IN THE COURT OF APPEALS OF IOWA

No. 1-420 / 10-1287
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHRISTOPHER GEORGE PAULSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Kossuth County, Duane Hoffmeyer, Judge.

Christopher Paulsen appeals from his convictions of sexual abuse in the third degree and assault with intent to commit sexual abuse. **REVERSED AND REMANDED FOR NEW TRIAL.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Todd Holmes, County Attorney, and Stephanie Nielson, Assistant County Attorney, for appellee.

Heard by Eisenhauer, P.J., and Doyle and Tabor, JJ.

TABOR, J.,

This appeal requires us to decide whether the State presented sufficient evidence to convict Christopher Paulsen of sexual abuse in the third degree and assault with intent to commit sexual abuse. We also must determine whether Paulsen's allegations of ineffective assistance of counsel warrant the grant of a new trial.

Viewing the evidence in the light most favorable to the verdict, we believe a reasonable jury could accept the testimony of Paulsen's stepdaughter, D.D., and find him guilty of sexual abuse in the third degree. On the count of assault with intent to commit sexual abuse, we do not find sufficient proof of Paulsen's intent to commit a sex act with his stepdaughter's friend, C.P.

Regarding Paulsen's contention that his trial counsel's performance was subpar, we conclude counsel's failure to object to impermissible opinion evidence fell below the normal range of competency and resulted in prejudice to his client. On this ground, we reverse and remand for a new trial on the offense of sexual abuse in the third degree and the offense of assault. We decline to reach the remaining issues because we are uncertain whether they will arise in their same form during the retrial proceedings.

I. Background Facts and Procedures

At the time of trial, Cara and Christopher Paulsen (hereinafter Paulsen) had been married for about seven years. D.D., Cara's child from a previous marriage, lived primarily with her mother and stepfather. Paulsen stayed home

to care for the couple's three children while Cara worked nights as a registered nurse.

The allegations against Paulsen surfaced in late January 2009, following D.D.'s thirteenth birthday party. After the party, D.D. and three of her friends returned to D.D.'s house. Cara and Paulsen got into an argument and left the girls at home by themselves. The girls speculated as to why the couple was fighting, and one of D.D.'s friends, C.P., took the occasion to tell D.D. that Paulsen had touched her inappropriately. C.P. told D.D. that the incident occurred after the homecoming football game in October 2008, when C.P. and one or two other friends spent the night at D.D.'s house. D.D. and C.P. slept on an air mattress in front of the television in the family's living room. Another friend slept on a couch nearby. Paulsen had gone to the bar that night and, upon returning home, told his wife he was going to stay up to watch television. Paulsen sat in front of the television on the air mattress in between the two girls. He eventually fell asleep, fully clothed.

C.P. testified that when she woke up the next morning, Paulsen was rubbing her back and stomach, touching her skin. To stop Paulsen from touching her, C.P. rolled over and got up to go to the bathroom. She testified that she believed Paulsen would have moved his hand up to her breasts if she would not have moved. When C.P. returned from the bathroom, Paulsen was in the kitchen. Nothing was said about the incident and the rest of the day passed normally.

D.D. responded by telling her friends that Paulsen had been "doing that stuff" to her. D.D. told her friends that her stepfather would regularly come into her room in the middle of the night and touch her inappropriately. D.D. testified that the abuse began when she was three or four years old. D.D. recalled Paulsen coming into her room sometime in October 2008. D.D. testified that when her mother worked nights, her stepfather would come into her room after going to the bar; she estimated this happened once or twice a week. At trial, D.D. testified Paulsen used his hands and "male parts" to rub her "breasts and vaginal area." D.D. testified Paulsen never penetrated her and stated that she did not know if Paulsen ever ejaculated. D.D. also testified Paulsen once came to her room and showed her pornography on a laptop computer. She stated that when Paulsen abused her, he would sometimes ask her "don't you wish I was some guy in [your] class." D.D. stated the abuse would usually stop when Paulsen "g[o]t tired of [D.D.] pushing him away."

Cara and Paulsen returned home late the night of the birthday party, but did not find out about the allegations until the next day. One of D.D.'s friends posted information online to the effect of "my friend's stepdad is a child molester." The friend's mother discovered this message and notified Cara. Cara did not believe D.D. but she asked her husband to stay with her mother until the issue was resolved.

