FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-646 / 88-1834

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RONALD RAY, SR.,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Leo F. Connolly, Judge.

Appellant appeals the denial of his postconviction relief. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; and E. A. Westfall, County Attorney, for appellee.

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

SCHLEGEL, P.J.

In 1984, Ronald Ray was accused of sexually abusing his eleven-year-old daughter. In 1985, he was convicted, following a jury trial, of second-degree sexual abuse. Upon appeal, this conviction was affirmed by the Iowa Supreme Court in an unpublished per curiam opinion. State v. Ray, no. 85-554 (Iowa, April 23, 1986).

Ray later challenged his conviction by filing the present application for postconviction relief. The district court denied postconviction relief, and Ray has appealed.

Ray challenges the admission, during his 1985 criminal trial, of testimony by a doctor and a social worker. These two witnesses both testified that their findings in this case were consistent with sexual abuse. Ray contends this testimony was inadmissible because it conveyed a conclusion about his guilt and therefore invaded the province of the jury.

Ray also contends his attorney in the 1985 criminal trial rendered ineffective assistance by failing to object to the testimony noted above.

In examining counsel's conduct, we review de novo the totality of relevant circumstances.

The appellant's complaint centers around the testimony of two witnesses. The testimony of Dr. Jones was as follows:

> Q. Based on your experience and training and having examined and treated [A.R.], are you able to form an opinion as to whether or not she was sexually abused?
>
> A. From the history and physical examination with [A.R.], it is very conceivable that her findings are consistent with sexual abuse.
>
> Q. And what do you base that on?
>
> A. Based that on her story and also on the physical examination which accompanied her visit and which were compatible.

Ray contends this testimony conveyed a conclusion about the defendant's guilt and was therefore inadmissible under Iowa Rule of Evidence 702. Ray claims his trial counsel should have objected to the statement. In addition, Ray claims failure to object to the following testimony by the social worker, Julie Kennedy, was also ineffective assistance of counsel.

> Q. Did you substantiate your report on the sexual abuse of [A.R.] by Mr. Ray?
>
> A. Yes, I did.

Established principles govern our review of defendant's sixth amendment claim that trial counsel was ineffective. Ineffective assistance is measured by 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. State v. Risdal, 404 N.W. 2d 130, 131 (Iowa 1987). 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.

The testimony by Dr. Jones was not inadmissible under Iowa Rule of Evidence 702. His statements did not convey an opinion that the defendant was guilty. His statements were clearly within his expertise. It was certainly helpful to the jury to know that the conditions of the victim could be a result of sexual abuse. Dr. Jones did not state that the appellant was the abuser. He did not even state that an adult male was the abuser. If an expert is not allowed to give his opinion concerning the physical manifestations of child abuse, a jury might never be able to determine that such abuse did occur. The statements by Dr. Jones were admissible and, therefore, trial counsel did not fail to perform an essential duty by declining to object.

The statement by the social worker presents a more difficult problem. The question appeared to ask her whether she believed the appellant committed sexual abuse. She answered in the affirmative which did suggest to the jury that the appellant was guilty. However, the fact that the statement was inadmissible does not mean that prejudice resulted.

The statement by Julie Kennedy was a one-line question to which a "yes" answer was given. It was not a direct statement of belief in guilt, but only suggested her belief to the jury. A trial attorney has many options and must consider all of them in time to make a proper objection.

If the attorney objected and was overruled, or even if he was sustained, the jury's attention would have been directed to this unfavorable statement. A claim of ineffectiveness of counsel must be premised on more than simply questionable or unsuccessful trial tactics. Id. at 133. Counsel could certainly make the decision that such a statement would be better left unnoticed rather than shouted from the hilltops through an objection. Whether twenty/twenty hindsight tells us trial counsel was wise or unwise in selecting this strategy, common sense and experience teach that the strategy was well within the range of reasonable professional competence. Id.

The appellant has not demonstrated that his trial counsel's performance deprived him of his sixth amendment right to effective assistance of counsel.

AFFIRMED.