IN THE COURT OF APPEALS OF IOWA

No. 2-649 / 91-1518

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RICHARD McLAUGHLIN,

Appellant.

Appeal from the Iowa District Court for Muscatine County, J. L. Burns, Judge.

Defendant directly appeals his conviction on the grounds his trial counsel rendered ineffective assistance in four particulars. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General; Christie J. Scase, Assistant Attorney General; William R. Creasey, County Attorney; and Ann Terry, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

Defendant Richard McLaughlin directly appeals his conviction on the grounds his trial counsel rendered ineffective assistance in four particulars.

The State charged McLaughlin with four counts of third-degree sexual abuse, two counts of lascivious acts with a child, one count of assault with intent to commit sexual abuse, one count of indecent conduct with a child, and one count of lascivious conduct with a child.

At trial, a number of witnesses testified concerning improper sexual conduct initiated by McLaughlin, the owner of the Imperial Dance Academy, with several of his child pupils. The alleged conduct ranged from taking nude measurements of the children to sexual intercourse.

The State also introduced videotaped interviews of each of the alleged victims without objection. The district court interrupted the viewing of the tape due to concerns that the jury was being exposed to improper material. Defense counsel responded that although there was some hearsay in the tape which he would rather the jury not hear, he felt it would attract more attention if he asked for portions of the tape to be stricken from the record or to have portions of the tape skipped. Since defense counsel was concerned about certain hearsay evidence which was on the tape, the tape was edited and play was resumed. The district court again interrupted the viewing because an officer's opinions and comments were not edited. Defense

counsel explained that he intentionally did not edit the officer's comments out of the tape because it was part of his trial strategy to show that this was a "witch hunt."

A social worker and two police officers also testified concerning their interviews with the alleged victims without any hearsay objections by defense counsel.

During jury deliberations, the jury posed the following question to the trial judge: "Concerning M.A. we do not understand which incident matches which charge?" The court called counsel into chambers. Defendant was not present because he had already gone home. Defense counsel did not object to proceeding without him. The court proposed the following response:

> Count III - December 1990, alleged shower incident at the Defendant's home. Alleged touched breasts and vaginal area.
>
> Count V - April 28, 1990, alleged shower incident at defendant's home. Also alleged measure for costume with no clothing. Alleged touching breasts and vaginal area.
>
> Count VI - December 1990, alleged defendant got in shower with her. Alleged touched breasts and vaginal area.
>
> See instructions for further information regarding each count.

Defense counsel and the prosecutor each agreed to the court's proposed response and neither suggested revision.

Defendant was acquitted on Count IX by motion for judgment of acquittal made at the close of the State's evidence. The jury found McLaughlin guilty of all counts submitted. The district court entered judgment and sentenced McLaughlin.

McLaughlin appeals his felony convictions. He contends his trial counsel rendered ineffective assistance in failing to object to (1) consideration of the jury note without his presence, (2) the trial court's supplemental instruction, (3) the edited and unedited videotaped interviews, and (4) the testimony of the social worker and police officers. McLaughlin does not appeal his simple assault convictions.

Established principles govern our review of appellant's Sixth Amendment claim his counsel was ineffective. Our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

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). 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, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698 (1984). With these principles in mind we now turn to appellant's specific claims.

I. **Failure to Object to the Videotape**

Defendant contends that counsel was ineffective for allowing the unedited videotape to play for the jury, and for determining that certain portions should remain after the decision to edit had been made. An attorney's decision regarding strategy or tactics does not ordinarily provide an adequate basis for a claim of ineffective assistance of counsel. State v. Wilkens, 346 N.W.2d 16, 19 (Iowa 1984). When trial counsel acts reasonably in selecting and following through on the chosen strategy, the claim of ineffectiveness is without merit. Id. at 19.

We conclude the defendant's trial counsel was within the normal range of professional competency in deciding upon his strategy and in presenting evidence consistent with that strategy. The defendant denied all allegations of improper contact with his dance students, testifying

that he believed the charges of misconduct were contrived by the girls out of jealousy and anger with the defendant for making the dance lessons difficult. In order to show the girls were lying, defense counsel had the videotaped interviews admitted to show the girls talked among themselves and contrived allegations of abuse from rumors they had heard. The defense counsel also attempted to show through the video that the police were overzealous in their investigation of the allegations and therefore were overly anxious to believe the girls. When questioned by the trial judge, defendant stated he agreed with his defense counsel's strategy.

II. Failure to Object to the Testimony of the Social Worker and the Police Officers

Defendant argues his trial counsel was ineffective because he did not object to the testimony of a social worker and two police officers since their testimony contained inadmissible hearsay by the victims to the investigators.

We need not decide whether the testimony of the social worker and the two police officers contained inadmissible hearsay because we find defendant has failed to show he was prejudiced by the testimony. The girls who made the statements testified at trial to the same events. Defense counsel cross-examined them. There was not a reasonable probability that the result would have been different

without the social worker's and the police officers' testimony about what the girls had said.

III. **Failure to Object to Instructing Jury in Defendant's Absence**

Defendant contends his defense counsel should not have allowed consideration of the jury request without insisting upon the defendant being present.

Iowa R. Cr. P. 18(5)(g) provides:

> After the jury has retired for deliberation, . . . if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required may be given, in the discretion of the trial court. . . . Where the court gives the jury additional instructions, this shall appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

In State v. Snyder, 223 N.W.2d 217, 221-22 (Iowa 1974), our supreme court held that the absence of the defendant when the trial court gives additional instructions in a felony case "gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows the instruction had no influence on the jury's verdict prejudicial to the defendant." See also State v. Meyers, 426 N.W.2d 614, 617 (Iowa 1988) (presumption of prejudice must be overcome beyond a reasonable doubt by the evidence and proceedings in the record).

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for failure to object to instructing jury in defendant's absence for postconviction proceedings.

IV. Failure to Object to the District Court's Supplemental Instruction

Defendant also claims his defense counsel was ineffective by not objecting to the supplemental jury instruction. Since this claim is so interrelated to defendant's claim in division III, we also preserve this claim for postconviction proceedings.

V. Summary

The jury communication related only to the three counts involving M.A. We therefore only preserve for postconviction proceedings defendant's claims in Division III and IV. When considering the totality of the

circumstances and considering counsel's overall representation on the five remaining counts, we find defendant's counsel was within the range of normal competency, and prejudice did not result from any errors counsel might have committed.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent.

It was error not to have defendant present when the additional instructions to the jury were being considered.

Iowa Rule of Criminal Procedure 18(7) (g) provides if after the jury "has retired for deliberations ... (and) there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information may be given, in the discretion of the trial court." Further, "the procedures described in this section shall take place in the presence of the defendant and counsel for the defense and the prosecution, unless such presence is waived." (Emphasis supplied). This rule, formerly Iowa Code section 784.2, was first reviewed in State v. Snyder, 223 N.W. 2d 217 (Iowa 1974). A response to a jury's question is an additional instruction. Id. at 221. The defendant had not only the right to be present but his presence was essential to the fair administration of justice. See id. Simply having defendant's counsel present does not solve the problem. Id. at 222. Prejudice is presumed and the State bears the burden of showing no prejudice resulted. See State v. Meyers, 426 N.W. 2d 614, 616-17 (Iowa 1988); State v. Williams, 341 N.W. 2d 748, 751 (Iowa 1983).