IN THE COURT OF APPEALS OF IOWA

No. 8-465 / 97-1208
Filed December 28, 1998

STATE OF IOWA,
Appellee,

vs.

C. SHOBHA SHETH HORSTMAN,
Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Lawrence H. Fautsch, Judge.

Horstman appeals the judgment and sentence entered upon her convictions of child endangerment, multiple acts, and child endangerment resulting in serious injury.

AFFIRMED.

Paul Rosenberg of Paul Rosenberg & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Fred H. McCaw, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Vogel, JJ., but decided by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

PER CURIAM.

Shobha Horstman appeals the judgment and sentence entered upon her convictions of child endangerment, multiple acts, and child endangerment resulting in serious injury. We find substantial evidence in the record to support the convictions and further find that Horstman was not denied effective assistance of counsel. We therefore affirm.

Background facts. In June of 1995, juvenile court Child in Need of Assistance proceedings were commenced for Gary Hoffa, then aged four, and Steven Hoffa, then aged two. On June 28, 1995, the children were removed from the home of their mother and placed in the foster care of Mick and Shobha Horstman. At the time of their placement with the Horstmans, the children were in poor health and lagging in physical, social, emotional, and intellectual development.

Witnesses at trial testified that Horstman threw herself into the role of a foster parent with extreme zeal. However, Horstman was observed to be very strict and "somewhat obsessive" with the boys. She kept daily logs which detailed precisely what the boys ate, and at what time. She kept the boys on a strict diet and was very upset when a Department of Human Services (DHS) worker allowed the boys to eat some cookies their biological mother brought to a visit.

Although Gary and Steven were expected to dramatically grow and gain weight after removal from their mother's care, their pediatrician diagnosed them with "failure to thrive" eight months into their placement with the Horstmans. The children were

referred to doctors at the Iowa City Growth Clinic, who could find no medical reason for their height and weight problems.[1] The doctors recommended that the Horstmans add various foods to the boys' diet. The psychologists at the clinic further observed that the Horstmans had high expectations for the boys from manners to learning and recommended that they would benefit from further education about appropriate expectations for the boys. Horstman was upset with the doctor's recommendations and the implication that the boys' failure to thrive was somehow her fault. In a letter she wrote to DHS social worker Vicky Debes, Horstman complained that the doctors made her and her husband "look like idiots" and expressed concern about what would happen if the adoption agency that the Horstmans had contacted saw the report. Horstman also stated that she did not want to take the boys back to the Growth Clinic and had alternatively arranged for their height and weight to be monitored by their pediatrician in Dubuque.

While living with the Horstmans, both children suffered injuries which required medical attention. In November of 1995, Steven was treated for two broken toes in his right foot. In March of 1996, Gary was treated for second-degree "splatter burns" on his mouth, face, neck and shoulders. In May of 1996, Gary suffered a cut to his head which required stitches. While being treated for that cut, he was also diagnosed with having suffered a skull fracture. At this point, doctors and staff at the pediatrician's office were becoming suspicious of the frequent injuries and

[1] Gary has achieved normal height and weight since being removed from the Horstmans' care.

Horstman's dubious explanations and demeanor. The children's pediatrician, Dr. James Hubbard, contacted DHS, who made plans to have the boys meet alone with a social worker to investigate the possibility of abuse. On May 18, 1996, Steven died of unknown causes. During the autopsy, the medical examiner observed "ulcers" on Steven's right buttock and penis. X-rays revealed either a skull fracture or "anomalous suture," and a healing fracture in Steven's foot.

Shobha Horstman was arrested in September of 1996. Count I of the indictment charged Horstman with committing multiple acts of child endangerment, alleging that her actions resulted in a skull fracture, broken bone in the right foot, bruise on the scalp, burn to the buttocks and burn to the penis of Steven Hoffa. Count II of the indictment charged Horstman with committing child endangerment with serious injury, alleging that her actions resulted in a skull fracture to Gary Hoffa. Count III of the indictment charged Horstman with child endangerment without serious injury, alleging that her actions resulted in a burn to Gary Hoffa. A jury trial was held in May of 1997. The jury found Horstman guilty of causing the skull fracture to Gary; and the burn to the penis, burn to the buttocks, and skull fracture to Steven, thus returning guilty verdicts on counts I and II. Horstman appeals.

I. Substantial evidence. Horstman asserts that there was insufficient evidence from which a rational juror could find that she inflicted injuries on Gary and Steven Hoffa.

