IN THE COURT OF APPEALS OF IOWA

No. 6-229 / 95-0355

FILED
MAY 31 1996
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

JAMES A. LUCAS,

Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Appeal from conviction of second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, William E. Davis, County Attorney, and Julie Walton, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Huitink and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

The defendant, James Lucas, appeals his conviction of second-degree sexual abuse. He argues: 1) the trial court erred in halting testimony which contradicted testimony of the victim; 2) there was insufficient evidence to support the conviction; and 3) his trial counsel was ineffective in failing to object to the admission of hearsay evidence. We affirm.

I. Exclusion of Testimony Contradicting Testimony of Victim. The defendant contends the trial court erred in halting testimony which contradicted the testimony of the victim. Our scope of review in evidentiary matters is for an abuse of discretion. *See State v. Nelson*, 480 N.W.2d 900, 903 (Iowa App. 1991).

During cross-examination the victim denied having ever told her mother the defendant had caused a bruise on her leg

> Q. Okay. Sometime maybe as long ago as a couple of years ago, did you ever tell your mom that [the defendant] had done something to you that he didn't really do? A No.
> Q. Did you ever tell your mom that [the defendant] had put a bruise on your leg? A On my what?
> Q. On your leg A No
> Q. Okay You don't ever remember telling your mom anything like that? A No

As part of its case, the defense called a friend of the victim, Tanisha, as a witness The defense apparently called Tanisha for the purpose of contradicting the victim's earlier testimony, but the State's objection to the testimony was sustained by the court.

> Q. Did you ever know of [the victim] to try to get [the defendant] in trouble with [the victim's mother]? A. Yes.
>
> Q. Can you tell me what happened? A. Well, she was riding my bike, and she fell down. She got a bruise on her leg.
>
> STATE: Your honor, I'm sorry. I'm going to ask that this objection precede the answer, but I believe I anticipate that this is calling for some hearsay. I also anticipate that this is an impeachment, which is not with the scope -- which is improper and not within the scope of Rule 608.
>
> DEFENDANT'S ATTORNEY: Your Honor, this isn't an impeachment. I asked [the victim] the same thing, and she stated that she had never done that.
>
> STATE: This particular incident was never brought up with the [victim], and it would be improper regardless under Rule 608(b).
>
> THE COURT: Under Rule 608(b), the objection is sustained. Now, that means you can't answer the question. She'll have to ask you another question. Okay, Tanisha? Thank you.

The State claims the defendant has failed to preserve error on this issue because no offer of proof was made after the trial court sustained the State's objection. We agree. An offer of proof is required to preserve error. *State v. Lange*, 531 N.W.2d 108, 114 (Iowa 1995). The purpose of an offer of proof is two-fold. It gives the trial court a more adequate basis for its evidentiary ruling, and it provides a meaningful record for appellate review. *Id.*

We will not presume prejudice when the answer to a question is not obvious and the proponent made no offer of proof. *Id.* Nor will we consider error preserved without such an offer unless the whole record makes apparent what is sought to be proven. *Id.*

It is not apparent from the whole record what Tanisha's testimony would have been had she been allowed to testify further on this topic. It is possible her testimony would not necessarily have contradicted the victim's earlier testimony.

Error cannot be based on speculation as to what the witness's testimony would have been had an offer of proof been made. Error which is not preserved is waived. *See State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). Given the failure to preserve error with respect to this issue, we decline to address it on appellate review.

II. Sufficiency of the Evidence. The defendant claims there was insufficient evidence to support his conviction. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38.

Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38 A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W 2d 337, 340 (Iowa 1980).

A review of the record reveals the defendant was the step-father and primary caretaker for the victim. The victim testified the defendant sexually abused her and threatened to kill her if she told anyone about it. Considerable evidence corroborated the victim's testimony. A friend of the victim testified that when she spent a night with the victim, she saw the defendant enter the victim's room and touch the victim "down there between her legs." The victim's younger brother testified he heard the victim cry and scream when in a closed room with the defendant. When these incidents occurred, he would be unable to enter the rooms where the victim and defendant were. The brother testified the defendant would tell him he was tickling the victim and to go away.

Both the victim's mother and step-grandmother testified about a deterioration in the victim's behavior and her relationship with the defendant. The mother testified the victim would scream when the mother left for work and ask her not to go and not to leave her at home. The mother had asked her children if they had ever been touched in a "bad way," and in responding "no" the victim hesitated and would not look at her mother.

Given the evidence in the record, there was substantial evidence which could convince a rational trier of fact the defendant was guilty of the crime charged beyond a reasonable doubt. We affirm the jury's entry of a guilty verdict.

III. Ineffective Assistance of Counsel. The defendant claims his trial counsel was ineffective in failing to object to one witness's hearsay account of what the victim

had told her about the abuse. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty, and, as a result, he was prejudiced. *Id.* To demonstrate prejudice a defendant must prove there is a reasonable probability but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The testimony at issue was that of the step-grandmother who testified about what the victim told her when she revealed she had been abused by the defendant. The testimony was hearsay, but was arguably admissible as nonhearsay under the then-existing law governing the admission of prior consistent statements pursuant to Iowa Rule of Evidence 801(d)(1)(b) *See State v. Gardner* 490 N.W.2d 838, 841 (Iowa 1992). Counsel could not have been expected to foresee the overruling of Gardner in *State v. Johnson*, 539 N.W.2d 160, 165 (Iowa 1995), and the subsequent limitation on the admission of prior consistent statements

Even if counsel could conceivably have raised a valid objection to the testimony, a reviewing court can deny an application for postconviction relief based on the failure to prove prejudice, without deciding whether counsel's representation was deficient. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992); *Taylor v. State*, 352 N.W.2d

683, 685 (Iowa 1984). In this case the victim testified at length about the sexual abuse. The grandmother's repetition of these statements was merely cumulative. *See State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994) (defendant not prejudiced by counsel's error where excluded evidence was cumulative). Finding no prejudice, we deny the defendant's claim of ineffective assistance.

AFFIRMED.