

IN THE COURT OF APPEALS OF IOWA

No. 7-597 / 06-1570
Filed September 19, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL RAMON JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Michael Roman Johnson appeals his conviction and sentence for one count of second-degree sexual abuse and two counts of third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Matthew Wilber, County Attorney, and Daniel McGinn and Shelly Sedlak, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Michael Roman Johnson appeals his conviction and sentence for one count of second-degree sexual abuse and two counts of third-degree sexual abuse. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

J.W., an eight-year-old boy, lived with his mother and had overnight visits with Johnson, his father. Johnson's parents allowed Johnson to live in the basement of their home and Johnson and J.W. slept together in a bed in the basement.

On September 2, 2004, Dr. Ravipati, a board-certified child psychiatrist, saw J.W. for an outpatient psychiatric evaluation because J.W. was having difficulty controlling his temper. Dr. Ravipati noted J.W. was defying authority, impulsive, very anxious, and felt that something bad was going to happen. Dr. Ravipati diagnosed J.W. with attention deficit hyperactivity disorder and depression and recommended J.W. obtain individual counselling with a therapist. In addition to seeing the therapist, J.W. met with Dr. Ravipati ten times over the course of the next year.

On July 30, 2005, J.W. told his mother about Johnson's alleged sexual abuse, his mother called the police, and the police interviewed J.W. the next day.

In September 2005, J.W.'s therapist asked Dr. Ravipati to perform another evaluation due to J.W.'s worsening behavior. J.W. was engaging in sexually inappropriate actions with animals and other children. During this evaluation, J.W. told Dr. Ravipati that his father, Johnson, had threatened to murder J.W.

when Johnson pulled down J.W.'s pants. J.W. also stated his father had touched him and had forced him to watch pornographic movies. Dr. Ravipati diagnosed J.W. as having post-traumatic stress disorder.

On August 15, 2006, the case was tried to a jury. At trial, J.W. testified about incidents of sexual abuse and threats made by Johnson. Johnson denied all allegations of sexual abuse. The State utilized Dr. Ravipati as an expert witness.

The jury found Johnson guilty of two counts of third-degree sexual abuse and one count of second-degree sexual abuse. On September 27, 2006, the district court sentenced Johnson to three concurrent sentences. The longest sentence was twenty-five years of incarceration with a statutory minimum for second-degree sexual abuse.

On appeal Johnson raises two issues. First, Johnson argues the trial court should not have allowed testimony from Dr. Ravipati because it constituted an impermissible comment on J.W.'s credibility. Second, Johnson argues his trial counsel was ineffective for not objecting to statements made by the prosecutor in closing argument.

II. SCOPE AND STANDARDS OF REVIEW.

We review evidentiary rulings, including the admission of expert testimony, for an abuse of discretion. *State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable."

State v. Rodriguez, 636 N.W.2d 234, 239 (Iowa 2001). We will affirm the trial court's evidentiary ruling on any ground, even if it was not argued or relied upon in the trial court. *DeVoss v. State*, 648 N.W.2d 56, 62-63 (Iowa 2002).

We review claims of ineffective assistance of counsel de novo. *Hannan v. State*, 732 N.W.2d 45, 50 (Iowa 2007).

III. MERITS.

A. EXPERT TESTIMONY

Johnson argues the trial court abused its discretion by admitting expert testimony of Dr. Ravipati that improperly bolstered J.W.'s credibility. Johnson admits Dr. Ravipati's testimony did not explicitly state J.W. was telling the truth, but argues the testimony is improper because it implies J.W. was telling the truth. At trial, Johnson's attorney objected during Dr. Ravipati's testimony and the court ruled:

Well, to the extent that you try to reach the opinions from Dr. Ravipati that [J.W.] is being truthful or credible, that's not going to be allowed. That's not appropriate testimony and not an appropriate area for expert testimony even. . . . [Dr. Ravipati] can't specifically talk about how [J.W.] is credible or truthful or believable, but he can talk about symptoms and how they match his experience with these sorts of cases.

While we take a liberal approach to the admissibility of expert testimony, we do not allow expert testimony directly expressing an opinion on the credibility of a witness. *State v. Allen*, 565 N.W.2d 333, 338 (Iowa 1997). However, experts are allowed to "express opinions on matters explaining the pertinent mental and physical symptoms of the victims of abuse." *Id.* "There is a fine but essential line between testimony that is helpful to the jury and an opinion that merely conveys a conclusion concerning the defendant's guilt." *Id.*

The trial judge accurately summarized Iowa law and correctly instructed the parties regarding permissible and impermissible expert testimony. After the trial court's ruling, the prosecutor questioned Dr. Ravipati:

Q. Generally, doctor, the children you have treated who have been sexually abused, one of the symptoms is that they sexually act out? A. That is correct.

Q. And the sexually acting out, that type of symptom, is that similar to the symptoms you heard in your treatment of [J.W.]? A. Yes, I have.

Q. Also, Doctor, this sexually acting out that's done by patients – done by children who have been sexually abused, is that difficult for them to report or to tell you about in treatment in your experience? A. In my experience, most of the time it is difficult for children to verbally express that. Often it is the behavior that speaks to it.