We review substantial evidence claims on error. Iowa R. App. P. 4; *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). We are bound by the jury verdict unless the verdict is not supported by substantial evidence. *State v. Lewis*, 514 N.W.2d 63, 65-66 (Iowa 1994). In making this determination, we must consider all the evidence in the light most favorable to the State. *State v. Peck*, 539 N.W.2d 170, 172 (Iowa 1995). "Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Direct and circumstantial evidence are equally probative." *Bayles*, 551 N.W.2d at 608. However, evidence which merely raises suspicion, speculation, or conjecture is insufficient. *Id.*

Horstman asserts that the fact that she was the primary caretaker of the children is not sufficient under Iowa law to establish that she was the perpetrator of their injuries. She argues that Iowa courts have only found adequate circumstantial evidence of identity where the caretaker in question had *exclusive* custody of a child during a narrow time period in which the abuse occurred. We find no authority in Iowa to support this reading of our case law. However, we find there was sufficient circumstantial evidence presented to support that Horstman was the perpetrator of each of the injuries for which the jury found her guilty. We note that:

> [m]uch of the evidence that can be gathered to show an instance of "battered child syndrome" is circumstantial. In allowing such evidence to support a conviction, . . . those felonious assaults are in a unique category. Most cases of felonious assault tend to occur in a single episode to which there are sometimes witnesses. By contrast, cases that involve "battered child syndrome" occur in two or more episodes to which there are seldom any witnesses. In addition, they usually involve harm done by those who have a duty to protect the child. The harm

> often occurs when the child is in the exclusive control of a parent. *Crucial to identifying such cases are the discrepancies between the parent's version of what happened to the child when the injuries occurred and the testimony of the medical experts as to what could not have happened, or must have happened, to produce the injuries.*

State v. McKowen, 447 N.W.2d 546, 549 (Iowa App. 1989) (quoting *State v. Durfee*, 322 N.W.2d 778, 783 (Minn. 1982) (citations omitted) (emphasis added)).

Gary's skull fracture. On May 6, 1996, Gary arrived at school with a fresh cut on his head. The school nurse, Linda Marshall, testified that as she was cleaning the cut she noticed a "spongy" area in a different location from the cut. Concerned about the injuries, she contacted the Horstmans. Shobha Horstman arrived and the two discussed the cause of Gary's injuries. Horstman said she didn't know how Gary had been cut, but indicated that the spongy area might have resulted from a fall he had taken from a park slide a few days earlier. In Horstman's presence, Marshall asked Gary how he had been injured. At that point, Horstman said "Gary, you don't have to say anything."

Horstman then left the school and took Gary to the doctor's office. Dr. Donald Reyerson saw Gary and observed a deep, recent wound that required stitches. He also observed the spongy area and suspected that Gary had suffered a skull fracture. X-rays were taken which confirmed his suspicions. Dr. Reyerson testified that when he told Horstman that Gary had a skull fracture, she didn't seem particularly concerned; he described her reaction as "not typical." Horstman explained to Dr. Reyerson that she thought the fracture might have occurred when Gary fell from a slide and bumped his

head. Dr. Reyerson told Horstman such an incident could not have caused Gary's skull fracture and, as a precaution against further injury, prescribed a protective bicycle helmet for Gary to wear for a few weeks. Horstman got a helmet, but told DHS social worker Vicky Debes that she thought it was "dumb."

At trial, Dr. Reyerson testified that "[it] takes a considerable amount of force to fracture the skull of a child, and the injury that was described to me [by Horstman] was not consistent with that amount of force." Dr. Wilbur Smith, a pediatric radiologist at the University of Iowa Hospitals, testified that Gary had suffered a "stellate skull fracture," and concluded that the slide explanation as described by Horstman could not have resulted in this injury. Dr. Smith stated:

> A stellate skull fracture almost always occurs owing to major trauma. It takes severe trauma, trauma like an automobile accident, a severe blow to the head or a fall from a story or more to cause a stellate skull fracture.

Dr. Smith further testified that he believed Gary had suffered the fracture several days prior to Horstman's explanation of the injury. In addition, Gary's behavior after the slide story, as described by Horstman and other witnesses at trial, was inconsistent with the severe symptoms described by Drs. Smith and Reyerson. Both testified that after suffering the fracture Gary would have been noticeably stunned or lethargic, if not completely unconscious, and would have been likely to vomit.

