IN THE COURT OF APPEALS OF IOWA

No. 8-327 / 07-1108
Filed October 1, 2008

ROBERT V. PAULSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Appeal from the district court ruling that denied appellant's application for postconviction relief. **AFFIRMED.**

Scott L. Bandstra of the Bandstra Law Firm, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

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

SACKETT, C.J.

Robert Paulson appeals from the district court ruling denying his second application for postconviction relief. He contends he received ineffective assistance of trial, appellate, and postconviction counsel. He argues trial counsel was ineffective in failing to object to certain evidence and prosecutorial misconduct. He further argues appellate and postconviction counsel were ineffective in not properly raising the claims concerning trial counsel. We affirm.

I. Prior Proceedings.

The State charged appellant with second-degree sexual abuse of his daughter, M.P., in July of 2000.[1] He was convicted following a jury trial and sentenced to up to twenty-five years in prison. The court of appeals affirmed his conviction. *See State v. Paulson*, No. 01-0379 (Iowa Ct. App. Jan. 15, 2003). In July of 2003 appellant filed an application for postconviction relief, alleging eighteen grounds of ineffective assistance of counsel. In August of 2004 the court dismissed appellant's application. The court of appeals reversed and remanded for an evidentiary hearing on appellant's four ineffective assistance claims. *See Paulson v. State*, No. 04-1321 (Iowa Ct. App. Aug. 17, 2005).

On remand, the district court received testimony from trial, appellate, and first postconviction counsel, appellant's mother, and appellant himself. It also took judicial notice of the complete record from the criminal trial. The court found trial counsel's performance was not ineffective and did not result in prejudice to appellant. It further found appellate and postconviction counsel could not be

[1] M.P. was born in 1993. No charges were filed concerning appellant's younger daughter, C.P., born in 1996.

ineffective for failing to raise allegations trial counsel was ineffective. Finally, it found "[i]f Paulson was not prejudiced by anything trial counsel did or did not do, he was not prejudiced by anything appellate or PCR counsel did or did not do."

II. Scope of Review.

Postconviction relief proceedings are law actions generally reviewed for errors at law. Iowa R. App. P. 6.4; *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). Ineffective-assistance-of-counsel claims, however, are constitutional in nature; our review is de novo. *See Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to prevail on a claim counsel was ineffective, the applicant must prove, by a preponderance of the evidence, both that counsel failed to perform an essential duty and that the applicant was prejudiced. *State v. Williams*, 695 N.W.2d 23, 28-29 (Iowa 2005). "A defendant's inability to prove either element is fatal." *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003).

III. Claims on appeal.

Appellant raises four claims on appeal:

> 1. The PCR court erred when it found trial counsel was not ineffective for failing to object to inadmissible hearsay that violated Paulson's Sixth Amendment right to confrontation.
> 2. The PCR court erred when it found trial counsel was not ineffective for failing to object to evidence that was inadmissible pursuant to Iowa Rules of Evidence 5.402, 5.403, and 5.404.
> 3. The PCR court erred when it determined that trial counsel was not ineffective for failing to object to prosecutorial misconduct.
> 4. The PCR court erred when it determined that appellate and PCR counsel were not ineffective.

IV. Discussion.

***1. Right to Confront Witnesses*.** Appellant contends trial counsel was ineffective in not objecting to violations of his Sixth Amendment right of confrontation regarding statements by his daughter, C.P., who did not testify at trial. He argues they were inadmissible hearsay, citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004). The PCR court correctly noted that *Crawford* was not decided until after appellant's trial, appeal, and PCR application. Our supreme court has determined the new analysis set forth in *Crawford* is not to be applied retroactively to ineffective assistance claims. *State v. Williams*, 695 N.W.2d 23, 29 (Iowa 2005).

