IN THE COURT OF APPEALS OF IOWA

No. 5-220 / 05-0298
Filed May 10, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BLUE JAY KALAR,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson and Annette J. Scieszinski, Judges.

Defendant, Blue Jay Kalar, appeals from his four convictions for second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Mark Tremmel, County Attorney, and Sarah Pettinger, Assistant County Attorney.

Considered by Sackett, C.J., and Vogel and Mahan, JJ.

SACKETT, C.J.

Defendant, Blue Jay Kalar, was convicted of four counts of second-degree sexual abuse for abusing his girlfriend's six-year-old daughter. On appeal, defendant contends (1) the district court erred in allowing the introduction into evidence of a videotaped interview of the victim, (2) his trial counsel was ineffective because counsel failed to raise a proper objection to the admission of the videotaped interview and did not make a motion for a new trial based on a challenge to the weight of the evidence, and (3) the district court improperly considered defendant's parole eligibility in imposing consecutive sentences. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

Defendant was charged on February 19, 2004, with four counts of second-degree sexual abuse, in violation of Iowa Code sections 709.1 and 709.3(2) (2003). A jury trial commenced on December 7, 2004. The jury returned a guilty verdict on December 10, 2004.

The victim was A.T., a six-year-old female. Defendant lived with A.T., her mother Natalie, and Natalie's younger daughter. Additionally, defendant's daughter would stay with them when defendant exercised his visitation with her.

A.T. testified the first incident of abuse occurred while she was in the basement of the house playing on January 4, 2004. On that day defendant showed her magazines with pictures of nude people. Defendant then touched A.T. on her "private parts" with his finger and his penis. A.T. indicated defendant subsequently masturbated in front of her and cleaned himself off with curtains stored in a bag in the basement. Defendant then told A.T. not tell anyone or he

would get in trouble. Natalie recalled in her testimony, that on the evening of January 4, 2004 all of the children were downstairs playing with defendant. Her youngest daughter and defendant's daughter came upstairs to watch a movie. Natalie estimated defendant and A.T. were alone in the basement for between thirty and forty-five minutes.

The second incident of abuse occurred the next day. School was cancelled that day due to snow. Defendant took A.T. and his daughter sledding. On the way to the sledding location defendant stopped at a park near their home. A.T. was in the front passenger seat and defendant's daughter was in her car seat in the back. A.T. testified that defendant instructed her to pull her pants down, which she did. Defendant touched A.T.'s private parts. Defendant then instructed A.T. to grab his penis, which she did. Defendant masturbated into a baby wipe that he had A.T. get from the glove compartment. Before leaving the park, defendant told A.T. not to tell anyone.

The next day, January 6, 2004, Natalie discovered pornographic magazines in the car while driving A.T. to school. A.T. then told Natalie about the two instances of abuse by defendant. Natalie returned to the house where she confronted the defendant about the abuse. A.T. remained in the car. Defendant did not respond to the allegations. Natalie then brought A.T. inside and A.T. repeated her allegations of abuse to defendant. Defendant denied the allegations. Natalie testified defendant then went over to A.T. and "he picked her up against the door by the collar of her coat and was telling her that she needed to lie and say it wasn't true."

Law enforcement was subsequently contacted. Natalie gave permission to the police to search the house. Police did not find the pornographic magazines Natalie had seen in the house, nor did they find the bag of curtains in the basement. However, a police officer followed footprints in the snow outside of the house. The officer found a burn pile in the backyard that was still hot. Partially burned magazines with pictures of naked women were found in the burn pile. Defendant was subsequently arrested on charges of sexual abuse.

A.T. was taken to Blank Children's Hospital's Regional Child Protection Center for an examination. A.T. met with a social worker at Blank. The social worker conducted a forensic interview with A.T. The interview was videotaped. In the interview A.T. recounted the instances of sexual abuse perpetrated by defendant. The interview lasted one hour and twelve minutes. A.T. was also examined by the medical director of the Regional Child Protection Center at Blank. The physical examination revealed no evidence of injury to the vaginal or anal area of A.T.

Prior to trial, the State moved for a pre-trial ruling on the admissibility of the videotape of the interview of A.T. Defendant objected to the admission of the videotape on hearsay and Confrontation Clause grounds. The district court held the videotape was admissible pursuant to the medical diagnosis and treatment hearsay exception found in Iowa Rule of Evidence 5.803(4). Alternatively, the district court held the videotape was admissible pursuant to the residual hearsay exception found at Iowa Code section 915.38(3) and Iowa Rule of Evidence 5.803(24). The district court further held the videotape was not barred by the

Confrontation Clause or *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

II. ANALYSIS.

A. Admission of Videotape into Evidence.

Defendant argues the district court erred in admitting the videotape of the forensic interview of A.T. into evidence. Defendant contends the videotape did not qualify as a hearsay exception under either the medical diagnosis and treatment exception or the residual exception.