Injuries to Steven. Horstman was found guilty of causing three injuries to Steven Hoffa: a burn to his penis, a burn to his buttocks, and a skull fracture. All

injuries were discovered and examined after Steven's death.[2] Dr. Francis Cicciarelli, a pathologist who performed the first autopsy of Steven Hoffa, testified that he observed unusual ulcers on the buttocks of Steven and on the tip of his penis. He later discovered in a death review meeting that Steven had not received medical treatment for the ulcers prior to his death. When asked about the ulcers, Horstman opined that they were the result of severe diaper rash or an allergic reaction to baby wipes. However, several experts testifying at trial rejected this explanation. Dr. James Hubbard, a pediatrician, testified that location and size of the ulcers were not consistent with diaper rash. Dr. Randell Alexander, an associate professor of pediatrics at the University of Iowa, also testified that diaper rash does not result in the specific ulceration he observed in the photographs of Steven. Dr. Thomas Bennett, who performed the second autopsy and was at that time the medical examiner for the State of Iowa, also rejected that the injuries were caused by diaper rash.

The majority of experts testified that the "ulcers" to Steven's penis and buttocks were, in fact, burns. Dr. Bennett testified that microscopic inspections of samples taken from Steven revealed granulation tissue which indicated that the injuries were burns. Dr. Patrick Kealey, director of the burn treatment center at the University of Iowa Hospitals, also testified that the microscopic samples taken from Steven's penis and buttocks were typical of a branding type of burn and that each was

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[2] Due to a miscommunication, the medical examiner was not notified that there were positive findings in Steven's x-rays prior to his body being sent to the funeral home. Steven's body was later exhumed for a second autopsy.

caused by the application of a flat, hot surface. Phylip Peltier, a criminal investigator who specializes in suspicious burn injuries, testified that the injury to Steven's buttocks was a burn caused by application of a hot, flat object. He further noted that the burn mirrored the shape of a clothes iron. Dr. Alexander opined that the ulcers were either burns or pressure sores, but concluded they would have been burns if they were not observed a few days before Steven's death. Dawn Steinke, Steven's preschool teacher, testified that she had not observed ulcers when she cleaned Steven up after he wet his pants at school a few days before his death. Horstman also testified that she did not notice the ulcers the night before Steven's death when she changed his diaper.

Steinke further testified that the day after Steven wet his pants, Horstman informed her that Steven was now in a diaper and instructed her not to let Steven drink so much water. Steinke also testified:

> . . . on Monday [the day he wet his pants] Steven was fine about going home, but it started on Tuesday, he would scream, throw his book bag, throw his coat, hang on to my leg and he begged me not to let him go, and then as soon as [the defendant] would walk into the door, he would quit crying and immediately get his coat.

Steinke recalled that Steven repeated this behavior on three consecutive days, including the day of his death.

Experts at trial testified that Steven's skull showed signs of healing, and concluded the fracture occurred some time prior to his death. Dr. Bennett estimated that the fracture was between four and eight weeks old. Dr. Wilbur Smith, a pediatric

radiologist at the University of Iowa, believed the fracture to be between two and four weeks old. Dr. Smith testified that the location of the fracture was suspicious and caused him to believe that it was caused by a blow to the back of the head. Dr. Smith further testified:

> This is a major, major injury. A caretaker would have known that there was a major injury if they were in attendance when the child was injured. Good possibility the child would be knocked unconscious. If not knocked unconscious, the child would have been in tremendous pain, screaming and yelling.

At trial, Horstman testified that she had been unaware of Steven's skull fracture prior to his death. She had told police that Steven had hit his head when he stood up under a pool table approximately a week prior to his death. However, Dawn Steinke had noticed a lump on the back of Steven's head a few days before his death. When she pointed out the lump to Horstman, she replied that he must have fallen down.

