

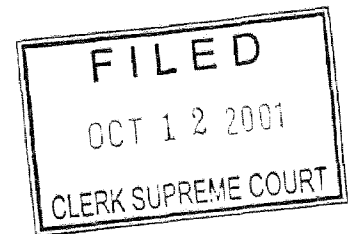
IN THE COURT OF APPEALS OF IOWA

No. 1-441 / 00-1192
Filed October 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY LEE KINDSCHUH,
Defendant-Appellant.



Appeal from the Iowa District Court for Adair County, Jerrold W. Jordan,
Judge.

The defendant appeals his convictions and sentences, following a jury
trial, on two counts of second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney
General, Clint Hight, County Attorney, for appellee.

Considered by en banc.

SACKETT, C.J.

Defendant-Appellant Jeffrey Lee Kindschuh was convicted following a jury trial of two counts of second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3(2) (1997). Defendant appeals, contending his trial attorney was not effective because he failed to object to comments made by a medical doctor on the credibility of child witnesses. We affirm.

Defendant lived for a period of time with the mother of the two alleged child victims. In 1999, about a year after defendant's relationship with the mother ended, the victims, a female child born in 1992 and a male child born in 1991, engaged in inappropriate sexual behavior. Their mother sought assistance and the children were examined by Dr. Christine Nevin-Woods in August of 1999. The doctor found both children exhibited physical abnormalities and infections consistent with sexual abuse. The doctor then interviewed the children, each of whom stated that defendant had engaged in sexual behavior with them.

At trial the female child testified she was in kindergarten and first grade when the abuse occurred while she stayed with the defendant when her mother worked. She said the defendant sometimes touched her "privates," both front and back, with his "privates." The male child testified that defendant had squeezed his front "privates" with his hand and had stuck something up his back "privates."

There was evidence, however, that the victim's mother had men in her home and evidence to suggest someone other than defendant was the perpetrator. There was also testimony that the female child may have been sexually abused by one of her mother's male friends earlier and that the

children's mother may have been vindictive enough to want to lash out at former male friends. Testimony further showed that she had threatened to get even with defendant when their relationship ended.

Dr. Nevin-Woods' examination showed the female child had a scar on the lower part of her vagina, which extended onto her hymen, and that there was a break in her hymen. The child also had a discharge that the doctor said was an indication of an infection. Dr. Nevin-Woods opined these were clear indicators of some type of penetration. The child's anus was normal in appearance.

The doctor testified that her physical examination of the male child showed he had an abnormal anus with an elongated and irregularly dilated opening not of recent origin. The doctor testified these findings were consistent with penile-anal penetration.

After the doctor testified to what the children told her and to the results of her physical examination of them, she was asked twice if she believed the female child was coached. In response to both questions the doctor said she believed the child was not coached. When asked why this was her belief, the doctor said that the female child gave a clear and consistent history developmentally appropriate for her age. The doctor also stated that in order to coach a child to lie about sexual abuse, the coach must have familiarity with developmentally appropriate behavior of a child of that age, must review sexual abuse histories for children of similar age who have experienced penetration, and must take the time to teach the child what to say. The doctor was next asked if the male child was coached. She gave the opinion that he had not been, and again related similar information about what it would take to coach a child.

The defendant contends this testimony would not have been admitted had his trial attorney properly made an objection that the doctor's opinions impermissibly attested to the credibility of the witness. The State contends the testimony was admissible because it did no more than explain relevant mental and physical symptoms present in sexually abused children.

Defendant also objects to a statement made by the doctor while being questioned by the prosecutor regarding the female child's comment to the doctor that there had been penile penetration of her anus when there were no physical findings supporting that statement. The doctor explained that the absence of physical findings does not preclude the possibility of sexual abuse because some children heal without a scar. The doctor then said, "So I was not surprised that she didn't have anal findings. She relates that he put his pee-pee in her anus, and I believe that is what happened."

When a defendant asserts a 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. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). In order to prevail on his claim of ineffective assistance of counsel, defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. See *State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa Ct. App. 1989). Defendant must establish both of these requirements by a preponderance of the evidence. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). In evaluating counsel's performance, we presume counsel acted competently. See *Risdal*, 404 N.W.2d

at 131. Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." *Id.*, (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). Ineffective assistance is measured by whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93; see *Schertz v. State*, 380 N.W.2d 404, 408 (Iowa 1985).

Defendant's objections to the doctor's testimony are based on his conclusion that portions of her testimony are the doctor's opinions of the truthfulness of two witnesses.

