

IN THE COURT OF APPEALS OF IOWA

No. 8-409 / 07-0602
Filed October 1, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALLEN LEROY HUENEFELD,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Amanda Potterfield,
Judge.

Defendant appeals following his conviction of sexual abuse in the second
degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant
Attorney General, Harold Denton, County Attorney, and Susan Nehring,
Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ. Potterfield, J.,
takes no part.

HUITINK, P.J.

Allen Huenefeld appeals following his conviction for sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3(2) (2005). He contends the district court erred in allowing evidence of his suicide attempt to be admitted at trial and in denying his motion for mistrial following testimony contrary to an in limine ruling. Huenefeld also contends his trial counsel was ineffective in numerous respects. We affirm.

I. Background Facts and Proceedings. At the time of trial, Sue¹, Huenefeld's daughter, was twelve and in seventh grade. She testified that she currently lived with Eunice and Lloyd Wessels. She stated she had lived with her father in the past from about the end of fourth grade until the beginning of sixth grade. When she lived with her father, she lived there with two of her sisters, a brother, and her step-mother, Dori. Before living with her father, she and the same three siblings lived with their mother. Their mother died in August 2006 while Sue was living with the Wessels family.

Sue described that her father's home consisted of one floor and a basement. Her father and Dori slept on a waterbed in the basement. She testified that Dori would sometimes visit her son in Cedar Falls.

Sue described there were times when her father would ask her to sleep with him on the waterbed when Dori was gone and that she would do so. She testified that one time she woke up to find her underwear had been removed. She testified that Huenefeld asked to put his penis into her vagina and that he

¹ All the names of minors have been replaced with fictitious names. The victim, A.H. is herein named Sue; half-sister A.P. is named Nancy; sister Al.H. has been called Helen; brother Ar.H. is called Joe.

wanted her to suck his penis. She described that he used lotion and tried to fit his penis into her vagina. She testified that Huenefeld wanted her to suck on his penis and she did. She described Huenefeld “put[ting] a plastic thing on it.”

Sue testified that one time in the bathroom Huenefeld told her to rub his penis “and then this white stuff came out.” She also described an incident on the couch in the family living room when she lay on the couch with her father with her pants pulled down. She also testified her father had come into her room one time and “tried to put his thing in mine,” but someone had knocked on the door.

Sue testified that Huenefeld told her that if she told anyone about the sexual activity he would get in trouble and the children would not be able to live with him anymore. She further testified that she believed these events took place in the summer time.

The prosecutor then asked, with no objection:

Q. And at the end of summer of 2005, it's my understanding that you and your brother [Joe] and your sisters all had to leave your dad's house because he had tried to kill himself; is that right?

To which Sue responded, “yes.”

Sue testified that she then lived with one set of foster parents, but the woman was having heart problems, so she then moved to the Wessels' home. She testified that before moving to the Wessels', she had not told anyone about what happened with her father.

Sue stated she first told a friend, who told her she should tell somebody. Sue then testified she told her sister, Nancy, by way of a note she left on Nancy's bed. When Nancy did not respond to the note, Sue told her sister Helen—also by way of a note—written while they were out to dinner. The redacted note was

admitted into evidence. The note is written in the handwriting of Sue and Helen and reads in part: “tried to sex with me and fit his winner into me shhh...so he actually tried to do it to you? Yes, please don’t tell anybody.” Sue testified that Helen later that day told another sister and Ms. Wessels.

Sue was seen at St. Luke’s Hospital and interviewed. Sue described some drawings she had made while being interviewed by a child protective worker: one of what Huenefeld’s penis looked like; one of she and Huenefeld laying on the bed with her underwear on the bed between them; and another showing Huenefeld “scooting over” toward her in the bed.

Sue’s sister Helen, age fourteen and in ninth grade, testified there were some weekends Dori was gone to see her son. She responded “yes” to the question, “it’s also my understanding that in August of 2005 that your dad tried to kill himself, and at that point you moved to a foster home.” There was no objection to the question or answer. Helen testified that she showed the note from Sue to Ms. Wessels and that was the first time she had known about the “things that [Sue] had talked about in that letter.”

