IN THE COURT OF APPEALS OF IOWA

No. 9-585 / 98-1529
Filed February 9, 2000

JESSE ROBERT COMLY, III,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Adair County, Donna L. Paulson, Judge.

Jesse Robert Comly, III appeals the denial of post conviction relief from his conviction for sexual abuse in the second degree in violation of Iowa Code section 709.3(2)(1997). **AFFIRMED.**

Joseph R. Cahill of Cahill Law Offices, Nevada, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Scott Brown, Assistant Attorneys General, and Clint Hight, County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

SACKETT, C.J.

Petitioner-Appellant, Jesse Robert Comly, III, petitioned for postconviction relief contending he received ineffective assistance of trial counsel in the proceedings where he was found guilty of second-degree sexual abuse of an eleven-year-old cousin. The district court denied his claim for relief. Comly contends on appeal the district court should have found his trial counsel ineffective in a number of areas. We affirm.

Ordinarily, we review a postconviction proceeding for errors at law. *Jones v. State*, 545 N.W.2d 313, 314 (Iowa 1996). However, we review ineffective-assistance-of-counsel claims under a de novo standard. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998). We review an ineffective-assistance-of-postconviction-counsel claim under a de novo standard of review as well. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). To prevail, a petitioner must prove that his counsel failed in an essential duty and that prejudice resulted. *State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998). Petitioner has the burden to show his counsel was ineffective by a preponderance of the evidence. *State v. Allen*, 565 N.W.2d 333, 336 (Iowa 1997). In resolving an ineffective-assistance claim, the ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983). Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *Jones v. State*, 479 N.W.2d 265, 272 (Iowa 1991). The petitioner must overcome a strong presumption of counsel's competence, and a postconviction

applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Id.*

Comly was charged after his cousin claimed that he sexually abused her while giving her a ride home from their grandmother's home where he had taken her earlier in the day. The initial trial information claimed the abuse occurred on or about July 8, 1994.

Comly filed a notice of an alibi defense. Trial was set for November 28, 1994. On November 4, Comly hired a new attorney. The State amended the trial information to expand the time frame of the alleged abuse to the period between June 10, 1994 and July 15, 1994. The amendment came after the victim in depositions said she believed the abuse happened on July 8 but was not certain of the date. Comly filed a resistance to the motion to amend on the morning of trial. The district court allowed the amendment. Following a jury trial Comly was found guilty on December 1, 1994 of second-degree sexual abuse. This court affirmed the conviction. *State v. Comly,* No. 95-0251, slip op. at 8 (Iowa App. Oct. 25, 1996).

Comly first claims that his trial attorney should have requested a continuance of the November 28 trial date after he learned the district court was going to allow the amendment to the trial information. Comly contends this would have allowed his attorney the time necessary to find witnesses to testify to his whereabouts during the time frame alleged in the amended information.

The district court found Comly was not prejudiced by his attorney's failure to ask for a continuance since the original trial information did not allege an exact time or date of the assault.

Comly's trial counsel said he told Comly he could request a continuance, but they made a joint decision not to do so. He said Comly was anxious to have the matter resolved. He further related that there were at least twelve statements in the victim's deposition focusing on the time for which Comly had the alibi and he and Comly felt they could convince a jury that was when the abuse happened.

Comly's trial attorney's decision not to request a continuance was reasonable trial strategy. When counsel makes a reasonable tactical decision we will not engage in second-guessing. *Van Hoff v. State*, 447 N.W.2d 665, 670 (Iowa App. 1989). Comly has failed to meet the burden necessary to succeed on this issue.

Comly next contends his trial attorney was not effective because he failed to get copies of oral and written statements made by the victim. Comly's attorney made a motion for discovery requesting any written or recorded statement of any witness. He received a number of reports. No further discovery requests were made.

Comly claims he was prejudiced because his attorney did not obtain all the reports and the absent reports could have been used to impeach the victim.

We have examined Comly's challenges to alleged inconsistencies between the reports and the victim's testimony. Any inconsistencies are minor and would have minimal or no impeachment value. Comly cannot show that had his attorney had these reports they would have changed the result of his trial. Comly has failed to show he was prejudiced by the absence of the reports.

Comly next contends his attorney was ineffective in failing to interview a young girl by the name of Amanda and to object to her testimony at trial. Amanda, who was not listed as a state's witness, testified for the state on rebuttal. She said

she had ridden in Comly's pickup with Comly's daughter and the victim before the incident when Comly took the victim to their grandmother's house. She also talked about playing Sorry and hide-and-seek with the victim that day. This was consistent with testimony of the victim as to how she had spent the day. On cross-examination Amanda was asked the date this occurred. Her answer rebutted the testimony of Comly's alibi witness.

Comly contends Amanda was a witness called to rebut his alibi witness and that under Iowa R. Crim. P. 10(11)(a), the State was required to give notice of her testimony within ten days after he filed his witness list and the state failed to do so. The State contends the evidence was only introduced to refute Comly's testimony that the victim had never been in his pickup; that he had not picked the victim up that summer; and that he had never been at his grandmother's home when his daughter or Amanda were there. The State points out the only time the witness refuted Comly's alibi witness was when she was cross examined.

We agree with the State that Amanda was a rebuttal witness called to rebut certain portions of Comly's testimony where he denied any association with the victim or that he had her in his pickup. We disagree with defendant that she was called to rebut his alibi. As a general rule the prosecution is not required to identify rebuttal witnesses. *Grieman v. State*, 471 N.W.2d 811, 813 (Iowa 1991). Rebuttal evidence explains, repels, controverts, or disproves the defense's evidence, and until defendant presents that evidence, the State cannot know if rebuttal is necessary or what direction it should take. *Id.* Comly has failed to make the necessary showing to succeed on this challenge.

Comly next contends his trial attorney was ineffective because he did not object to certain testimony of a doctor who examined the victim after the alleged abuse. The expert testified that the physical examination he did of the victim did not confirm her rendition of the events, but rather complimented and gave further evidence of her story as to what happened. The doctor then went on to say, "And her ability to relate some of those details I talked about before makes me confident what she says happened is what happened."

Comly contends the doctor in giving this testimony was expressing an opinion as to the ultimate fact of the accused's guilt or innocence. Comly correctly advances that an expert is not permitted to express such an opinion. *See State v. Griffin*, 564 N.W.2d 370, 374 (Iowa 1997); *see also State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986).

Assuming without deciding that the doctor's opinion evidence was not admissible, Comly has failed to show the required prejudice to succeed on this claim. He has failed to show that the exclusion of the expert's opinion in the context in which it was made would have changed the result of the trial. We have examined other claims made by Comly and find them without merit. We affirm.

AFFIRMED.