

IN THE COURT OF APPEALS OF IOWA

No. 7-790 / 07-0745
Filed November 15, 2007

RUSSELL FIDLER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Audubon County, Jeffrey L. Larson,
Judge.

Applicant appeals the district court's denial of his request for
postconviction relief. **AFFIRMED.**

Chad Primmer, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney
General, and Francine O'Brien Andersen, County Attorney, for appellee State.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

In this postconviction relief appeal, we are asked to decide if the applicant's counsel was ineffective in failing to properly challenge the victim's competency, present expert testimony concerning the victim's competency and credibility, or to properly seek exclusion of improper character evidence. We agree with the district court that counsel was not ineffective and affirm.

I. Background and Facts

On April 26, 2003, Russell Fidler attended a barbecue at the home of Leslie Jacobson in Kimballton. Jacobson invited Fidler to spend the night, which he did. The following morning, Jacobson discovered Fidler laying side-by-side on the living room floor with J.V., the daughter of another guest. J.V. was an eleven-year-old girl with cognitive mental disabilities and attention deficit disorder.

On May 5, 2003, the Iowa Department of Human Services (DHS) received two reports of possible sexual abuse of J.V. During the DHS investigation, J.V. described sexual acts that occurred between Fidler and her, and stated that Fidler had threatened her with a knife. Fidler denied any sexual contact with J.V. He was charged with sexual abuse in the second degree in violation of Iowa Code sections 709.1(2), 709.1(3), and 709.3(2) (2003).

A jury trial was held, and on January 22, 2004, Fidler was convicted of the charges. He was sentenced to a term of twenty-five years. Fidler filed an application for postconviction relief on March 5, 2004. The district court denied the application. Fidler appeals. Other facts relevant to the issues raised on appeal are discussed below.

II. Merits

Fidler contends the district court erred in dismissing his application for postconviction relief. He argues his trial counsel rendered ineffective assistance by failing to (1) properly challenge the victim's competency, (2) present expert testimony concerning the victim's competency and credibility, and (3) properly seek exclusion of and object to improper character evidence.

We review postconviction proceedings for errors of law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To the extent Fidler's appeal raises constitutional issues, our review is de novo. *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005).

To establish that his trial counsel rendered ineffective assistance, Fidler must show both that counsel failed to perform an essential duty and that prejudice resulted. See *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). "The test is 'whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competence.' A defendant is not entitled to perfect representation." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (citations omitted). Whether counsel failed to perform an essential duty is "measured against the standard of a reasonably competent practitioner." *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). To prevail, Fidler must overcome a strong presumption that his counsel performed in a competent manner. See *id.*; *State v. Nucaro*, 614 N.W.2d 856, 858 (Iowa Ct. App. 2000).

To prevail on his ineffective assistance claim, Fidler must also show prejudice. *Artzer*, 609 N.W.2d at 531. It is not enough to show counsel's errors

“had some conceivable effect on the outcome.” *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674, 695 (1984). “Because proof of both prongs of this test is required, should [Fidler] fail to prove prejudice we need not consider whether his trial counsel failed to perform an essential duty.” *State v. Tejada*, 677 N.W.2d 744, 754 (Iowa 2004).

Fidler argues his trial counsel rendered ineffective assistance by failing to properly challenge the victim’s competency, as she had “serious mental defects and . . . there was a probability that she would lack the competence to testify at trial.” Fidler also argues he received ineffective assistance due to counsel’s failure to present expert testimony to rebut the victim’s testimony.

Defense counsel Joel Baxter testified that he had deposed the victim before trial, asked several competency questions to ensure she knew the difference between right and wrong, and decided against challenging her competency or obtaining an expert witness to testify regarding her competency. It was a strategic decision to keep the victim’s testimony as short as possible in order to avoid drawing attention to her. We agree with the district court’s conclusion that “the strategy applied by applicant’s counsel does not fall below a standard of reasonableness.” Fidler has failed to prove the first prong, that his trial counsel breached an essential duty. See *Ledezma*, 626 N.W.2d at 143 (“Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance.”).

Fidler also failed to show prejudice due to his counsel’s failure to challenge the victim’s competency and credibility. Even if the victim had not testified or her credibility and competency had been questioned, other witnesses

offered admissible testimony which supported the allegations. We agree with the district court that Fidler has failed to show that his counsel's failures prejudiced him. We therefore affirm the court's holding that Fidler did not receive ineffective assistance on the issues related to counsel's failure to challenge the victim's competency.

Fidler also argues that his trial counsel rendered ineffective assistance by failing to properly seek exclusion of and object to improper character evidence, specifically evidence concerning similar acts and charges from Carroll County. Trial counsel did file a motion in limine seeking to exclude references to these acts and charges, and at trial counsel objected to testimony concerning these acts on grounds of relevance and prejudice. The court, in fact, excluded evidence that charges were filed in Carroll County but allowed evidence of the second incident. We find "counsel's performance was within the normal range of competence." *Artzer*, 609 N.W.2d at 531.

Further, even if counsel should have done more to exclude the evidence, Fidler suffered no prejudice. There was overwhelming evidence supporting Fidler's guilt. Fidler has not shown "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.*

We conclude Fidler has failed to show counsel failed to perform an essential duty or that he suffered prejudice due to counsel's alleged failures. We therefore affirm the decision of the district court denying Fidler's application for postconviction relief.

AFFIRMED.