

IN THE COURT OF APPEALS OF IOWA

No. 2-959 / 11-1171
Filed February 13, 2013

KEVIN JOHN McDONNELL,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Mary E. Howes,
Judge.

Appeal from the denial of postconviction relief. **AFFIRMED.**

Lori Kieffer-Garrison, Rock Island, Illinois, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Alan Ostergren, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.
Tabor, J., takes no part.

EISENHAUER, C.J.

Kevin McDonnell appeals from the order denying his application for postconviction relief. He contends the postconviction court erred in (1) failing to find the trial court violated his right of confrontation by stopping the testimony of the complaining witness and (2) failing to find his trial attorney provided ineffective assistance of counsel for not objecting to the trial court's action. We affirm.

Background Facts and Proceedings. McDonnell was charged with second-degree sexual abuse. At trial, the six-year-old complaining witness testified by closed-circuit video from another room with the judge, the attorneys, and the witness's mother present. The jury and McDonnell observed the testimony from the courtroom. McDonnell's trial attorney cross-examined the witness for about twenty minutes and asked all the questions he intended to ask. The attorney then asked the court, "May I take a very, very brief recess to talk to my client? Two minutes?" The court replied, "We've been at this for over an hour. That's enough time for a six-year-old, so if you want to finish up now, finish up now." The attorney said he had no further questions. The jury found McDonnell guilty.

On direct appeal, McDonnell claimed the district court violated his right to confrontation in allowing the complaining witness to testify by closed-circuit television and by improperly restricting his counsel's cross-examination of the witness. *State v. McDonnell*, No. 08-0798, 2009 WL 1492839, at *1 (Iowa Ct. App. May 29, 2009). He also claimed ineffective assistance of counsel if the claims were not properly preserved. *Id.* We affirmed on his confrontation claim,

concluded error was not preserved on his claim the court improperly restricted cross-examination, and preserved his ineffective-assistance claims for possible postconviction relief proceedings. *Id.* at *6.

Later in 2009 McDonnell filed an application for postconviction relief, alleging his trial attorney rendered ineffective assistance and the trial court violated his Sixth Amendment right of confrontation. Following a hearing in May 2011, the court denied his application. Concerning his claim the court did not allow full cross-examination, the court concluded Iowa Code section 915.38(4) (2007) provides for a break after one hour of testimony, the court extended the time beyond one hour to allow McDonnell's trial attorney time to complete cross examination, McDonnell had the opportunity to consult with his attorney after the testimony of the child, trial counsel had no additional questions, and there was "no evidence that additional cross-examination would have assisted in his defense."

McDonnell filed a motion to enlarge or amend, including allegations the court made no finding on his claims (1) he was denied a fair trial by the court's limitation on the time of cross-examination or (2) his trial attorney was ineffective in not objecting to the trial court's "violation" of section 915.38. The court amended its ruling to find McDonnell's rights to a fair trial were not violated under either the state or federal constitution. Specifically, the court found McDonnell was "not deprived of his right to counsel or to confront witnesses" under either constitution.

Scope of Review. Our review of postconviction relief proceedings generally is for correction of errors at law. *Lowery v. State*, 822 N.W.2d 739, 741

(Iowa 2012). If an applicant alleges constitutional error, our “review is de novo in light of the totality of the circumstances and the record upon which the postconviction court’s rulings were made.” *Perez v. State*, 816 N.W.2d 354, 356 (Iowa 2012) (citation and internal quotation marks omitted).

To prove ineffective assistance, an applicant must show his trial attorney failed to perform an essential duty and prejudice resulted. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). The attorney’s competence is presumed, and prejudice will not be found unless there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007). A reviewing court need not engage in both prongs of the analysis if one is lacking. See *State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992).

Ineffective Assistance. McDonnell contends his trial attorney was ineffective in not objecting to the court’s “stopping [the] minor’s testimony.” Concerning prejudice, he raises two conclusory claims: the attorney did not make a motion for mistrial or any other motions except for a motion for new trial, and the attorney prejudiced him “by not following this specific witness and the process of her cross-examination more carefully.”

At the postconviction hearing the trial attorney testified he filed motions to set aside the verdict and for a new trial. He did not consider raising the issue of the limited cross-examination. We see no reasonable probability the final result would have been different had the attorney moved for a mistrial. The attorney testified he had asked all the questions he wanted to ask on cross examination.

The court did not cut him off before he was done. He consulted with McDonnell after the witness was excused.

At the postconviction hearing McDonnell testified he had additional questions he wanted his attorney to ask. However, he did not say what the questions were or what testimony those questions would have elicited to change the outcome of the trial. His appellate brief identifies no additional information his attorney could have sought. The conclusory assertion he was prejudiced because his attorney didn't follow this witness and the process of her cross-examination more carefully is too general for us to consider. See *State v. Wagner*, 410 N.W.2d 207, 215 (Iowa 1987); see also *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We conclude McDonnell has failed to demonstrate prejudice.

Confrontation. McDonnell contends the: "Court erred in not finding McDonnell's rights were violated by the court discontinuing the minor's testimony and therefore McDonnell's right to confrontation of his accusers." He cites Iowa Code section 915.38(1), which provides a defendant "shall be allowed to communicate with the defendant's counsel in the room where the minor is testifying by an appropriate electronic method." However, instead of challenging the lack of communication by electronic method, he challenges the court's decision not to allow a brief recess so his attorney could consult with him. On direct appeal McDonnell claimed the court erred in allowing testimony by closed-circuit video and "improperly" restricting cross-examination. We determined error was not preserved on this issue, and we preserved the resulting ineffective assistance of counsel claim for postconviction relief proceedings. *McDonnell*,

2009 WL 1492839, at *6. In our discussion of the issue above, we noted McDonnell's trial attorney completed his cross-examination of the witness and, although McDonnell asserts he had additional questions he wanted his attorney to ask, he does not say what the questions were or what testimony those questions would have elicited to change the outcome of the trial. His appellate brief identifies no additional information his attorney could have sought. We conclude McDonnell has failed to demonstrate he was prejudiced.

AFFIRMED.