Trial counsel testified at the PCR hearing. He indicated appellant did not deny that his daughters were acting out sexually. Allowing testimony concerning C.P.'s statements and actions was part of a unified trial defense strategy to show the girls were being coached by appellant's ex-wife to claim appellant abused them sexually. In pursuing that strategy, trial counsel also adduced evidence of the custody battle between appellant and his ex-wife during their divorce, her prior allegations of sexual abuse that were unfounded, and medical examinations of the girls. Trial counsel did not object to admission of evidence from interviews of the children, but sought, through expert witnesses, to show the bias in how the interviews were conducted. Allowing the interview evidence also allowed appellant to show the jury his reaction to the accusations without having to testify at trial and be subject to cross-examination.

Generally, trial counsel will not be found ineffective simply because trial strategy proves to be unsuccessful. *State v. Andrews*, 705 N.W.2d 493, 498 (Iowa 2005). In support of his position, appellant points to trial counsel's statements when questioned about his trial actions. Counsel conceded that some of the challenged evidence would violate appellant's Sixth Amendment right of confrontation. We presume competency and avoid second-guessing and hindsight. *State v. Kress*, 636 N.W.2d 12, 20 (Iowa 2001). We do not look to the success of trial strategy, but rather whether it was reasonable. *See Johnson v. State*, 495 N.W.2d 528, 533 (Iowa Ct. App. 1992). Given the state of the law before *Crawford*, we conclude trial counsel's strategy to deal with damaging evidence was reasonable. Consequently, we conclude trial counsel did not fail in an essential duty by not objecting to the admission of the challenged evidence on Confrontation Clause grounds. "We do not expect counsel to anticipate changes in the law, and counsel will not be found ineffective for a lack of 'clairvoyance.'" *Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008) (citing *Williams*, 695 N.W.2d at 30).

We agree with the postconviction court that appellant failed to demonstrate prejudice from the claimed errors. To prove prejudice, appellant must show a reasonable probability the result of the trial would have been different if counsel had not committed the alleged errors. *See id.* "A reasonable probability is one that is 'sufficient to undermine confidence in the outcome.'" *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996) (citation omitted). From our review of the record, we do not see any reasonable probability the result of the

trial would have been different had trial counsel challenged the admissibility of the evidence on Confrontation Clause grounds. There was a great deal of evidence related directly to appellant's sexual abuse of M.P. presented through M.P. herself and others. There was testimony from more than one witness concerning observations of M.P.'s sexual acting out and sexualized conduct. There also was testimony of observations of appellant's improper actions with M.P. and improper touching and kissing. Even if we exclude all of the challenged evidence from our consideration, we find more than sufficient evidence from which the jury could convict and no reasonable probability appellant would not have been convicted based on the unchallenged evidence.

2. Relevance, Prejudice, Other Bad Acts. Appellant contends trial counsel was ineffective in not challenging certain evidence under Iowa Rules of Evidence 5.402 (relevance), 5.403 (prejudice, confusion, or waste of time), 5.404(*b*) (other bad acts), and 5.803 (hearsay). In particular, appellant argues (a) C.P.'s statements were not relevant to the charge he abused M.P. and were prejudicial; (b) testimony about his participation in "phone sex" was not relevant, was prejudicial, and was improper propensity evidence; (c) testimony about sexual acts with his wife while married was not relevant, was prejudicial, and could lead the jury to conclude he was a sexually violent person; and (d) a videotape of a police interview of M.P. was hearsay and prejudicial.

A. C.P.'s Statements. The postconviction ruling on this claim does not deal with *statements* by C.P., but addresses evidence of C.P.'s *behavior*. It analyzed the relevance and potential prejudice of evidence of C.P.'s behavior,

finding it was relevant and not unfairly prejudicial. The postconviction court did not identify C.P.'s statements as the issue before it and did not address that issue in its analysis of this claim in the ruling. Issues must ordinarily be presented to and passed upon by the trial a court before they may be raised and adjudicated on appeal. *Jain v. State*, 617 N.W.2d 293, 298 (Iowa 2000); *State v. Ashburn*, 534 N.W.2d 106, 109 (Iowa 1995). We do not review issues, even of constitutional magnitude, that are raised for the first time on appeal. *See State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982).

