IN THE COURT OF APPEALS OF IOWA

No. 1-451 / 00-1363
Filed November 28, 2001

DAVID T. ODERMANN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Emmet County, Joseph J. Straub, Judge.

David Odermann appeals from the district court's denial of postconviction relief. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Denise A. Timmins, Assistant Attorney General, William Ridout, County Attorney, and Doug R. Hansen, Assistant County Attorney, for appellee

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

An eight-year-old girl told her teacher that her step-father, David Odermann, touched her inappropriately. Odermann was charged, tried, and convicted of second-degree sexual abuse and two counts of assault with intent to commit sexual abuse. Our court affirmed the conviction.

Odermann filed an application for postconviction relief, contending: (1) a prosecutor coerced his step-daughter into giving false testimony and (2) there existed newly discovered evidence of prior sexual abuse that, at a minimum, required a new trial. The district court considered and rejected both contentions on the merits. On appeal, Odermann claims the court's decision was erroneous. The State responds that Odermann waived error by failing to argue there was sufficient reason why the issues were not raised on direct appeal. The State also contends the district court was correct in rejecting Odermann's claims on the merits. We essentially agree with the State.

I. Waiver of Error

A postconviction relief applicant must show sufficient reason for failing to raise on direct appeal any claims that could have been raised at that time. *See Bugley v. State*, 596 N.W.2d 893, 896-97 (Iowa 1999). Odermann concedes neither of his claims was raised on direct appeal, yet he does not set forth sufficient reason for these omissions. While the State urges us to dismiss the appeal under Iowa Rule of Appellate Procedure 14(a)(3) for failure to raise, argue or cite authority in support of a "sufficient reason" argument, we decline to do so. *See Forsyth v. Forsyth*, 210 N.W.2d 430, 431 (Iowa 1973).

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Nevertheless, on our independent review of the record, we find nothing to suggest Odermann had sufficient reason for failing to raise the prosecutorial misconduct issue on direct appeal. Defense counsel was aware of the coercion issue at the time of trial and, indeed, addressed this issue on cross-examination of the victim. While counsel focused on coercion by a State investigator rather than the prosecutor, it is apparent from his questions that he knew the prosecutor was present during the allegedly coercive incident. Therefore, the prosecutorial misconduct issue could have been raised on direct appeal and we can discern no reason why it was not. Accordingly, we conclude the issue of prosecutorial misconduct has been waived. *See Origer v. State,* 495 N.W.2d 132, 138-9 (Iowa Ct. App. 1992) (defendant failed to show sufficient reason for not raising issue of prosecutorial misconduct on direct appeal).

We do not resolve the newly discovered evidence claim on similar grounds of waiver. It is true our court has held the "sufficient reason" standard for failing to raise issues on direct appeal applies to claims of newly discovered evidence. *See Carroll v. State*, 466 N.W.2d 269, 271 (Iowa Ct. App. 1990). However, the requirement that claims be raised on direct appeal applies only to claims which could have been raised at that time. *See Bugley*, 596 N.W.2d at 897. The record here suggests neither Odermann nor his defense attorney knew of the newly discovered evidence until after the direct appeal was decided. Therefore, we conclude Odermann had sufficient reason for failing to raise this issue on direct appeal and we proceed to the merits of that claim.

II. Newly Discovered Evidence

An applicant alleging newly discovered evidence as the basis for postconviction relief must show the evidence: (1) was not discovered until after judgment; (2) could not have been discovered earlier through the exercise of reasonable diligence; (3) is material to the issue, not merely cumulative or impeaching; and (4) would probably change the result if a new trial is granted. *Summage v. State*, 579 N.W.2d 821, 822 (Iowa 1998) (interpreting Iowa Code section 822.2(4)).

Odermann's wife testified at the postconviction relief hearing that her daughter had been sexually abused at the age of two by her first husband's step-brother, a possible explanation for the tear in her daughter's hymen. His wife stated she did not recall this incident until approximately two years after trial and did not communicate it to Odermann's trial counsel. She also did not recollect talking to Odermann's appellate attorney. There is no question this evidence is material to the issue of whether Odermann sexually abused his step-daughter. Therefore, we agree with the district court that Odermann established the first three elements of the *Summage* test.

Odermann did not, however, establish the fourth element: that the newly discovered evidence probably would have changed the result if a new trial were granted. The State called Odermann's step-daughter, who vividly recounted the sexual episodes. Although she later recanted, insisting at the postconviction trial that her testimony was coerced, we have repeatedly stated that recanted testimony must be viewed with suspicion. *Adcock v. State*, 528 N.W.2d 645, 648 (Iowa Ct. App. 1994). This is particularly true where the essential aspects of her

testimony were confirmed by health care professionals and others who interviewed her shortly after the events took place. Odermann himself offered only a tepid denial of the events, conceding they very well could have happened but without the requisite intent. Given this evidence, we conclude the result probably would not have changed with the testimony of Odermann's wife that her then two-year old daughter "gave her the indication" she had been touched in her private area. Accordingly, we affirm the district court's denial of this postconviction relief claim.

III. Summary

We conclude Odermann waived his prosecutorial misconduct claim by failing to demonstrate sufficient reason for not raising the issue on direct appeal. We affirm the district court's denial on the merits of his newly discovered evidence claim.

AFFIRMED.