After D.D.'s biological father contacted the police, Iowa Department of Human Services child protective worker Todd Van Otterloo and Kossuth County Sheriff's Deputy Charles Robinson interviewed both D.D. and C.P. D.D. also

visited the Mercy Child Advocacy Center in Sioux City where Sexual Assault Nurse Examiner Karin Ward examined her and social worker Sherrie Schweder interviewed her. Ward testified that D.D.'s examination was normal, adding that even in cases in which full penetration has occurred, most examinations are normal. Both Robinson and Schweder videotaped their interviews.

On March 27, 2009, the State filed a trial information against Paulsen, charging: (Count I) sexual abuse in the third degree against D.D. in September 2008; (Count II) sexual abuse in the third degree against D.D. in October 2008; and (Count III) assault with the intent to commit sexual abuse against C.P.

Trial began on March 9, 2010. Both D.D. and C.P. testified. In addition, the State admitted D.D.'s two videotaped interviews and C.P.'s one videotaped interview, in their entirety, without objection. Robinson, Van Otterloo, Ward and Schweder also testified for the State, explaining their involvement and recounting what D.D. and C.P. had told them.

Cara, D.D's aunt, D.D.'s maternal grandmother, D.D.'s uncle, and a family friend testified on behalf of Paulsen. Cara testified that D.D. often lied. D.D.'s aunt also opined that D.D. was not trustworthy. D.D.'s grandmother also told the jury D.D. often lied and testified to her son-in-law's good and honest character. Paulsen took the stand in his own defense, denying any sexual contact with D.D. Paulsen did not admit to knowingly touching C.P., but did acknowledge calling C.P. to apologize if any "inadvertent hand placement" may have occurred while he was asleep. Paulsen moved for judgment of acquittal on all counts. Pursuant to Iowa Rule of Criminal Procedure 2.19(8), the court reserved its ruling on the

motions for a later date. After a three-day trial, the jury found Paulsen guilty on all counts.

On April 7, 2010, Paulsen filed a motion for a new trial and a motion in arrest of judgment. After retaining new counsel, Paulsen filed a supplement to his motion for new trial and a supporting brief. The State resisted. On August 3, 2010, the court held a combined hearing for post-trial motions and sentencing. The court granted Paulsen's motion for acquittal on Count I but denied the remainder of his requests. The district court sentenced Paulsen to indeterminate ten- and two-year sentences, to run consecutively, and life-time parole. Paulsen filed a notice of appeal on August 6, 2010.

II. Analysis

A. Sufficiency of the Evidence

1. Scope and Standard of Review

We review sufficiency-of-evidence claims for errors at law. *State v. Leckington*, 713 N.W.2d 218, 221 (Iowa 2006). "The jury's findings of guilt are binding on appeal if supported by substantial evidence." *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). "Substantial evidence is evidence that could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt." *Id*. In determining whether there is substantial evidence, we view the record in a light most favorable to the State, including all legitimate inferences that may fairly and reasonably be deduced from the evidence. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005).

2. Count II—Sexual Abuse in the Third Degree

Paulsen asserts the evidence is insufficient to support his conviction for sexual abuse in the third degree pursuant to Iowa Code section 709.4(2)(b) (2007), which required the jury to find: (1) between October 1, 2008, and October 31, 2008, Paulsen performed a sex act with D.D., and (2) he performed the sex act while D.D. was under the age of fourteen. Paulsen argues D.D.'s statements were the only evidence supporting his conviction and her statements were inconsistent and self-contradictory.

Paulsen first questions the circumstances under which D.D. revealed that he abused her, finding it unusual that D.D. told her friends but did not promptly tell her mother. Paulsen next challenges D.D.'s account of the abuse, citing varying details of the abuse emerging in her interviews with Deputy Robinson, nurse Ward, and interviewer Schweder. Paulsen also points to discrepancies in D.D.'s recollection of when the abuse started and stopped.

Credibility of witnesses is generally left to the jury. *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997). "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). But when a witness's testimony is impossible, absurd, and self-contradictory, the court should deem it a nullity. *Mitchell*, 568 N.W.2d at 503.

Paulsen cites *State v. Smith*, 508 N.W.2d 101 (Iowa Ct. App. 1993), to support his argument that D.D.'s testimony was insufficient to support his conviction. In *Smith*, the jury convicted the defendant based solely upon the

testimony of his three minor stepdaughters. *Smith*, 508 N.W.2d at 103. The girls contradicted themselves regarding both the location and the number of times the defendant abused them. *Id*. at 104. When asked to recount details, the girls responded, "I don't know" to almost all of the questions and one girl's responses frequently began with "probably . . ." or "might have been . . . ." *Id*. The girls described incidents of abuse that occurred while in the presence of others, including one occasion during a birthday party while at least fifteen people were in the same room. *Id*. In addition, a medical examination of one of the girls revealed no physical evidence of abuse though she claimed the defendant had hurt her. *Id*. We reversed the defendant's convictions for sexual abuse and assault because "when read separately or together, the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and, at times, border on the absurd." *Id*. at 103.