The Iowa courts have determined that experts should not be allowed to testify to matters that either directly or indirectly render an opinion on the credibility or truthfulness of a witness. See *State v. Brotherton*, 384 N.W.2d 375, 378 (Iowa 1986) (Harris, Larson and Wolle, concurring specially); *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986). Experts should not be allowed to give testimony that essentially passes on the guilt or innocence of the defendant. *Myers*, 382 N.W.2d at 95. Experts also should not be allowed to testify directly on the credibility of a witness. *State v. Tonn*, 441 N.W.2d 403, 405 (Iowa Ct. App. 1989). The credibility or truthfulness of a witness is a determination solely for the trier of fact. See *Myers*, 382 N.W.2d at 95; *State v. Taylor*, 516 N.W.2d 38, 40 (Iowa Ct. App. 1994). The ultimate determination of the credibility or truthfulness of a witness is not "a fact in issue," but a matter to be generally determined solely by

the jury. *Myers*, 382 N.W.2d at 97. Expert opinions as to the truthfulness of a witness are not admissible pursuant to Iowa Rule of Evidence 702. *Id.*

Defendant contends his position finds support from our holding in *Johnson v. State*, 495 N.W.2d 528, 529-31 (Iowa Ct. App. 1992). In that case Johnson raised a claim of ineffective assistance of counsel similar to this one in a postconviction proceeding challenging his conviction of the sexual abuse of child victims. Johnson contended his trial attorney should have objected to the following exchange between the prosecutor and a social worker who was the State's witness:

Q. Ms. Harlan [defense counsel] asked you about whether children can make accusations as to sexual abuse. Do you have any opinion with relation to Lora and Kora [the child victims] A. I do.

Q. What would that opinion be? A. My opinion is that they are telling the truth and that they are credible.

We agreed and affirmed the district court's finding Johnson's trial counsel ineffective in not objecting to that testimony, holding that the social worker's opinion testimony as to the credibility of child witnesses clearly violated the Supreme Court's holding in *Myers*. *Johnson* 495 N.W. 2d at 530. In deciding *Johnson* we looked to *State v. Tracy*, 482 N.W.2d 675 (Iowa 1992). At Tracy's trial a State's expert witness testified, "there are probably no more than two or three children per thousand who come forth with such a serious allegation who are found later to be dishonest." *Id.* at 678. The Supreme Court reversed and remanded *Tracy* for a new trial after concluding the admission of the expert's testimony concerning the truthfulness of the complainant's testimony was in violation of its holding in *Myers*. *Tracy*, 482 N.W.2d. at 678. The court's conclusion was not based on the *Myers* violation alone, but it rejected the State's

suggestion that Tracy's trial counsel may have intentionally allowed the expert to testify so as to cross-examine him regarding an inconsistent statement in his report. The court found the collective prejudicial impact of the expert's testimony in conjunction with that given by the others outweighed any favorable testimony that could reasonably have been anticipated in the course of the expert's cross-examination. *Tracy*, 483 N.W.2d at 680. The court also concluded that any argument that defense counsel failed to object to in order to avoid calling the jury's attention to the expert's unfavorable testimony was unreasonable in light of their position that the mere admission of such evidence is reversible error. *Id.*¹

The State acknowledges that opinions as to the credibility of witnesses are not admissible. The State advances here, however, that the doctor's opinions are distinguishable from those in *Myers*, *Tracy* and *Johnson*. The State contends that Dr. Nevin-Woods' opinions concerning the witness being coached are more akin to opinions on matters that explain relevant mental and physical symptoms present in sexually abused children.

Experts are allowed generally to express opinions on matters that explain relevant mental and physical symptoms in persons who are abused. *State v. Tonn*, 441 N.W.2d 403, 405 (Iowa Ct. App. 1989); *See Myers*, 382 N.W.2d at 97. The admissibility of expert opinions, however, is not unlimited. *State v. Fox*, 480 N.W.2d 897, 899 (Iowa Ct. App. 1991). There is a fine but essential line between testimony that is helpful to the jury and an opinion that merely conveys a conclusion concerning the defendant's guilt. *State v. Pansegrau*, 524 N.W.2d 207, 210-211 (Iowa Ct. App. 1994).

¹ The court also noted, ". . . this proposition applies with equal force to the hearsay testimony given."

The question we must address is whether the doctor's opinions that the witnesses were not coached were opinions of the witnesses' credibility or merely evidence relevant to the characteristics of children who are sexually abused. Dr. Nevin-Woods's qualifications to render opinions on mental and physical symptoms present in sexually abused children are not questioned on appeal and our review of the evidence shows she was qualified to give opinions on these issues. The doctor's testimony as to factors to be considered in assessing whether a child is coached or not would appear to be testimony of the children's mental and physical symptoms such as was allowed in *Fox*, 480 N.W.2d at 899-900, *Tonn*, 441 N.W.2d at 405, and *State v. Seevanhsa*, 495 N.W.2d 354, 357 (Iowa Ct. App. 1992).

