**IN THE COURT OF APPEALS OF IOWA**

No. 9-629 / 08-1382
Filed September 17, 2009

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**JOEL ARNOLD DUVALL,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Audubon County, Charles L. Smith, Judge.

Defendant appeals his conviction and sentence for sexual exploitation by a counselor. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas Gaul, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Francine O'Brien Andersen, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**ZIMMER, S.J.**

Joel Duvall appeals from the judgment and sentence entered following his conviction and sentence for sexual exploitation by a counselor. He contends his trial counsel was ineffective for failing to challenge the propriety of the district court's questioning of a State's witness. He further contends the trial court abused its discretion by failing to ascertain if it had all the necessary information before imposing sentence and by failing to suspend his sentence. Because we find no merit in Duvall's contentions, we affirm.

**I. Background Facts and Proceedings.**

Joel Duvall, age thirty-three, was the youth pastor for the Faith Evangelical Free Church in Audubon. In this capacity he met with young people from the church to discuss issues they were dealing with. One of the members in Duvall's youth group was K.A., a sixteen-year-old girl. In the fall of 2006, K.A. sought counseling from Duvall to deal with her depression and suicidal thoughts.[1] Her need for counseling stemmed from an incident of sexual abuse which occurred when she was nine or ten years old.

On December 22, 2006, the Audubon County Sheriff, Todd Johnson, came across Duvall and K.A. parked off a gravel road near some grain bins in a rural area at about 9:00 p.m. Duvall claimed he was parked in a remote area because he was trying to get a signal on his cell phone. A few days later, Sheriff Johnson told Duvall "it wasn't smart to be out on a gravel road parked like that with a youth in his vehicle, and [he] told him to use his head." Duvall stated K.A.

[1] K.A. saw another counselor in Atlantic on one occasion after her school year started, but later sought counseling from Duvall.

was discussing family problems with him. Sheriff Johnson told Duvall he should talk to K.A.'s parents about any problems K.A. was having. Duvall replied that he would do so, but did not follow through with this promise.

About one week later, Sheriff Johnson spoke with K.A.'s father. The sheriff informed K.A.'s father that he had seen K.A. and Duvall parked in a rural area. He also made the father aware of the conversation he had with Duvall. After receiving this information, K.A.'s father told Duvall he was not to have any contact with K.A. in person, by cell phone, or by text message.

On January 23, 2007, Sheriff Johnson saw Duvall's vehicle and K.A.'s vehicle parked near each other in a secluded farm drive. At first, Johnson could not see anyone in or around the vehicles. As the sheriff came closer to Duvall's vehicle, he saw Duvall rise up from where he had been lying across the front seats. He then saw K.A. rise up from the passenger seat. The sheriff realized that Duvall had been lying on top of K.A. Duvall first claimed he was meeting with K.A. to give her something, but then both Duvall and K.A. stated Duvall was counseling her regarding an incident of sexual abuse that had occurred several years earlier. Duvall told Johnson he was giving K.A. a hug, and might have kissed her on the cheek. The sheriff called K.A.'s parents and informed them of his observations.

On March 23, 2007, Duvall and K.A. made arrangements for Duvall to come to K.A.'s house while her parents were out of town. Text messages between the two detailed their planned sexual relations. Duvall was stopped by a deputy sheriff as he was leaving K.A.'s neighborhood. Duvall initially denied being at K.A.'s house. He told the deputy he was coming from a cycle shop in

Marne. Duvall told the deputy that kids in his youth group talk to him in confidence and seek his advice and guidance. He admitted he was counseling K.A.[2] The deputy then went to K.A's residence and spoke with her. K.A. admitted that Duvall had been at her house.

An investigation by the sheriff's office uncovered text messages between Duvall and K.A. containing a strong sexual content. Duvall's cell phone contained a photograph of K.A.'s breasts, identified by a necklace she always wore. Also, Duvall sent K.A. a picture of his unclothed pelvic area. Duvall initially denied sending any text messages to K.A. with a sexual content; however, when confronted with copies of the messages, he stated he and K.A. had engaged in phone sex. Duvall admitted that he sent K.A. a picture of himself lying nude on a bed. Duvall also admitted that he had been to K.A.'s residence on March 23.

K.A. denied that she and Duvall had ever had sexual intercourse and stated that she was not sexually active. K.A. was subsequently examined at a Child Advocacy Center. The examination revealed that K.A. had a deep hymeneal tear which was consistent with sexual intercourse.

In April 2007, the State charged Duvall with sexual exploitation by a counselor, in violation of Iowa Code section 709.15(2)(a) (2007) (class "D" felony), and sexual exploitation by a counselor, in violation of section 709.15(2)(b) (aggravated misdemeanor). Duvall waived is right to a jury trial and the case proceeded to trial.

