IN THE COURT OF APPEALS OF IOWA

No. 16-1471
Filed November 22, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL RAY WINEINGER,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

A defendant appeals his convictions on four counts of sexual abuse in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Zachary C. Miller, Assistant Attorney General, for appellee.

Considered by Tabor, P.J., McDonald, J., and Goodhue, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

GOODHUE, Senior Judge.

Michael Wineinger was convicted by a jury of four counts of sexual abuse in the second degree. A motion in arrest of judgment and for a new trial was denied. Wineinger was sentenced to four concurrent terms of twenty-five years. Wineinger appeals. We affirm.

I. Factual Background

In December of 2011, Wineinger moved into an apartment with Fred, Fred's three children, and Stephanie, who the children considered their mother. The living accommodations included only two small bedrooms. The children shared one bedroom. At the time of trial, the oldest child, a male, J.L., was fourteen years of age; L.L., the alleged victim, was a female age ten; and there was a younger child, age nine. The children eventually came to share their bedroom with Wineinger. The children referred to Wineinger as Uncle Mike, and they appeared to have a good relationship with him.

Stephanie became concerned with Wineinger's drinking problem, and confronted Wineinger, requesting he permanently move from the apartment. Wineinger complied. The children overheard the confrontation.

Soon after, in April of 2014, J.L. reported to school authorities that Wineinger had inappropriately touched L.L. J.L. has been diagnosed with autism and mental-health issues that require medication, and he was not always considered truthful. On April 14, 2014, immediately after being notified about J.L.'s statement, Fred and Stephanie took L.L. to Project Harmony, where L.L. was interviewed by Mindee Rolles, a social worker. Project Harmony is an organization that helps children by providing various services. L.L. told Rolles nothing had

happened between her and Wineinger. That evening, Stephanie confronted J.L. about lying concerning the inappropriate contact with L.L., but J.L. insisted he had been truthful. When Stephanie confronted L.L., she admitted lying, and on the following day, Stephanie took L.L. back to Project Harmony, where she was again interviewed by Rolles. Videos were made of both interviews.

At the second interview, L.L. stated that Wineinger awakened her one night by touching her private parts and he otherwise sexually abused her. L.L. testified the abuse started when she was in the second grade. She further testified that Wineinger made her perform oral sex and he put his penis in her vagina and her anus. She testified the abuse took place over and over. L.L. had frequently asked Wineinger to stop, but he would continue and say "no." She testified she had hesitated to tell anyone because Wineinger had told her that if she told anyone about the sexual abuse, "her mom would go away." At trial, Wineinger contended L.L. concocted the story to punish him after his confrontation with Stephanie and to protect J.L. from being punished for lying.

Sarah Cleaver, a pediatric nurse, examined L.L.'s genitalia for any abnormalities that might have resulted from sexual abuse. She discovered a suspicious notch at the three o'clock position of the hymen. L.L. was tested for a variety of conditions and diseases associated with sexual contact, but none were found. Cleaver testified the results did not prove or disprove that L.L. had been sexually abused.

Prior to trial, Wineinger filed a motion in limine to keep the second video interview out of evidence. Counsel agreed, however, that under *State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994), if the second interview came in then the first

interview should also come in. The State agreed both videos could come in but opposed the first coming in without the second. The district court found the parties to be "on the same page." With the court understanding both interviews would be admitted into the record, no further consideration was given of the matter.

At a break in the State's case, and prior to the playing of either video, Wineinger's counsel advised the court and the State that the essential elements of L.L.'s first video were already in the record, showing the first video was not required, and he did not intend to present it. Wineinger contended that if he elected not to show the first interview, the agreement had been abandoned and, therefore, the second interview would not be admissible. Wineinger's counsel stated, "I am not seeking any further to admit the first interview of Project Harmony and likewise I think the second interview should also be likewise excluded under *Crawford* [*v. Washington*, 541 U.S. 36, 68-69 (2004)]." Wineinger's counsel argued, "It is testimonial, it is investigatory, and it would violate the confrontation clause." The court ruled during the break:

> Both opening statements referred to it. All of the examination of witnesses referred to it. Everything refers to it as something that will occur during this trial. That is no longer a trial strategy. That's an agreement. . . .
>
> . . . So I'm going to allow the evidence in.

The State offered the videos of both interviews, and they were received without objection on the part of Wineinger. Wineinger asserts it was error for the court to admit the second interview. If we find error was not preserved, Wineinger requests the court to consider the issue under the ineffective-assistance-of-counsel rubric.