Sue’s sister Nancy, age fifteen and in tenth grade, testified there were times when Huenefeld would be alone with Sue in her room when Sue was upset. Nancy testified she had seen the two lying on Sue’s bed together. She thought that there were a couple of times when the door to Sue’s room was locked. She also remembered that Dori sometimes was gone to visit her son. Nancy testified that Huenefeld had asked her and both of her sisters to sleep downstairs with him. The prosecutor asked Nancy, “It’s my understanding that in August of 2000—August 2005 that Allen Huenefeld tried to kill himself and you all

were placed in a foster home; is that correct?" Nancy replied "yes," and further explained that she first went to a different foster home than a brother and Sue, but that later they all were living at the Wessels.

She testified that when the siblings were again living together that Sue was worried about Huenefeld finding her at the foster home. She testified she received a letter from Sue that Huenefeld had done something bad to Sue, which she gave to Ms. Wessels and asked that the letter be given to the children's counselor.

Ms. Wessels explained how the children came to live with her. She was asked if, when Sue moved in, there was anything unusual about her behavior.

A. Well, just that when I took the two older girls to dance, I took [Joe and Sue] with me the first day that they come to be there with us, and the girls had dance, so I took them. And [Joe] was talking about his dad, and [Sue] would plug her ears like this and go la-la-la. She just – she says, "I don't want to talk about it." That's all she would say to me.

Q. After [Sue] had been there for a little while, was there a point where something came to your attention that led you to believe that there was something more serious going on? A. Yes. She wrote a letter to Nancy and laid it on Nancy's bed. Nancy later brought it down that night and showed it to me, and Nancy was crying. And I said to her, well, we'll let it go for a few days and we'll see if anything else surfaces, and then it did.

Q. When you – at that point, were there very many details about what was going on in the letter? A. All she said is that the same thing happened to me as did to you and your sister.

Huenefeld's counsel at that point asked to approach the bench. He objected to the answer as unresponsive, moved to strike and argued that the statement was contrary to earlier rulings of the court and highly prejudicial. Huenefeld moved for a mistrial. The motion was denied, though the court noted that the statement was a "serious violation of the Court's order."

Dr. Kathleen Opdebeeck testified that she examined Sue on April 5, 2006, and that she observed an irregularity of Sue's hymen, which could have been a normal variation or a result of an attempt at penetration.

Huenefeld testified on his own behalf. He testified that his suicide attempt was a result of work-related and financial stresses. He denied any improper conduct with Sue and stated that she and he were never alone in the house together. He testified Dori had only been out of town once the summer the children lived with him. There was also testimony from which the jury could infer that Sue had made allegations of sexual contact with her brother.

Dori testified that there would not have been a time when Sue would have been alone in the house with Huenefeld. She stated she visited her son twice in 2005. She testified that Sue first shared a room with her brother, but that she was moved to the girls' room after statements concerning her brother.

Huenefeld renewed his motion for mistrial. He noted that the court had, prior to trial, disallowed any evidence of unrelated accusations of sexual misconduct concerning Huenefeld and any accusations toward him made by another of Huenefeld's daughters. He argued that Ms. Wessels' testimony violated that court ruling. He also informed the court that there had been some physical display between Ms. Wessels and a person from the prosecutor's office in the hallway that might have been viewed as congratulatory following the testimony.

The court again denied the motion for mistrial. The following curative instruction was given to the jury:

In her testimony for the State, Eunice Wessels mentioned the content of a letter [Sue] wrote to [Nancy] in late March 2006. The Court strikes that testimony and you shall disregard it.

The reason for striking the testimony is that it was misleading. Unfortunately, some of [Sue's mother's] children made reports of improper sexual contact involving men [she] knew and Nancy or her sisters. None of these reports involved a claim of improper sexual contact against Allen Huenefeld.