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[2] In a subsequent interview, Duvall changed his story. He claimed he was not counseling K.A. at any point in time.

After a bench trial, the district court found the State had proved all the elements of sexual exploitation by a counselor, as a Class D felony under section 709.15(2)(a). The court found Duvall had engaged in sexual conduct with K.A., and that he did so as part of a pattern, practice, or scheme. The court further found that Duvall engaged in this sexual conduct with the specific intent to satisfy his sexual desires. The court concluded Duvall was a counselor or therapist because he was providing counseling to K.A. in his role as a youth pastor. Finally, the court found K.A. was a patient or former patient, and Duvall's conduct was not part of a necessary examination or treatment. After finding Duvall guilty, the trial court scheduled a date for sentencing and ordered a presentence investigation (PSI).

At Duvall's sentencing hearing, the State recommended that Duvall be sentenced to a term of incarceration. Duvall argued that he should receive a suspended sentence. The presentence investigator recommended a suspended sentence. The court sentenced Duvall to a term of imprisonment not to exceed five years and did not suspend the sentence. Duvall appeals. He claims he received ineffective assistance of counsel and that the court abused its discretion at his sentencing.

**II. Ineffective Assistance**

Duvall contends he received ineffective assistance because his defense counsel did not object to certain questions asked by the district court. We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential

duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). A defendant's failure to prove either element is fatal to the claim. *State v. Polly*, 657 N.W.2d 211, 214 (Iowa 2008). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

Section 709.15(2) prohibits sexual exploitation by a counselor or therapist. *State v. Allen*, 565 N.W.2d 333, 337 (Iowa 1997). The terms "counselor or therapist" are defined as follows:

> [A] physician, psychologist, nurse, professional counselor, social worker, marriage or family therapist, alcohol or drug counselor, *member of the clergy*, *or any other person, whether or not licensed or registered by the state*, who provides or purports to provide mental health services.

Iowa Code § 709.15(1)(a) (emphasis added).

During the trial, Galyn Wiemers, the pastor at the church, testified concerning Duvall's role as the youth pastor. At the conclusion of Wiemers's testimony, the court asked Wiemers three questions:

> Q. I have a couple of questions. Do you consider yourself a member of the clergy? A. Because of my position, the church recognized by the elders, yes. Outside of the church?
> Q. Well, no. Do you consider yourself a member of the clergy? A. Yes.
> Q. And was Joel a member of the clergy? A. The same reason I am, yes.

Duvall claims defense counsel should have objected to the court's questions because judges should not interrogate witnesses. He argues that he was prejudiced by his counsel's performance because this testimony by Wiemers, as a result of questioning by the court, was the only evidence to

support a finding that he was a member of the clergy for purposes of section 709.15(1)(a). For the reasons which follow, we reject this assignment of error.

A district court may question witnesses, but judges are not encouraged "to enter the fray with their own interrogation of witnesses." *State v. Willet*, 305 N.W.2d 454, 457 (Iowa 1981) (quoting *State v. Cuevas*, 288 N.W.2d 525, 532-33 (Iowa 1980)). Under the circumstances present here, we find it unnecessary to decide whether or not defense counsel breached a duty by failing to object to the trial court's questions. We reach this conclusion because Duvall has not shown he was prejudiced by his counsel's performance.

The phrase "member of the clergy" is not defined in section 709.15(1)(a). "We may consult a dictionary in order to determine the ordinary meanings of words used by the legislature." *State v. Gonzalez*, 718 N.W.2d 304, 308 (Iowa 2006). The term "clergy" is defined as "persons ordained for religious service, as ministers, priests, rabbis, etc., collectively." Webster's New World Dictionary 265 (2nd ed. 1976). Whether a person is a minister is "left wholly to the recognition of the 'denomination.'" *Reutkemeier v. Nolte*, 179 Iowa 342, 346, 161 N.W. 290, 292 (1917).

As the State points out, the record is replete with evidence that Duvall was the youth minister at his church. The Faith Evangelical Free Church was associated with the Evangelical Free Organization. Under this church structure the business of the church was run by church elders, who were elected by the congregation. Wiemers testified that church elders appointed the ministry positions, and "[t]here are certain ministries that are recognized in the church, including the youth ministry." Duvall became the youth minister, and then also

became a church elder. His position was sometimes referred to as "youth pastor" or "youth leader." Before trial, Duvall consistently referred to himself as the "youth minister" or "youth pastor" of the Audubon church. Duvall conducted a funeral for the church.

