

IN THE COURT OF APPEALS OF IOWA

No. 7-222 / 05-1970
Filed May 23, 2007

THOMAS S. MILLAM,
Applicant-Appellee/Cross-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Scott County, David H. Sivright, Jr.,
Judge.

The State appeals from the district court decision granting defendant's
application for postconviction relief. **REVERSED ON APPEAL; AFFIRMED ON
CROSS-APPEAL.**

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney
General, William E. Davis, County Attorney, and Julie Walton, Assistant County
Attorney, for appellant State.

Kent A. Simmons, Davenport, for appellee.

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

HUITINK, J.

The State appeals from the grant of Thomas Millam's application for postconviction relief. Millam cross-appeals, claiming the court erred in rejecting his additional claims of ineffective assistance of counsel.

I. Background Facts and Prior Proceedings

Millam was charged with three counts of second-degree sexual abuse, two relating to his girlfriend's seven-year-old daughter, J.S., and a third relating to his own daughter, B.M. Counts I and II concerned recent incidents of alleged abuse, while count III pertained to events that occurred more than four years prior to the incidents in counts I and II.

At trial, J.S., now eight years old, gave graphic details describing how Millam had stuck his penis in her mouth and how he ejaculated. She also described how he had put his tongue and mouth on her vaginal area. B.M. testified as to how, on two occasions, she woke to discover she was no longer wearing underwear while Millam laid next to her. On one such occasion, Millam rolled over and put his hand on her crotch. Millam testified in his own defense, specifically denying he ever sexually abused J.S. or B.M.

The jury convicted Millam on the two counts of sexual abuse against J.S., but acquitted him of the charges related to B.M. The court sentenced him to concurrent twenty-five-year terms of imprisonment.

Millam filed a postconviction relief action citing numerous grounds for ineffective assistance of counsel. The district court rejected most of Millam's

claims, but ultimately granted the application for postconviction relief because his trial counsel did not make a motion to sever the charges.

The State now appeals, claiming the district court erred in finding ineffective assistance. Millam cross-appeals, contending the court erred in denying his other claims for ineffective assistance.

II. Standard of Review

Our review of postconviction relief proceedings is for correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when an applicant raises constitutional issues, our review is de novo. *Id.*

III. Merits

To establish a claim of ineffective assistance of counsel, a defendant has the burden to prove (1) counsel failed in an essential duty and (2) prejudice resulted from counsel's failure. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). "To prove the first prong, the defendant must overcome the presumption that counsel was competent." *Id.* To prove the second prong, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000). If the defendant is unable to prove either prong, the ineffective-assistance claim fails. *Ledezma*, 626 N.W.2d at 142.

A. Motion to Sever the Charges

In his application for postconviction relief, Millam argued the charge in count III concerning B.M. should not have been tried with the charges in counts I and II involving J.S. Millam claimed his trial counsel failed in an essential duty by

not making a motion to sever the charges and this failure prejudiced his case because evidence pertaining to count III spilled over to the charges in counts I and II. The State contended there was no proof of prejudice because the jury acquitted Millam of the third count.

The district court found Millam's argument persuasive and granted his application for postconviction relief. The court concluded Millam suffered prejudice because evidence pertaining to count III "may have elicited an unjustified response from the jurors as they considered Counts I and II."

Even assuming, *arguendo*, that Millam's trial counsel failed to perform an essential duty by not making a motion to sever, we reject the district court's conclusion that this failure prejudiced Millam's case. Our test for prejudice is well established. The resulting prejudice element of an ineffective assistance claim is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding" because "virtually every act or omission of counsel would meet that test." *Id.* at 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 697 (1984).

The court's reasoning that the alleged failure to move to sever "may have elicited an unjustified response from the jurors" does not coincide with either the jury instructions or the jurors' actions in this case. Millam was accused of sexually abusing two young children for his own sexual gratification. The court

specifically instructed the jury to determine guilt or innocence separately on each count, and not to find guilt or innocence for one count by utilizing evidence pertaining to the other counts. In order to prove prejudice, Millam asks this court to conclude the jury followed this instruction so as to acquit him on the third charge, but then ignored this same instruction and improperly used B.M.'s testimony to infer guilt for his actions against J.S.

“A jury is presumed to have followed its instructions absent evidence to the contrary.” *State v. Morrison*, 368 N.W.2d 173, 176 (Iowa 1985). The facts in this case do not override such a presumption. The jury properly compartmentalized the evidence between the three charges and concluded Millam did not sexually abuse B.M., even though it concluded Millam sexually abused J.S. on two occasions. We find no reason to conclude the evidence pertaining to count III spilled over to the jury's analysis of counts I and II. *Cf. People v. Doshi*, 715 N.E.2d 113, 116 (N.Y. 1999) (“defendant's argument of prejudicial spillover effect on the non-tainted counts is belied by the fact that the jury actually voted to acquit on five of the remaining counts”); *Williams v. State*, 367 S.E.2d 92, 94 (Ga. Ct. App. 1988) (“Nor do we find that a severance was necessary to a fair determination of appellant's guilt or innocence of each offense charged. This is demonstrated, in part, by the fact that appellant was acquitted of two of the three charges against him.”). We conclude Millam failed to prove that, but for his trial counsel's failure to make a motion to sever, the result of the

proceeding would have been different.¹ We therefore reverse the district court's decision finding ineffective assistance on this claim.

