

IN THE COURT OF APPEALS OF IOWA

No. 1999-540 (9-801) / 98-2087
Filed February 9, 2000

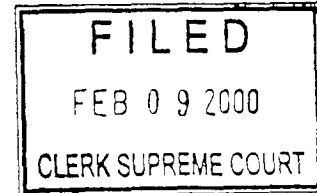
STATE OF IOWA,

Appellee,

vs.

WALTER RAYMOND DOYLE,

Appellant.



Appeal from the Iowa District Court for Woodbury County, James D. Scott,
Judge.

Walter Raymond Doyle appeals his conviction and sentence for sexual
abuse in the third degree following a jury trial. **REVERSED.**

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

Thomas J. Miller, Attorney General, Cheryl A. Soich, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and Lisa M. Krigsten, Assistant
County **Attorney**, for appellee.

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

ZIMMER, J.

Walter Raymond Doyle appeals his conviction and sentence for sexual abuse in the third degree following a jury trial. We reverse.

Doyle was charged with third-degree sexual abuse stemming from a 1995 incident involving a friend of his teenage stepdaughter, Angel. The friend, M.B., was staying overnight visiting Angel. Angel and M.B. were both laying on the couch with their heads at opposite ends. Angel was asleep and Doyle was in a chair seated near M.B.'s head. She alleged he began rubbing her back and she pretended she was sleeping and tried wriggling away from his touch. According to M.B., Doyle touched her vagina and breasts under her clothing. She responded by rolling onto her stomach. Doyle then left the room. Nothing was said during the encounter. M.B. immediately awakened Angel and told her what happened, but did not leave. Nothing was said to anyone else about the incident until M.B. reported it to police some time in 1997.

At trial, Doyle contended he had been rubbing M.B.'s back trying to comfort her when she appeared to be having a difficult time sleeping. He denied touching M.B.'s genitals but also asserted that if he did do so, he did not remember it, it was accidental and lacked a sexual aspect. Trial commenced on September 21, 1998, and a jury returned a guilty verdict three days later.

Doyle appeals and claims the following errors require reversal: (1) his trial counsel was ineffective for failing to object to an incorrect jury instruction defining "sex act"; (2) the district court erroneously admitted the videotape of Doyle's

interview with police and a hearsay statement of the victim; and (3) the record was insufficient to support the guilty verdict.

I. Scope of Review. We review ineffective assistance of counsel claims de novo. *State v. Smothers*, 590 N.W.2d 721, 722 (Iowa 1999). We find this claim dispositive and, therefore, do not address the others.

II. Ineffective Assistance of Counsel. The State concedes the sex act instruction given at trial was not a correct statement of the law. See *State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994). Iowa Code section 709.1 (1995) defines sexual abuse as any "sex act" between persons when one of the participants is a child. The definition of "sex act" is found in section 702.17: "[t]he term 'sex act' or 'sexual activity' means any *sexual* contact between two or more persons. . . ." Iowa Code § 702.17 (emphasis added). The instruction given in this case, based on Iowa Criminal Jury Instruction 900.8, eliminated the requirement that the contact be sexual in nature. It read:

Concerning element number 1 of instruction No. 14, "sex act" means:

1. Penetration of the penis into the vagina or anus.
2. Contact between the mouth of one person and genitals of another.
3. Contact between the genitals of one person and the genitals or anus of another.
4. Contact between the finger or hand of one person and the genitals or anus of another person.
5. A person's use of an artificial sex organ or a substitute for a sexual organ in contact with the genitals or anus of another.

In *Monk*, a case that was four years old at the time of Doyle's trial, the Iowa Supreme Court invalidated this very instruction because it failed to inform the jury that it must find the contact was sexual in nature. See *Monk*, 514 N.W.2d at 450.

In 1995, to reflect the holding in *Monk*, a sentence was added to the end of

instruction 900.8 which reads: "You may consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in nature."

See Iowa Crim. Jury Instructions 900.8 (1995).

