IN THE COURT OF APPEALS OF IOWA

No. 1-293 / 10-0404
Filed June 29, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES EUGENE FAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Palo Alto County, Don E. Courtney, Judge.

James Fay appeals from his convictions, sentence, and judgment for two counts of sexual abuse in the second degree and two counts of incest. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Peter C. Hart, County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DOYLE, J.

James Fay appeals from his convictions, sentence, and judgment for two counts of sexual abuse in the second degree and two counts of incest. He contends the district court erred in denying his request for an expert witness to evaluate his mental state during an interview in which he gave statements against his interest and in denying his motion to suppress those statements as involuntary. Additionally, he asserts his trial counsel rendered ineffective assistance in several respects. We affirm.

***I. Background Facts and Proceedings*.**

James Fay (Fay) is the father and Carissa Fay is the mother of C.F., born in September 2001, and R.F., born in December 2002. On April 14, 2008, Fay was charged with two counts of sexual abuse in the second degree[1] and two counts of incest.[2] Viewed in the light most favorable to the State, the jury could have found the following facts:

In April 2007, C.F. and R.F. began seeing a therapist after R.F., then four years old, was observed acting out sexually. The therapist found R.F. to be highly sexualized, noting R.F. "continually had an erection. He inappropriately touched . . . me and his mother, and everything he touched was sexualized." In R.F.'s first session with the therapist, R.F. "took the father doll and the boy doll and had them having intercourse." Additionally, C.F. disclosed to the therapist

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[1] "A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances: . . . The other person is under the age of twelve." Iowa Code § 709.3(2) (2009).

[2] "A person . . . who performs a sex act with another whom the person knows to be related to the person . . . as an ancestor, descendant, . . . commits incest." *Id.* § 726.2.

"that her father was touching her." In June 2007, the children's therapist conveyed the children's reports to the Iowa Department of Human Services (DHS).

On July 6, 2007, a medical examination, including a colposcopy exam, was performed on the children at the Mercy Child Advocacy Center. C.F. told the examiner that she had been touched by her half brothers. When asked if anyone else had touched her, she initially stated no, and then paused and told the examiner "sometimes daddy." C.F. told the examiner that Fay used gloves and touched her private spots. The colposcopy exams showed no evidence of physical abuse.

On July 23, 2007, DHS's child protective worker Kelly McKeever and Palo Alto Deputy County Sheriff Todd Suhr interviewed Fay at the DHS office in Emmetsburg, Iowa. Deputy Suhr read to Fay a written form entitled "Statement of *Miranda* Rights," and advised, among other things, that at "any time, [Fay], you can say I don't want to talk to you no more." Deputy Suhr and Fay both signed the form.

The interview lasted ninety minutes. Deputy Suhr and McKeever specifically questioned Fay concerning C.F.'s statements to her therapist that Fay had touched her vagina with his fingers, he had digitally penetrated her vagina, and he had touched her with his penis. Fay denied, approximately fifty-two times, purposefully touching C.F. in a sexual manner. He also denied having ever changed C.F. and R.F.'s diapers and bathing them. However, Fay ultimately admitted that he had accidentally touched C.F.'s vagina with his fingers once when he picked her up and she was not wearing panties. He also stated

that once, as he was toweling off after a shower, C.F. came into the bathroom and walked into his penis. He also stated that C.F. might have had accidental contact with his penis when she crawled into Fay and Carissa's bed at night.

Fay began attending psychosexual therapy with Susan Rohden, a licensed independent social worker for Catholic Social Services, in December 2007. In April 2008, Fay acknowledged to Rohden he had touched C.F.'s vaginal area eight different times and he had once digitally penetrated her vagina, but he maintained that those contacts were accidental. However, Fay also stated "that he was sexually interested when he touched his daughter's vagina and digitally penetrated her on one occasion." Fay also told Rohden he had massaged R.F.'s private parts on two occasions based upon a doctor's recommendation regarding a urinary problem R.F. was having. Fay stated to Rohden that his contact with R.F. was not sexual, but he was curious to see that his son's penis became erect and did acknowledge being sexually interested.

