IN THE COURT OF APPEALS OF IOWA

No. 7-284 / 96-807

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STATE OF IOWA,

Appellee,

vs.

ROBERT ALFRED COER, Jr.,

Appellant.

FILED
SEP 24 1997

Appeal from the Iowa District Court for Linn County, David M. Remley, Judge.

Robert Alfred Coer, Jr , appeals from the judgment and sentence entered upon his conviction for child endangerment in violation of Iowa Code section 726 6(1), (2) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Considered by Cady, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, P. J.

Robert Coer, Jr. appeals the judgment and sentence for his conviction of child endangerment. He claims ineffective assistance of counsel. We affirm Coer's conviction.

The facts of this case began when Robert Coer stopped at a truck stop with his baby daughter. A waitress, Serita Smith, noticed the baby's head appeared abnormal. Smith inquired about the baby's appearance, and Coer responded such an injury would be expected if you dropped a child on its head and threw a diaper bag at it. Coer then asserted his wife caused the injuries. Coincidentally, a police detective Smith knew entered the truck stop to have lunch. Smith informed him of her observations, and the detective decided to investigate. After observing the child's injuries, the detective called paramedics.

A doctor who examined the baby observed a gross enlargement of her head. Further tests revealed blood volume at half the normal level, extensive bleeding in the brain, and a skull fracture. The doctor opined the injuries resulted from repeated, forceful, blunt trauma to the head.

Other witnesses observed Coer with the child prior to and after her head injury. One witness observed Coer with the child when she was allegedly dropped. Another witness observed Coer shaking the baby and dropping her on a bed.

Coer was charged with child endangerment resulting in serious injury. The trial information stated:

> Robert Alfred Coer, Jr., . . . did unlawfully and willfully by an act or series of acts use unreasonable force or did knowingly permit unreasonable force against a three month old infant or did willfully deprive the infant of necessary health care which resulted in serious injury. . . .

The jury found Coer guilty. The court sentenced him to an indeterminate term not to exceed ten years. On appeal Coer argues ineffective assistance of counsel in failing to move to dismiss the trial information as improperly duplicitous.

Coer's ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *Id.*; *see also State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *Ray*, 516 N.W.2d at 865. Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Coer must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Ray*, 516 N.W.2d at 865. Coer must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)).

We first look to whether counsel failed to perform an essential duty in failing to object to the trial information. In reviewing the trial information, we must determine if Iowa Code section 726.6 contains several alternatives of the same offense or separate and distinct offenses. If the alternatives are considered disjunctive, then the trial information was not defective and counsel was not ineffective for failing to object.

The relevant portions of the Iowa Code child endangerment statute provide

> 1. A person who is the parent, guardian, or person having custody or control over a child...commits child endangerment when the person does any of the following:
>
> a. Knowingly acts in a manner that creates a substantial risk to a child or minor's physical, mental or emotional health or safety.
>
> b. By an intentional act or series of intentional acts, uses unreasonable force, torture or cruelty which causes substantial mental or emotional harm to a child or minor.
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> * * *
>
> d. Willfully deprives a child or minor of necessary health care . . . and which deprivation substantially harms the child or minor's physical, mental or emotional health.
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> * * *

Iowa Code § 726.6(1) (1997).

A statute may define a single crime in the alternative. *See State v. Bratthauer*, 354 N.W.2d 774, 776 (Iowa 1984). Whether this has been done is a question of legislative intent. *Id.* Generally, intent to establish a single crime is found when the various alternatives are contained in the same code section or subsection. *See State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993) (statute prohibiting manufacture, delivery,

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or possession of controlled substances outlines a single offense which may be committed by alternative means); *State v Aldrich*, 231 N W.2d 890, 896 (Iowa 1975) (the crime of mistreatment of bodies may be committed in any of the three ways stated in the statute disjunctively); *State v. Williams*, 305 N.W.2d 428, 431, (Iowa 1981) (various acts of drug trafficking do not constitute separate offenses); *State v Houston*, 211 N.W 2d 598, 600 (Iowa 1973) (the offense of possessing stolen property could be committed by various means and the State possessed the right to allege the commission by the various means), *State v. Conger*, 434 N.W 2d 406, 409 (Iowa App. 1988) (theft statute defines a single offense)

Likewise, the child endangerment statute sets forth numerous alternative means of committing the crime of child endangerment. *State v. Hancock*, 521 N.W 2d 707, 708 (Iowa 1994). Furthermore, the statute makes no distinction in the culpability of the various alternatives within the subsection containing the alternatives *See State v. Williams*, 305 N.W.2d at 431. Different punishment is limited to the severity of the injury to the child, not the actions of the perpetrator. Iowa Code § 726.6(2), (3). We conclude Iowa Code section 726.6 defines a single crime.[1] Accordingly, trial

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[1] Coer suggests this court adopt the four part test used by the Wisconsin Supreme Court to determine whether a statute defines a single offense committable in alternative ways or separate multiple offenses. *See Manson v. State*, 304 N.W.2d 729, 734 (Wis. 1981). Even under this test, which we decline to adopt, we could conclude the legislature intended the commission of child endangerment could be committed by the alternative methods described in Iowa Code section 726.6. In fact, in *Manson*, the court concluded the crime of robbery could be committed by using force or threat of force. The court pointed out the legislative concern with a "single wrong" rather than making a distinction between the means of accomplishing the offense. Similarly, the Iowa child endangerment provision addresses a single wrong. Although various means exist to achieve the wrong, it remains, nonetheless, one offense.

counsel was not ineffective.

In addition to showing counsel failed to perform an essential duty, Coer must prove prejudice resulted. *Ray*, 516 N.W.2d at 865. Even if we found counsel failed to perform an essential duty in not objecting to the trial information as duplicitous, we find no prejudice resulted to Coer. The record indicates the jury found Coer guilty based upon strong evidence rather than upon counsel error. Numerous witnesses observed the injured baby in Coer's custody. Medical testimony indicated the baby's head was "grossly enlarged." Thus, Coer clearly should have provided medical care to the child. We therefore find strong evidence to support the conviction.

For the reasons expressed, we affirm the conviction.

AFFIRMED.