IN THE COURT OF APPEALS OF IOWA

No. 7-024 / 96-0271

STATE OF IOWA,

Plaintiff-Appellee,

vs.

KEITH W. PLETT,

Defendant-Appellant.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

Defendant appeals from judgment and sentence entered, following a jury trial, of two counts of second-degree sexual abuse of a child in violation of Iowa Code section 709.3 (1993). **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, William E. Davis, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ.

SACKETT, P.J.

Defendant Keith W. Plett appeals his conviction, following a jury trial, of two counts of second-degree sexual abuse of a child in violation of Iowa Code section 709.3 (1993). Defendant contends the cumulative effect of trial counsel's failure to object to what he terms improper prosecutorial argument and inadmissible evidence resulted in his not having effective representation. We agree with defendant his trial attorney failed to lodge a number of objections that would have been sustained. We find he has shown he was prejudiced. We reverse and remand for new trial.

On August 22, 1995, the State charged defendant with two counts of second-degree sexual abuse of his daughter, who alleged defendant sexually abused her in December 1992 and July 1993 when she was eight years old. At the time of trial, she was twelve.

During opening statements at trial, the prosecutor told the jury possible defense theories, such as claiming a child fabricated abuse or a parent influenced a child to fabricate abuse, were myths. She repeatedly told the jury she was confident it would make favorable conclusions regarding the victim's credibility and the State's evidence. She stated she was confident the jury would return a guilty verdict.

At trial, defendant's daughter testified defendant bound her hands behind her back, masked her face, spanked her, and then "push[ed] into [her] butt hole." She was not certain what he "pushed" into her, but she thought it was his finger or his penis. She said defendant applied Neosporin or Vaseline to her anus because he said "it

would make it feel better." She estimated this abuse occurred about ten times, generally in the morning after her mother had left.

The child's mother testified after the child was born in September 1983 she did not have a steady relationship with defendant, nor did her daughter. In 1991, defendant began living with his daughter and her mother. They were married in February 1992. They separated in October 1993 and divorced in March 1994.

The child's mother testified defendant remained unemployed "[a]s long as he could get unemployment." When he was unemployed, he cared for the children while she worked.

The child's mother married again on July 9, 1994. She first learned at her wedding reception defendant had allegedly abused her daughter. She was told by her niece, who had been told by the child.

A doctor testified a medical examination of the child was performed on July 19, 1994. The examination was inconclusive as to whether the abuse occurred. The State introduced into evidence, without objection, a letter from the doctor to the Department of Human Services and attached medical reports containing hearsay statements of the mother and relatives.

Defendant testified and denied the abuse. The trial lasted three hours. The jury deliberated seven hours and returned verdicts of guilty. The court sentenced defendant to concurrent, indeterminate twenty-five year terms of imprisonment.

Defendant contends his trial counsel failed to object during the prosecutor's opening statement to inadmissible evidence. He advances the prosecutor's references to possible theories of defense as myths and her repeated references to her confidence in a favorable outcome were improper and prejudicial. Defendant further contends the prosecutor elicited improper character evidence about his "sporadic" work history, his alleged abuse of unemployment compensation, and his cruelty towards the his daughter in addition to the alleged abuse. He further asserts several witnesses testified to hearsay statements of what his daughter said about the abuse. Additionally, he advances the doctor's letter and attached reports contained inadmissible hearsay regarding what the mother reported to the doctor and a nurse about the alleged abuse. Defendant contends trial counsel's failure to object to all of these statements constitutes ineffective assistance of counsel.

We first address defendant's claims that with proper objections, which his trial attorney failed to make, statements by the prosecutor and evidence would not have been admitted or stricken from the record.

Defendant contends his attorney should have objected to the prosecutor's statement in opening that certain defenses were myths. The State acknowledges in its brief the comment may have been objectionable as it was a pejorative characterization of a possible defense more suitable for closing argument. We agree with defendant and the State this statement had no place in the State's opening

statement and with proper objection, at the least, should have been stricken and the jury should have been instructed to disregard the statement.

Defendant objects to the additional comments made in opening statement:

> Next that leaves regarding some of these the myth about the child concocting this, making this up. And I asked you in voir dire to consider motives. Why would a child do this. And in this case you will find no motive for [the child] to concoct this. You will find, I think we talked about that in voir dire, that children may talk themselves out of trouble, may talk to -- take evidence -- or excuse me -- to take accusations or trouble away from them, but will not tell lies to get themselves into trouble, or to bring the kind of attention and the kind of pressures that are involved in this sort of case.

Defendant contends this statement is contrary to *State v. Myers*, 382 N.W.2d 91, 98 (Iowa 1986). There the court reversed where a witness said it was very rare for a child to lie about sexual abuse because it was, in essence, an opinion the victim was telling the truth and the defendant was guilty. We agree with defendant these statements made by the prosecutor, if objected to, should have been stricken.

Defendant next contends his trial attorney should have objected to the prosecutor continually advancing in her opening statement she was confident the jury would find the State's testimony credible, she was confident the jury would return a verdict for the State, and she was confident the jury would find defendant guilty.

The Iowa Code of Professional Responsibility for Lawyers DR 7-106(c) provides in applicable part:

> In appearing in his [or her] professional capacity before a tribunal, a lawyer shall not:

> (4) Assert his [or her] personal opinion as to the justness of a cause, . . . or as to the guilt or innocence of any accused; but he [or she] may argue, on his [or her] analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

It is misconduct for counsel to create evidence by argument or express a personal belief regarding defendant's guilt. *State v. TeBockhorst*, 305 N.W.2d 705, 709 (Iowa 1981); *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975). An attorney's expression of a personal belief that is not stated as a reasonable inference from the record is barred because such a statement is a form of "unsworn, unchecked testimony and tends to exploit the influence of [the prosecutor's] office and undermine the objective detachment which should separate a lawyer from the cause for which he or she argues." *State v. Williams*, 334 N.W.2d 742, 745 (Iowa 1983) (citing ABA Standards, The Prosecution Function). The prosecutor's statements were personal opinions of defendant's guilt and not proper. *See State v. Poppe*, 499 N.W.2d 315, 318 (Iowa App. 1993). On proper objection, the statements should have been stricken.