We review a district court's rulings on the admission of evidence for an abuse of discretion. *State v. Price*, 692 N.W.2d 1, 3 (Iowa 2005). Hearsay, as defined by Iowa Rule of Evidence 5.801, is not admissible at trial absent certain conditions. Iowa R. Evid. 5.802. Although the videotape in question clearly constitutes hearsay, the State argues that it was properly admitted by the district court pursuant to the exception to the hearsay rule found in Iowa Rule of Evidence 5.803(4). Rule 5.803(4) provides that:

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The issue we must resolve is whether the videotape is "reasonably pertinent to diagnosis and treatment." Our supreme court has adopted a two-part test for establishing the admissibility of hearsay statements under rule 5.803(4): "first the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis."

State v. Tracy, 482 N.W.2d 675, 681 (Iowa 1992) (citing *United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985)).

On appeal, defendant contends the second prong of the test was not satisfied. As to the second prong our courts have explained that in instances "[w]here the abuser is a member of the victim's immediate household, statements regarding the abuser's identity are reasonably relied on by a physician in treatment or diagnosis." *Id.* In cases of child abuse physicians "must be attentive to treating the emotional and psychological injuries which accompany this offense," in addition to treating the physical injuries. *Id.* To treat such injuries, the physician will often times need to ascertain the identity of the abuser and the specifics of the abuse. *See id.* Medical staff have an obligation to ensure that a child does not return to an abusive home; thus, ascertaining the identity of the abuser and specifics of the abuse are "reasonably pertinent" to treatment and diagnosis. *See id.* at 681-82. Admissible hearsay is often crucial in child sexual abuse cases because most often the only direct witnesses to the crime are the perpetrator and the victim. *Id*. at 682.

Defendant argues this rationale is not applicable in the present case because the victim had already reported to law enforcement that it was defendant who abused her.

Applying the rationale found in *Tracy*, the district court held the videotape was admissible pursuant to rule 5.803(4). The district court noted the interview by the social worker was conducted at the hospital and the social worker was a "licensed mental health professional capable of providing diagnosis and is part of the multi-disciplinary team at Blank Children's Hospital that coordinates care of

alleged victims such as [A.T.]." The interview was conducted prior to the physical examination of A.T., and it was the type of interview that would be relied upon by a physician for the purpose of medical diagnosis. The intention of the interview was as a preliminary step to the physical examination. The victim's motive for participating in the interview was as a part of the anticipated physical examination. Thus, we conclude the district court properly admitted the videotape pursuant to rule 5.803(4).

Having held the videotape was properly admitted under rule 5.803(4) we need not, and do not, consider whether the evidence was admissible pursuant to the residual hearsay exception found at Iowa Code section 915.38(3) and Iowa Rule of Evidence 5.803(24).

B. Ineffective Assistance of Counsel.

Defendant raises two grounds in claiming his trial counsel provided him ineffective assistance. First, defendant contends his trial counsel was ineffective for failing to raise the proper objections to the introduction of the videotape into evidence. Second, defendant contends his trial counsel was ineffective for failing to move for a new trial based on the weight of the evidence.

Because a claim of ineffective assistance of counsel implicates constitutional rights, our review of those claims is de novo. *State v. Carter*, 602 N.W.2d 818, 820 (Iowa 1999). To prevail on his claims of ineffective assistance of counsel, defendant must prove "(1) counsel failed to perform an essential duty and (2) prejudice resulted." *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). Prejudice results when "'there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been

different.'" *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

Ordinarily, we preserve an ineffective assistance of counsel claim for possible postconviction relief proceedings. By preserving the claim the defendant is allowed to make a complete record of the claim, trial counsel is allowed an opportunity to explain his or her actions, and the trial court is allowed to rule on the claim. *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). However, we will not preserve a defendant's ineffective assistance of counsel claim if the appellate record shows as a matter of law the defendant cannot prevail on such a claim. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). In such circumstances, we will affirm the defendant's conviction on direct appeal. Similarly, we will reverse a conviction based on an ineffective assistance of counsel claim on direct appeal if the appellate record establishes both prongs of the *Strickland* test and a further evidentiary hearing would not change the result. *Id.* In the present case, a sufficient record exists on direct appeal and we will address defendant's claims.

