

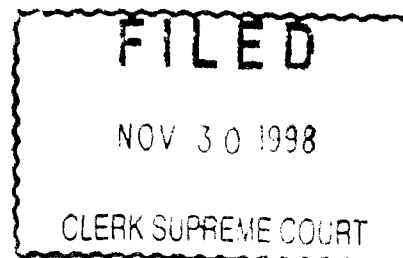
IN THE COURT OF APPEALS OF IOWA

No. 8-561 / 97-2107
Filed November 30, 1998

STATE OF IOWA,
Appellee,

vs.

MATTHEW EARL BOURGOYNE,
Appellant.



Appeal from the Iowa District Court for O'Brien County, Patrick M. Carr,
Judge.

Matthew Bourgoyne appeals his conviction and sentence for first-degree
murder. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald and Charles Thomas,
Assistant Attorneys General, and Bruce A. Green, County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Matthew Bourgoyne appeals his conviction and sentence for first-degree murder. We find sufficient evidence in the record to support his conviction, no prejudice by his trial counsel's failure to object to the introduction of prior bad acts evidence, and no abuse of discretion by the trial judge in failing to recuse himself. We therefore affirm.

Backgrounds facts. Bourgoyne and Bonnie Everetts met and dated briefly in 1989. After becoming reacquainted in November of 1995, Bourgoyne moved into Bonnie's trailer home in Hartley, Iowa. Also living in the home at that time were Bonnie's three children: Amber, born in 1985, Eddie, born in 1989, and Ciara, born in 1992. Bonnie worked various evening shifts at the local medical center. Bourgoyne obtained employment at Beef Specialists of Iowa in Hartley and worked a morning shift. Bonnie and Bourgoyne shared finances, housekeeping and cooking chores, and the supervision and correction of Bonnie's children.

On March 17, 1996, Bonnie was scheduled to work a shift beginning at 10:00 p.m. When she left, Amber, Ciara, and a friend, Alyssa Hofmeyer, were sleeping in one bedroom, Eddie in another. Bourgoyne was watching television. At 6:15 a.m., Bonnie received a call from Amber, who said "Ciara is so cold." Bonnie raced home where she found Bourgoyne and Amber trying to revive Ciara, without success. Emergency medical technicians were also unable to revive Ciara; the medical examiner pronounced her dead at the scene.

After an autopsy and investigation, Bourgoyne was arrested and charged with first-degree murder. Bourgoyne waived his right to a jury trial, and a bench trial was held in July of 1997. The district court issued its ruling, finding Bourgoyne guilty as charged. Bourgoyne now appeals.

I. Sufficient evidence. Bourgoyne asserts that the trial court erred in failing to grant his motion for judgment of acquittal based on the insufficiency of the evidence to support his conviction for first-degree murder.

We review substantial evidence claims on error. Iowa R. App. P. 4; *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996). We are bound by the verdict unless the verdict is not supported by substantial evidence. *See State v. Lewis*, 514 N.W.2d 63, 65-66 (Iowa 1994). In making this determination, we must consider all the evidence in the light most favorable to the State. *State v. Peck*, 539 N.W.2d 170, 172 (Iowa 1995). All evidence is considered, not merely the evidence supporting the verdict. *State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). “Evidence is substantial if it could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Direct and circumstantial evidence are equally probative.” *Bayles*, 551 N.W.2d at 608. However, evidence which merely raises suspicion, speculation, or conjecture is insufficient. *Id.*

Bourgoyne first asserts that there was insufficient evidence at trial to support the trial court’s finding that Ciara died from a blunt head trauma. He points to the testimony of Dr. John Plunkett, Director of Laboratories at Regina Hospital in

Hastings, Minnesota, who testified for the defense. Dr. Plunkett offered no specific opinion as to the cause of Ciara's death but suggested pneumonia, suffocation, abnormal heart arrhythmia, or meningitis as possible causes. However, Dr. Plunkett also agreed it was possible that Ciara had been beaten to death.

The State produced two medical experts who testified on the injuries and cause of death of Ciara. Dr. Brad Randall, a forensic pathologist who performed an autopsy on Ciara, testified to observing multiple bruises on her body, including bruises to her face, head, abdomen, forearm, middle and lower back, and left flank. Dr. Randall testified that the majority of the bruises were of the same age and the severity of some indicated that they had been inflicted by adult force. He further testified that Ciara's neck injuries could have been caused by strangling, and if so, may have caused her death. However, Dr. Randall was of the opinion that Ciara had died from a blunt head trauma. Dr. Thomas Bennett, then medical examiner for the State of Iowa, concurred with Dr. Randall's opinion. Dr. Bennett testified to finding evidence of swelling in the brain, likely caused by blows to the head, which would have caused brain functions to cease and death to follow. Drs. Randall and Bennett found no evidence of meningitis, and testified that Ciara's scattered pneumonia played no role in her death. We find more than sufficient evidence in the record to support the trial court's finding on the cause of Ciara's death.

