IN THE COURT OF APPEALS OF IOWA

No. 9-1005 / 09-0370
Filed February 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CARL GENE GARNICA,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

Carl Gene Garnica appeals from his conviction and sentence for second-degree sexual abuse. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Michael J. Walton, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Carl Gene Garnica appeals from his conviction following a jury trial for second-degree sexual abuse in violation of Iowa Code section 709.3(2) (2001). On appeal, Garnica argues: (1) his counsel rendered ineffective assistance by failing to object to confusing and prejudicial instructions regarding the proof required for sexual abuse and (2) the district court imposed an illegal sentence when it imposed a special sentence of lifetime parole on acts that occurred before the effective date of Iowa Code section 903B.1 (Supp. 2005), and alternatively, that his counsel was ineffective in failing to object to the special sentence. We affirm the conviction, vacate the sentence in part, and remand for resentencing.

***I. Background Facts and Proceedings*.**

Garnica was charged by trial information with two counts of sexual abuse in the second degree in violation of Iowa Code section 709.3. The counts alleged offenses against two separate victims, B.G. and K.S. During the jury trial, B.G. testified she was twenty-one years of age and gave her birth date. She testified Garnica first started sexually abusing her when she was ten years old. She testified these actions stopped when she was seventeen or eighteen. K.S. testified at trial she was seventeen years old and gave her birth date. K.S. testified Garnica sexually abused her when she was ten years old, and again a few months later when she was eleven. The jury acquitted Garnica of the second-degree sexual abuse charges under Count 1 (acts against B.G.), but convicted him of the second-degree sexual abuse charges under Count 2 (acts against K.S.). The court sentenced Garnica to an indeterminate term of

imprisonment not to exceed twenty-five years with a seventy percent mandatory minimum, and ordered him to pay a civil penalty and costs. Additionally, the court imposed a special sentence of lifetime parole pursuant to Iowa Code section 903B.1.

Garnica appeals his conviction. Also, he requests his sentence be vacated to the extent it included a mandatory special sentence of lifetime parole.

II. Instructions.

The district court gave the jury the following marshalling instruction, Instruction No. 8:

> The State must prove all of the following elements of Sexual Abuse in the Second Degree under Count 2:
> 1. The defendant performed a sex act with K.S.
> 2. The defendant performed the sex act while K.S. was under [twelve] years of age.
> If the State has proved both of the elements, the defendant is guilty of Sexual Abuse in the Second Degree under Count 2. If the State has failed to prove either one of the elements, the defendant is not guilty of Sexual Abuse in the Second Degree under Count 2.

The court also gave the jury an instruction, Instruction No. 9, that joined several standard instructions explaining various issues pertinent to sexual abuse cases. The instruction stated in part:

> The State must prove that B.G. and K.S. were under [twelve] years of age at the time of the defendant's act. The defendant's ignorance of B.G.'s and K.S.'s age or a belief that they were older is no defense to the crime charged. The State does not have to prove the specific date on which the crime occurred. *The State must prove that the crime occurred and that the victim was less than [twenty-eight] years of age on July 9, 2008.*[1]

[1] We assume the last sentence is a reference to the applicable statute of limitations. Iowa Code section 802.2(1) permits the filing of a trial information charging sexual abuse in the second degree for acts against a person under the age of eighteen within ten years after the victim turns age eighteen. The date of July 9, 2008 does not

(Emphasis added.)

Garnica claims that when read together, the instructions are a confusing and contradictory misstatement of the law that prejudiced his ability to receive a fair trial. He argues the instructions provided the jury with two conflicting versions of what the State was required to prove to establish Garnica's guilt under Count 2. He asserts his counsel was ineffective for failing to object Instructions Nos. 8 and 9.

To establish a claim of ineffective assistance of counsel, Garnica must show by a preponderance of the evidence that (1) counsel's performance fell outside the normal range of competency and (2) the deficient performance so prejudiced the defense as to deprive the criminal defendant of a fair trial. *Thompson v. State*, 492 N.W.2d 410, 413 (Iowa 1992). We may dispose of an ineffective-assistance-of-counsel claim if the applicant fails to meet either the breach of duty or the prejudice prong. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 699 (1984). In order to show prejudice, Garnica must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Garnica agrees that marshalling Instruction No. 8 correctly states the law, but contends the instructions are confusing when Instruction Nos. 8 and 9 are

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relate to either B.G.'s or K.S.'s birth dates. It appears the district court used the filing of the complaint as the relevant date for the statute of limitations determination in the jury instruction. Although not a part of the record before us, the State states a criminal complaint was filed by the Davenport Police Department on July 9, 2008. This is consistent with the fact that the arrest warrant for Garnica, a part of the record before us, is dated July 9, 2008.

read together. Citing to the sentence in instruction 9 that reads: "The State must prove that the crime occurred and that the victim was less than twenty-eight years of age on July 9, 2008[,]" he speculates that a jury would wonder if the State had to prove whether K.S. was under the age of twelve, or whether she was under the age of twenty-eight, or whether the sex acts occurred before July 9, 2008, in order for the State to obtain a conviction. We disagree. "An instruction is not confusing if a full and fair reading of all of the instructions leads to the inevitable conclusion that the jury could not have misapprehended the issue presented by the challenged instruction." *Moser v. Stallings*, 387 N.W.2d 599, 605 (Iowa 1986). The jury had nothing to wonder about.