The question of the admissibility of the doctor's statement regarding her opinion that the children had not been coached is more difficult. In addressing this issue we find guidance from *Brotherton*, 384 N.W. 2d at 378-381. In *Brotherton* the State called as a witness a psychiatric social worker, who counseled abused and neglected children. Over defendant's objection that the witness's testimony went to bolster the credibility of the complaining witness and involved an issue reserved for the jury to decide, the social worker was allowed to state opinions negating the ability of a three or four-year-old child to fantasize a sexual activity between the child and another person. In addressing the challenge the court took note of a Missouri case in support of *Myers*, specifically *State v. Taylor*, 663 S.W.2d 235 (Mo.1984). See *id.* The *Brotherton* court commented that in *Taylor* the Missouri Supreme Court held inadmissible a psychiatrist's statement that the victim did not fantasize the rape because the

statement was an implied opinion that the victim told the truth. *Id.* at 378, citing *Taylor*, 663 S.W.2d at 241. The *Brotherton* court went on to find the opinion rendered by the social worker inadmissible as an indirect opinion of the truthfulness of the complaining witness rather than an explanation of relevant mental and psychological symptoms present in a sexually abused child. *Id.* at 379. Applying this reasoning to the case before us, it is clear that Doctor Nevins-Woods's opinion that the children were not coached implied they were telling the truth. Had defendant's trial counsel made the proper objection, that particular testimony would not have been admissible. Furthermore, despite the State's argument to the contrary, we find the doctor's statement, "She relates that he put his pee-pee in her anus, and I believe that is what happened," to be a comment that the female child was telling the truth about defendant's actions rather than a comment on the fact that the child's scarring had healed. Had defendant's trial counsel objected to the discussed evidence, it should have been excluded.

We therefore preserve defendant's claim of ineffective assistance of trial counsel for postconviction proceedings to allow trial counsel an opportunity to defend the charge. See *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa Ct. App. 1996).

AFFIRMED.

Vogel, J. concurs in part and dissents in part.

VOGEL, J. (concurring in part and dissenting in part)

While I agree that Kindschuh's convictions should be affirmed, I respectfully dissent with the majority's decision to preserve the ineffective assistance of counsel claim for postconviction proceedings.

The doctor did give clearly inadmissible opinion testimony when she stated she "believed" the female victim, and the doctor's opinions as to whether these specific children had been coached, while not blatantly inadmissible, are troubling. Although coached testimony is not synonymous with false testimony, concerns over coaching can raise the issue of a witness's credibility. See *State v. Farnum*, 397 N.W.2d 744, 747 (Iowa 1986). Under the facts of this case, it appears the doctor did indirectly comment on the children's credibility when she opined that they had not been coached. However, even if trial counsel could be deemed ineffective for failing to object to those portions of the doctor's testimony, that failure was not so prejudicial as to require a reversal of Kindschuh's convictions.

The majority of the doctor's testimony was clearly admissible and supported both the State's theory of the case and a finding of the children's credibility. Even if the opinions themselves were inadmissible, the specific observational facts supporting those opinions were otherwise admissible and stand wholly unchallenged. See *State v. Tonn*, 441 N.W.2d 403, 404-05 (Iowa Ct. App. 1989) (finding admissible testimony regarding characteristics of child abuse victims in general, and that specific victims had such characteristics).

More importantly, the jury was allowed to view the live testimony of each victim, which itself provided substantive indicia of credibility. See *State v. Knox*,

536 N.W.2d 735, 742 (Iowa 1995) (jury is in the best position to assess a witness's credibility and to determine what weight should be assigned to his or her testimony). The children, aged eight and nine at the time of trial, were able to specifically describe their abuse and identified Kindschuh as the perpetrator. The children also testified to other facts that, while not directly pertinent to the abuse charges, demonstrated the reliability and truthfulness of their testimony.

The testimony also established Kindschuh's unmonitored access to the children during the time the abuse allegedly occurred, and the evidence of another perpetrator is less than persuasive. Although Kindschuh attempted to cast the male child victim in the role of perpetrator upon the female child victim, the evidence refutes such an assertion. Additionally, while there was some indication that the female victim suffered sexual abuse at age three, before coming in contact with Kindschuh, suffering prior abuse does not negate the possibility of subsequent abuse. Evidence was also presented casting doubt on whether the abuse at issue in this case could have occurred when the female victim was three, as the severity of the physical injuries would have likely resulted in an earlier manifestation of symptoms.

The only other evidence presented on this issue was limited access to the children by a few men sometime after Kindschuh left the home. The mother's contention that none of these men had unregulated access to the children was unrefuted. When questioned, the children also denied they were abused by any of the men present in the home after Kindschuh's departure.

Any prejudicial impact from the doctor's statements was minimized by the remainder of the State's case, which stressed the credibility of the children's

testimony. See *State v. Brotherton*, 384 N.W.2d 375, 379-80 (Iowa 1986) (finding inadmissible opinion testimony regarding a minor child's ability to give detailed reports of sexual activity or to fantasize such activity was harmless error). Evidence of the mother's penchant for vindictive behavior, and the implication the children were coached to accuse Kindschuh as a form of her revenge, pales in comparison. In light of the record before this court, the doctor's opinions – that she believed the female victim and that neither child was coached – are simply insufficient to raise a reasonable probability that their exclusion would have produced a not guilty verdict. See *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). I would therefore resolve this issue on direct appeal, and affirm the convictions.