In *Mitchell*, our supreme court again considered a challenge to a victim's testimony. 568 N.W.2d at 503-04. The court noted that

> [e]xcept for several omissions from the several lengthy recountings about the many misdeeds done to her, [the victim] never wavered from her accusation against Mitchell. [The victim] was somewhat inconsistent with her story about how she was abused by Mitchell, but she never changed the operative fact that she and Mitchell had sexual intercourse.

Id. at 503. The *Mitchell* court also emphasized that, unlike the girls' testimony in *Smith*, there was corroboration of the victim's testimony. *Id*. at 504.

As an initial matter, we conclude that a rational jury could choose to believe D.D. despite her reluctance to report the abuse to her mother. D.D. testified she did not tell her mother sooner because she did not want to upset her

mother and cause her to experience another difficult romantic split. This testimony explains not only why D.D. felt more comfortable reporting the abuse to her friends than to her mother but also why D.D. did not tell her mother immediately when her mother returned home on the night of D.D.'s birthday. Furthermore, D.D. planned to tell her mother the next day after her friends had left. It is understandable that D.D. was not eager to report the abuse to Cara. We find that a jury could reasonably conclude D.D.'s delay in reporting the abuse did not undermine her credibility.

We also do not find the discrepancies in D.D.'s testimony significant enough to overturn the jury's verdict. Although no evidence directly corroborates D.D.'s account, a sex abuse victim's accusations do not require corroboration to uphold a verdict. *See* Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of victims shall not be required."); *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). During each of the five times D.D. recounted the story of Paulsen's abuse, her telling was specific and fundamentally consistent. Like the victim in *Mitchell*, D.D. never changed the operative fact that Paulsen inappropriately touched her vaginal area and breasts. When Robinson first questioned D.D., she was not familiar with the word ejaculation, which may explain the inconsistencies in her statements regarding this aspect of the abuse. The other inconsistencies regarding the abuse and the dates on which the abuse occurred may be attributed to D.D.'s age and the length of time the abuse occurred. Unlike the girls in *Smith*, D.D.'s testimony did not "border on the absurd." Rather, D.D.'s testimony that Paulsen repeatedly

abused her after coming home late from the bar on nights when her mother was at work is conceivable.

Viewing all of the evidence in this record in the light most favorable to the State, a rational jury could have found proof beyond a reasonable doubt Paulsen committed the crime. We honor the jury's credibility assessment and conclude D.D.'s testimony was sufficient to establish Paulsen performed a sex act with her in October 2008. *See State v. Dullard*, 668 N.W.2d 585, 598 (Iowa 2003) (finding sufficient evidence based on proof presented, including evidence challenged on appeal).

3. Count III—Assault with Intent to Commit Sexual Abuse

Paulsen also challenges the sufficiency of the evidence supporting Count III, assault with intent to commit sexual abuse in violation of section 709.11. That count required the State to prove: (1) On October 10, 2008, Paulsen assaulted C.P.; and (2) he did so with the specific intent to commit a sex act against the will of C.P. Paulsen contests this conviction in two ways. He first attacks C.P.'s credibility and second contends C.P.'s testimony, even if believed, was insufficient to prove he possessed the specific intent to commit a sex act against her.

Paulsen points to minor inconsistencies in C.P.'s version of events. We do not find these inconsistencies significant enough to discredit her entire testimony. C.P.'s recollection of the sleeping arrangements for homecoming night were corroborated by the testimony of other witnesses, including Paulsen. Paulsen admitted apologizing to C.P. for what may have been "inadvertent hand

placement." Under these circumstances, credibility findings should be left to the jury. *See Mitchell*, 568 N.W.2d at 504.

But we agree with Paulsen that even C.P.'s credible testimony does not prove his specific intent to commit sexual abuse. To reasonably infer specific intent to commit sexual abuse from the defendant's outward performance, the record must reveal conduct that goes beyond mere preparation. *State v. Radeke*, 444 N.W.2d 476, 478 (Iowa 1989). In other words, a defendant's "overt act must reach far enough towards the accomplishment, toward the desired result, to amount to the commencement of the consummation." *Id*. While a fact finder may infer the defendant's intent before he commits the "last proximate act to the consummation of the offense," his conduct must be a step in the direction of the offense. *Id.*

When trying to determine if the defendant had the requisite sexual intent, courts have looked to

> a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a desire to engage in sexual activity.

