

IN THE COURT OF APPEALS OF IOWA

No. 2-052 / 10-2063
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN NAGBEAH GADDEH,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Defendant appeals his conviction for lascivious acts with a child, contending trial counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda Fangman, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

On July 31, 2010, the father of thirteen-year-old E.G. received a text message warning him defendant Benjamin Gaddeh was at his home with his daughter. The father went home and went directly to his daughter's room in the basement. The door was locked. He knocked on the door. No one answered, but he heard sounds as if someone was going toward the basement window. He went upstairs and outside the house and stood at the window, but no one came out so he went back down to E.G.'s room and knocked again. When no one opened the door, he kicked it in. He saw his daughter running behind the door trying to pull her clothes up, and Gaddeh in boxer shorts, with his shirt in his hand and with his other shorts around his knees. When the police responded to the father's call, Gaddeh told the officers he was friends with the father; E.G. had called him and told him to come over; he had come to the house to deliver a birthday present for E.G.; and he and E.G. were just sitting and talking, nothing had happened. When asked about the present, Gaddeh stated he didn't have the present.

Twenty-eight-year-old Gaddeh was charged with lascivious acts with a child.¹ E.G. told a jury that Gaddeh had asked her to have sex and when she said, "I can't have sex without no condom," he told her that if she got pregnant he would take her to New Jersey with him. Gaddeh testified E.G. had invited him

¹ The jury was instructed that in order to convict Gaddeh of lascivious acts with a child, the State had to prove:

1. On or about July 31, 2010, the Defendant, with or without [E.G.'s] consent, solicited [E.G.] to engage in a sex act.
2. The Defendant did so with the specific intent to arouse or satisfy the sexual desires of the Defendant or [E.G.]
3. The Defendant was then eighteen years or older.
4. [E.G.] was then under the age of fourteen years.

over and they were just talking when her father kicked in the door. The prosecutor questioned him about inconsistencies between his testimony and prior statements to police. The jury convicted Gaddeh as charged and he now appeals, contending his trial counsel was ineffective.

We review ineffective-assistance-of-counsel claims de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005).

Two elements must be established to show the ineffectiveness of defense counsel: (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice. A defendant's inability to prove either element is fatal.

"Generally, ineffective-assistance claims are preserved for postconviction relief proceedings to afford the defendant an evidentiary hearing and thereby permit the development of a more complete record." If the record on appeal shows, however, that the defendant cannot prevail on such a claim as a matter of law, we will "affirm the defendant's conviction without preserving the ineffective-assistance-of-counsel claims." Conversely, if the record on appeal establishes both elements of an ineffective-assistance claim and an evidentiary hearing would not alter this conclusion, we will reverse the defendant's conviction and remand for a new trial.

State v. Graves, 668 N.W.2d 860, 869 (Iowa 2003) (citations omitted).

Gaddeh claims trial counsel was ineffective in failing to object to questioning by the prosecutor during the State's case in chief and in failing to request a limiting instruction regarding that testimony. The prosecutor asked one of the investigating police officers about statements made by Gaddeh in response to the officer's questions at the scene:

Q. Do you know why he would say, "I'm bringing over a present," and then say, "but I don't have the present?" A. Probably to take the guilt off of him. He was probably there doing something wrong.

Q. Do you know why he claimed to be great friends with [E.G.'s father]? A. Maybe so that we would trust what he's saying to be more inclined to believe him.

Q. So he might have had a lot of motives for telling you things, correct? A. Yes.

Q. Whether any of it was factual is a different story.
A. Right.

When Gaddeh later testified, he was cross-examined about these answers to the officer's questions and, in general, denied having made the statements.

We will assume trial counsel should have objected to the prosecutor's questions as asking the officer to comment on the defendant's credibility. See *Nguyen*, 707 N.W.2d at 325 (“[I]t is not proper to take the further step of asking one witness if another witness is untruthful, mistaken, or to otherwise ask the witness to comment on the credibility of another witness. This type of examination asks for an improper conclusory opinion.”).

But Gaddeh must establish prejudice resulted, that is, that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 324 (internal quotation marks and citation omitted). In determining whether improper questioning “prejudiced, inflamed or misled the jurors so as to prompt them to convict the defendant for reasons other than the evidence introduced at trial and the law,” we consider these factors:

(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

Graves, 668 N.W.2d at 877.

We conclude the alleged misconduct in this case was not so pervasive as to undermine the confidence of the verdict. The questioning was relatively brief

and, generally, leading. It is not surprising that the defendant might have tried to deflect the officer's attention after having been found half-clothed in a thirteen-year-old's bedroom. The defendant's own testimony was fraught with even more inconsistencies, which, along with E.G.'s testimony and the circumstances of his arrest constituted overwhelming evidence of guilt. Gaddeh failed to prove prejudice resulting from his counsel's error.² We affirm his conviction.

AFFIRMED.

² His claim that counsel was ineffective in failing to request a limiting instruction similarly fails for lack of prejudice.