B. False Claims of Sexual Abuse

Millam argues his trial counsel was also ineffective because he did not attempt to discredit J.S. with evidence that she had previously made a false report of sexual abuse to her mother. J.S.'s mother initially told police she had doubts concerning J.S.'s claim of sex abuse because J.S. had recanted a prior claim of sexual abuse. At trial, neither J.S. nor her mother was questioned about this prior incident.²

At the time this case went to trial, our supreme court had not definitively addressed whether a complainant's prior false accusations were admissible under Iowa's rape shield law. The only published case law addressing the issue, *State v. Alvey*, 458 N.W.2d 850, 851-52 (Iowa 1990), rejected a defendant's attempt to introduce evidence that the complainant had previously said she was raped following a consensual sexual experience. In *Alvey*, the defendant claimed the proffered testimony did not fall within the prohibition of the rape shield law because it did not involve past sexual conduct, only a false claim of rape. 458 N.W.2d at 852. The State argued the testimony was in substance that of past sexual conduct and hence subject to exclusion under the rape shield law. *Id.* Our supreme court chose not to address this issue under the context of the rape shield law; instead, it found the controlling question was one of relevancy.

¹ Under the same rationale, we reject Millam's argument that his trial counsel failed to provide effective assistance because he did not file a motion to dismiss count III.

² Neither J.S. nor her mother were called to testify at the hearing for postconviction relief, so there is no testimony regarding the veracity of J.S.'s prior claim of sexual abuse.

Id. The court suggested the complaining witnesses' reputation and privacy interests were the primary focus of the relevance inquiry when it stated

The rape shield law calls upon the trial judge to sort through proffered evidence of a victim's prior sexual activity and, on a case-by-case basis, to weigh whether it would yield more in the truth-finding process than it would cost in devastating the victim's reputation and right to privacy. The rule presupposes that much evidence which the accused wishes to place before a jury will be excluded.

Id. at 853. While it did not directly address the issue under the rape shield law, the court held exclusion of the evidence was appropriate in light of the purposes of the rape shield law. See *id.* This quoted language remained the law in Iowa until 2004, four years after the trial in this case, when the Iowa Supreme Court specifically overruled *Alvey* and decided that "prior false claims of sexual abuse do not fall within the coverage of our rape-shield law." See *State v. Baker*, 679 N.W.2d 7, 10-12 (Iowa 2004).

Millam now claims his counsel was ineffective because the question of whether this evidence was admissible was unresolved, and therefore "worth raising" to the district court. We reject this argument because, as stated in *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996), a "claim for ineffective assistance of counsel will not lie when the law governing the issue complained of is unsettled at the time the case is tried." See also *State v. Williams*, 695 N.W.2d 23, 30 (Iowa 2005) ("In addressing ineffective-assistance-of-counsel claims, we have said that counsel is not under a duty of clairvoyance."). Accordingly, Millam's trial counsel did not breach an essential duty by failing to offer evidence that J.S. had recanted a previous claim of sexual abuse.

C. Other Allegations of Ineffective Assistance

Prior to trial, Millam gave his trial counsel a sprawling note setting forth numerous reasons why he was not guilty of these crimes. Trial counsel reviewed this note and pursued many of these defenses at trial. However, because trial counsel did not present all his proffered evidence on every defense listed in this note, Millam claims his trial counsel was ineffective. For example, Millam claims his trial counsel should have argued J.S. had a motive to concoct these charges so that she could gain attention and argued that her mother had a motive to encourage J.S. to allege sexual abuse so that she could steal Millam's tools. In addition, Millam wanted trial counsel to present evidence that J.S.'s mother abused drugs and was a former exotic dancer. Millam also wanted trial counsel to present evidence that J.S. could have watched a pornographic video to learn about ejaculation.

Even though trial counsel did not present all of Millam's "evidence" on every allegation set forth in the note, the district court pointed out that he presented some evidence on many of these allegations. The court concluded Millam did not prove trial counsel violated an essential duty because he did not establish that trial counsel failed to conduct a reasonable investigation into these matters. We adopt this reasoning as our own. We also note the decision of whether or not to emphasize a particular theory of defense, based upon the strength of the evidence supporting that theory, is strategic in nature. Because ineffective assistance of counsel claims generally do not lie for the exercise of judgment and "[i]mprovident trial strategy or miscalculated tactics" typically do not

constitute ineffective assistance of counsel, *State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) (citations omitted), we find Millam's trial counsel did not violate an essential duty when he chose not to present all possible evidence pertaining to each defense theory.

D. Prosecutorial Misconduct

Millam argues his trial counsel failed to properly investigate and rebut the State's suggestion that he disappeared after police confronted him with J.S.'s allegations. Millam also contends police perjury and suppression of a police report concerning this alleged flight constitute prosecutorial misconduct.

We find no basis in Millam's claim of prosecutorial misconduct or his trial counsel's "utter failure to expose the false and misleading evidence." The prosecutorial misconduct claim fails because there is insufficient evidence to conclude the officer's statements were untruthful. We also find no ineffective assistance because Millam's trial counsel rebutted the officer's testimony with evidence from multiple sources that he was working in town and available during the disputed time frame.

IV. Conclusion

We have carefully considered all of Millam's remaining issues on appeal and find they have no merit or are effectively resolved by the foregoing. Therefore, we conclude the district court improperly granted Millam's application for postconviction relief.

REVERSED ON APPEAL; AFFIRMED ON CROSS-APPEAL.