

**IN THE COURT OF APPEALS OF IOWA**

No. 9-331 / 08-1196  
Filed July 2, 2009

**BRETT ANDERSON,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,  
Judge.

Brett Anderson appeals the district court's ruling denying his applications  
for postconviction relief. **AFFIRMED.**

Kevin Hobbs, West Des Moines, for appellant.

Brett Anderson, Clarinda, pro se

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Jeffrey Noble, Assistant County  
Attorney, for appellee State.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

**VOGEL, J.**

Brett Anderson appeals the district court's denial of his application for postconviction relief. He claims his conviction should have been reversed and the case should have been remanded for a new trial.<sup>1</sup> We affirm.

After waiving his right to be tried by a jury and entering into a pre-trial stipulation, Anderson was convicted on four counts of sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3 (2003). The convictions were based primarily on taped testimony of the children who accused Anderson, and their accounts regarding nights spent at his house. Each child recounted a similar story about Anderson having sexual or indecent contact with them. Anderson's convictions were affirmed on appeal. *State v. Anderson*, No. 08-1196 (Iowa Ct. App. Nov. 23, 2005). Following a postconviction hearing, the district court denied Anderson's application for relief and he now appeals, raising claims of ineffective assistance of both his trial and appellate counsel.

**I. Scope of Review**

Our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In order to succeed on a claim of ineffective assistance of counsel, Anderson must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

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<sup>1</sup> The issues Anderson raises in his pro se brief are subsumed in the issues raised by his appellate counsel.

have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id.* A claimant must also overcome a strong presumption of counsel's competence. *Collins v. State*, 588 N.W.2d 399, 402 (Iowa 1998). The ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. *Id.*

## **II. Objections to Statements**

Anderson first asserts his trial counsel was ineffective for failing to make hearsay and confrontation clause objections to one of the children's statements. "An out-of-court statement by a witness that is testimonial in nature is barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *State v. Musser*, 721 N.W.2d 734, 753 (Iowa 2006). Generally, a stipulation to the admission of testimony at trial constitutes a waiver of any objection to the testimony raised prior to trial. *State v. Brown*, 656 N.W.2d 355, 360 (Iowa 2003).

In a videotaped interview of the children, one child, N.P., testified that he had been warned by another child, R.M., not to go to Anderson's home, as Anderson had inappropriately touched R.M. Anderson claims that his counsel was ineffective for not objecting to the admission of this videotaped evidence, as it was hearsay and did not allow him a chance for cross-examination. However, Anderson stipulated prior to trial that the videotaped evidence could be used. His defense counsel testified that the stipulation was part of his trial strategy, in that it

was his theory that one of his accusers planted suggestions in the minds of the other accusers.

#### Ineffective-assistance-of-counsel claims

involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment.

*Ledezma*, 626 N.W.2d at 143. Anderson's counsel stated that the videotapes were used in lieu of live testimony because it would be less prejudicial to Anderson, and he thought he could exploit the conflicts in the children's differing versions of events. Anderson stated that he agreed with counsel to have the videotapes used as testimony. Based on trial counsel's articulated strategy and Anderson's acceptance of that strategy in his pre-trial stipulation, we find that counsel did not breach an essential duty.

### **III. Jury Trial**

Anderson next claims his trial counsel was ineffective for erroneously advising him to waive his right to a jury trial, and the right to confront his accusers.<sup>2</sup> In order to waive a trial by jury, a defendant must make a knowing, voluntary, and intelligent decision to do so, both by written waiver and on the record. Iowa R. Crim. P. 2.17(1).

Prior to trial, defense counsel stated on the record that Anderson chose to waive his right to a jury trial, and Anderson confirmed this decision. The court then addressed Anderson, and fully advised him of the rights he would be waiving should he persist in his waiver of a jury trial. To each inquiry by the

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<sup>2</sup> For the reasons cited above, we affirm the postconviction court's conclusion this was a reasonable trial strategy.

court, Anderson indicated he understood the rights encompassed in a jury trial and that he wished to waive those rights. He did so both in writing and on the record, as required. *State v. Liddell*, 672 N.W.2d 805, 812 (Iowa 2003). The record affirmatively and convincingly refutes any claim that Anderson's waiver of a jury trial was unknowing, involuntary or unintelligent, or that his counsel inadequately represented him. Moreover, his counsel provided strategic reasons for advising Anderson to waive a trial by jury. These were acknowledged by Anderson, and included the notion that a judge would be less negatively influenced than a jury by the testimony of six young boys as to the accusations against Anderson. 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 agree with the postconviction court that Anderson has failed to establish either a breach of his counsel's duty or prejudice.

#### **IV. Failure to Object to Cross-Examination**

Anderson next claims his trial counsel was ineffective for failing to object to part of the State's cross-examination of him, as being beyond the scope of direct examination. He also claims his appellate counsel was ineffective in failing to raise this issue on direct appeal. Anderson specifically asserts that prior to being charged with a crime, one of the children accusing him placed a "cold call" to him while being taped by the police. During cross-examination, the State questioned Anderson about this phone call and a follow-up police interview.

Generally speaking, "when the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted

to mere parts which constitute a unity, or to the specific facts developed by the direct examination.” *State v. Damme*, 522 N.W.2d 321, 325 (Iowa Ct. App. 1994). During direct examination, Anderson was questioned and denied any sexual conduct with the boys. On cross-examination, the State asked questions regarding the “cold call.” Although Anderson said nothing incriminating during the call, he later revealed to the police that the child had accused him of specific acts. These specific acts were not revealed to Anderson during the phone call; he disclosed this information during the subsequent police interview, based on his own knowledge. The district court determined that the line of questioning regarding the cold call was used as a follow-up to Anderson’s general denial of the sexual contact. We agree that these questions did not exceed the scope of direct examination. Counsel was therefore not ineffective for failing to lodge any objections to the questions. Moreover, as the postconviction court found, Anderson asserted no legal or factual basis to challenge the cross-examination. As such, appellate counsel was not ineffective for failing to raise this argument on appeal.

#### **IV. Failing to Challenge Cross-Examination of Motive**

Anderson next asserts his appellate counsel was ineffective for failing to challenge the trial court’s ruling allowing the State to ask Anderson to speculate as to the motives of his accusers, thereby seeming to shift the burden of proof to him. Prior to filing the direct appeal, appellate counsel spoke with Anderson. As appellate counsel recalled, he chose not to raise this as an issue. With very little record of this in the postconviction proceedings, we agree with the district court that Anderson has failed to show any evidence of a reasonable probability that

the outcome of this appeal would have been different had the issue been raised. Finding no prejudice, we affirm. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

We affirm the postconviction court's dismissal of Anderson's application for postconviction relief.

**AFFIRMED.**