

IN THE COURT OF APPEALS OF IOWA

No. 9-748 / 08-1956
Filed October 21, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CONNIE SUE WRIGHT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Colin J. Witt, District Associate Judge.

Connie Wright appeals from the judgment and conviction entered on the charge of operating a child care center without a license. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Adams, Assistant Appellate Defender, and Sean C. Beaver, student intern, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Olubunmi Salami, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield, J., and Huitink, S.J.*

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

POTTERFIELD, J.**I. Background Facts and Proceedings**

In 2005, Connie Wright registered her home with the Iowa Department of Human Services (DHS) as a category A child development home. This registration allowed her to provide child care to a maximum of eight children.¹ Iowa Admin. Code r. 441-110.8. On April 17, 2007, DHS completed a spot check at Wright's home and found that she had fourteen children in her care. Another spot check on May 8, 2007, revealed Wright had thirteen children in her care. Accordingly, on May 18, 2007, DHS sent a letter to Wright revoking her registration. Wright was allowed to continue to operate her category A child development home until a final decision was rendered on appeal. The revocation was affirmed in a decision dated July 17, 2007. DHS sent a letter to Wright on August 1, 2007, informing Wright that the revocation of her registration had been upheld on appeal and she was to discontinue all child care services as a registered child development home.²

In February and March of 2008, DHS received two complaints about the number of children in Wright's care. Bill Dickey, a child protective worker with DHS, went to Wright's house three times to talk to her about whether she was operating a daycare. On his third attempt, on March 18, 2008, Dickey went to Wright's home accompanied by a police officer.

¹ Of these eight children, only six could be in daycare all day. Iowa Admin. Code r. 441-110.8. Two of the children had to be school-aged children who were in daycare for less than two hours at a time. *Id.*

² Wright asserted that she did not receive this letter.

There is conflicting testimony as to the number of children in Wright's home when Dickey arrived. Dickey and the police officer who assisted him both testified that when they arrived at Wright's home, there were twenty-one children and two adults inside. Dickey testified that the other adult, Shelby Burns, identified three of the children as her own. Wright testified that when Dickey arrived, there were sixteen children in her house—ten children in her care and six children in the care of Shelby Burns.

Wright was charged with operating a child care center without a license in violation of Iowa Code sections 237A.2(1) and 237A.19(1) (2007). After a two-day trial, a jury found Wright guilty. Wright appeals, arguing her counsel was ineffective for failing to: (1) argue in the motion for judgment of acquittal that there was insufficient evidence that her child care business fit the statutory definition of "child care center"; (2) object to testimony and exhibits that were unfairly prejudicial; and (3) object to the prosecutor's inflammatory and misleading comments.

II. Standard of Review

Because Wright asserts a constitutional violation, we review the totality of the circumstances *de novo*. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

III. Ineffective Assistance of Counsel

In order to prove her counsel was ineffective, Wright must show that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id.* In order to establish the first prong of the test, Wright must show that her counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). In evaluating counsel's

effectiveness, we require more than a showing that counsel's strategy failed. *Taylor*, 352 N.W.2d at 684. In addition, there is a strong presumption that counsel performed competently. *Id.* To satisfy the second prong, prejudice, Wright "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* If we can dispose of Wright's claim under the prejudice prong, we need not evaluate her counsel's performance. *Id.* Ordinarily, we preserve ineffective-assistance-of-counsel claims for postconviction proceedings to enable full development of the record and to afford trial counsel an opportunity to respond to the claims that have been made. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). We may resolve the claim of ineffective assistance of counsel on direct appeal if we find the record is sufficient to do so. *State v. Hildebrant*, 405 N.W.2d 839, 840-41 (Iowa 1987). Upon review of the record here, we conclude the record is adequate to address the claim on direct appeal.

A. Motion for Judgment of Acquittal

Wright asserts her counsel should have argued in the motion for judgment of acquittal that there was insufficient evidence presented to show her child care business was a child care center under Iowa Code section 237A.19(1). Wright asserts that the facts instead support a violation of Iowa Code section 237A.19(3), which states that it is a simple misdemeanor to continue involvement with child care after being prohibited from doing so. The State agrees that such a charge would have been appropriate, but contends that Wright's conduct also violated section 237A.19(1), which is a serious misdemeanor. When a single act

violates more than one criminal statute, the prosecutor may exercise discretion in selecting which charge to file. *State v. Perry*, 440 N.W.2d 389, 391 (Iowa 1989).

