IN THE COURT OF APPEALS OF IOWA

No. 2-1063 / 12-0095
Filed February 13, 2013

RICHARD KORSCHGEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Lee (South) County, John M. Wright, Judge.

Richard Korschgen appeals the ruling denying his application for postconviction relief. **AFFIRMED.**

Steven E. Ort of Bell, Ort & Liechty, New London, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael P. Short, County Attorney, and Bruce McDonald, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

EISENHAUER, C.J.

In July 2009, Richard Korschgen was charged with two counts of sexual abuse in the second degree in Lee County: (1) a 2003 sex act with under-twelve victim S.G. and (2) a 2009 sex act with under-twelve victim J.H. After a January 2011 jury trial, he was convicted on the second count, abuse of J.H. Korschgen now appeals the denial of his application for postconviction relief arguing his trial counsel was ineffective in: (1) failing to move to sever the two counts, (2) failing to depose the State's complaining witnesses, and (3) failing to object to testimony. We affirm.

I. Background Facts and Proceedings.

S.G. spent time at Korschgen's Keokuk residence babysitting for T.W. J.H., a friend and classmate of T.W., would stay overnight with T.W. at Korschgen's residence.

Immediately before trial and outside the presence of the jury, the issue of severance of the counts was discussed:

> DEFENSE COUNSEL: Your Honor, we talked earlier about the fact that there was at least an arguable reason for the defense to move to sever the . . . counts . . . for trial.
>
> And I mentioned during our conversation [severance] is something that I considered, actually, as soon as the trial information was filed . . . . I'm well familiar with [Iowa] Rule [of Evidence] [5.]404(b), I've been involved in many, many cases involving it, and the court pointed out the statute as well [Iowa Code § 701.11 (2009)]; but even [though] the statute seems to favor admissibility . . . the relevancy has to be substantially outweighed by the danger of undue prejudice and a list of other things.
>
> And, also I talked it over with Mr. Korschgen, the fact that we may have grounds to sever this. However . . . our defenses to both cases are . . . basically the same. Of course, the allegations in both cases are basically the same.

> The only factor in our favor for severance, really, is the six-year difference[1] and he wishes—and I think it's reasonable under the circumstances—to simply conclude everything in one trial rather than have two trials on the matter and for that reason we did not move to sever.
>
> THE COURT: And, Mr. Korschgen . . . is that true, that you and [defense counsel] Henson have talked about that and you're comfortable with that decision?
>
> [Korschgen]: Yes, ma'am.

The State called two witnesses, S.G. and J.H. Eighteen-year-old S.G. testified she turned twelve in October 2003, and she was "elevenish" when she would spend the night while babysitting five-year-old T.W. at Korschgen's residence. S.G. stated Korschgen touched her inappropriately on two occasions when she stayed overnight when she was "eleven or twelve. It was—pretty sure I was like eleven." Additionally, S.G. was "pretty sure" she was in Burlington when Korschgen touched her inappropriately while she, Korschgen, and T.W. were spending the night at a hotel. S.G. thought the Burlington trip probably occurred in 2003, but was not sure.

S.G. also testified Korschgen told her not to tell anyone. After S.G. twice told Korschgen to stop touching her, he stopped. Thereafter, S.G. continued to spend time with Korschgen and T.W., swimming, bowling, and going to movies, because "I didn't think it was that big of a deal and I enjoyed the things we did."

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[1] Section 701.11(1), evidence of similar offenses—sexual abuse, provides:

> In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

S.G. explained her delay in reporting the alleged 2003 abuse:

> Q. . . . [D]id you tell anybody [Korschgen] had done this to you? A. One person.
> Q. And who was that? A. My best friend.
> Q. And what was her reaction or her response? A. She—First, she looked at me weird and she said, yeah, right, like she didn't believe me, so—
> Q. And how do you feel about that? A. I feel like if she [does not] believe me, who [is] going to.
> . . . .
> Q. Why did you end up telling somebody about this? A. Okay. Because . . . Stacia, she was at my house [in the summer of 2009] and I was outside filling up [the] pool.
> . . . .
> Q. Okay. Tell us what happened. A. Okay. I was outside filling my pool and [Korschgen] drove by and he was talking to me . . . and when he drove away, my neighbor, Stacia, she said: He's a pervert . . . . And I'm like: This is important; you really need to tell me why. And she said: Because . . . he's done stuff to [J.H.].
> . . . .
> Q. So what else did Stacia state to you? A. Okay. She said that [Korschgen] touched [J.H.'s] vagina when she was sleeping—well, trying to sleep . . . . It was really important for me for [J.H.] to tell someone because I didn't want her to go so many years without saying anything.
> Q. Okay. So did you end up telling somebody? A. Yes.

Ten-year-old J.H. testified her friend T.W. was in the same grade in the same school and T.W. spent a lot of time at Korschgen's house. While J.H. went to hotels in Burlington and Keokuk with T.W. and Korschgen, she testified to Korschgen's actions at *his residence*:

> Q. . . . [D]id anything ever happen at Korschgen's house here in Keokuk when you stayed with him in the last year that scared you or made you feel uncomfortable? A. Yes.
> Q. Can you tell these people what happened? A. He touched me in my boob and my vagina and my butt.
> . . . .
> Q. What were you doing right before he did this? A. Sometimes I'd be watching TV or I'd be playing a game with [T.W.].
> Q. Did [T.W.] see this happen? A. Yes.
> Q. Did you ever see that happen to [T.W.]? A. Yes.

