IN THE COURT OF APPEALS OF IOWA 1158

No. 1-408 / 90-963

STATE OF IOWA,

Appellee,

vs.

NORMAN W. CROZIER,

Appellant.

FILED
APR 28 1992
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

Crozier appeals his conviction, following a jury trial, of sexual abuse in the second degree. **AFFIRMED.**

Lawrence F. Scalise and Robert B. Scism of Scalise, Scism, Sandre, Uhl, McConville, Miller & Holliday, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General; Julie Ann Halligan, Assistant Attorney General; Richard Crowl, County Attorney; and Martha Heinicke, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

OXBERGER, C.J.

Norman Crozier was accused of sexually abusing his son on repeated occasions during weekend visitation. The boy was approximately eight years old at the time of the alleged abuse. A jury found Crozier guilty of sexual abuse in the second degree. Crozier has appealed from the resulting conviction.

Crozier challenges the sufficiency of the evidence to support his conviction. He insinuates the boy's testimony should be given little weight because of alleged coaching by the boy's mother, Crozier's former wife. Crozier also contends his trial attorney rendered ineffective assistance in numerous respects. He complains the attorney failed to investigate the case adequately, did not present all relevant evidence, and failed to adequately question the credibility of the State's evidence or object to various instructions.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL: Crozier asserts his trial counsel was ineffective on several grounds, including failure to use an alibi defense, failing to object to certain jury instructions, failure to object to certain evidence at trial, and failed to use impeaching evidence.

SCOPE OF REVIEW: Our ultimate concern in claims of ineffective assistance is with the "fundamental fairness of the proceeding whose result is being challenged." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (quoting Strickland

v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. Risdal, 404 N.W.2d at 131. The burden is on the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted.

The first prong requires an affirmative factual basis demonstrating the alleged inadequacy of representation to be set forth. Hinkle v. State, 290 N.W.2d 28, 31 (Iowa 1980). When addressing the second prong of a claim of ineffective assistance of counsel, prejudice, we require the defendant to show that counsel's failure to perform an essential duty worked to the client's actual and substantial disadvantage and thereby constituted "a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984). The test to determine whether specified errors of counsel have resulted in prejudice to this degree is that the defendant must show that there is 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, 697 (1984).

A. Alibi Defense: Crozier argues his trial counsel failed to refute the possibility of an offense having been committed on or about September 9, 1989, as the information charged. The State argues that Crozier's trial counsel correctly believed that under the circumstances it would be futile to pursue an alibi defense for September 9, when his client could be convicted for any sexual assault against T.C. which occurred within the statute of limitations. Counsel therefore, under the circumstances of this case, made a strategic decision to focus on the Mother's influence on the child to make false allegations.

During a hearing on the issue of ineffective assistance, Crozier's trial counsel testified that although the State alleged the acts charged took place "on or about September 9, 1989," he did not believe the State had to prove that a sex act occurred on September 9. He therefore did not pursue an alibi defense. There was evidence in the proceeding and in the minutes of testimony alleging the sexual abuse occurred throughout the summer of 1989. Trial counsel believed the State did not have to prove the exact date of the last incident, but merely prove the incident occurred through the time period as set out in the minutes of testimony.

Regarding the contents of an indictment, Iowa R. Crim. P. 4(7)(c) provides:

> Where the time or place is a material ingredient of the offense, a brief statement of the time or place of the offense if known. (Emphasis added.)

The date fixed in the indictment or information for the commission of a crime is not material, and a conviction can be returned upon any date within the statute of limitations, absent a fatal variance between the allegations and proof. State v. Brown, 400 N.W.2d 74, 77 (Iowa App. 1986).

In the present case time was not a material ingredient of the offense. Iowa Code section 709.3 defines second-degree sexual abuse and does not make a particular time period a material element of the offense. Defense counsel was correct in believing the State did not have to prove the exact date. It is well settled in Iowa that the date fixed in the information for the commission of a crime is not material, and a conviction can be returned upon any date within the statute of limitations absent a fatal variance between the allegations and proof. State v. Brown, 400 N.W.2d 74, 77 (Iowa App. 1986).

We find trial counsel's decision to emphasize the wrongful influence of the mother over the children as opposed to an alibi defense was a reasonable tactical decision. When counsel makes a reasonable tactical decision, this court will not engage in second-guessing. Fryer v. State, 325 N.W.2d 400, 413 (Iowa 1982).

Crozier next argues that trial counsel was ineffective by failing to object to the following testimony elicited from T.C.:

> Q. From the fall of 1988 when you began second grade until September of 1989 did anything happen

to you while you were sleeping with your father in his bed in Sixth Avenue that you didn't like?

Crozier argues this question opened the door to admission of other-crimes evidence unrelated to any specific incident. Crozier maintains this failure to object allowed testimony of other crimes and abuse which was unfairly prejudicial under Iowa R. Evid. 403.

We find this argument relies upon the previous assumption that conviction of the crime required the establishment of the criminal act within a time frame "on or about September 9, 1989." As we have previously indicated in this opinion, time is not a material ingredient of the offense. The time period for which the child was asked regarding the conduct of the father was within the statute of limitations period. We find, therefore, the question was relevant to the commission of the crime for which Crozier was charged.

Crozier asserts that even if under Iowa law the State does not have to elect or prove a date certain, there is still a need to prove an offense was committed on some particular occasion. Crozier points to State v. Beltz, 225 Iowa 155, 279 N.W. 386 (1938), a statutory rape prosecution in which the indictment alleged an offense "on or about September 16, 1936." See id. at 157, 279 N.W. at 388. In Beltz proof of other offenses was admitted. After the State rested the Court granted a motion requiring the State "to elect which offense or which time they rely upon under

this indictment." The State then elected a certain transaction which was supported by testimony. See id. Crozier argues had the State been put to the need by motion to elect an occurrence relied upon for conviction, it could only have elected "on or about September 9." Crozier argues that defense counsel erroneously assumed that if the State need not prove the "exact time" of the offense, it need not prove beyond a reasonable doubt that the offense was committed on some particular occasion. Upon review of the record, we find Crozier's assertion that the State could not specify any other particular occasion on which the offense occurred is without merit. W.C. testified that "about one week before the end of August," he observed a blood stain on his father's bed sheet and asked T.C. how it got there. T.C.'s testimony regarding this incident graphically portrayed evidence to indicate a sexual offense on a particular occasion.

We have considered all other issues presented and affirm the trial court.

AFFIRMED.

Schlegel, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would reverse the trial court.