

IN THE COURT OF APPEALS OF IOWA

No. 9-146 / 08-0275
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH WADE BOOSE, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, Stephen P. Carroll,
Judge.

Joseph Wade Boose, Jr. appeals from his conviction of first-degree
murder. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney
General, Kasey E. Wadding, County Attorney, and Jill S. Dashner, Assistant
County Attorney, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

EISENHAUER, J.

Joseph Wade Boose, Jr. appeals from his conviction of first-degree murder in violation of Iowa Code section 707.2 (2001). He contends his trial counsel was ineffective in several respects. Because there is an insufficient record to resolve his claims on direct appeal, we preserve them for possible postconviction relief proceedings and affirm.

I. Background Facts and Proceedings. Boose was at the home of his girlfriend, Elizabeth Freeman, on April 4, 2001. Freeman had gone to sleep at approximately 10 p.m. while Boose stayed up and watched a movie. Sometime later, Boose awakened Freeman to tell her that her fifteen-month-old daughter, Emily, was not breathing.

When Freeman went into Emily's bedroom, she discovered Emily in the throes of a seizure and placed her on the floor. Freeman called 911 while Boose performed CPR at the dispatcher's instruction. When law enforcement arrived, Boose was hiding in a closet. When asked if she had performed CPR on Emily, Freeman stated she had not, but a friend had.

Boose was located hiding in the closet. There was a protective order in place prohibiting contact between Boose and Freeman, which law enforcement confirmed. Boose told a law enforcement officer that he had heard Emily coughing or choking and went in to her bedroom to discover her lying on her belly. At other times, Boose stated that Emily was lying on her side or moving around.

Emily was transported to the hospital, where Dr. Rathe examined her. At the time, Emily was still having seizures, was stiff, but was breathing on her own. She did not have bruises or any signs of infection. Dr. Rathe deduced a problem with Emily's brain. A CT scan was normal.

Emily was then transported to University Hospital. She was still breathing on her own, but was unconscious. Dr. Edens believed she had suffered some type of severe brain injury. Although Emily did not have a skull fracture, trauma could not be eliminated as a cause of her injury. Dr. Edens believed Emily's injury was similar to that of people who drown, and was concerned Emily had suffocated.

Dr. Afifi, a neurologist, examined Emily and concluded there was ongoing damage to the brain of an unknown origin. An MRI showed findings consistent with a decreased amount of oxygen to the brain. A CT scan showed a very marked decrease of oxygen to the brain.

On April 7, 2001, Freeman made the decision to remove Emily from life support and Emily died. An autopsy confirmed that Emily's brain had been deprived of oxygen. The cause of death was listed as anoxic encephalopathy, or the deprivation of oxygen to the brain, due to an undetermined cause. The investigation into the cause of Emily's death was suspended.

In December of 2003, Boose was being released from the Black Hawk County Jail. However, he refused to change his clothes and insisted upon staying in jail. When Sergeant Wessels entered the changing room, Boose told him that he had killed someone. He stated that he had entered Emily's bedroom

and put his hand over her mouth and suffocated her. He then stated that he waited a while before telling Freeman something was wrong with Emily.

Boose was transported to an interview room where he gave a recorded interview and provided a written statement. He stated that he took his “frustrations out on Emily” by suffocating Emily until she stopped breathing and then placed her back in her crib. Boose admitted to having done this thirty to forty times over the course of his relationship with Freeman. However, on the night in question, Boose returned to Emily’s bedroom to suffocate her a second time and discovered she was not breathing. He woke up Freeman, who called 911.

Following Boose’s confession, the cause of death on the autopsy report was amended to list anoxic encephalopathy due to smothering. The manner of death was listed as homicide. Boose’s confession was considered in making the determination of the manner and cause of death.

Following a jury trial, Boose was convicted of first-degree murder. Boose was sentenced to prison for life.

II. Analysis. We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct.

2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must show counsel's performance fell below an objective standard of reasonableness so that counsel failed to fulfill the adversarial role that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark*, 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001).

Additionally, our courts have ruled that trial strategy, miscalculated tactics, mistake, or inexperience do not constitute ineffective assistance. *Id.* at 143. We may dispose of the defendant's ineffective assistance claims under either prong. *Id.* In order to prove the prejudice prong, the defendant must show a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)).

Boose first contends counsel was ineffective in failing to move the district court to enter judgment of acquittal on the grounds the State failed to present any evidence to corroborate his confession and to prove he had custody or control of the child. For his motion for judgment of acquittal, counsel contended the State failed to present evidence of specific intent to kill the child. He did not raise the issues urged in this appeal.

Boose also contends his trial counsel was ineffective in failing to object to the jury instructions. He argues counsel failed to make a proper objection to the court's preliminary instruction that the diminished capacity defense only applied to the first-degree murder alternative and to object to the jury instruction precluding application of the defense to the assault alternative. He also argues counsel was ineffective in failing to request the jury instruction regarding corroboration of his confession.

We prefer to leave these ineffective-assistance-of-counsel claims for postconviction relief proceedings. See *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). “[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims.” *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). As no record has yet been made before the trial court on these issues, trial counsel has not been given an opportunity to explain his actions, and the trial court has not ruled on these claims, we pass these issues in this direct appeal and preserve them for a

possible postconviction proceeding. See *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

AFFIRMED.