The State chose to charge Wright with operating a child care center without a license, and was therefore required to prove: (1) Wright operated a child care center (as distinguished from a child care home or a child development home); and (2) Wright did not have a license to do so. Iowa Code § 237A.19(1). It was undisputed that Wright did not have a license to operate a child care center. A “child care center” is defined as a “facility providing child care . . . for seven or more children, except when the facility is registered as a child development home.” Iowa Code § 237A.1(4). Wright’s home was not registered as a child development home on March 18, 2008, and the State presented ample evidence that she was providing care for seven or more children.

The jury’s findings of guilt are binding on appeal if supported by substantial evidence. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* The State presented substantial evidence that Wright was guilty of the crime with which she was charged, and her counsel breached no duty in failing to make a meritless argument in the motion for judgment of acquittal.³

³ Further, Wright’s counsel made the argument at issue multiple times, including in his motion for adjudication of law points, motion for new trial and in arrest of judgment, and his renewal of these motions at sentencing.

B. Unfairly Prejudicial Testimony

Wright argues her counsel was ineffective for failing to object to testimony by Kristy Kanth-Singh related to sanitary conditions in Wright's home and for failing to object to two photographic exhibits that also depicted conditions in the home. Kanth-Singh testified that Wright had no furniture at her house and that when she arrived at Wright's house, she found her son wearing only his diaper because he had thoroughly soiled his outfit while sitting on the floor, eating lasagna. The photographs depict three infants in Wright's home and primarily serve to show the conditions of the home.

The inquiry whether evidence is admissible under Iowa Rules of Evidence 5.402 and 5.403 involves a two-step inquiry: first, is the evidence relevant? If so, is its probative value substantially outweighed by the danger of prejudice or confusion? Evidence is relevant if it has a tendency to make a consequential fact more or less probable than it would be without the evidence. Iowa R. Evid. 5.401; *McClure v. Walgreen Co.*, 613 N.W.2d 225, 235 (Iowa 2000). Even relevant evidence, however, is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403.

While we agree with Wright that Kanth-Singh's testimony and the photographic exhibits regarding the conditions of Wright's home were not relevant to the charge of operating a child care center without a license, we find Wright cannot prove she was prejudiced by counsel's failure to object to such evidence.⁴ Given the strength of the State's evidence against her, Wright cannot

⁴ Counsel objected to the relevancy of some of the testimony at issue, and his objection was overruled.

show there is a reasonable probability that the results of the proceeding would have been different had her counsel objected to Kanth-Singh's testimony and the exhibits at issue. The State presented substantial evidence that Wright was operating a child care center and that she was not licensed to do so.

C. Prosecutorial Misconduct

Wright argues her counsel was ineffective for failing to object to the prosecutor's inflammatory and misleading comments in closing argument, which she argues violated her due process right to a fair trial. Wright takes issue with the prosecutor's statements emphasizing the conditions of the house, the vulnerability of children, and Wright's breach of the parents' trust. Wright asserts these inflammatory remarks were intended to incite the passions of the jury. We agree that the prosecutor's argument was unnecessarily inflammatory.

To prevail on her claim of prosecutorial misconduct, Wright must prove that misconduct occurred and that she was so prejudiced by the prosecutor's misconduct that she was denied a fair trial. *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). In determining whether Wright was prejudiced by the prosecutor's misconduct, we are to consider:

(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct.

State v. Graves, 668 N.W.2d 860, 877 (Iowa 2003). After evaluating these factors, we believe the strength of the State's evidence outweighed any possible impact of the prosecutor's inflammatory statements. Without the prosecutor's inappropriate statements, the State presented ample evidence for the jury to

reach its guilty verdict. Wright cannot prove that she was denied a fair trial as a result of the prosecutor's statements, and, therefore, cannot prove prejudice sufficient to sustain her ineffective assistance claim.

Wright also asserts the prosecutor improperly stated the law and mischaracterized the jury instructions given by the district court. The prosecutor stated twice that all he had to prove was that Wright had seven or more children in the house. Wright asserts this was an inaccurate statement of the law and constituted prosecutorial misconduct that violated her due process right to a fair trial. The prosecutor's statements properly stated the law. A "child care center" is defined as a "facility providing child care . . . for seven or more children, except when the facility is registered as a child development home." Iowa Code § 237A.1(4). Wright's home was not registered as a child development home during the time in which the current charges arose. Thus, Wright's home did not fit within the exception to the definition of child care center. Therefore, under the relevant statute, the State had the burden to prove Wright was providing child care for seven or more children. The prosecutor's statements correctly stated the law as it applied in this case. Therefore, Wright's claim that her counsel should have objected to the prosecutor's allegedly misleading statements fails.

AFFIRMED.