IN THE COURT OF APPEALS OF IOWA

No. 8-315 / 07-0808
Filed October 1, 2008

REECE BOWEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, John Bauercamper, Judge.

Reece Bowen appeals from the district court's denial of his application for postconviction relief following his conviction for sexual abuse in the third degree. **AFFIRMED.**

Jon J. Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Meredith Friedman, Intern, Ralph Potter, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

Reece Bowen appeals from the district court's denial of his application for postconviction relief following his conviction for sexual abuse in the third degree. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

From the evidence presented at trial of the underlying criminal charge against Bowen, the jury could have found the following facts. In October 2002, Bowen called then thirteen-year-old S.C. and asked her to babysit for his infant daughter. S.C. knew Bowen through his nieces, C.J. and M.J., who were her friends. Bowen offered S.C. fifty dollars for twenty minutes of babysitting. Once at Bowen's house, S.C. was put to work moving boxes, not babysitting. Bowen then asked S.C. to vacuum his bedroom. As she finished vacuuming Bowen confronted her in his bedroom, closed the door, locked it, and removed his clothes from the waist down. Bowen, who had an erection, put S.C. on the bed, took her clothes off, and forced vaginal intercourse. S.C. stated that she screamed and cried for him to stop. After Bowen was done he told S.C. to get dressed and go home. He threatened to kill her if she told anyone what he did.

S.C. did not tell her mother about the incident for several weeks because of her fear of Bowen. When she did finally tell her mother she made her promise not to tell anyone else. In June 2004, during an office visit to her pediatrician regarding her irregular periods, S.C. told her doctor that she had been raped. Dr. Julie Hanson reported the crime to the police who investigated Bowen.

The State charged Bowen, by trial information, with sexual abuse in the third degree, in violation of Iowa Code section 709.4(2)(b) (2003). A jury found Bowen guilty as charged. Bowen appealed his conviction, claiming there was insufficient evidence to support his conviction and the trial court used an improper standard in denying his motion for new trial. He also claimed his trial counsel was ineffective for failing to, among other things, object to portions of Corporal Thomas Schaefer's testimony, object to prosecutorial misconduct in closing arguments, and adequately argue a motion for judgment of acquittal. In affirming Bowen's conviction, this court concluded the conviction was supported by substantial evidence and rejected his claims of ineffective assistance with regard to his motion for judgment of acquittal. *State v. Bowen*, No. 05-0878 (Iowa Ct. App. April 12, 2006). We preserved all of his other ineffective assistance claims for a possible postconviction proceeding. *Id.*

Bowen filed an application for postconviction relief on May 26, 2006. In his application he alleged his trial counsel failed to (1) adequately consult with him concerning possible defenses, trial strategy, plea arrangements, penalties, and other matters, (2) object to hearsay testimony, (3) object to "expert testimony" by Corporal Schaefer, whom he asserted was not an expert, and (4) object to prosecutorial misconduct during closing arguments. A hearing was held on the application and the district court entered a ruling rejecting Bowen's claims and dismissing his application for postconviction relief.

On appeal Bowen claims the district court erred in denying his application because his trial counsel was ineffective for failing to object to (1) hearsay

testimony by Corporal Schaefer, (2) "expert testimony" by non-expert Schaefer, and (3) prosecutorial misconduct during closing arguments.

II. SCOPE AND STANDARDS OF REVIEW.

We typically review postconviction relief proceedings on error. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when the applicant asserts a claim of constitutional nature, such as ineffective assistance of trial counsel, we evaluate the totality of the circumstances in a de novo review. *Id*.

III. MERITS.

A person claiming he or she received ineffective assistance of counsel must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted from the error. *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). To prove the first prong, failure to perform an essential duty, the person must overcome a strong presumption of counsel's competence and show that under the entire record and totality of circumstances counsel's performance was not within the normal range of competency. *Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998). To prove the second prong, resulting prejudice, the person must show that counsel's failure worked to the person's actual and substantial disadvantage so there exists a reasonable probability that but for counsel's error the result of the proceeding would have been different. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). On appeal we may affirm a rejection of an ineffective-assistance-of-counsel claim if proof of either element is lacking. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

A. Hearsay Testimony.

Corporal Thomas Schaefer of the Dubuque Police Department investigated the sexual abuse complaint on the day Dr. Hanson reported it. During his trial testimony Schaefer testified about his interview with S.C. and how he got her to pinpoint the time frame within which the abuse occurred, because she was initially unsure whether it had occurred in 2002 when she was in seventh grade, or in 2003 when she was in eighth grade. Bowen challenges as hearsay the following testimony by Schaefer on direct examination:

> Q. Okay. At the time that you spoke with [S.C.], what in general did she tell you happened?
>
> . . . .
>
> A. Okay. She reported to me that at an earlier age, she was sexually assaulted at 790 West Locust Street, the residence of Reece Bowen.
>
> Q. Okay. And in the course of speaking with her, what if anything did you determine concerning the date? A. As we attempted to refine the date, she could associate the fact that it occurred when she was in the seventh grade, because she remembered that she would have had Mrs. Loeffelholz as her teacher.

