FILED
MAY 2 9 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-166 / 90-359

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DOUGLAS CARL RUPP II,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Polk County, George Bergeson, Judge.

Douglas Rupp appeals the trial court's denial of his application for postconviction relief. **AFFIRMED.**

Bruce L. Cook of Cook, Gotsdiner, McEnroe & McCarthy, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Tom Fisher and Richard J. Bennett, Assistant Attorneys General, John Sarcone, County Attorney, and Melodee Hanes, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

In 1987 Douglas Rupp was accused of hitting and injuring his infant daughter. His wife reported to social workers, police officers, and a doctor that Rupp had inflicted the injuries on their child.

Rupp was charged with the crime of child endangerment, a violation of Iowa Code section 726.6. His wife did not testify at his trial. The State indicated it planned to have other witnesses testify about his wife's reports implicating Rupp. The district court ruled such testimony would be inadmissible unless Rupp's wife testified. The State made several attempts during trial to have other witnesses testify about his wife's reports. Most of these attempts were overruled. One witness, a doctor, did make a testimonial reference to Rupp's wife's reports.

In August 1987 a jury found Rupp guilty of child endangerment. In November 1987 he was convicted and sentenced on that charge. Upon direct appeal, the Iowa Court of Appeals affirmed Rupp's conviction in 1989.

Rupp later filed the present application for postconviction relief to challenge the conviction. The district court denied postconviction relief, and Rupp has appealed.

Rupp contends he was denied due process and a fair trial by the prosecution's "continual and flagrant" efforts to elicit testimony which had previously been declared inadmissible. He refers here to the State's attempts to

have third persons testify about the reports made by Rupp's wife implicating Rupp.

In a related issue, Rupp contends his trial attorney rendered ineffective assistance by making only a belated and incomplete objection when one witness, a doctor, testified about a report made by Rupp's wife which implicated Rupp.

In addition, Rupp contends his trial attorney rendered ineffective assistance in several other respects. He complains the trial attorney did not adequately investigate the case, did not call witnesses favorable to Rupp, and did not offer documents showing the child's injuries were inconsistent with the State's theory that Rupp struck the child.

Ordinarily, our review of postconviction relief proceedings is for errors of law. Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances. This is the equivalent of de novo review. Id.

Upon review of the record, we determine none of Rupp's objections have been properly preserved. The ineffective assistance of counsel issue was not raised on direct appeal. Nor was the allegation of prosecutorial misconduct ever raised on direct appeal. In oral argument in the

present case, Rupp's counsel specifically stated counsel on direct appeal was not ineffective for failing to raise these issues.

Rupp relies extensively on State v. Levy, 160 N.W.2d 460 (Iowa 1968). In Levy, the Iowa Supreme Court found prosecutorial misconduct sufficient to require reversal of the defendant's conviction. The supreme court held no objection was necessary to preserve error of flagrant and repeated prosecutorial misconduct on direct appeal. Id. at 467-68; see State v. Hastings, 466 N.W.2d 697, 699-700 (Iowa App. 1990).

The problem here is the prosecutorial misconduct was never raised on direct appeal. If raised at that stage, the egregious character of the misconduct alone might have been adequate to preserve the issue. See Hastings, 466 N.W.2d at 699 (quoting Burgess v. Sims Drug Co., 144 Iowa 275, 280, 86 N.W.2d 307, 308 (1901)). Rupp argues the failure of trial counsel in the original trial to properly object excused counsel on direct appeal from raising the issue. Consequently, Rupp argues, the issue is preserved for postconviction relief.

Rupp misunderstands the steps necessary to preserve error. We have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974). The trial court must be given the opportunity to

consider the matter and correct any error. Miller v. Bonar, 337 N.W.2d 523, 530 (Iowa 1983). Additionally, there must be a decision of record for us to review. See, e.g., Slater v. Farmland Mut. Ins. Co., 334 N.W.2d 728, 730 (Iowa 1983).

These same basic rules hold true on appeal. Where appellate counsel had the opportunity to raise issues on direct appeal and failed to do so, these issues may not be asserted for the first time on application for postconviction relief. Schertz v. State, 380 N.W.2d 404, 408 (Iowa 1985). This rule is only overcome by a showing of sufficient reason for not raising the issue on direct appeal. Id.

No such showing was made in this case. All the issues presented in this postconviction relief hearing should have been raised on direct appeal. We determine Rupp has failed to preserve error. We affirm the trial court on all issues.

AFFIRMED.