To prevail on a claim of ineffective assistance of counsel, a defendant must prove counsel failed to perform an essential duty and the failure prejudiced the defendant. *State v. Dinkins*, 553 N.W.2d 339, 341 (Iowa App. 1996). In looking at the second prong of the claim, we ask whether trial counsel's failure created a reasonable probability that but for the trial attorney's unprofessional errors, the outcome would have been different. See *State v. Davis*, 584 N.W.2d 913, 918 (Iowa App. 1998). "A reasonable probability is one sufficient to undermine confidence in the outcome." *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996) (citation omitted). We will address an ineffectiveness claim on direct appeal "when the record is clear and plausible strategy and tactical considerations do not explain counsel's actions." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (citation omitted). That is the situation here.

We find trial counsel's failure to object to the instruction breached an essential duty. A defendant has the right to representation that falls within a normal range of competency. *Hopkins*, 576 N.W.2d at 379. Competency includes familiarity with the current state of the law. *Id.* The failure to recognize an erroneous instruction and preserve error breaches an essential duty. *Id.* at 379-380; see also *State v. Baker*, 560 N.W.2d 10, 14 (Iowa 1997); cf. *State v. Allison*, 576 N.W.2d 371, 374 (Iowa 1998) (finding defense counsel ineffective for failing to challenge jury instruction that included an aggregation of value element that was

not contained in statute defining the offense). The *Monk* case was four years old at the time of trial and the uniform instruction had been changed in 1995. We can find no justification for failing to object to the instruction given in this case. One of Doyle's primary contentions was that if he did have contact with M.B., it was not sexual in nature. The instruction given was not advantageous. The statement omitted from this instruction directly involved a fighting issue in this case. We can conceive of no tactical reason for failing to object to this instruction.

We must also examine the prejudice prong of Doyle's ineffectiveness claim. *Baker*, 560 N.W.2d at 14 (noting prejudice must also be shown to stem from counsel's failure to object to erroneous instruction). We recognize that the failure to object to an erroneous jury instruction "is diminished in most situations where practical considerations make it unlikely that the inclusion of a particular element in the marshaling instruction would have produced any difference [in the jury verdict]."

State v. Broughton, 450 N.W.2d 874, 876 (Iowa 1990) (citations omitted). When trial counsel fails to object to an erroneous instruction, several factors militate against a finding of prejudice. *State v. Miles*, 344 N.W.2d 231, 235 (Iowa 1984). The first is where a separate instruction correctly informs the jury of the element omitted from the challenged instruction. See *id.* Another is when the missing element is not a fighting issue in the case. See *id.* Finally, there may also be a lack of prejudice where there is so much evidence of guilt, no reasonable probability exists that the result would have been different, even if the instruction had been correct. *Hopkins*, 576 N.W.2d at 380.

The State contends when the instructions are read as a whole, the general

intent instruction supplied the 'mistake' element of Doyle's defense. We agree there ~~would be~~ no prejudice to Doyle if the missing element, that the contact be sexual in nature, had been supplied by another instruction. See *State v. Propps*, 376 N.W.2d 619, 623 (Iowa 1985). The general intent instruction provided:

To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude a person intends the natural results of his acts.

We disagree that this instruction sufficed. Doyle still could have been convicted for a touch that was voluntary, but not sexual. Not all voluntary contact is a "sex act." See *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994). The touching *must be* shown to be *sexual* in nature in order to prove guilt on a sexual abuse charge. See *id.*

We conclude Doyle has proved the prejudice prong of his ineffective assistance of counsel claim. The nature of Doyle's touching was a fighting issue in this case. Furthermore, we would not characterize the evidence of Doyle's guilt as 'overwhelming,' such that there could have been no other result. M.B.'s testimony itself lacks a sexual context. She testified that during and after the incident neither he nor ~~she~~ said anything. When she saw him on other occasions, they did not discuss the incident and M.B. continued her friendship with Doyle's stepdaughter. It appears the incident was first reported to police quite some time later and possibly after M.B. had personal differences with Angel. While we do not impugn the credibility of M.B. or express an opinion on Doyle's guilt or innocence, we use these facts to demonstrate there is a reasonable probability the jury could have found

otherwise if properly instructed. Finding Doyle's counsel breached an essential duty that worked actual prejudice, we reverse and remand for a new trial.

REVERSED.