At trial in mid-December 2004 S.C. could not remember whether the sexual abuse had taken place in 2002 or in 2003. She testified she could not remember what she had told Corporal Schaefer about whether she had been in the seventh grade or in the eighth grade, and could not remember whether she had told him anything about her seventh grade teacher or her eighth grade teacher.

Bowen contends Schaefer's testimony was hearsay and was a "boon" to the State because S.C. could not pinpoint the date of the abuse. He argues that

S.C.'s uncertainty about the date created a reasonable doubt that but for Corporal Schaefer's testimony would have led to an acquittal, as Schaefer's testimony provided the October 2002 date the State needed to establish its case.[1]

Generally if hearsay is admitted prejudice to the non-offering party is presumed unless the contrary is affirmatively established. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998); *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992) However, that prejudice will not be found where substantially the same evidence is in the record without objection and thus the challenged testimony is merely cumulative. *Id*. Initially we note that with the exception of his testimony about how S.C. was able to tell him what year the sexual abuse occurred by relating it to the specific teacher she had at the time, Schaefer's testimony was cumulative to other testimony produced without objection. S.C., her mother, and Dr. Hanson all testified to substantially the same facts as Schaefer regarding the circumstances surrounding and constituting the abuse. The great majority of Schaefer's testimony was merely cumulative and cannot be seen as at all prejudicial to Bowen.

In defending Bowen, trial counsel relied heavily upon inconsistencies concerning dates when the alleged sexual abuse occurred, as well as S.C.'s own vagueness and inability to specify when it occurred. This was one of several means counsel used to attack S.C.'s credibility. First, counsel cross-examined

[1] We note that the date of the sexual abuse is not an element of the crime the State was required to prove beyond a reasonable doubt and lack of specificity of the date, assuming any potential dates were within the statute of limitations, as all were here, is not fatal to the State's case.

S.C.'s mother, Schaefer, and Dr. Hanson, pointing out S.C.'s uncertainty regarding the time of the crime and her identification of possible dates ranging from January 2002 to September 2003. Next, during his opening statement, which he had apparently reserved until immediately prior to presentation of Bowen's evidence, counsel emphasized the discrepancies in possible dates identified by S.C. Finally, defense counsel returned to this theme of differing and uncertain dates during his closing argument. Thus, it is clear from the record that part of defense counsel's trial strategy was to delve into S.C.'s various accounts of when the sexual abuse allegedly occurred in order to attack her credibility and create reasonable doubt. During trial counsel's testimony at the postconviction hearing he testified the uncertainty and discrepancies concerning dates was significant because "if a person doesn't know when they were raped, that that would call into question whether, in fact, it ever happened or whether there was some story being made up here." When asked if it was fair to say he wanted the jury to hear as much as possible about the discrepancies in dates, trial counsel answered,

> The more things that the victim couldn't identify or was vague about, I would estimate or would believe would be a better opportunity for the jury to say, I got a doubt and this is a doubt, and be able to explain it to a fellow juror.

"Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). A defendant is not entitled to perfect representation, but rather only that which is within the range of normal

competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000); *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987). Representation is presumed competent and a party claiming ineffective assistance has the burden to prove by a preponderance of the evidence that counsel's performance was deficient. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). A reasonable decision by counsel concerning strategy will not be interfered with simply because the chosen strategy was unsuccessful. *State v. Losee*, 354 N.W.2d 239, 243 (Iowa 1984). Where counsel's decisions are made pursuant to reasonable trial strategy we will not find ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999).

We conclude defense counsel not objecting to the testimony in question involved a decision made pursuant to a reasonable trial strategy, to challenge S.C.'s credibility and attempt to create reasonable doubt, by exploiting the discrepancies in the dates given by S.C. and her uncertainty as to when the alleged sexual abuse occurred. Whether this strategy was good or bad, it was a tactic that is not so unreasonable that it shows ineffectiveness. *Losee*, 354 N.W.2d at 244; *Frank v. State*, 376 N.W.2d 637, 641 (Iowa Ct. App. 1985). In evaluating counsel's performance, we initially presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington,* 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984); *Losee*, 354 N.W.2d at 244. Bowen has not overcome the strong presumption of counsel's competence in

deciding not to object to Corporal Schaefer's testimony regarding what S.C. told him about when the sexual abuse most likely occurred.

