

IN THE COURT OF APPEALS OF IOWA

No. 3-069 / 92-476

FILED

MAY 04 1993

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JOHNNY D. NEVILLS,

Appellant.

000811

Appeal from the Iowa District Court for Scott County,
Margaret S. Briles, Judge.

Nevills appeals from his convictions, following a bench trial, of third-degree sexual abuse, in violation of Iowa Code section 709.4(2)(b) (1991), and lascivious acts with a child, in violation of Iowa Code section 709.8(1) (1989).

AFFIRMED.

Randy J. Hohenadel, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Bridget A. Chambers, Assistant Attorney General, William E. Davis, County Attorney, and Mary Howes Davis, Assistant County Attorney, for appellee.

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

000812

SACKETT, J.

Defendant-appellant Johnny D. Nevills appeals his conviction for third-degree sexual abuse in violation of Iowa Code section 709.4(2)(b) (1991), and lascivious acts with a child in violation of Iowa Code section 709.8(1) (1989). The events occurred in 1991 with a female born in 1977, and in 1989 with a female born in 1979, when defendant allegedly had improper contact with a daughter of a former girlfriend of defendant. At trial, the girls testified to the events forming the basis of the charge and the older girl also testified to an incident where defendant abused her three years earlier. Defendant was tried to the court and convicted.

Defendant contends the district court erred in (1) preventing him from cross-examining the victims and their mother about charges of sexual abuse they made against another man, and (2) allowing evidence of his prior bad acts. Defendant also contends he was not afforded effective assistance of trial counsel. We affirm.

Defendant contends the victims and their mother made allegations of sexual abuse against another man at a different time. On cross-examination, defendant's attorney asked the three women if John F. had been accused by them of abuse. The trial court sustained the State's objections to the question and the three women did not answer the questions.

Defendant contends the trial court should not have limited his cross-examination.

A defendant's right to cross-examine a witness is secured by the confrontation clause of the Sixth Amendment to the United States Constitution, Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347, 353 (1974), made applicable to the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 1067, 13 L. Ed. 2d 923, 936 (1965).

The scope of cross-examination of a State's witness should be extended liberally on behalf of a defendant charged with a grave offense. State v. Carney, 236 N.W.2d 44, 46 (Iowa 1975); State v. Rowe, 238 Iowa 237, 243, 26 N.W.2d 422, 425 (1947). A witness may be cross-examined to show his or her bias by reason of emotional influences. See Carney, 236 N.W.2d at 46; State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974).

We cannot under this record determine whether the trial court abused its discretion in limiting the cross-examination. No record was made concerning how the cross-examination questions would have been answered.

Defendant, without directing us to that part of the record where it occurred, contends the trial court did not allow the offer of proof because it was the fact finder. The proof could have been dictated in the record in the trial court's absence.

We affirm on this issue.

Defendant next argues the trial court improperly allowed evidence of his past bad acts. The trial court

allowed the older girl to testify to an incident similar to the one defendant was charged which apparently happened some three years earlier. Defendant's attorney objected on the ground the facts concerning the incident three years earlier were not relevant. The State contends the objection made at the trial court level was not sufficient to apprise the court the reason for the objection was it was evidence of prior bad acts. We agree with the State that the objection now made was not preserved at the trial court level. Matters not raised in the trial court will not be considered on appeal. See Connor v. State, 362 N.W.2d 449, 457 (Iowa 1985).

Defendant next contends his trial counsel was not effective in three areas. Defendant contends the trial court erred in allowing him to waive a jury trial. He contends the waiver was made because he did not have effective assistance of counsel. The waiver was not made until the day of trial. Defendant's argument is Iowa Rule of Criminal Procedure 16(1) requires the waiver be in writing and it was not in writing.

A defendant's waiver of his or her constitutional right to a jury trial must be done voluntarily and the defendant must understand the consequences of the waiver. See State v. Lawrence, 344 N.W.2d 227, 229-30 (Iowa 1984); State v. Johnson, 318 N.W.2d 417, 426 (Iowa 1982).

The trial court after learning from defendant's lawyer that he intended to waive a jury took considerable time to

explain to defendant the consequences of the waiver and to assure defendant himself wanted the waiver.

Our review of this record convinces us the trial judge carefully explained the consequences of the waiver to defendant and elicited a number of responses from him to assure he understood his decision. This exchange was of record.

Defendant has failed to show why he was prejudiced by the fact he did not also sign a paper waiving the jury. In order to prevail on a 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, 131-132 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). Defendant must establish both of these requirements by a preponderance of the evidence. See Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). Defendant failed to establish prejudice on this issue.

Defendant next contends his trial counsel was not effective because he failed to call as a witness, Dr. Ozaki who examined the complaining witnesses but allegedly made no finding of sexual abuse. The State advances the record is not sufficient for us to address this claim and this claim should be reserved for postconviction proceedings. We agree. Defendant may raise this issue in a postconviction procedure.

Defendant's last contention is his trial counsel was not effective in allowing two charges regarding alleged crimes against two different persons occurring three years apart to be joined for trial.

Rule 6(1) of the Iowa Rules of Criminal Procedure in relevant part provides:

Multiple Offenses. Two or more public offenses which rose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise. . .

We agree with defendant that the occurrences were not so closely linked in time, place and circumstances that a complete account of one charge cannot be related without relating details of the other charge and that on proper motion, they should have been severed. See State v. Bair, 362 N.W.2d 509, 511 (Iowa 1985). Defendant may raise this issue in a postconviction procedure.

AFFIRMED.

Schlegel, J., dissents and Hayden, J., joins.

I respectfully dissent.

I do not believe the record is insufficient to determine if the denial of cross-examination was improper. I would hold the court erred in limiting the cross-examination. An offer of proof was unnecessary. I would reverse on this issue.

I also call to the attention of the majority that in this case, as in most claims of ineffective assistance of counsel on direct appeal, it is not accurate to state "defendant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted" or that "Defendant must establish both of these requirements by a preponderance of the evidence." (Emphasis added.) On direct appeal there is no ability to offer any evidence unless trial counsel has done so in connection with a posttrial proceeding. At the most, the defendant does have the duty to point out, and raise in argument, how counsel breached an essential duty and how, by reason of that breach, the defendant was prejudiced. Unfortunately, the quoted principles have been carried over from Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a postconviction relief action, and other postconviction relief opinions. Those statements in the context of direct appeals are not logical, nor correct.

000818

I would reverse and remand this case for a new trial because of the limitations placed upon defendant's cross-examination of the witnesses. Thorough cross-examination was essential to his defense.