Contrary to Duvall's arguments, we conclude there was an abundance of other evidence in the record that would support a finding that he was a "member of the clergy" within the meaning of section 709.15(1)(a). Moreover, we note that while the district court's bench order refers to Duvall as a member of the clergy, the court did not rely exclusively on this finding to conclude he was a "counselor or therapist." The court found Duvall "was admittedly purporting to provide mental health services to K.A., and whether or not licensed, he is a 'counselor or therapist' within the meaning of section 709.15(1)(a)." We agree. The definition of a "counselor or therapist" under section 709.15(1)(a) includes a person, "whether or not licensed or registered by the state, who provides or purports to provide mental health services." *See Gonzalez*, 718 N.W.2d at 309. Mental health services include the counseling of another person for an emotional, mental, or social dysfunction. *See* Iowa Code § 709.15(1)(d). Prior to trial, Duvall repeatedly insisted that his duties as youth pastor of the church included counseling members of the youth group about problems which affected them emotionally, including suicidal tendencies. Duvall counseled K.A. regarding her problems and she placed her trust in him. She confided in him by sharing information about her alleged molestation at age nine or ten. The prosecution proved that defendant counseled or purported to counsel K.A. during the period in which they engaged in sexual conduct.

Thus, even if defense counsel had successfully objected to the questions the district court posed to Wiemers, Duvall has not shown a reasonable probability that the result of the proceeding would have been different. *See State v. Reynolds*, 746 N.W.2d 837, 844 (Iowa 2008) (noting there is no prejudice from the admission of challenged evidence when substantially the same evidence was admitted without objection). Because Duvall has failed to demonstrate prejudice, we conclude he has failed to show he received ineffective assistance of counsel.

**III. Sentencing Issues**

Duvall asserts the district court abused its discretion by failing to determine if it had all the necessary information before imposing sentence. During the sentencing hearing, the court asked Duvall it he had anything he wanted to say, and Duvall responded that he had written a letter. The court stated it did not have a letter from Duvall in the court file. Duvall then clarified, "When I was interviewed by Mr. Roller, he had me write a statement." This exchange then occurred:

> DEFEFNSE COUNSEL: Your Honor, there's a statement in the PSI that Mr. Duvall wrote.
> COURT: Defendant's version?
> DEFENSE COUNSEL: Defendant's version, I believe, Your Honor.
> COURT: All right.

From this exchange, Duvall contends there was doubt as to whether the court had thoroughly reviewed all of the PSI. He also argues that the court abused its discretion by not suspending his five-year sentence. We find no merit in either of these contentions.

Chase Roller prepared the PSI at the direction of the court. Duvall's statement, prepared at the behest of "Mr. Roller," clearly refers to the "Defendant's Version" of the offense which is found on page ten of the PSI. At the sentencing hearing, the court states, "The court ordered a presentence investigation report. I have reviewed it." Simply put, the record does not support Duvall's contention that the district court neglected to review the PSI in its entirety. Because Duvall has failed to show any impropriety on the part of the district court, we reject this assignment of error.

We also conclude that Duvall has failed to show the district court abused its discretion in sentencing him to prison. *See State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999) (finding we review sentencing decisions for an abuse of discretion). Duvall argues that a suspended sentence with conditions of probation would serve the same purpose as a term of incarceration. He also notes that the PSI recommended a suspended sentence.

When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *State v. Sandifer*, 570 N.W.2d 256, 257 (Iowa Ct. App. 1997). The court demonstrates that it exercised discretion by stating on the record the reasons for imposing a particular sentence. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

In this case, the district court explained why it chose to impose a term of imprisonment. The court stated:

> The reason for my sentence is your need for rehabilitation and your potential for rehabilitation, the seriousness of your offense, the way in which you manipulated and took advantage of the victim. I agree with everything that the county attorney stated here.

The sentencing court was not obligated to follow the recommendation of the PSI. *State v. Taylor*, 490 N.W.2d 536, 539 (Iowa 1992). In addition, the court was not obligated to accept Duval's expression of remorse which appears in "Defendant's Version" of the PSI. We note that Duvall's claim of remorse was contradicted by the findings of a psychosexual evaluator which are included in the PSI:

> Mr. Duvall only marginally admits to his current sexual offense. He uses a great deal of blaming and justification when talking about his deviant sexual behavior. He also shows little insight into his deviant sexual arousal/preferences and his grooming techniques. All of the factors above place him at a greater risk to re-offend. As a result, I believe he poses a threat to the community . . . .

The record reveals the court relied on appropriate factors to support its sentencing decision. We find no abuse of discretion in the court's decision to incarcerate Duvall.

Because we find no merit in Duvall's appellate claims, we affirm his conviction and sentence.

**AFFIRMED.**