B. "Expert" Testimony.

Bowen next contends his trial counsel was ineffective for failing to object to Corporal Schaefer's "expert" testimony regarding the technique he used to help S.C. recall when the sexual abuse occurred, arguing the evidence did not establish that Schaefer was qualified to render an opinion concerning how children of an age such as S.C. are able to remember approximately when a past event occurred. Specifically, Bowen alleges counsel should have objected to the following testimony by Schaefer on direct examination:

> Q. Okay. Now in the course of your training and experience, have you been trained in the investigation of sexual abuse of children and teenagers? A. Yes.
>
> Q. And in the course of your training and experience, what is your training as to the determination of a date when something occurs? A. Specifics are very difficult for children at that age unless they can relate it to some – some time in school or some teacher they had such as in this case, or some event that was going on in their life. In this case, she specifically remembered that it was in her seventh grade when she had [teacher] Loeffelholz.
>
> . . . .
>
> Q. Okay. And what about that concerned you then when she told you that information: A. I then asked her what teacher she had when she was in the eighth grade, and she responded that it would have been a teacher by the last name of Kramer, and she stated that it positively would not have happened then, and she then refined it to be when she was in seventh grade with . . . teacher Loeffelholz.

Initially, we note that the necessity of special qualifications concerning this interview technique is questionable. We believe that most people are aware of the fact that memory is triggered by reference to some benchmark in a person's

life. That this might be particularly true when dealing with a child is not a concept requiring specialized training to understand or describe.

However, assuming without deciding that the testimony in question did require demonstrated expertise, counsel had a duty to object to the testimony only if Corporal Schaefer was not an expert in interview techniques with child and teenage victims of sexual abuse. At the time of trial, Schaefer had been a police officer for thirty years and had been an investigator for twelve years. He had received specialized training in the investigation of sexual abuse of children and teenagers, including getting a child to relate an event to something else in the child's life in order to determine when the event occurred. Accordingly, we believe Corporal Schaefer in fact qualified as an expert in this area and counsel therefore had no duty to object to the testimony in question. *See, e.g., State v. Sykes*, 412 N.W.2d 578, 584 (Iowa 1987) (holding police officer with extensive experience investigating illegal drug use and sales, and significant special training and education in that area, was properly allowed to testify about practices of drug traffickers in the area and to identify substance as marijuana); *State v. Taylor*, 336 N.W.2d 721, 726-27 (Iowa 1983) (holding Waterloo police officer of fifteen years with extensive experience in drug cases and people involved in drug cases qualified to testify concerning effects of a certain quantity and quality of heroin); *State v. Nowlin*, 244 N.W.2d 591, 595 (Iowa 1976) (holding special agent with DCI was qualified to testify that in his opinion puncture wounds in body were caused by a knife or thin-bladed instrument); *State v. Knudtson*, 195 N.W.2d 698, 701 (Iowa 1972) (holding police officers were qualified to testify

to their opinion that tools in question were burglary tools when it was shown they were experienced police officers, had all received special training in police investigation, including crime scene investigations, and had investigated scenes of burglaries where similar tools that had apparently been used were found).

Accordingly, assuming without deciding that the challenged testimony in fact requires special qualifications or expertise, the record shows that through experience and training Corporal Schaefer had the required expertise. We conclude counsel had no duty to object to the testimony in question on the basis that Schaefer lacked required expertise. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996) (finding a claim of ineffective assistance cannot be predicated upon counsel's failure to make a meritless objection.).

C. State's Closing Arguments.

Bowen next claims his trial counsel was ineffective for failing to object to two separate instances of alleged prosecutorial misconduct during closing argument. He first claims the following statement made by the State during closing argument was an impermissible comment on Bowen's failure to testify.

> He raped her. She said she was yelling, and screaming. He finished. He told her to get up, get out, and then told her, and if you tell, I will kill you. And there's been no contradiction to that.

The accused's silence may not be used directly or indirectly to aid the prosecution. *State v. Hutchison*, 341 N.W.2d 33, 38 (Iowa 1983). A statement is an impermissible reference to the defendant's silence if either (1) the prosecutor manifestly intended to refer to the defendant's silence, or (2) the jury would naturally and necessarily interpret the statement to be a reference to the

defendant's silence. *Id*. at 39. "The court will not find that the prosecutor manifestly intended to comment on a defendant's right to remain silent when an equally plausible explanation exits for his or her statement." *Van Hoff v. State,* 447 N.W.2d 665, 675 (Iowa Ct. App. 1989).