As to defendant's first claim of ineffective assistance, that trial counsel should have more vigorously and specifically objected to the admission of the videotape under the medical diagnosis and treatment and residual hearsay exceptions, we find no merit in the claim. We have fully considered the arguments made to the district court and the arguments made on appeal as to why the videotape was admissible hearsay under the medical diagnosis and treatment exception. Having held the videotape was admissible under that

hearsay exception, we conclude trial counsel did not fail in an essential duty by failing argue more vigorously and specifically the points of that hearsay exception. *See State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998). Because the videotape was properly admitted pursuant to the medical diagnosis and treatment exception we need not, and do not, address whether trial counsel was ineffective for his argument against admission of the videotape under the residual hearsay exception. *See id.*

In his second claim of ineffective assistance defendant claims the verdict was contrary to the evidence and, thus, trial counsel had a duty to move for a new trial based on the weight of the evidence. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other." *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998) (quoting *Florida v. Tibbs*, 457 U.S. 31, 37-38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). In considering such a motion, the judge is to consider evidence and evaluate the credibility of the witnesses. *See id.*

While defendant's trial counsel did not specifically ask the district court to apply the weight of the evidence standard in the motion for a new trial, the court did in fact apply that standard in denying defendant's motion for a new trial. The trial court stated: "The Court has carefully reviewed the trial record and finds that the verdicts are not contrary to the law or the evidence and finds a basis to overrule the Motion for New Trial and does so." We agree with these findings and also note there is overwhelming evidence supporting defendant's guilt.

Defendant has failed to show he was prejudiced by trial counsel's failure to specifically seek a new trial based on the weight of the evidence.

C. Sentencing.

Defendant's final contention on appeal is that the district court considered improper factors in sentencing defendant. Specifically, defendant claims that the district court considered defendant's parole eligibility and lengthened his sentence, by imposing consecutive sentences, in order to delay defendant's parole eligibility.

We may address challenges to the legality of a sentence for the first time on appeal. *State v. Dann*, 591 N.W.2d 635, 637 (Iowa 1999); *see also State v. Thomas*, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). The district court must "state on the record its reason for selecting the particular sentence." Iowa R. Crim. P. 2.23(3)(*d*). We review alleged defects in sentencing procedure for correction of errors at law. Iowa R. App. P. 6.4; *see State v. Cooley,* 587 N.W.2d 752, 754 (Iowa 1998). Consideration of impermissible factors is a defective sentencing procedure. *State v. Jorgensen*, 588 N.W.2d 686, 687 (Iowa 1998).

We agree with defendant that it is improper for a sentencing court to alter a sentence in an effort to interfere with parole eligibility. *State v. Hulbert*, 481 N.W.2d 329, 330 (Iowa 1992); *Thomas*, 520 N.W.2d at 313. In contending the district court acted improperly defendant cites the following statement by the district court at the sentencing hearing:

> The Court has considered the sentencing options that it has, and specifically, the provisions of [Iowa Codes sections] 902.9, which deals with the sentencing of convicted felons; 702.11, which designates these crimes forcible felonies; *the provisions of 902.12 and 903A.2 which deal with the minimum terms of incarceration before eligibility for parole*. And the Court's judgment is based on

> the options that provide you, Mr. Kalar, the best opportunity for rehabilitation and at the same time will protect the community from further offenses by you and by others.

(Emphasis added.)

When considering the district court's statement about parole in context, we are convinced that the court did not include defendant's parole eligibility as a factor in selecting the term of incarceration or whether the sentences would run consecutively. The statement about parole was made in order to catalogue the code sections that applied to defendant's sentencing hearing. Iowa Code section 901.5 requires the sentencing court to "publicly announce . . . [t]hat the defendant may be eligible for parole before the sentence is discharged." Iowa Code sections 902.12 and 903A.2 are the sections applicable to defendant's eligibility for parole and the district court later indicated defendant would be eligible for parole pursuant to these sections. Also of import, the district court, after cataloguing the applicable sections, went on to state the reasons for the term of incarceration on each count and the reasons for imposing consecutive sentences in great specificity. At no point in enumerating the reasons for the sentence did the district court suggest that it considered defendant's eligibility for parole in reaching its decision. Therefore, we conclude the district court did not commit error in sentencing defendant.

AFFIRMED.