Huenefeld was found guilty of sexual abuse in the second degree. He appeals.

II. Evidence of Suicide Attempt. Huenefeld contends the district court erred in allowing evidence of his attempted suicide. The issue had been raised in an oral motion in limine. Huenefeld argued that the evidence would likely view the suicide attempt as an admission of guilt if it was admitted in conjunction with allegations by another of Huenefeld's daughters and, as such, it would be highly prejudicial. The State resisted, stating that Sue believed that the children's removal from her father's home was precipitated by the attempt and that the jury needed to be given some reason for the children's removal.

In an order dated January 5, 2007, the district court ruled that evidence of other bad acts was not admissible. "The suicide attempt therefore will not be coincidental with any accusations and may be relevant for other reasons. If otherwise relevant, evidence of the suicide attempt will not be unfairly prejudicial." The evidence of Huenefeld's attempted suicide was then received at trial without objection, as noted above.

Questions of the admissibility of evidence are generally reviewed for an abuse of discretion. *State v. Rodriguez*, 636 N.W.2d 234, 239 (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. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

Huenefeld notes that the State attempted to introduce the suicide attempt in leading questions, to explain the removal of the children from the Huenefeld home. He argues the evidence, however, was not relevant and prejudicial. The State correctly points out that there was no objection to the testimony. Nor did Huenefeld move to strike the testimony. Huenefeld thus waived any claim of error regarding the admissibility of the testimony. See *State v. Wells*, 522 N.W.2d 304, 310 (Iowa Ct. App. 1994).

Moreover, any error in admitting the testimony did not result in prejudice to the defendant. See *id.* The testimony of the children did not relate the attempted suicide to the case against the defendant, it was solicited to explain why the children were moved to foster care. Huenefeld asserts the State could have simply asked the witnesses about the fact that they were removed from the home. In so asserting, the defendant belies his own argument that the children’s removal from the home was irrelevant. Additionally, the defendant testified that the suicide attempt was a result of financial and work-related difficulties. We find the district court did not err in allowing the testimony of Huenefeld’s attempted suicide to provide context for the jury and that Huenefeld was not thereby unduly prejudiced.

III. Denial of Motion for Mistrial. Huenefeld next contends the district court erred in denying his motion for mistrial based upon the testimony of Eunice Wessels, which introduced hearsay statements by Nancy that the note from Sue stated “the same thing happened to me as did to you and your sister.” Defendant argues that the statement implied that he had abused two other siblings of the alleged victim and was unfairly prejudicial.

We note that the district court had ruled that any evidence of other bad acts by the defendant was not relevant and, even if relevant, its probative value was substantially outweighed by unfair prejudice. The court instructed the State not to “mention any of that evidence in the presence of the jury, and shall instruct its witnesses not to raise any suggestion that the evidence exists.”

The district court’s ruling reflects the required two-step analysis of relevance versus unfair prejudice. *State v. Mitchell*, 633 N.W.2d 295, 298-99 (Iowa 2001). Evidence of other crimes or wrongs is not admissible to prove the defendant acted in conformity therewith. Iowa R. Evid. 5.404. It was within the trial court’s “sound discretion” to conclude that evidence that the defendant had engaged in sexual conduct with other children would be unfairly prejudicial. See *Mitchell*, 633 N.W.2d at 299.

After Ms. Wessels’ testimony, out of the presence of the jury, the district court explained to counsel, that its concern with the testimony was “misinformation . . . [Sue] was misinformed that her sister [Nancy] had a similar situation going on at the time” unrelated to the defendant. Noting it was the court’s duty to determine if the information that came in would no longer allow an impartial verdict to be reached, the district court overruled the motion for mistrial.