Rohden, with Fay present, then contacted DHS caseworker Beth Borchardt via telephone. Rohden indicated to Borchardt "that she was in session with [Fay], and that he had just acknowledged touching the children." Fay repeated to Borchardt what he had stated to Rohden—that he had been touching both his children's private parts. He admitted he had touched C.F.'s vagina eight times over the prior three to four months and he had once digitally penetrated her, but again asserted the contacts were accidental. He also stated he had touched C.F. in a sexual manner on her private parts, specifically her vagina. He also stated he touched R.F. in a sexual manner and he was sexually interested when he touched R.F.

On April 14, 2008, a trial information was filed charging Fay with two counts of third-degree sexual abuse and two counts of incest occurring between March 1 and July 1, 2007. In January 2009, Fay filed a motion to suppress the statement he gave to Deputy Suhr and McKeever on July 23, 2007, as involuntary. The district court overruled Fay's motion, finding Fay's statements at the interview to be voluntary.

In April 2009, Fay filed an application for an expense voucher for an expert witness to retain an expert for the purpose of evaluating and testifying as to Fay's medical and mental state when he gave incriminating statements. The State resisted the application, and a hearing on the application was held. During the hearing, the district court seemed to initially approve Fay's application, stating "because . . . the—offenses are serious, I'll allow you to consult and you'll have to prepare a voucher then." However, the court's written ruling following the hearing denied Fay's application.

Trial commenced in November 2009. The audio recording of Deputy Suhr and McKeever's July 23, 2007 interview of Fay was played for the jury. Two references to Fay's past during the interview were fast-forwarded on the audiocassette so the jury did not hear them. However, a few references by Deputy Suhr to a past encounter concerning bondage between Fay and Carissa were not objected to by Fay's trial counsel and were thus were played along with the rest of the interview's audio recording.

The children testified via closed circuit camera. Both children testified their father had touched their genitals. C.F., eight years old at the time of trial, testified that her dad took her into his bedroom, laid her down on the bed, and

touched her. She testified that after her dad touched her he told her not to tell. However, she testified that both her parents had touched her private parts. R.F., six years old at the time of trial, testified his dad had touched his "wiener." However, he also testified his dad had pooped in his mouth when he was four, that his half-brothers had tied his dad up with a rope and threw him in the truck and took Fay to jail. He also testified that when he was two years old he caught eighteen rabbits with a trap and that his dad killed some of the rabbits with a sword.

Fay and Carissa testified that R.F. and C.F. both suffered from urinary problems. They testified that medical professionals advised them to massage R.F. above his penis to help stimulate urination. They also testified that C.F. had developed a severe rash in her diaper region that required application of ointment. Fay testified and denied ever touching C.F. or R.F. for purposes of sexual gratification.

The jury found Fay guilty as charged on all counts. He was sentenced to an indeterminate term of imprisonment not to exceed twenty-five years with a seventy percent mandatory minimum on each sexual abuse count, and an indeterminate term of imprisonment not to exceed five years plus a fine on each incest count, with the sentences running consecutively. Fay now appeals.

II. Discussion.

On appeal, Fay contends the district court erred in denying his request for an expert witness to evaluate his mental state at the time of his statements to Deputy Suhr and McKeever and in denying his motion to suppress his

statements to Suhr and McKeever as involuntary. Additionally, he asserts his trial counsel rendered ineffective assistance in several respects.

A. Motion to Suppress.

We first address Fay's challenge of the district court's ruling on his motion to suppress because, should we find the court erred, we need not address his other arguments. Because Fay's claim implicates his constitutional rights, we review the record de novo. *State v. Bogan*, 774 N.W.2d 676, 679 (Iowa 2009). We review the totality of the circumstances and consider both the evidence from the suppression hearing and the evidence introduced at trial. *Id*. at 679–80.

In *Miranda v. Arizona*, 384 U.S. 436, 473, 86 S. Ct. 1602, 1627, 16 L. Ed. 2d 694, 723 (1966), the United States Supreme Court determined the Fifth and Fourteenth Amendments require the police to inform a suspect he has a right to remain silent and a right to counsel during a custodial interrogation. Absent *Miranda* warnings and a valid waiver of those rights, statements made during an interrogation are inadmissible. *Miranda*, 384 U.S. at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726.

