FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JAMES THOMAS JOHNSON,

Defendant-Appellant.

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8-540
87-1438

Appeal from the Iowa District Court for Jasper County (T-485), Van Wifvat, Judge.

Defendant appeals his conviction and sentence, following a jury trial, on two counts of second-degree sexual abuse. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and James F. Whalen, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie Ann Halligan, Assistant Attorney General, for plaintiff-appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, J.

The defendant appeals his conviction and sentence, following a jury trial, on two counts of second-degree sexual abuse. He contends: (1) he was denied effective assistance of counsel because his trial counsel failed to object to inadmissible testimony; (2) jury misconduct deprived him of a fair trial; and (3) the trial court failed to give adequate reasons for imposing consecutive sentences. We reverse and remand.

A jury found the defendant, James Johnson, guilty of two counts of second-degree sexual abuse for incidents involving the eleven- and nine-year-old daughters of the woman he was living with, and the trial court sentenced him to consecutive 25-year terms of imprisonment.

Johnson first contends that he was denied effective assistance of counsel. He claims that his trial counsel was ineffective in: (1) failing to object to a social worker's testimony that in her opinion the two child victims were telling the truth; (2) failing to object to the social worker's opinion that the children had been sexually abused; (3) failing to object to a doctor's opinion that the children had been sexually abused; (4) failing to object to testimony that the defendant had committed sexual acts with another, unrelated juvenile; (5) failing to object to evidence that the victims' mother disbelieved their allegations; and (6) failing to object to

evidence of other criminal acts by defendant including murder and a threat to commit murder. Defendant contends that he was prejudiced by these omissions, either when considered individually or cumulatively.

As a general rule, we do not decide this question on direct appeal, preferring to reserve it for postconviction proceedings when counsel can defend such a charge. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980). The Iowa courts, however, have not hesitated to resolve such claims on direct appeal where the incompetency of which counsel is accused is so glaring that we are justified in saying so upon an examination of the record on direct appeal. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We believe such is the case here, and we focus upon counsel's failure to object to the social worker's testimony that in her opinion the children were telling the truth. We believe the present record is adequate for a decision on the effectiveness issue.

When a defendant relies on a specific act or omission to establish ineffective assistance, two conditions must be satisfied. It must be shown that 1) counsel failed to perform an essential duty, and 2) prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981).

Social worker Susan Gauger, who holds a master's degree in social work and, at the time of defendant's trial, was

the coordinator of the center of child neglect evaluation at Iowa Lutheran Hospital, testified on redirect examination as follows:

> Q. Ms. Harlan asked you about whether children can make accusations as to sexual abuse. Do you have any opinion with relation to [L.M.] and [K.M.]? A. My opinion is that they are telling the truth and that they are credible.

In State v. Myers, 382 N.W.2d 91 (Iowa 1986), the Iowa Supreme Court held that the admission of expert testimony that children rarely lie about sexual abuse, constituted abuse of the trial court's discretion and prejudiced defendant, who had been charged with indecent contact with a child. The court held that as the credibility of the eight-year-old child was a fighting issue between the parties, "the prosecutor's obvious purpose in offering the expert testimony was to bolster the complainant's credibility. We believe the effect was comparable to telling the jury that the complainant would not lie about matters concerning sexual abuse." Id. at 93.

Although recognizing that Iowa has "long been a leader in the liberal use of expert witnesses presenting opinion evidence," the court surveyed previous cases in attempting to address the issue and stated that:

> These cases reveal that we generally will not admit expert opinion testimony that essentially passes on the guilt or innocence of the defendant. These inadmissible opinions go a step beyond merely aiding the fact finder in understanding the evidence and actually invade the exclusive domain of the jury, that is, the determination of the guilt or innocence of the accused. Additionally, expert opinions on the

> truthfulness of a witness should generally be excluded because weighing the truthfulness of a witness is a matter reserved exclusively to the fact finder.

Id. at 95. The court further stated:

> In this case the trial court admitted expert testimony relating to the truthfulness of the complaining witness. We believe the effect of the opinion testimony was to improperly suggest the complainant was telling the truth and, consequently, the defendant was guilty. We conclude the opinion testimony crossed that "fine but essential" line between an "opinion which would be truly helpful to the jury and that which merely conveys a conclusion concerning defendant's legal guilt."

Id. at 97-98 (citation omitted).

We believe that the facts of this case are similar to those in Myers. It is clear from the record that the credibility of the children's testimony was the fighting issue in this case. We see no way to attribute counsel's omission in objecting to Ms. Gauger's testimony to mere improvident trial strategy, miscalculated tactics, or mistaken judgment. State v. Hrbek, 336 N.W.2d 431, 436 (Iowa 1983). We therefore conclude that defense counsel's failure to object to such testimony denied defendant his constitutional right to effective representation of counsel guaranteed him by the sixth and fourteenth amendments of the United States Constitution. We reverse and remand for a new trial. We see no reason to reach defendant's remaining claims.

REVERSED AND REMANDED.

Sackett, J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I dissent for the reasons that follow.

As a general rule, we do not decide the issue of ineffectiveness of counsel on direct appeal. As the majority points out, we have, for the most part, expressed a preference to reserve that question for postconviction proceedings when counsel is afforded the opportunity to defend the charge. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980); but see State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

We are once again confronted with the problem concerning the admissibility of expert testimony that young children do not lie about sexual matters. The supreme court in State v. Myers, 382 N.W.2d 91 (Iowa 1986), in a divided court, determined that expert testimony as to the truthfulness of a witness is not admissible under rule 702. The court reasoned that the effect of such expert opinion is the same as directly opining on the truthfulness of the complaining witness. Id. at 97-98. The supreme court reversed in Myers on the grounds that the trial court erred in overruling the defendant's objection to such testimony. Id. at 98.

It is clear that to preserve error on appeal, an objection to disputed testimony should be lodged. In this instance, defense counsel failed to do so. We have nothing before us to explain his reasoning. I believe he should be

given the opportunity by way of postconviction proceedings to explain his position.

The trial court, under the circumstances here, is the better forum to initially make that determination. It will have the benefit of the testimony of witnesses and, from the record made, it can then determine whether the defendant has established by a preponderance of the evidence whether defense counsel failed to perform an essential duty and whether prejudice resulted therefrom.

Thus, I would affirm the trial court. In doing so, I would hold that it is without prejudice to defendant's right to raise the issue of ineffective counsel through postconviction relief where a fully evidentiary hearing may be had and where counsel will have the opportunity to respond to defendant's charges.