B. Phone Sex. Appellant claims testimony of a former girlfriend about his wanting to have phone sex with her and masturbating during the phone calls while the girls were asleep in bed with him should have been excluded. The postconviction court determined the evidence was "likely admissible" and trial counsel "could easily have concluded that 5.404(*b*) would not operate to exclude the testimony as it related to Paulson's propensity to engage in inappropriate sexual behaviors directly involving M.P." *See State v. Spaulding*, 313 N.W.2d 880, 881 (Iowa 1981) (discussing prejudice and exceptions to the exclusionary rule). Appellant argues that trial counsel admitted the evidence was not directly relevant to the specific charge against appellant and it could have been damaging to appellant. Citing *State v. Castenada*, 621 N.W.2d 435, 440 (Iowa 2001), appellant contends the probative value of the evidence is outweighed by its undue prejudicial effect. The case before us differs from *Castenada* in that the evidence there clearly influenced the defendant's conviction of a crime closely resembling the actions portrayed in the evidence, while he was acquitted

of the other charges. *Castenada*, 621 N.W.2d at 441. Clearly, in *Castenada* the jury was influenced to make a decision on an improper basis, which is at the heart of unfair prejudice. *See* Iowa R. Evid. 5.403; *State v. Haskins*, 573 N.W.2d 39, 45 (Iowa Ct. App. 1997) (citing *State v. Uthe*, 542 N.W.2d 810, 814 (Iowa 1996)).

The challenged evidence in the case before us was relevant to show appellant's lack of any proper bounds relating to sexual activity and his daughters (motive) and his opportunity to abuse M.P. While we would not, like the postconviction court, use the term "propensity" when discussing the admissibility of the evidence under rule 5.404(b), we agree the evidence was "likely admissible" and trial counsel was not ineffective in not objecting to the evidence. We also do not believe appellant has shown any prejudice, and would affirm on that basis also.

C. Sexual activity during marriage. Appellant contends trial counsel was ineffective in not objecting to testimony of his ex-wife that he enjoyed sexual activity outside the bedroom, would force her to have sex, and would come into the shower while she was using it and masturbate in front of her. The State argued the evidence was proper to show appellant's preference for the shower as a place for sexual behavior. There was other evidence at trial that appellant showered with his daughters and had become sexually aroused on at least one occasion, but appellant claimed he left the shower once he began to get an erection. The postconviction court was troubled by the testimony that appellant would force himself on his wife, believing "there is a likelihood that the jury,

having heard this testimony, would conclude that Paulson was a sexually violent person, and that he would act in conformity with this trait by committing sexual abuse against M.P."

The court then summarized its conclusion concerning appellant's failure to demonstrate prejudice:

> However, even if counsel rendered ineffective assistance by failing to object to testimony concerning C.P.'s behavior, Paulson's sexual behaviors toward [his girlfriend] with regard to the matter of phone sex, or Paulson's sexual behavior toward his ex-wife . . . it is unlikely that this purported ineffective assistance unfairly prejudiced Paulson. As noted above, the jury would still have heard the direct testimony of M.P. with regard to the allegations of abuse by Paulson, Paulson's admissions to officers regarding some of his behavior toward the girls, and witness observations of his behavior toward the girls. Paulson cannot prove by the preponderance of the evidence that counsel's objection and the consequent exclusion of the aforementioned evidence would have resulted in a different outcome at trial.

Although we share the postconviction court's concern about the evidence of appellant's forcing himself on his wife, we must agree with the court's conclusion appellant cannot demonstrate that exclusion of the challenged evidence would have resulted in a different outcome at trial. Failure to prove prejudice is fatal to appellant's claim trial counsel was ineffective in failing to object to the evidence discussed above.