Summation. The evidence showed that Gary and Steven's fractures were severe, and that their immediate symptoms would have been obvious. No one at trial testified to witnessing these injuries; however, these were young children who were rarely alone with anyone but Shobha Horstman. Horstman stated that she had been aware of Gary's "spongy" spot before it was discovered by the school nurse, and Steven's teacher testified that she had informed Horstman of a bump on Steven's head prior to his death. Horstman also testified that she had been previously informed by

a pediatric nurse of the symptoms to watch for following a head injury.[3] Despite this, she did not seek medical treatment for Steven's bump and took Gary for treatment only when he required stitches for another head injury. Horstman further gave implausible explanations for these injuries at trial and was described by witnesses as exhibiting an atypical lack of concern for and reaction to the injuries. In addition, although the photographic and expert evidence established that the burns to Steven's buttocks and penis would have been manifestly apparent, Horstman did not seek medical attention for them and testified that she did not notice them the night before his death. Although Horstman maintained her innocence at trial, it was for the jury to determine her credibility. *See State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984); *State v. Taylor*, 516 N.W.2d 38, 41 (Iowa App. 1994). Viewing the evidence in a light most favorable to the State, we find sufficient circumstantial evidence to support the jury's finding that Horstman was the perpetrator of these injuries.

II. Ineffective assistance of counsel. Horstman asserts that her trial counsel was ineffective for failing to make certain evidentiary objections.

Our standard of review as to the constitutional issue of effective assistance of counsel is de novo. *See State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994).

To prevail on a claim of ineffective assistance of counsel, the burden rests with Horstman to prove by a preponderance of the evidence that (1) counsel failed to

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[3] Horstman testified that she had called the pediatric clinic for advice after Steven had fallen down the stairs and bumped his head in the fall of 1995. The nurse told her what symptoms would indicate the type of head injury requiring medical attention.

perform an essential duty, and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997). To prove counsel failed in an essential duty, the defendant must prove the attorney's performance was outside the range of normal competency. *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App.1996). In the case of evidentiary objections, trial counsel need not take advantage of every opportunity to object in order to satisfy the standard of normal competency. *See State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If the claim is based on the failure to object to the admission of certain evidence, we can ordinarily adjudicate the claim on direct appeal if the evidence was admissible. *State v. Dinkins*, 553 N.W.2d 339, 341 (Iowa App. 1996); *see also State v. Bumpus*, 459 N.W.2d 619, 627 (Iowa 1990).

Multiple acts. Horstman argues that her trial counsel was ineffective in failing to object to submission of the injuries to the penis and buttocks as two separate and distinct acts when the injuries were charged and proven as one episode of abuse. Horstman asserts that had her counsel objected to the separation of the injuries in the instructions, the jury would have found only two acts of child endangerment and she

would not have received the enhanced punishment for multiple acts of child endangerment under Iowa Code section 726.6A. That section provides that:

> A person who engages in a course of conduct including three or more acts of child endangerment as defined in section 726.6 within a period of twelve months involving the same child or a minor with a mental or physical disability, where one or more of the acts results in serious injury to the child or minor or results in a skeletal injury to a child under the age of four years, is guilty of a class "B" felony. Notwithstanding section 902.9, subsection 1, a person convicted of a violation of this section shall be confined for no more than fifty years.

The three separate acts required under Iowa Code section 726.6A should be established with enough precision to enable a jury to be satisfied beyond a reasonable doubt of a time and place where each of the acts occurred. *See State v. Hickman*, 576 N.W.2d 364, 368 (Iowa 1998).

Count I of the indictment charged that between November of 1995 and May of 1996, Horstman:

> engaged in a course of conduct including three or more acts of child endangerment as defined in Section 726.6, to wit: did by an intentional act or series of intentional acts use unreasonable force, torture or cruelty that resulted in physical injury or that was intended to cause serious injury, to wit: a skull fracture, broken bones in the feet and a bruise to the back of the skull suffered by Steven Hoffa, d/o/b 2-4-93; where one or more of the acts resulted in serious injury to the child, a person under the age of 4 years, *and injuries to the penis and buttocks of Steven Hoffa.*[4]

Horstman asserts that the phrasing of the above italicized language indicates that the grand jury intended to combine the injuries to Steven's penis and buttocks

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[4] We note but find no significance in the fact that the indictment was entirely typewritten except for language added by the grand jury, which is identified in italics.

into one chargeable act of endangerment. We disagree with this interpretation, and do not believe that it was necessary for the indictment to allege an "injury to the penis and injury to the buttocks" as argued by Horstman. Regardless of the language in the indictment, the injuries were clearly proven by the prosecution as separate injuries. Phylip Peltier testified only in regard to the burn to the buttocks. Drs. Bennett and Kealey also testified that they examined separate tissue samples from Steven's buttocks and penis in determining that each injury was a burn. Furthermore, the fact that the injuries to the penis and buttocks may have occurred in one episode of abuse is irrelevant. *See State v. Newman*, 326 N.W.2d 788, 793 (Iowa 1982) ("A defendant should not be allowed to repeatedly assault his victim and fall back on the argument that his conduct constitutes but one crime."). We find that the injuries to the penis and buttocks were properly submitted as two separate acts and conclude that Horstman's counsel was not ineffective in failing to object to the same.