A mistrial is appropriate when “an impartial verdict cannot be reached” or the verdict “would have to be reversed on appeal due to an obvious procedural error in the trial.” *State v. Dixon*, 534 N.W.2d 435, 439-40 (Iowa 1995); see also *State v. Piper*, 663 N.W.2d 894, 902 (Iowa 2003). We review for an abuse of discretion. *Dixon*, 534 N.W.2d at 439 (“A trial judge has considerable discretion to declare a mistrial after a procedural error has occurred during a trial and we will not reverse the court’s decision absent a finding of abuse of discretion.”).

The trial court found that Wessels’ testimony was contrary to its earlier ruling excluding hearsay statements. The court concluded the testimony was misleading and offered a curative instruction specifically stating that, with respect to Nancy, there was no report involving a claim of improper sexual contact against Huenefeld. We find that the trial court reasonably concluded the defendant’s right to an impartial verdict was not at risk due to the unsolicited testimony. First, we note that the testimony was somewhat vague:

Q. When you – at that point, were there very many details about what was going on in the letter? A. All she said is that the same thing happened to me as did to you and your sister.

The district court instructed the jury:

In her testimony for the State, Eunice Wessels mentioned the content of a letter Sue wrote to [Nancy] in late March 2006. The Court strikes that testimony and you shall disregard it.

The reason for striking the testimony is that it was misleading. Unfortunately, some of [Sue’s mother’s] children made reports of improper sexual contact involving men [she] knew and [Nancy] or her sisters. None of these reports involved a claim of improper sexual contact against Allen Huenefeld.

We presume the jury followed the court's instruction absent evidence to the contrary. *State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988). We hold the district court did not abuse its discretion in refusing to grant a mistrial.

IV. Ineffective Assistance of Counsel. Huenefeld argues that his trial counsel was ineffective in several respects. First, if we find that error was not properly preserved on the issue of admission of testimony of Huenefeld's attempted suicide, he claims trial counsel was ineffective in not preserving the issue. Second, he argues trial counsel failed to object to testimony from Wessels that Sue stated "I don't want to talk about it." He claims the testimony is inadmissible hearsay. Third, he contends trial counsel failed to move to strike an unqualified juror. Fourth, should the court find trial counsel's motion in limine concerning the attempted suicide was untimely, counsel was thereby ineffective. Finally, in a separate pro se brief, Huenefeld claims trial counsel failed to call witnesses the defendant believed would have changed the outcome of the trial; trial counsel did not adequately prepare for trial; and failed to strike the jury foreman following prejudicial statements made during voir dire.

Ineffective assistance of counsel claims presented on direct appeal are typically preserved for postconviction relief proceedings to allow for a full development of the facts surrounding the conduct of counsel. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). Mere allegations, without more, are insufficient to preserve the matter for postconviction proceedings. We can only address such claims on direct appeal if the record is sufficient. *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999). Should we reach the merits, a claim of ineffective assistance grounded on counsel's failure to take some action, the defendant

must demonstrate (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983). The defendant has the burden to establish each element and must rebut a presumption of counsel's competence. See *State v. Dunbar*, 515 N.W.2d 12, 15 (Iowa 1994).

We first address Huenefeld's pro se complaints. He provided this court with only a terse assertion that trial counsel failed to adequately investigate and present evidence the defendant thought helpful. We deem this presentation inadequate as a matter of law either to demonstrate prejudice or to preserve the claims for potential future postconviction proceedings. See *State v. Dunbar*, 515 N.W.2d 12, 15 (Iowa 1994) (declining to preserve allegations of ineffective assistance for future postconviction proceeding where the applicant merely alleges a general failure to investigate and fails to state how competent representation would have altered the outcome).

With respect to Huenefeld's appellate counsel's claims of ineffective assistance, we preserve these issues for postconviction proceedings. We find the record insufficient to fully investigate trial counsel's actions.

V. Conclusion. We hold the trial court did not err in allowing testimony of defendant's attempted suicide to show why the children were removed from the defendant's home. The trial court did not abuse its discretion in finding that testimony, followed by a curative instruction, did not deprive the defendant of an impartial verdict. Finally, we preserve some issues of ineffective assistance of counsel for postconviction proceedings.

AFFIRMED.