Bourgoyne next asserts that there was insufficient evidence to support that he was the perpetrator of the alleged injuries that caused Ciara's death. Instead, he

asserts that the evidence at trial pointed to Bonnie Everetts as being the most likely suspect. However, none of the witnesses who testified at trial observed the multiple bruises on Ciara prior to her being left alone in the care of Bourgoyne. In addition, all experts at trial agreed that Ciara probably died between 2:00 and 4:00 a.m., when Bourgoyne was the only adult present. At trial, Bourgoyne also attempted to assert that Ciara's sister Amber could have inflicted her injuries. However, Dr. Randall testified that several of the injuries could have only been inflicted by adult force and Dr. Bennett testified that the injuries could not have been produced by child of Amber's size.

Finally, during an investigative interview, a deputy informed Bourgoyne that there would be laboratory testing done on Ciara for evidence of sexual assault. Bourgoyne replied: "[y]ou will know when the test comes back that she wasn't sexually assaulted." As the trial court noted in its ruling: "[t]his implies that Mr. Bourgoyne knew he didn't assault her, but does not answer the question of how he could know she wasn't sexually assaulted unless it was he who injured her." We find substantial evidence in the record to support that Bourgoyne was the perpetrator of Ciara's injuries, and therefore find no error in the court's denial of his motion for judgment of acquittal.

II. Ineffective assistance. Bourgoyne next asserts he was denied ineffective assistance of counsel because his trial counsel failed to object to the introduction of prior bad acts evidence.

Our standard of review as to the constitutional issue of effective assistance of counsel is de novo. *See State v. Havemann*, 516 N.W.2d 26, 28 (Iowa App. 1994).

To prevail on a claim of ineffective assistance of counsel, the burden rests with the defendant to prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131-32 (Iowa 1987); *State v. Palmer*, 569 N.W.2d 614, 617 (Iowa App. 1997). It is not necessary for us to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *See State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996); *see also Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996). We depart from this preference as the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* We find the record in this case sufficient to allow us to address Bourgoyne's claim on direct appeal.

At issue is the admission at trial of a transcript from a deputy's interview with Bourgoyne the day after Ciara's death. At trial, the prosecutor asked the deputy to read various portions of the transcript. Defense counsel objected on the grounds that it was an improper use of a writing to refresh his memory. The prosecutor then laid a foundation for the admission of the transcript as an exhibit, and defense counsel

consented to the admission of the entire transcript. The transcript contained admissions by Bourgoyne that he had been twice convicted of having sex with teenage girls and had been “involved with sexual assault” of his daughter.

Bourgoyne asserts that his trial counsel’s failure to object to the admission of the prior bad acts prejudiced him by embittering and hardening the bench towards him. The court did not mention Bourgoyne’s prior bad acts in its extensive ruling. However, Bourgoyne’s prior bad acts involved sexual assaults, and the trial court specifically rejected the prosecution’s contention that this was a sexually motivated crime. Given this and the overwhelming evidence supporting the trial court’s findings, we conclude that Bourgoyne suffered no prejudice from the introduction of his prior bad acts.

III. Recusal. Finally, Bourgoyne complains that the trial judge should have recused himself because he and the prosecutor had attended law school together and had been roommates for two years during law school.

We review issues of recusal for abuse of discretion. *See Forsmark v. State*, 349 N.W.2d 763, 767 (Iowa 1984); *State v. Wells*, 522 N.W.2d 304, 310 (Iowa App. 1994). The party seeking recusal carries a substantial burden. *See State v. Haskins*, 573 N.W.2d 39, 44 (Iowa App. 1997) (citations omitted). In order to show an abuse of discretion, one generally must show the court exercised its discretion “on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976); *see also State v. Summage*, 532

N.W.2d 485, 487 (Iowa App. 1995). The test is essentially whether a reasonable person would question the judge's impartiality. *See McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 827 (Iowa 1996); *see also State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994).

At a hearing on Bourgoyne's application for recusal, the prosecutor made a professional statement testifying that his relationship with the trial judge had been strictly professional since they attended law school some twenty years earlier. The trial judge also outlined his limited contacts with the prosecutor since law school on the record, and stated that there was no bias or prejudice on his part. After reviewing the record, we find no abuse of discretion by the trial judge's refusal to recuse himself from this trial.

Having considered all issues properly before us on appeal, we hereby affirm Matthew Bourgoyne's conviction and sentence.

AFFIRMED.