The jury was informed twice, once in Instruction No. 8 and once in Instruction No. 9, that the State had to prove K.S. was under twelve years of age at the time of Garnica's sex acts. K.S. testified at trial Garnica's sex acts occurred when she was ten and eleven years old. Trial was held in January 2009. K.S. testified she was then seventeen years old. It would not have taken any mathematical gymnastics to determine K.S. was under age twenty-eight in July 2008. Nor would it have taken a calculator to figure out Garnica's sex acts occurred prior to July 9, 2008. Garnica's claims about the effect on the jury are speculative and, we think, without merit. We conclude the court's superfluous reference to July 9, 2008, was not confusing. We doubt the outcome of the trial would have been different and the sentence in question not been submitted to the jury. Thus, no prejudice resulted. *See State v. Maxwell*, 743 N.W.2d 185, 197 (Iowa 2008) ("When the submission of a superfluous jury instruction does not give rise to a reasonable probability the outcome of the proceeding would have

been different had counsel not erred, in the context of an ineffective-assistance-of-counsel claim, no prejudice results.”).

Garnica additionally states the instruction misstates the law. Although the court’s reference to July 9, 2008, was in error, an error in giving a jury instruction “does not merit reversal unless it results in prejudice to the defendant.” *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). “Prejudice results when the trial court’s instruction *materially* misstates the law . . . .” *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000) (emphasis added). In the context of this case, we find no material misstatement of the law. In any event, Garnica’s ineffective-assistance-of-counsel claim is not to be reviewed on the basis of whether the claimed error would have required reversal if it had been preserved at trial. *Maxwell*, 743 N.W.2d at 196. Garnica “must demonstrate a breach of an essential duty and prejudice.” *Id.* “‘[T]he instruction complained of [must be] of such a nature that the resulting conviction violate[s] due process.’” *Id.* (quoting *State v. Hill*, 449 N.W.2d 626, 629 (Iowa 1989)). Submission of the reference to an erroneous date, apparently related to the statute of limitations, did not give rise to a reasonable probability the outcome of the trial would have been different had counsel objected, and we doubt the complained of language in the instruction had any effect on the jury’s decision. Again, no prejudice resulted.

Accordingly, Garnica failed to establish the prejudice prong of the *Strickland* test. Therefore, he failed to prove his ineffective-assistance-of-counsel claim.

***III. Lifetime Parole*.**

Garnica claims the district court imposed an illegal sentence when it imposed a special sentence of lifetime parole on acts that occurred before July 1, 2005, the effective date of Iowa Code section 903B.1 (2005 Supp.). Alternatively, he claims his trial counsel was ineffective for failing to challenge the special sentence.

Section 903B.1 provides that under certain circumstances, in addition to the regular sentence under chapter 709, a person will be sentenced "to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life, with eligibility for parole as provided in chapter 906." Section 903B.1 went into effect on July 1, 2005. Garnica was found guilty of conduct that occurred before September 2003.

The *ex post facto* clauses of the federal and Iowa constitutions "forbid the application of a new punitive measure to conduct already committed." *State v. Corwin*, 616 N.W.2d 600, 601 (Iowa 2000). *Ex post facto* clauses are "violated when a statute makes more burdensome the punishment for a crime after its commission." *Id.* The *ex post facto* prohibitions apply only to criminal penalties. *State v. Seering*, 701 N.W.2d 655, 667 (Iowa 2005).

We then must consider whether the legislature intended the statute to be punitive in nature. *Id.* Punitive statutes serve not only a remedial purpose, but accomplish the goals of retribution and deterrence. *Corwin*, 616 N.W.2d at 602. The United States Supreme Court has noted, "parole is an established variation on imprisonment of convicted criminals." *Samson v. California*, 547 U.S. 843, 850, 126 S. Ct. 2193, 2198, 165 L. Ed. 2d 250, 258 (2006) (citation omitted).

Also, “parolees are on the ‘continuum’ of state-imposed punishments.” *Id.* We conclude section 903B.1 is punitive in nature. Therefore, imposition of the provisions of section 903B.1 under the facts of this case would violate the *ex post facto* clauses of the federal and Iowa constitutions. We note that in its appellate brief the State has agreed with this conclusion and agrees the lifetime portion of Garnica’s sentence pursuant to section 903B.1 should be vacated.

We determine that portion of Garnica’s sentence which committed Garnica to lifetime parole under section 903B.1 should be vacated and we remand for entry of a corrected judgment entry.

***IV. Conclusion*.**

We affirm Garnica’s conviction and sentence, but vacate that portion of the sentence which imposed lifetime parole under section 903B.1. We remand for a new judgment entry.

CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED FOR RESENTENCING.