For Fay's statements to be admissible, the State must first prove Fay was adequately informed of his *Miranda* rights, understood them, and knowingly and intelligently waived them. *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410, 421 (1986) ("[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."); *State v. Morgan*, 559 N.W.2d 603, 606 (Iowa 1997). Second, the State must prove Fay gave his statement voluntarily. *Morgan*, 559 N.W.2d at 606. "[F]or a waiver to be made voluntarily,

the State must prove by a preponderance of the evidence that the relinquishment of the right was 'the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" *State v. Palmer*, 791 N.W.2d 840, 845 (Iowa 2010) (quoting *Moran*, 475 U.S. at 421, 106 S. Ct. at 1141, 89 L. Ed. 2d at 421). Fay argues his wavier of *Miranda* rights was not voluntarily entered into because his statements were allegedly made under duress and coercion.

We find we do not need to address these claims because even if we assume without deciding Fay's statements during the interview were involuntary and thus inadmissible, we find their admission was harmless beyond a reasonable doubt. *See State v. Simmons*, 714 N.W.2d 264, 275 (Iowa 2006) ("In order for a constitutional error to be harmless, the court must be able to declare it harmless beyond a reasonable doubt."). In assessing whether a constitutional error was harmless, the Iowa Supreme Court has explained:

> There are two steps in the harmless error analysis. We first consider all of the evidence the jury actually considered, and then we weigh the probative force of that evidence against the erroneously admitted evidence. The inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

Id. (citations omitted). Furthermore, "[i]f substantially the same evidence is in the record, erroneously admitted evidence is not considered prejudicial." *Id.* at 276. (citation omitted).

Here, Fay's therapist Rohden testified Fay admitted to her that he touched both C.F. and R.F. and was sexually interested when he touched both children. DHS caseworker Borchardt testified she heard Fay admit on the telephone call with Rohden that he touched both children in a sexual manner. Clearly the

statements Fay made to Rohden and Borchardt, which Fay does not challenge, are substantially more incriminating than the statements he made in his interview with Deputy Suhr and McKeever. Weighing the probative force of the admission of Fay's statements to Deputy Suhr and McKeever during the interview against the testimony of Rohden and Borchardt, we cannot find the jury's verdict attributable to the allegedly inadmissible evidence. Therefore, any alleged error was harmless beyond a reasonable doubt. *See id*. at 276-76.

***B. Expert Witness*.**

Fay also argues the district court erred in denying his request for an expert witness to evaluation his mental state at the time of his statements to Deputy Suhr and McKeever. We review the district court's ruling on an application for the appointment of an expert witness for an abuse of discretion. *State v. Leutfaimany*, 585 N.W.2d 200, 207 (Iowa 1998). We will reverse the court's decision only if that discretion has been abused. *State v. Stewart*, 445 N.W.2d 418, 420 (Iowa Ct. App. 1989).

"An indigent criminal defendant is not entitled to appointment of expert services at state expense unless there is a finding that the services are necessary in the interest of justice." *Leutfaimany*, 585 N.W.2d 208; *see also* Iowa R. of Crim. P. 2.20(4).

> Although [the] trial court should prevent random fishing expeditions undertaken in search of rather than in preparation of a defense, it should not withhold appointment of an expert when the facts asserted by counsel reasonably suggest further exploration may prove beneficial to defendant in the development of his or her defense.

State v. Coker, 412 N.W.2d 589, 592 (Iowa 1987) (internal citation omitted). "The underlying question is whether the application is reasonable. If it is reasonable it should be granted." *Stewart*, 445 N.W.2d at 420.

Fay's application for a voucher for an expert witness asserted:

> [C]entral to the State's case is an alleged "confession" which came at the end of an interrogation. . . . [T]he response to the interrogation and the alleged "confession" are rambling and inconsistent statements by [Fay]. . . . [Fay's] counsel has, subject to court approval, retained [an expert] . . . to evaluate [Fay] and [the expert] has rendered a preliminary opinion indicating that [Fay] suffered medically and mentally at the time of giving said statement. . . . [T]here is no factual basis to support the charge of [s]exual [a]buse in the [s]econd [d]egree . . . and the State relies heavily on the interrogation and alleged "confession" of [Fay], who at the time of said interrogation and "confession" was medically and mentally incompetent.

The State resisted, arguing that Fay's was trying to untimely assert a diminished responsibility defense. At the hearing, Fay's counsel asserted he was not attempting to assert a mental health defense but trying to explain to the jury why Fay "would make certain statements against his interests in light of the fact he may be facing a criminal charge." The court's written ruling denied Fay's application "for all those reasons cited in the State's resistance."