Because the challenged testimony does not directly express an opinion on the credibility of J.W., the trial court did not abuse its discretion in allowing the evidence. The doctor's testimony explained the unusual sexual behavior of J.W. in the context of other victims of sexual abuse and his statements fall within the rule allowing experts to express opinions "on matters explaining the pertinent mental and physical symptoms of the victims of abuse." *See id.* The *fine line* was not crossed in this case and no error occurred.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings to allow the defendant an opportunity to have an evidentiary hearing and develop a more complete record. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). However, direct appeal is appropriate when the record is adequate to determine as a matter of law that the defendant will be unable to establish one of the elements of his ineffective-assistance claim. *Id.*

In order to prevail, Johnson must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). Johnson's inability to prove either element is fatal. See *In re C.M.*, 652 N.W.2d 204, 207 (Iowa 2002).

Johnson has a heavy burden regarding the first requirement because Iowa recognizes "a strong presumption trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). We can resolve Johnson's ineffective-assistance-of-counsel claim on direct appeal because we conclude, as a matter of law, his attorney's actions did not constitute breach of an essential duty.

Johnson asserts his trial counsel was ineffective in not objecting to the rebuttal argument on the grounds the prosecutor came *very close* to calling him a liar, relying on *State v Graves*, 668 N.W.2d 860 (Iowa 2003). In *Graves*, the prosecutor stated the defendant had lied or was lying five times during closing argument. *Graves*, 668 N.W.2d. at 876. The *Graves* court ruled "it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *Id.* at 876 (discussing *Rutledge*, 600 N.W.2d 324, 325-26 (Iowa 1999) (improper to describe alibi witnesses as liars and druggies)). Additionally, the *Graves* court instructed: "[But,] a prosecutor is still free to craft an argument that includes reasonable inferences based on the evidence and . . . when a case turns on which of two conflicting stories is true, [to argue that] certain testimony is not believable." *Graves*, 668 N.W.2d. at 876; see

also Claire Gagnon, Note, *A Liar by Any Other Name? Iowa's Closing Argument Conundrum*, 55 Drake L. Rev. 471 (2007) (discussing application of *Graves* in subsequent cases).

Later, the supreme court clarified Iowa's rule in *State v. Carey*, 709 N.W.2d 547 (Iowa 2006): "Thus, misconduct does not reside in the fact that the prosecution attempts to tarnish defendant's credibility or boost that of the State's witnesses; such tactics are not only proper, but part of the prosecutor's duty." *Carey*, 709 N.W.2d at 556.

In determining whether a prosecutor's statements are objectionable misconduct, Iowa courts consider three factors:

- (1) Could one legitimately infer from the evidence that the defendant lied?
- (2) Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful?
- and (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Graves, 668 N.W.2d at 874-75.

In considering the first factor, we find a jury could reasonably conclude from the evidence Johnson had lied. Johnson testified he did not sexually abuse his son and J.W. testified his father had sexually abused him. Dr. Ravipati's testimony helped explain J.W.'s statements of abuse. In analyzing the divergent testimony, the jury could reasonably believe J.W. and conclude Johnson was lying.

Before discussing the second and third factors delineated in *Graves*, we set out the closing argument Johnson alleges is objectionable:

The other interesting thing is that you have to look at the defendant's demeanor. And the defendant got up on the stand, and he answered the questions. But you as jurors need to evaluate the demeanor of all the witnesses and what they said. You guys are the truth detectors, basically, in what you believe and what you don't.

And Mr. Johnson sat up there, and every question that was asked regarding "did you touch your son, did you ever have your son touch your penis," he was looking down at the floor. Now, when you ask a little kid – when I ask my little son, "Did you take the last cookie?" "No, Mommy. Nope." Think about that. Use your common sense and your experiences.

Here, the prosecutor did not violate the *Graves* second test and state it was her personal opinion Johnson lied, nor call him a liar. See *Nygen v. State*, 707 N.W.2d 317, 117 (Iowa 2005) (no *Graves* violation where prosecutor's closing argument did not engage in any name-calling tactics).

Further, Johnson's demeanor on the stand is not outside the record, but is part of the evidence for the jury. *State v. Plowman*, 386 N.W.2d 546, 551 (Iowa Ct. App 1986) (jury can consider defendant's demeanor on witness stand in determining credibility). The prosecutor was highlighting Johnson's demeanor for the jury and encouraging them to use their common sense and experience in evaluating his demeanor and credibility. Since the prosecutor did not inject her personal opinion and since her argument related to the specific evidence of the defendant's demeanor, the second part of *Graves* is not established.

Additionally, we find nothing unprofessional or unfairly disparaging in the prosecutor's statements, so Johnson has also failed to meet the third prong established in *Graves*.

In conclusion, Johnson has failed to establish ineffective assistance of counsel as a matter of law. Trial counsel was not ineffective for failing to object

to proper closing argument. Johnson has not proven his attorney breached an essential duty, because trial counsel has no duty to raise an issue that has no merit. *State v. Graves*, 668 N.W.2d at 881.

AFFIRMED.