State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992).

> Other relevant circumstances include but are not limited to the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact.

State v. Pearson, 514 N.W.2d 452, 455 (Iowa 1994).

In this case, C.P. did not recall Paulsen making any sexual comments to her. Paulsen was fully clothed and C.P. was wearing pajamas. Paulsen did not remove any clothing or request that C.P. remove any clothing, though he did rub her back and abdomen on her bare skin. C.P. testified that D.D. also was sleeping on the air mattress when the contact occurred.

The State argues that Paulsen demonstrated his desire to engage in sexual activity with C.P. by lying with her on an air mattress, after a night of drinking, and by rubbing her abdomen and back while she was sleeping. The State also asserts that Paulsen's sexual conduct with D.D. illuminates his intent toward C.P.

The State is correct in its assertion that under certain circumstances intent to commit sexual abuse may be established by evidence of the defendant's similar sexual assault of another victim. *See Casady*, 491 N.W.2d at 788; *State v. Coen*, 382 N.W.2d 703, 708 (Iowa Ct. App. 1985). In both *Casady* and *Coen*, the appellate courts upheld convictions for assault with intent to commit sexual abuse because the defendant employed the same modus operandi for luring a victim into his car as he did in a previous completed crime of sexual abuse. *Casady,* 491 N.W.2d at 788; *Coen*, 382 N.W.2d at 704-08.

But we do not find enough symmetry between the sexual abuse alleged by his stepdaughter and his untoward touching of C.P. to infer Paulsen's specific intent from a modus operandi. Paulsen's alleged abuse of D.D. occurred in her bedroom, in private, when her mother was at work, whereas the contact with C.P. occurred in the living room while several other people, including Cara, were

nearby in the home. Moreover, D.D. did not testify that her molestation started with Paulsen rubbing her back or stomach.

C.P. testified she believed Paulsen would have touched her breasts had she not woken up and moved away from him. But the mere instinct or hunch Paulsen intended indecent contact with C.P. is insufficient to support a finding of guilt for assault with intent under section 709.11. *See Casady*, 491 N.W.2d at 787. While the jury could have deduced that Paulsen's conduct toward C.P. carried a sexual purpose, "there is nothing to indicate that sex-oriented purpose was to achieve a sex act specifically described in section 702.17." *See State v. Baldwin*, 291 N.W.2d 337, 340 (Iowa 1980) (speculating that defendant's "sex-oriented purposes might very well have been limited to the fondling of the little girl's breast"). Accordingly, even if the jury accepted C.P.'s belief that Paulsen would have touched her breasts if she had not moved, her belief does not justify his conviction of assault with intent to commit sexual abuse.

Because we find insufficient evidence of Paulsen's intent to commit sexual abuse, any retrial of this count would be limited to the lesser included offense of assault.

B. Ineffective Assistance of Counsel

1. Principles of Review

On appeal, Paulsen advances several ineffective-assistance-of-counsel claims. We review these claims de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006).

We commonly preserve ineffective-assistance-of-counsel claims for postconviction proceedings. *State v. Soboroff*, 798 N.W.2d 1, 8 (Iowa 2011). "We do this so 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." *Id*. "Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *Ondayog*, 722 N.W.2d at 786 (citation omitted). A defendant asserting an ineffective-assistance-of-counsel claim on direct appeal must establish "an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). "[I]t is for the court to determine whether the record is adequate and, if so, to resolve the claim." *Id*.; *see also* Iowa Code § 814.7.

If the record on appeal shows the defendant cannot prevail on a claim as a matter of law, we will affirm the defendant's conviction without preserving the ineffective-assistance-of-counsel claims. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Conversely, if the record on appeal establishes both elements of an ineffective-assistance claim and an evidentiary hearing would not alter this conclusion, we will reverse the defendant's conviction and remand for a new trial. *Id.*

2. Analytical Framework

The Sixth Amendment to the federal constitution and Article I, Section 10 of the state constitution both guarantee the right to effective assistance of counsel. *State v. Fountain*, 786 N.W.2d 260, 265 (Iowa 2010). To prove ineffective assistance, a defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Ondayog*, 722 N.W.2d at 784.