Defendant next contends his trial attorney should have objected to testimony he abused his unemployment compensation. The evidence was not relevant to any issue and with proper objection should have been stricken. *See State v. Roghair*, 353 N.W.2d 433, 434-35 (Iowa App. 1984). It also was more prejudicial than probative. *See State v. Brown*, 337 N.W.2d 507, 511 (Iowa 1983).

Defendant next contends his attorney should have objected to testimony by the mother that on her wedding day her niece told her the child had said defendant "fucked her," and when the mother asked her child if it were true, the child said, "Yeah." Defendant contends these statements were hearsay and not admissible.

Both statements are hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). Hearsay is a statement, other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Rush*, 242 N.W.2d 313, 319 (Iowa 1976); *State v. Kidd*, 239 N.W.2d 860, 864 (Iowa 1976); *Tonini v. Maloney*, 228 N.W.2d 91, 93 (Iowa 1975); *State v. Miller*, 204 N.W.2d 834, 840 (Iowa 1973).

The State agrees the niece's statements are hearsay but contends the niece was crying when she made the statement so it was an excited utterance. For a statement to be admissible under the excited utterance exception, there must be a determination whether the hearsay was brought about by the excitement of the startling event or condition being described. *State v. Hy*, 458 N.W.2d 609, 610 (Iowa App. 1990). The alleged abuse was so far removed in time from the wedding that the child's statements would not be admissible under this exception. *See State v. Watts*, 441 N.W.2d 395, 398 (Iowa App. 1989). The child's statement of events is the challenged hearsay.

The State does not contend the child's answer was admissible, but contends defense counsel may have had a reason for not objecting. We agree with defendant, had a proper objection been made, the child's answer would have been stricken.

Defendant's next complaint is his trial lawyer was ineffective in failing to object to testimony from the mother, "we came to the conclusion [the child] had told [her step-grandmother] and [her step-aunt] like six months before I knew," and it was the understanding of the mother the abuse occurred "at the trailer" where she lived. The State does not refute defendant's claim that with proper objection the testimony would not have come in. We find with proper objection it would have been stricken. The State does contend defendant was not prejudiced because this testimony came in through other witnesses.

Defendant next contends the medical report and attachments of Dr. Linda Ozoki should have been objected to by defendant's trial attorney because they contain hearsay, including a statement by the mother giving a history of the alleged abuse and that the child told her cousin, who told her aunt, who told the child's mother.

There is no showing the statements made by the mother were made for purposes of medical diagnosis or treatment. *See* Iowa R. Evid. 803(4). Consequently, there was not the probability the statements would not be fabricated because the future treatment of the patient is at stake. *See State v. Mann*, 512 N.W.2d 528, 535 (Iowa 1994); *Devore v. Schaffer*, 245 Iowa 1017, 1021, 65 N.W.2d 553, 555 (1954). Nor are the statements of a victim as to an abuser admissible when the abuser lives

in the same house. Here, defendant no longer lived in the alleged victim's house.

Additionally, we look to the reason the testimony was offered. Testimony that merely recounts the child's complaint of sexual abuse by her father would be inadmissible hearsay testimony if offered for any purpose other than impeachment. Iowa R. Evid. 801(c).

The real purpose of the testimony of the mother appears to be to gain admission of the child's statements to others corroborating her testimony. The testimony should have been stricken if proper objection had been made. *See State v. Deases*, 518 N.W.2d 784, 792 (Iowa 1994).

To prevail on a constitutional claim of ineffective assistance of counsel, defendant must show his attorney failed to perform an essential duty and he was prejudiced by the failure. *See State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984).

To gain relief on a claim of ineffective assistance of counsel, a convicted person must prove both a breach of an essential duty and prejudice. *See Morgan v. State*, 469 N.W.2d 419, 426 (Iowa 1991); *State v. Broughton*, 450 N.W.2d 874, 876 (Iowa 1990). To show a breach of an essential duty by his trial counsel, the defendant must show the lawyer's performance was outside the range of normal competency. *See Pettes v. State*, 418 N.W.2d 53, 56 (Iowa 1988).

Defendant has shown with proper objections not made by his trial attorney statements and evidence would have been stricken or excluded. However, defendant must show more to meet his burden of showing his trial attorney ineffective.

In deciding whether trial counsel failed to perform an essential duty, "we require more than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently. . . . Petitioner must overcome a presumption that counsel is competent." *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). "When counsel makes a reasonable decision concerning strategy . . . we will not interfere simply because it did not achieve the desired result." *State v. Newman*, 326 N.W.2d 788, 795 (Iowa 1982).

Error in admitting hearsay evidence must be presumed to be prejudicial unless the contrary is affirmatively established. *State v. Judkins*, 242 N.W.2d 266, 267 (Iowa 1976); *State v. Branch*, 222 N.W.2d 423, 427 (Iowa 1974); *State v. Mattingly*, 220 N.W.2d 865, 869 (Iowa 1974).

Defendant's trial attorney was not reasonable in allowing the collective impact of the hearsay testimony where, absent this testimony, the only evidence was the testimony of the alleged victim about events allegedly occurring over two years earlier. We reverse and remand for a new trial. Having so decided, we need not address defendant's other challenges or determine whether defendant was prejudiced by his attorney's failure to object to other matters.

REVERSED AND REMANDED.