On appeal, Fay argues the expert's testimony was for the "limited purpose of explaining to the jury why he gave apparently incriminating statements to interviewers." Fay contends "presentation of expert testimony as to why people sometimes falsely incriminate themselves would have resolved some serious questions about [Fay's] statements to investigators and therapists." He further asserts "[e]xpert testimony would have permitted [Fay] to place his statements in the context of the circumstances and his mental state at the time." "[E]xpert

testimony on the reliability of the statements under the circumstances presented was a necessary component to [Fay's] defense."

Upon our review, we find no abuse of discretion. Although Fay contends the expert's testimony was for the limited purpose of explaining to the jury why he gave apparently incriminating statements to interviewers, Fay was not asserting any mental health defense in this case. Thus, to the extent that the expert would testify that Fay's statements to Deputy Suhr and McKeever were "medically and mentally incompetent," the expert would be opining on whether Fay's statements were truly voluntary.

> The issue of whether or not a confession was voluntary is first and finally determined by the court after hearing outside the presence of the jury. If found to be admissible, the weight and credibility to be given to the confession is left to the jury.

State v. Bowers, 661 N.W.2d 536, 542-43 (Iowa 2003) (internal citation omitted).

Here, the judge determined Fay's statements were voluntary. It was then for the jury to determine the weight and credibility to be given to Fay's statements. As the State points out, the jury heard details concerning Fay's statements at the interview from all perspectives at trial. The jury was played the audio recording of the interview. McKeever and Deputy Suhr testified. Fay himself testified and could have explained why he gave apparently incriminating statements to interviewers.

Given what Fay asserted the expert would testify to in his application and Fay's lack of a mental health defense, we cannot find that further exploration may have proved beneficial Fay in the development of his defense. We therefore conclude the appointment of an expert witness was unnecessary in the interest

of justice. Accordingly, we find the district court did not abuse its discretion in denying Fay's application.

C. Ineffective Assistance of Counsel.

Fay contends his trial counsel rendered ineffective assistance in several respects. We conduct a de novo review of ineffective assistance of counsel claims. *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). Although we generally preserve such claims for postconviction relief, where the record is sufficient to address the issues, we may resolve the claims on direct appeal. *Palmer*, 791 N.W.2d at 850. However, "[o]nly in rare cases will the trial record alone be sufficient to resolve the claim. 'Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned.'" *State v. Bentley*, 757 N.W.2d 257, 264 (Iowa 2008) (citation omitted). "Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) (internal citation omitted). A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000).

"To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure." *State v. Fountain*, 786 N.W.2d 260, 265-66 (Iowa 2010). A defendant's inability to prove either prong defeats the claim of ineffective assistance of counsel. *Id.*

There is a strong presumption counsel's representation fell within the wide range of reasonable professional assistance, and Fay is not denied effective assistance by counsel's failure to raise a meritless issue. *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003). To demonstrate prejudice, the defendant must show that "but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008).

1. Hearsay.

Fay first asserts his trial counsel failed to object to Deputy Suhr's and McKeever's statements to Fay during their July 23, 2007 interview concerning C.F.'s reports that Fay had touched her vagina and had digitally penetrated her. Fay asserts C.F.'s allegations were inadmissible hearsay and should have been excluded. Because Fay's trial counsel failed to challenge the asserted hearsay statements, Fay contends his trial counsel was ineffective. We conclude the record in this case is adequate to decide this issue.

Under our rules of evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). "Hearsay . . . must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision." *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006); *see also* Iowa R. Evid. 5.802. The district court has no discretion to admit hearsay in the absence of a provision providing for admission. *Newell*, 710 N.W.2d at 18. "Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established." *Id.* However, "[w]e have held that where substantially the same evidence is in the

record, erroneously admitted evidence will not be considered prejudicial." S*tate v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986); *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]e will not find prejudice if the admitted hearsay is merely cumulative.").

Upon our review, we find no error. Iowa Rule of Evidence 5.803(4) provides, in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

"The policy underlying this exception is that a statement made while procuring medical services, when the declarant knows that a false statement could result in misdiagnosis, carries special guarantees of credibility." *Hildreth*, 582 N.W.2d 167, 169 (Iowa 1998) (citing *State v. Mann*, 512 N.W.2d 528, 535 (Iowa 1994)).