To satisfy the first prong of an ineffective-assistance-of-counsel claim, a defendant must show that counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). "Trial counsel's performance is measured objectively by determining whether counsel's assistance was reasonable, under prevailing professional norms, considering all the circumstances." *State v. Lyman*, 776 N.W.2d 865, 878 (Iowa 2010). The defendant must overcome a presumption that counsel performed within the normal range of competency. *State v. Horness*, 600 N.W.2d 294, 298 (Iowa 1999).

If Paulsen can show counsel failed to perform an essential duty, we then consider whether he suffered prejudice from the error. To establish the prejudice prong, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

Our supreme court has said:

> This requirement does not mean a defendant must establish that counsel's deficient conduct more likely than not altered the outcome in the case. A defendant need only show that the probability of a different result is sufficient to undermine confidence in the outcome.

State v. Graves, 668 N.W.2d 860, 882 (Iowa 2003) (citations omitted).

3. Counsel's Breach of Duty and Resulting Prejudice

Paulsen raises numerous allegations of constitutionally deficient performance by his trial attorney. Because we find the most glaring breach of duty and resulting prejudice in trial counsel's handling of the testimony of Deputy Robinson, we start with that claim. Paulsen contends Deputy Robinson offered opinions concerning witness credibility to the jury and counsel was ineffective for failing to object or otherwise control the witness. To support his argument, Paulsen points to several passages from Deputy Robinson's testimony[1]:

To explain why he cut his interview with D.D. short, Deputy Robinson stated:

> You can tell on the interview she was impaired by what had happen[ed] to her, face would turn red, was embarrassed, so I felt it would be better [to] interview through the Child Advocacy Center that specializes in interviewing kids.

At trial, in response to the prosecutor's question "How was the defendant's demeanor during the course of this interview?" Robinson stated:

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[1] Because we reverse the conviction on Count III, we do not analyze Robinson's statement explaining why he charged Paulsen with assault with the intent to commit sexual abuse. Robinson stated that although he had not originally planned to charge Paulsen with that offense, he changed his mind because he

> felt like there was—that the intent was there . . . . The problem would have gone further and that's part of the reason that decision was made along with the area of where he was touching at was close enough where I think that there was a potential of being—the intent was there.

> He gave me the impression of not being completely honest. Part of the training that I've had on interviewing, you look at body language, how they were answering questions, that type of stuff . . . . His feet kept tapping the whole time on the chair. He had a difficult time making eye contact. His ears were red. He would start and stop sentences. He would pause to collect his thoughts during it, just gave me the impression that he wasn't being completely honest.

During cross-examination, Robinson stated that "[D.D.'s grandmother] had some concerns, believed that D.D. was not telling the truth. I did not share her viewpoint." He further explained a conversation he had with D.D.'s grandmother, stating, "I am also a grandparent. If my grandkids said something happened to me, my reaction, I'm going to support my grandkids." Again during cross-examination, he stated "[i]f my grandkids came up and said something like that to me, I would support them."

During cross-examination, Robinson stated that he watched the Child Advocacy Center interview and it "also confirmed D.D.'s story as far as her consistency with what she was telling me and Todd VanOtterloo." When asked "[w]hen you say consistency, are you talking big picture or small facts?" Robinson responded, "[c]ombination of both."

Also during cross-examination, in a line of questioning regarding the dates the abuse occurred, Robinson stated:

> Well, I've raised three children of my own. I know timelines on teenage kids are many times not consistent because their idea of time is different than that of an adult.

We agree with Paulsen's contention that several portions of Deputy Robinson's testimony were objectionable. Deputy Robinson held himself out to be an expert in sexual abuse investigations, testifying: "I've gone through

extensive training on investigation of sex crimes and do the majority of sex crimes investigations for the county." Under Iowa law, neither expert nor lay witnesses may "express an opinion as to the ultimate fact of the accused's guilt or innocence." *State v. Oppedal*, 232 N.W.2d 517, 524 (Iowa 1975).

> Expert opinions regarding whether a witness testified truthfully bear similarity to expressing an opinion on the defendant's guilt or innocence. Typically, the truthfulness of the victim or the accused bears heavily upon, and is intertwined with, the guilt or innocence of the accused. Both matters, credibility of a witness and the determination of the guilt or innocence of the accused, are reserved solely for the fact finder.

State v. Myers, 382 N.W.2d 91, 94 (Iowa 1986).

