IN THE COURT OF APPEALS OF IOWA

No. 5-262 / 94-513

HOLLIS EUGENE SCRIVEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, David Sohr, Judge.

Applicant appeals from the denial of his application for postconviction relief.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Sharon Ruth Stevens, Assistant State Appellate Defender, for appellant.

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

Heard by Hayden, P.J., Cady, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

Hollis Scriven was charged with one count of second-degree sexual abuse. At his bench trial, J.D., then a twelve-year-old girl, offered testimony concerning three separate incidents of alleged sexual misconduct involving Scriven, only one of which served as the basis for the sexual abuse charge. The other two incidents were admitted as evidence of prior bad acts.

J.D. testified the first incident occurred while she and Scriven were in a swimming pool and he touched her breasts and bottom. J.D. testified the second incident occurred when Scriven stayed overnight while J.D.'s mother was in the hospital. J.D. testified Scriven exposed himself and told her and a friend, "Well, if you want to look at it, my thing, you can."

The final incident took place in October 1990. It is this incident upon which the charge of sexual abuse is based. J.D. testified Scriven came over to her house to put a lock on her bedroom door. She testified Scriven approached her while she was in bed, pulled down the covers, touched her breasts, and fondled her genitals. J.D. testified she told him to leave and threatened to tell her mother about what had happened. Scriven left the house shortly thereafter.

A police detective testified she conducted an investigation of the October 1990 incident. J.D. tape-recorded a telephone conversation with Scriven at the detective's request. The tape was admitted into evidence.

Gail Reich testified as a rebuttal witness about incidents of inappropriate touching which allegedly occurred several years earlier when she was a teenager babysitting Scriven's children.

The trial court found Scriven guilty as charged and sentenced Scriven to a term of imprisonment not to exceed twenty-five years.

On direct appeal, Scriven's conviction was affirmed. His claim that trial counsel was ineffective in failing to object to the testimony of alleged prior bad acts was preserved for postconviction proceedings.

Scriven then filed an application for postconviction relief. At the hearing on his application, his criminal trial attorney, Patricia Zamora, testified she did not object to the evidence because the trial information was based on all three incidents. She also felt, as a matter of strategy, it was better not to draw attention to the fact that three charges could be pending rather than one.

The district court denied Scriven postconviction relief.

Scriven appeals.

Ordinarily, our review of postconviction relief proceedings is for errors of law. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). However, when a postconviction petitioner asserts 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. *Id.*

In order to prevail on an ineffective assistance of counsel claim in postconviction proceedings, appellant must show by a preponderance of the evidence (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989).

In proving the first prong of this test, appellant must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). A defendant is not entitled to perfect representation, but rather only that within the range of normal competency. *Karasek v. State*, 310 N.W.2d 190,192 (Iowa 1981). To prove the second prong of this test, appellant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). With these principles in mind we now turn to appellant's specific claims.

Scriven has essentially two claims on appeal. First, he contends there was ineffective assistance regarding the testimony involving prior bad acts with the victim. Second. he contends there was ineffective assistance regarding the testimony involving prior bad acts with Gail Reich. Under both claims, Scriven argues three

objections should have been made. He contends a clear proof objection, a relevancy objection, and an undue prejudice objection should have been made.

Evidence of prior bad acts is admissible under certain circumstances. Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of unnatural sex crimes with other victims is also admissible as an exception to the general rule of 404(b). *State v. Spaulding*, 313 N.W.2d 878, 881 (Iowa 1981). To admit evidence under rule 404(b), the evidence must be relevant and there must be clear proof the individual against whom the evidence is offered committed the prior acts. *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990); *State v. Schaffer*, 524 N.W.2d 453, 455 (Iowa App. 1994). In addition, relevant evidence may be inadmissible if the probative value of the evidence is outweighed by the danger of unfair prejudice. Iowa R. Evid. 403.

Clear proof of the alleged acts is required when prior bad acts evidence is admitted. *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985). Clear proof is a lesser standard than beyond a reasonable doubt. *Id.* The clear proof rule is designed to avoid the danger of forcing the jury to engage in speculation. *Jones*, 464 N.W.2d at 243.

Regarding the prior bad acts evidence involving the victim, we find there was no ineffective assistance of counsel since we find there was no breach of duty. Counsel did not breach a duty in failing to make a clear proof objection since there was clear proof. The victim provided adequate testimony regarding the incident in the pool. Corroboration is not necessary to meet the clear proof standard. *Id.* The victim's testimony regarding the bedroom exposure incident was also testified to by the victim's friend. While the testimony was not identical, it was consistent and constituted clear proof. This claim of ineffective assistance is without merit.

We also find Scriven's ineffective assistance of counsel claims regarding the other objections to the prior bad acts with the victim are without merit. The evidence tended to show a propensity for illicit sexual relations with the victim; therefore, the evidence was relevant. *See Spaulding*, 313 N.W.2d at 880. Scriven's claim an undue prejudice objection should have been made is also without merit. While there was some prejudicial effect, the probative value of the evidence was very high. We find all of Scriven's claims of ineffective assistance of counsel regarding the evidence of prior bad acts with the victim to be without merit.

Regarding the evidence of prior bad acts with Gail Reich, we find all of Scriven's claims of ineffective assistance of counsel are without merit. Counsel did not breach a duty by not making a clear proof objection because Reich provided rather detailed testimony regarding the incidents. As we previously mentioned, no

corroboration testimony is necessary to meet the clear proof evidence standard. *Jones*, 464 N.W.2d at 243.

We further find there was no breach due to the failure to make a relevancy objection. Scriven's primary contention is the acts testified to by Reich were too remote to be relevant. Remoteness only renders evidence irrelevant "where the elapsed time is so great as to negative all rational or logical connection between the fact sought to be proved and the remote evidence offered in proof thereof." *State v. Maestas*, 224 N.W.2d 248, 251 (Iowa 1974) (quoting *State v. Engeman*, 217 N.W.2d 638, 639 (Iowa 1974)). We find the probative value of the disputed evidence is strong enough in this case to withstand the negative effect of the remoteness. In addition, we note the length of time affects the weight of the evidence rather than the admissibility. *Id.* We further find there was no breach of duty for failing to make an undue prejudice objection since the probative value of the evidence outweighed any prejudicial effect.

Upon consideration of all issues raised on appeal, we affirm the decision of the district court to deny Scriven's application for postconviction relief.

AFFIRMED.