Here, C.F.'s statements to her therapist and her colposcopy examiner were clearly made for the purposes of medical diagnosis or treatment. *See id*. Consequently, C.F.'s statements to professionals would fall under the hearsay exception of rule 5.803(4). Accordingly, Fay's trial counsel had no duty to raise a meritless issue.

Furthermore, even if those statements were deemed hearsay, they were merely cumulative, given the direct testimony of C.F.'s therapist and medical examiner concerning C.F.'s statements, as well as the testimony of Rohden,

Borchardt, and C.F. herself. Fay cannot demonstrate the requisite prejudice. We therefore find Fay's trial counsel was not ineffective in this respect.

2. Prior Bad Acts.

Fay next asserts his trial counsel was ineffective for failing to object to statements made by Deputy Suhr during the July 23, 2007 interview concerning prior bad acts. During the interview, Deputy Suhr made references to a past encounter he had had with Fay and Carissa in 2006 concerning bondage between the couple.

Upon our review, we agree with the State that Fay has failed to establish the requisite prejudice. No details concerning the past incident were stated, and the references to the past encounter were vague and isolated. Moreover, the jury was instructed that "[a]ny comments made concerning any other wrongful acts which have been committed by [Fay] should be disregarded. [Fay] is not on trial for those acts, and you should not consider them as part of your deliberations." "We presume juries follow the court's instructions," *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010), and there is no evidence indicating the jury did not follow the court's instructions in this case. Given the evidence against him, including the testimony of the children and Fay's admissions and changed stories, Fay cannot reasonably establish that he likely would have been acquitted had Deputy Suhr not made the vague references to a past encounter with Fay and Carissa. We therefore find Fay's trial counsel was not ineffective in this respect.

3. Personal Opinion.

During the July 23, 2007 interview, Deputy Suhr stated to Fay that, based on his training and his years of experience, "the one thing I do know for a fact is that five year old children do not make this kind of thing up generally." Deputy Suhr stated he believed C.F. was "being pretty honest about it." At one point, McKeever stated: "You know that we know what went on." McKeever stated he could "see it in [Fay's] eyes" that Fay wanted "to be honest" and wanted to tell them what happened. Deputy Suhr also stated he believed Fay had touched C.F.'s vagina, but expressed that the touching was "probably a mistake [Fay] made maybe once or twice."

Fay argues that Deputy Suhr's and McKeever's comments on the veracity of C.F.'s and Fay's statements "were improper comments upon the credibility of witnesses and [Fay's] guilt and should not have been admitted without explanation." The State argues that Fay cannot demonstrate the requisite prejudice. Upon our review, we agree.

Although it is generally not proper to ask "one witness if another witness is untruthful, mistaken, or to otherwise ask the witness to comment on the credibility of another witness, *see Nguyen v. State*, 707 N.W.2d 317, 325 (Iowa 2005), Fay must show that result of the proceeding would have been different but for his trial counsel's alleged error. *Anfinson*, 758 N.W.2d at 499. We agree with the State there is no reasonable likelihood the exclusion of the statements would have changed the result of the proceeding, given the direct testimony of the children, the testimony of the therapists and examiner concerning the children's reports,

the testimony of Fay's therapist, and Fay's own statements during the interview. We therefore affirm on this issue.

***III. Conclusion*.**

Assuming without deciding that Fay's statements during the interview were involuntary and thus inadmissible, we conclude their admission was harmless beyond a reasonable doubt given similar but substantially more incriminating statements were in evidence. Additionally, given what Fay asserted the expert would testify to in his application and Fay's lack of a mental health defense, we cannot find that further exploration may have proved beneficial Fay in the development of his defense. We therefore find the district court did not abuse its discretion in denying Fay's application for a voucher for obtaining an expert witness. Finally, we conclude Fay's trial counsel did not render ineffective assistance. Fay's trial counsel had no duty to object to the hearsay because it was admissible under the hearsay exception of Iowa Rule of Evidence 5.803(4), and no prejudice resulted because the statements were merely cumulative. Additionally, Fay cannot establish that excluding the vague references to prior bad acts by him and the personal opinions stated by Deputy Suhr and McKeever during the interview would have changed the outcome of the trial. Accordingly, we affirm Fay's convictions, sentence, and judgment.

AFFIRMED.