In *Myers*, the court held that expert opinions as to the truthfulness of a witness are not admissible under what has been renumbered as Iowa Rule of Evidence 5.702. *Id*. at 97. "These inadmissible opinions go a step beyond merely aiding the fact finder in understanding the evidence and actually invade the exclusive domain of the jury, that is, the determination of the guilt or innocence of the accused." *Id.* at 95.

Without objection, Deputy Robinson offered his opinion that D.D. was "impaired" and "embarrassed" by what happened to her; that is, by allegedly being sexual abused by her stepfather. The deputy also testified he did not share Vicki Bragg's viewpoint her granddaughter was lying and testified that he told Bragg he did not agree with her. The deputy further excused inconsistencies in D.D.'s recollection of when the abuse occurred by invoking his own experience raising teenagers and opining that their sense of timelines differed from that of adults. Counsel was ineffective for permitting the peace officer to express his

overall opinion that D.D. was telling the truth.[2] *See Johnson v. State*, 495 N.W.2d 528, 531 (Iowa Ct. App. 1992) (finding trial counsel was ineffective for not objecting to testimony from social worker that complainant children were credible witnesses).

Deputy Robinson gave his opinion not only as to D.D.'s honesty, but also his opinion as to Paulsen's dishonesty. Deputy Robinson reflected on his interview training, and told the jury that viewing the defendant's demeanor, "he gave me the impression of not being completely honest." This testimony improperly usurped the jury's function. *See State v. Raudebaugh*, 864 P.2d 596, 607 (Idaho 1993) (finding error in admission of police officer's opinion testimony evaluating the credibility of a witness's out-of-court statements based on his interpretation of the witness's body language). While the officer may have been free to describe the defendant's appearance and demeanor during the interview, it was within the jury's province to determine whether Paulsen was telling the truth when he made certain statements.

The State urges us to preserve these claims for postconviction proceedings to determine whether counsel's failure to object to Deputy Robinson's impermissible opinion testimony could be classified as an "improvident trial strategy." We see no strategic reason why counsel would want the State's witness—a peace officer—to testify that Paulsen did not seem honest

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[2] Paulsen also claims his attorney should have objected when the prosecutor asked Deputy Robinson whether it was his job to "gather the truth" and he responded "correct." Having determined counsel was ineffective for allowing the deputy to express his opinion as to the veracity of witnesses, we need not address that particular question and answer.

and that D.D. was telling the truth. *See Johnson*, 495 N.W.2d at 531 (finding "defense counsel's claimed trial strategy did not require counsel to remain mute when an opinion regarding the complainants' truthfulness was being elicited"). Deputy Robinson testified on behalf of the State from a position of authority, as a peace officer, trained and experienced in sex-crime investigations. Defense counsel did not challenge Deputy Robinson's statements regarding his client's dishonesty and D.D.'s honesty.[3] If anything, counsel exacerbated the situation, as many of Robinson's objectionable comments occurred during cross-examination. By failing to object to the deputy's impermissible opinions or control the witness during cross examination, counsel did not act as a reasonably competent practitioner.

The State argues that even if Deputy Robinson's statements were improper, Paulsen cannot show that excluding the officer's opinions would have likely changed the outcome of the trial given the testimony of D.D. and C.P. We disagree. This case was a credibility battle pitting Paulsen against the two girls. Deputy Robinson's endorsement of D.D.'s account may have caused the jury to place an inappropriate weight on her version of the events. *See Myers*, 382 N.W.2d at 97-98 (remanding for new trial because of expert's expression of opinion as to victim's honesty). Because the outcome of the case hinged on the

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[3] Defense counsel never challenged Robinson's assessment that Paulsen was not being completely honest. This issue was again discussed during the State's direct examination of Van Otterloo, when Van Otterloo testified he found Paulsen's demeanor during the interview "normal" because "for the type of situation in front of law enforcement and myself for the first time he was probably nervous." On cross-examination of Van Otterloo, counsel asked, "[Y]ou say [Paulsen] was quite nervous but you thought that was normal, is that correct?" to which Van Otterloo responded, "In front of law enforcement, yes."

relative truthfulness of the witnesses, a reasonable probability existed that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Johnson*, 495 N.W.2d at 531. This denial of effective assistance of counsel warrants a new trial.

We have decided not to address Paulsen's remaining claims of ineffective assistance of counsel or allegations of trial error because they may not arise on retrial. *See State v. Lawler*, 571 N.W.2d 486, 491 (Iowa 1997).

REVERSED AND REMANDED FOR NEW TRIAL.