D. Videotaped Police Interview of M.P.—Hearsay. Appellant contends trial counsel was ineffective in not objecting to the videotaped interview with the victim and the testimony of the interviewing officer concerning M.P.'s statements. From the evidence introduced at the postconviction hearing, it is clear the planned, prepared, and executed trial strategy was to allow the jury to see the

interview in order to challenge the improper interview techniques such as leading, coercive, and inappropriate questions. Appellant assisted in planning and preparing this strategy, even helping to locate experts to testify about the improper interview techniques. We agree with the postconviction court that the choice not "to object to this evidence was a deliberate and calculated strategy in which Paulson actively participated" and "trial counsel did not render ineffective assistance in this regard." *See Ledezma*, 626 N.W.2d at 143.

3. Prosecutorial Misconduct. Appellant claims trial counsel failed to object to prosecutorial misconduct when the transcript of the police interview of appellant was admitted in its entirety and the interviewing officer testified that she asked appellant if others were lying when they made statements at odds with appellant's statements. He argues it is improper for prosecutors to ask defendants if other witnesses are lying or to say defendants are lying. *See State v. Graves*, 668 N.W.2d 860, 876 (Iowa 2003). He points to an unpublished court of appeals case as support for his contention the principle in *Graves* should be extended to the State's witnesses or that the State's introduction of the transcript and the officer's testimony "evidences an acquiescence on the State's part of the impermissible inference lying to the State as if it has used it as its own line of questioning."

The postconviction court, in analyzing this claim, noted *Graves*, a 2003 decision, came after appellant's 2000 trial, so trial counsel could not have made an argument based on *Graves* in support of an objection to the transcript or testimony. We note that the unpublished court of appeals case was decided in

2005. Even if we agreed it stands for the principle claimed by appellant, it is not controlling authority for this court or district courts. *See* Iowa R. App. P. 6.14(5)(*b*). Even if it were, since it was decided five years after appellant's criminal trial, his trial counsel could not have been ineffective in not raising an objection on that basis. *See Morgan v. State*, 469 N.W.2d 419, 427 (Iowa 1991) (noting counsel has no duty of clairvoyance). Appellant asks us to extend the rule in *Graves*, which applies specifically to prosecutors with their duty "to seek justice, not merely to convict" to questions and comments by another agent of the State—the police. *State v. Graves*, 668 N.W.2d 860, 870 (Iowa 2003) (citation omitted). He argues the prosecutor's use of the police interview, without redacting the officer's "were-they-lying" questions, is as impermissible as the prosecutor asking the questions at trial.

We need not and do not address appellant's request to extend the rule in Graves to such circumstances as those before us. Appellant cannot demonstrate prejudice. The few statements or questions to which appellant objects do not rise to the kind of pervasive prosecutorial conduct necessary to prove prejudice. Given the substantial evidence of appellant's guilt that was before the jury, we find no reasonable probability the result of the trial would have been different had trial counsel successfully objected to the challenged testimony and the officer's questions and statements in the interview. *See Ledezma*, 626 N.W.2d at 143.

4. Appellate and Postconviction Counsel. Appellant contends the postconviction court erred in not finding appellate and his first postconviction counsel ineffective. The court determined:

> As trial counsel did not render ineffective assistance of counsel, appellate and PCR counsel did not render ineffective assistance of counsel by their failure to cite to trial counsel's tactics and choice of trial technique as ineffective assistance. If Paulson was not prejudiced by anything trial counsel did or did not do, he was not prejudiced by anything appellate or PCR counsel did or did not do.

Based on our determination appellant has not demonstrated that trial counsel was ineffective, we agree with the postconviction court that this claim necessarily fails. Although appellant points to actions or inaction of appellate and his first postconviction counsel that arguably could have been a breach of duty in failing to cite trial counsel's ineffective assistance, neither appellate or postconviction counsel could fail in an essential duty to raise meritless claims concerning trial counsel. *See Graves*, 668 N.W.2d at 881. Furthermore, because appellant has failed to demonstrate prejudice from trial counsel's conduct, he cannot demonstrate prejudice from appellate or postconviction counsel's conduct.

In our de novo review we have carefully considered all of appellant's claims and arguments. Those not specifically addressed in this decision are either covered by our resolution of the arguments addressed specifically or we concluded they are without merit. We affirm the decision of the postconviction court.

AFFIRMED.