Bowen's defense was centered on uncertainty in S.C.'s testimony, contradictions in her prior statements concerning when the crime occurred, impeachment of various aspects of her trial testimony, and the fact that her drawing of Bowen's bedroom was substantially inaccurate. Thus, the prosecutor's comment during closing argument can most reasonably be viewed as merely alluding to the fact that, although the defense had presented the jury with many questions concerning S.C.'s statements and testimony, it had presented no evidence directly contradicting her statements and testimony that Bowen had sexually abused her and threatened her to maintain her silence. Accordingly, we do not believe the jury would naturally and necessarily interpret this statement by the prosecutor to be a comment on Bowen's silence. "A prosecutor's statements are not viewed in isolation, but in the context they were made." *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586, 595, 98 S. Ct. 2954, 2959-60, 57 L. Ed. 2d 973, 983 (1978) (holding that in the context of the trial the prosecutor's references to the State's unrefuted and uncontradicted evidence did not violate constitutional prohibitions.).

Furthermore, Bowen made this same argument regarding the same comment by the prosecutor in his motion for new trial and the district court, in a

superior position to evaluate the effect on the jury of the prosecutor's remark, overruled the motion on this point. The district court found there were

> many different interpretations of the statements and none are conclusively and exclusive[ly] referring to the fact that [Bowen] did not take the witness stand. The victim's credibility was at issue. Many things she said and did after the incident were raised through testimony of other witnesses. . . . She was confronted about her timing as to when the incident happened and others were also questioned about the time line. The statements made by the county attorney are an effective and appropriate manner of arguing the level of evidence produced in support of finding the matter is proven beyond a reasonable doubt.

We agree with the district court's reasoning and find it is equally applicable to Bowen's claim of ineffective assistance on appeal.

The prosecutor's remarks fell within allowable comment on the evidence and thus trial counsel did not breach an essential duty by not objecting to these comments. *See Rice*, 543 N.W.2d at 888. Furthermore, Bowen has failed to prove that but for the lack of an objection to this comment the outcome of the trial would likely have been different.[2]

Finally, Bowen claims his trial counsel was ineffective for failing to object to the following remarks made by the prosecutor during closing argument. He alleges they were improper arguments that were designed to appeal to the passion and prejudice of the jury.

> Once [S.C.] made this report, basically, all hell broke loose. She's talking to strangers about being raped. She's talking to police

[2] Our conclusion that the lack of an objection did not constitute ineffective assistance of defense counsel in the context in which made should not be seen as any approval, when a defendant has not testified, of argument that evidence presented by the State has not been contradicted. When a defendant has not testified, such an ill-advised statement invariably runs the risk of being seen by the jury as a comment on the defendant not having testified.

> about personal matters. She's talking to doctors and she's talking to lawyers, and she's coming into the courtroom and talking to strangers. Nothing good came of this, and she knew it the day she told Dr. Hanson. All her worst fears came true.
> . . . .
> And [S.C.] told you, she has gotten no benefit out of this. She has been dragged in here twice; once by us, once by them. Everything she believed was going to go wrong has gone wrong. All her fears were realized.
> . . . .
> S.C. was let down by the people that cared about her most.
> . . . .
> She has been let down let down.

Prosecutors should not make arguments calculated to appeal to the passion and prejudice of the jury. *See State v. Werts*, 677 N.W.2d 734, 739 (Iowa 2004). Such statements can violate a prosecutor's duty to keep the record free of undue denunciations or inflammatory utterances. *See State v. Graves*, 668 N.W.2d 860, 874 (Iowa 2003). Here however, contrary to Bowen's claims, the prosecutor's remarks were merely responsive to Bowen's assertion that S.C. had an ulterior motive to make a false claim, to get back at Bowen's two nieces who were her former friends, with whom her relationship had soured. The first part of the prosecutor's challenged remarks was an accurate summation of S.C.'s testimony. She did not tell anyone about the crime for several months and did not want it reported to authorities. Thus, it was not an appeal to the passion and prejudice of the jury, but an appropriate response to Bowen's assertion that S.C. had an ulterior motive for making the false claim.

Further, a question inherent in the evidence presented was why no report of the sexual abuse was timely made, and it would have been reasonable for the jury to wonder why the adults in S.C.'s life did not do so. The jury might believe

the adults did not report the matter because they did not believe S.C. Alternatively, the jury might believe that the adults had simply not acted responsibly and had failed her. Bowen was challenging S.C.'s credibility and thus would have liked the jury to believe the former. Thus, the prosecutor was entitled to argue in support of the latter explanation. Because the prosecutor's comments were within the proper bounds of closing argument, Bowen's counsel had no duty to object to them, *see Rice*, 543 N.W.2d at 888, and did not breach an essential duty by not objecting. Furthermore, Bowen has not shown that but for the absence of an objection to such comments the outcome of the trial would likely have been different.

IV. CONCLUSION.

Based on our de novo review of the record, and for the reasons set forth above, we conclude Bowen's trial counsel did not render ineffective assistance by not objecting to the alleged hearsay testimony by Corporal Schaefer, the "expert" testimony by Corporal Schaefer, or the challenged statements made by the State during closing argument. The district court was correct in denying Bowen's application for postconviction relief.

AFFIRMED.