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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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| **STATE OF IOWA,** | ) | |
| Plaintiff-Appellee, | ) | Filed March 9, 1988 |
| vs. | ) | |
| **HOSEA EDWARD MORGAN,** | ) | 7-549<br>87-243 |
| Defendant-Appellant. | ) | |

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Appeal from the Iowa District Court for Marshall County (No. 6870), Carl E. Peterson, Judge.

The defendant appeals from his conviction, following a jury trial, for sexual abuse in the third degree. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Phillip L. Krejci, Marshall County Attorney, for plaintiff-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

**DONIELSON, P.J.**

The defendant was accused of having sexual contact with a twelve-year-old girl. A jury found him guilty of sexual abuse in the third degree. He has appealed from the resulting conviction. We affirm.

Because defendant is asserting that his constitutional right to a fair trial was violated, we make an independent evaluation of the totality of the circumstances; this is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

**I.** The defendant contends his trial attorney rendered ineffective assistance of counsel by failing to object adequately to the introduction of evidence about statements the defendant made to investigating officers. Although trial counsel objected to such statements on the grounds of hearsay, appellate counsel urges that the objection should have been voiced based on an inadequate foundational demonstration of voluntariness.

The following is the record made on this issue at the district court:

> Q. (by the State) During the course of your investigation of this matter, did you have occasion to interview the Defendant? A. Yes, I did.
> Q. Prior to doing that, did you advise him of his constitutional rights? A. Yes, I did.
> * * *
> Q. What did he tell you with regard to this matter?
> MR. HOGLAN: I'm going to object. It's calling for hearsay.
> THE COURT: Overruled.
> * * *
> Q. (by defendant's counsel) Mr. Morgan talked to you voluntarily, did he not? A. Yes, he did.
> Q. He knew that he was entitled to remain silent, that he had a right to counsel, all that, but still chose to talk with you; is that correct? A. That's correct.

In order to establish his claim that his trial attorney was ineffective, defendant has the burden of proving by a preponderance of the evidence counsel failed to perform an essential duty and prejudice resulted therefrom. State

v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); State v. Yaw, 398 N.W.2d 803, 805-06 (Iowa 1987).

The proper standard for judging the performance component is that of reasonably effective assistance; defendant must show that counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689, 104 S. Ct. at 2065, 80 L. Ed. at 694. Defendant is not entitled to perfect representation, only that which is within the range of normal competency. Karasek v. State, 310 N.W.2d 190, 192 (Iowa 1981). "Improvident trial strategy, miscalculated tactics, mistake, carelessness, or inexperience do not necessarily amount to ineffective counsel." State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981) (quoting Parsons v. Brewer, 202 N.W.2d 49, 54 (Iowa 1972)); see also Sallis v. Rhoads, 325 N.W.2d 121, 123 (Iowa 1982). More than a showing that trial strategy backfired or that another attorney would have prepared and tried the case somewhat differently is necessary. Taylor, 352 N.W.2d at 685.

Ordinarily, except for such basic decisions as whether to plead guilty, waive a jury, or testify in his or her behalf, the accused is bound by the tactical or strategic decisions made by counsel, even those rising to constitutional dimensions. Sims v. State, 295 N.W.2d 420, 425 (Iowa 1980). Where counsel makes a reasonable decision concerning strategy, regardless of the success or failure of such strategy, the reviewing court will not interfere. State v. Newman, 326 N.W.2d 788, 795 (Iowa 1982).

Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. Strickland, 466 U.S. at 694, 104 S. Ct. at 2067, 80 L. Ed. at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different, absent the errors. Id. at 696, 104 S. Ct. at 2068, 80 L. Ed. at 699. Prejudice is not established by a purely speculative assertion that the outcome of the trial would have been different but for counsel's alleged breach of an essential duty. Yaw, 398 N.W.2d at 807.

Defendant's trial counsel apparently felt there was no basis for a claim that defendant's statement to the investigating officer was involuntary. We agree. We do not find that trial counsel's performance was below the wide range of representation constituting reasonable professional assistance. Defense counsel's objection based on hearsay, rather than lack of foundation, was a strategic decision on his part which we do not think amounts to ineffective assistance of counsel. We do not find that the verdict reached would likely have been different absent the alleged error. There was sufficient evidence in the record to find defendant guilty beyond a reasonable doubt of third-degree sexual abuse.

**II.** The defendant also contends he was denied his sixth amendment right to confrontation by the method in which the victim's testimony was presented. The victim did not appear in the courtroom; instead, her testimony was given in an adjoining room and was piped into the courtroom by closed circuit television. The defendant asks for a reconsideration of State v. Coy, 397 N.W.2d 730 (Iowa 1986), a recent Iowa Supreme Court case approving similar procedures for taking the testimony of child sex abuse victims while screening them from direct contact with defendants. This practice was recently adopted in Iowa Code section 910A.14(1) (1987). In Coy, 397 N.W.2d at 733-34, the Iowa Supreme Court set forth three purposes served by the right of confrontation: (1) primarily,

confrontation is guaranteed for the purpose of cross-examination; (2) the judge and jury are able to obtain "the exclusive and incommunicable evidence of a witness's deportment while testifying;" and (3) confrontation insures the witness will give his or her statement under oath and thus will be reminded of the seriousness of the matter and be guarded against lying by the possibility of a penalty for perjury. Here, as in Coy, we find the three purposes of the confrontation clause were met. The child witness was cross-examined by defendant; the court, counsel, defendant and jury could observe the child witness; and the child witness testified under oath. The child witness was sworn in front of the jury and defendant, and the court had her turn and observe those persons in the courtroom and the general perception of the room's arrangement.

We find that the district court did not err in allowing the manner in which the child sex abuse victim's testimony was received. We affirm the conviction.

**AFFIRMED.**