory syndrome. Parker was charged with two counts of sexual abuse in the second degree and was principally convicted by the victim, S.L.'s testimony. S.L. had not reported the incident when it occurred and remembered it after a similar incident occurred by another abuser around two years later. She had flashback memory regarding the incidents that allegedly occurred with Parker. Parker claims an expert was needed to testify on false memory syndrome to effectively counter the State's case. However, the record reflects Mr. Erdahl did ask for permission to hire

an expert on false memory syndrome, but the court denied the request. He had no duty to engage in the “obviously useless act” of repeating his unsuccessful efforts. *See State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Parker does not suggest or offer any ways in which Mr. Erdahl could have acted differently to secure an expert, and thus Parker has not shown a failure of duty. Parker also fails to show prejudice since there is no evidence the result of the proceeding would have been different had Mr. Erdahl been successful in obtaining an expert. In fact, Mr. Erdahl consulted with Dr. Shepherd who informed him false memory syndrome was not applicable to the facts of Parker’s case and there is no evidence other experts would have disagreed with this. We find Parker does not succeed on this claim.

C. Failure to move for mistrial. Parker argues he was denied effective assistance of counsel by Mr. Erdahl’s failure to move for a mistrial, or move to have a prosecutor’s question stricken and the jury admonished. At the beginning of the trial, the court, per Mr. Erdahl’s motion, ordered the prosecutor not to elicit from the State’s expert, Dr. Opdebeeck, testimony that a majority of child abuse victims show no physical evidence of abuse. However, during the prosecution’s direct examination of Dr. Opdebeeck, the prosecutor asked, “Doctor, is it unusual that you have no physical findings in children that have been sexually abused?” Mr. Erdahl timely objected on the basis of the court’s previous order. The court sustained his objection and the doctor did not answer the prosecutor’s question.

A mistrial motion must be made when the grounds therefor first become apparent. *State v. Jirak*, 491 N.W.2d 794 (Iowa App. 1992). Mr. Erdahl did not ask for a mistrial as he was satisfied with the court's ruling and its warning that the prosecutor should not pursue the subject. Further, the court instructed the jurors that the lawyers' questions were not evidence to be considered. We assume, unless there is evidence to the contrary, jurors follow the instructions. *Schwennen v. Abell*, 471 N.W.2d 880, 887 (Iowa 1991). Accordingly, Mr. Erdahl did not find it necessary to have the jury admonished or the question stricken from the record. He reasoned that he did not want to make a "bigger deal of it than I had already made" in front of the jury. This was a tactical decision on Mr. Erdahl's part. Reasonable tactical decisions do not support ineffective assistance of counsel claims. *Brewer*, 444 N.W.2d at 83. Parker does not show Mr. Erdahl failed in his essential duties and further fails to show he was prejudiced on this claim.

D. Failure to exclude evidence of other abusers. Both parties at trial introduced evidence that S.L. had been sexually abused by her father and a third man. Neither party objected to the other's introduction of this evidence. Parker claims he was denied effective assistance of counsel because of Mr. Erdahl's offering this evidence and because of Mr. Erdahl's failure to exclude this evidence under Iowa Rule of Evidence 412 when it was offered by the State. Parker contends the challenged evidence outraged the jurors and caused them to convict Parker, the only person available to them on which to place their anger. However, Mr. Erdahl

considered it “essential to let the jury know there was some factual basis” for S.L.’s testimony, while presenting the defense that she was confused about the identity of the actual perpetrator. This was ultimately a strategic move on Mr. Erdahl’s part. “[W]e will not reverse where counsel has made a reasonable decision concerning trial tactics and strategy even if such judgments ultimately fail.” *Brewer*, 444 N.W.2d at 83.

Further, Mr. Erdahl strongly believed in his defense and stated he would still present evidence of other abusers if he had to try the case again. Parker does not establish Mr. Erdahl had a duty to exclude such evidence as Mr. Erdahl believed his defense to be viable and strong as a matter of strategy. We further find Parker fails to establish he was thereby prejudiced.

E. Failure to find and present witnesses. Parker claims he was denied effective assistance of counsel by Mr. Erdahl’s failure to discover and present the testimony of Parker’s former girlfriend, Stacy Laughlin. S.L. testified that Parker sexually abused her one day when she was home sick from school and that she and Parker were alone in the trailer home. At Parker’s sentencing, Laughlin testified she stopped by the trailer one weekday morning and stayed until 3:30 or 3:45 in the afternoon. She did not see Parker do anything improper. Parker does not suggest how Mr. Erdahl could have become aware of who Laughlin was and that she had information helpful to Parker’s case. In fact, Parker never mentioned Laughlin previously to Mr. Erdahl as a possible witness to the case. Parker does not establish

a failure of duty in this respect and we find nothing in the record to suggest Mr. Erdahl's performance was not within the range of normal competency.

Parker also fails to establish prejudice in this regard. Even assuming Laughlin had testified, this is not conclusive of the fact that Parker did not sexually abuse S.L. on one of the possible four days the incident took place. A jury could well have determined Parker's guilt regardless, and there is no reasonable probability Laughlin's testimony would have altered the verdict.

F. Cumulative effect. Parker maintains the cumulative conduct of Mr. Erdahl constituted ineffective assistance of counsel. In reviewing the record as a whole, we are unconvinced Mr. Erdahl failed to perform any essential duty, nor was there any resulting prejudice to Parker. Mr. Erdahl prepared a good defense and lost. This does not mean he was ineffective. We note the postconviction court's observations of Mr. Erdahl's competency:

Mr. Erdahl provided his client with an excellent defense. Mr. Erdahl's preparation and evaluation of the case was outstanding. No one can fault Mr. Erdahl for a lack of effort. He believed in his client and did everything he could to zealously represent him.

We agree and reject all of Parker's claims regarding ineffective assistance of counsel.

II. Newly discovered evidence and new trial. Parker claims he was entitled to a new trial because of alleged newly discovered evidence. Parker was in Oklahoma at the time the crimes occurred. Our scope of review on this claim is for errors of law. *Whitsel v. State*, 525 N.W.2d 860, 862 (Iowa 1994).

We are mindful that “motions for a new trial on the basis of newly discovered evidence should be looked upon with disfavor and granted sparingly.” *Id.* In order to succeed on his claim of newly discovered evidence, Parker must prove: (1) evidence was discovered after the verdict; (2) that it could not have been discovered earlier on the exercise of due diligence; (3) that the evidence is material to the issue in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial. *Whitsel*, 525 N.W.2d at 863 (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)). What Parker claims is new evidence was not discovered by him after the verdict. He knew before the verdict that he was in Oklahoma on one of the dates in question. While Parker attributes his failure to submit this evidence to the victim’s vague account of the dates of the abuse, he could have raised and developed this alibi earlier in the exercise of due diligence. We find the evidence Parker was in Oklahoma on one of the four possible dates the abuse occurred would not have likely changed the outcome of the trial. Having reviewed the record in its entirety, we do not find a new trial is warranted.

We affirm the district court’s postconviction findings regarding ineffective assistance of counsel and further deny the granting of a new trial.

AFFIRMED.