Wineinger also asserts counsel was ineffective in the following respects: (1) in failing to object to the introduction of the second video; (2) in not requesting a limiting instruction addressing interviewer Rolle's questions during the video interview; (3) in failing to object to the court's Instruction No. 15, which paraphrased Uniform Instruction 200.44; and (4) in failing to object to Wineinger's statements to L.L. as hearsay.

II. Admission of the Second Video

A. Preservation of Error

No objection was made to the State's introduction of either interview. A motion in limine had been filed, and the issue was resolved by an agreement that both be admitted. It was midway through the State's evidence when Wineinger's counsel decided it was unnecessary to place the first video in evidence and, therefore, the State should not be allowed to introduce the second. Wineinger's counsel limited his objection made at that time to the right of confrontation and did not make a hearsay objection. The court's ruling was based on what it considered was an agreement of counsel. The video was then admitted without further objection. The hearsay objection to the second video was not preserved.

III. Ineffective Assistance of Counsel Claims

A. Error Preservation

An exception to the traditional error preservation rules exists when the claim is ineffective assistance of counsel. *State v. Fountain*, 786 N.W.2d 260, 262-63 (Iowa 2010).

B. Standard of Review

Ineffective assistance of counsel claims raise constitutional issues and are reviewed de novo. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

C. Ineffective Assistance of Counsel—Generally

Claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, but when the record is adequate, they may be determined on a direct appeal. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015).

To prevail on a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). A claim of ineffective assistance must overcome the presumption that counsel is effective. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). For relief to be granted, there must be a determination that but for the ineffective assistance, there is a reasonable probability the result would have been different. *Ledezma*, 626 N.W.2d at 143.

1. Failure to Object to the Video as Hearsay

We do not conclude the record is adequate to determine whether counsel was ineffective for failing to object to the second video as hearsay. But we note, strategic choices made after proper investigation are virtually *unassailable*. *Id.* at 145.

2. Failing to Request a Limiting Instruction

On appeal Wineinger asserts that a limiting instruction should have been granted. He proposes the following limiting instruction:

> Statements and/or questions by Mindee Rolles and L.L. during the interviews depicted in State's Exhibits 9 and 10 are not evidence to be considered for their truth.

Exhibits nine and ten refer to the two videos. The thrust and the relevance of the proposed instruction is concerned with the admission of two videos and so intertwined with them that this issue, if it remains an issue, should also be reserved for a postconviction proceeding. The proposed instruction under the record as it stands would not be appropriate, but if the admission of the videos could only be used for some limited purpose then some type of a limiting instruction setting out the limited purpose would be appropriate.

3. Failure to Object to Instruction No. 15

Instruction No. 15 reads as follows:

> Evidence has been offered to show the defendant made statements at an earlier time and place. If you find any of the statements were made, then you may consider them as a part of the evidence, just as if they had been made at this trial.

Instruction No. 15 is a correct statement of law. Wineinger relates the instruction to L.L.'s testimony that Wineinger told her that she should not tell her mother (Stephanie) because if she did, she would lose her mom. The purpose of L.L.'s above testimony was not offered for the truth of the matter asserted but was instead an explanation of why L.L. delayed reporting the incidents. As such, the statements were not hearsay. *See* Iowa R. Evid. 5.801(c).

Furthermore, even if it were otherwise hearsay, it was Wineinger's own statement and was offered against him and as such is not hearsay. *See* Iowa R. Evid. 5.801(d)(2). Wineinger in his appellate brief contends the statement would have to have been an "admission" for the statement to be admissible under the

cited rule. The title of the rule does refer to an "admission" by a party opponent, but the body of the rule is not so limited. The 2017 revision clarifies the rule and has deleted the title Wineinger is relying on. *See* Iowa R. Evid. 5.801(d)(2). Wineinger's assertion that the statements could only have been used for impeachment purposes is simply not correct. Finally, L.L.'s testimony in court also included the same statements made by Wineinger at the time of the alleged incident. The statements were substantive evidence of what he said and obviously not hearsay.

4. Failure to Object to Wineinger's Statements

Wineinger claims evidence of statements he made to L.L. were in violation of his right not to incriminate himself. The statements Wineinger made to L.L were not made when he was in custody, were made voluntarily, were not in response to a question, and were not made under force or duress. Furthermore, as Wineinger points out, the statements made were not admissions to the criminal acts. Coercive police activity is a necessary predicate to claiming a statement is not made voluntarily within the meaning of the Due Process Clause of the Fourteenth Amendment. *State v. Conger*, 434 N.W.2d 406, 408 (Iowa 1988) (citing *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)).

IV. Conclusion

The decision of the trial court is affirmed, but defense counsel's failure to object to the second video and to request an appropriate limiting instruction are reserved for a possible postconviction relief action.

AFFIRMED.