Expert testimony on rebuttal. Horstman next argues that her trial counsel was ineffective in failing to object to the admission of rebuttal testimony by Dr. Marion Huettner and the prosecutor's alleged misrepresentation of that testimony in closing argument.

Horstman's primary defense at trial consisted of testimony by friends, relatives, teachers, and social workers which described a positive and loving relationship between Horstman and the children. The State called Dr. Marion Huettner, a pediatric psychologist, as a rebuttal witness to provide an explanation as to how the children

could have a seemingly happy and positive relationship with Horstman if she was abusing them. Dr. Huettner testified that children from abusive homes often develop "reactive attachment disorder," which she defined as a "marked disturbance in social relatedness in children and inappropriate developmental interactions with people allegedly in the context of abuse or neglect or terrible care." Dr. Huettner further testified that children with this disorder may have happy interactions with their normally neglectful or abusive caregiver.

Horstman contends that her trial counsel was ineffective for failing to object to this testimony because there was no foundation laid as to the relevance of the disorder to Gary and Steven Hoffa. Horstman asserts that Dr. Huettner never met or talked to the children, did not review their medical records, and was not even briefed on the evidence in the case. However, Iowa Rule of Evidence 702 allows the admission of expert testimony that will "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Furthermore, in Iowa we are "generally committed to a liberal rule which allows opinion testimony if it will aid the jury in screening the properly admitted evidence to ascertain the truth." *State v. Griffin*, 564 N.W.2d 370, 374 (Iowa 1997). Without deciding whether Dr. Huettner's testimony was admissible, we find Horstman was not prejudiced by counsel's failure to object to the testimony or to the prosecutor's references in closing.[5]

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[5] In closing, the prosecutor stated: "Dr. Huettner testified that she's a child psychologist and she testified again that there is no significance to the fact that these little guys were smiling and happy and hugging and kissing the Defendant."

Both sides had the opportunity to argue the significance, if any, of Dr. Huettner's testimony. Horstman's counsel established on cross-examination that Dr. Huettner had not diagnosed the Hoffa children with this disorder, and stated in closing that her testimony had "no bearing on this case and gives you no clue or direction in how to decide whether or not [the defendant] . . . is a monster. It serves no purpose. It's pop psychology." Due to the lack of prejudice, we find no ineffective assistance for counsel's failure to object.

Other objections. Horstman argues her trial counsel was ineffective for failing to object to misstatements of the record, inflammatory arguments, and prejudicial cross-examination executed by the prosecution.

In closing argument the prosecutor argued to the jury that Steven Hoffa had been "branded with a steam iron on his penis." Horstman asserts that this was a total misstatement of the testimony, yet her trial counsel did not object to this argument, nor request a curative admonishment or mistrial.

Counsel is allowed some latitude in closing argument. *See Thornton*, 498 N.W.2d at 676; *Phillips*, 226 N.W.2d at 19. Counsel may draw conclusions and argue all permissible inferences which reasonably flow from the record; however, counsel cannot create evidence or misstate the facts. *See Thornton*, 498 N.W.2d at 676; *Phillips*, 226 N.W.2d at 19. While we find the prosecutor's statement very graphic, it was reasonably inferred from the evidence presented at trial. Dr. Kealey testified that the burns were a "branding" type of burn caused by application of a flat, hot

surface, and Phylip Peltier testified that the burn to the buttocks was in the shape of an iron. We find no ineffective assistance from trial counsel's failure to object to this statement, nor to the other allegedly inflammatory arguments and prejudicial cross-examination.

The subject matter of this trial is one which naturally involved some emotional testimony, as well as emotional arguments. Prosecutors should certainly not engage in inflammatory argument as it is unnecessarily theatrical and outside the bounds of zealous advocacy. However, we do not believe the prosecutor's comments and cross-examination in this case were such that defense counsel's failure to object amounted to ineffective assistance.

Having considered all issues properly before us on appeal, we hereby affirm the conviction and sentence of Shobha Horstman.

AFFIRMED.