Q. Were there times that you asked [T.W.] to help you when it happened? A. Yes.
Q. And did she? A. Yes.
Q. How old were you when [Korschgen] stuck his hand down your pants? A. 9 or 8.
. . . .
Q. Did you ever tell anybody about this . . .? A. Yes.
Q. Who did you tell? A. Stacia . . . .
Q. And who's she? A. She's one of my friends.
. . . .
Q. How did it happen that you finally told your mom . . .? A. After we went to the cops.
Q. And did Stacia tell somebody else? A. Yes.
Q. Are you glad she did? A. Yes.

During cross-examination, J.H. testified:

Q. You say you told your mom and dad after you went to the cops? A. Yes.
Q. And who got you to go to the cops? A. Stacia . . . .
. . . .
Q. So am I to understand you and Stacia walked down to the police station? A. No, she told—she told the other girl and then she told her mom and then they went to the cops.
. . . .
Q. Are you talking about [S.G.'s] mom? A. Yes.

Defense counsel called several witnesses. Korschgen's stepdaughter testified to living with him from age six until she moved out in 2004 at age eighteen. She said Korschgen had never touched her inappropriately and she did not observe any inappropriate conduct or sexual conversation between Korschgen and S.G. The stepdaughter's husband testified he did not observe physical contact or sexual conversation between Korschgen and S.G. or Korschgen and J.H. Korschgen's sister testified she chaperoned one of T.W.'s birthday parties at a Burlington hotel and S.G. was not present.

Eleven-year-old D.K., a friend of J.H. and one of Korschgen's nieces, testified to being at Korschgen's residence with T.W. and J.H., and she did not

see Korschgen touch J.H. She said J.H. never asked her for help to protect her from Korschgen. D.K. went to hotels with her parents, Korschgen, T.W., and S.G., and they would watch movies and go swimming. D.K. had problems with J.H.—"like lying."

T.W.'s mother testified she had not observed any behavioral changes in T.W. and did not have any concerns for T.W. as a result of these allegations.

T.W., age ten, testified she loved Korschgen and considered him to be her father. Korschgen bought T.W. expensive items, and she had a bedroom at his residence. T.W. would stay overnight at Korschgen's residence on weekends while her mother worked. T.W. was friends with J.H., and sometimes J.H. would stay overnight with her at Korschgen's residence. T.W. never saw Korschgen touch J.H., and J.H. never asked her for help in getting away from Korschgen. Further, Korschgen never touched T.W. T.W. was uncertain about whether she remembered staying at a Burlington hotel when she was four or five with Korschgen and S.G. or Korschgen and J.H.

Korschgen, age thirty-five, denied inappropriately touching either S.G. or J.H. Korschgen testified he started taking care of T.W. in 2005, while her mother was working, and T.W. started staying overnight. Further, Korschgen testified:

> Q. Do you recall taking [S.G.] to the Fairfield Inn in Burlington back in 2003? A. No, I never took her to a Fairfield Inn in Burlington in 2003. I didn't start—really start staying at the Fairfield Inn until after I was employed at a Fairfield Inn [in 2006] and I got a discount rate.

The jury acquitted Korschgen on count one, the abuse of S.G., and convicted him on the second count, abuse of J.H. Korschgen appealed, arguing the trial court erred in failing to grant his motion for new trial. We affirmed his

conviction. In 2011, Korschgen filed an application for postconviction relief alleging trial counsel, Jon Henson, rendered ineffective assistance. The postconviction court denied relief, and this appeal followed.

II. Scope and Standards of Review.

When an applicant alleges trial counsel was ineffective, we evaluate the totality of the relevant circumstances in a de novo review. *State v. Lane*, 726 N.W.2d 371, 392 (Iowa 2007). To be successful, Korschgen must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 393. Iowa recognizes "a strong presumption trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). "Moreover, we avoid second-guessing and hindsight." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). Additionally, "[m]iscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel." *Id*. at 143.

III. Failure to File a Motion to Sever the Charges.

Korschgen argues trial counsel should have filed a motion to sever the two counts. Attorney Henson testified[2] he talked to Korschgen about a motion to sever early in the case in order to file one if Korschgen authorized it. Also, "I would say I went over it with [Korschgen] again another couple of times . . . to make absolutely certain that he didn't want me to file the motion. And at all times [Korschgen] indicated that he just wanted to try and get it over with." Henson testified he discussed severance in a pretrial meeting with the court and counsel

[2] The deposition testimonies of Korschgen and Henson were submitted to the postconviction court.

and also in court immediately before trial. In contrast, Korschgen testified he never discussed severance with attorney Henson. The postconviction court ruled:

> The evidence . . . establishes that [attorney] Henson discussed a motion to sever on at least two occasions and the court specifically addressed Korschgen thereby giving him an opportunity to request the same. There is no evidence, other than Korschgen's deposition testimony in this case, that establishes Mr. Korschgen wanted a severance of the counts in the trial information. Accordingly, Korschgen has failed to prove by a preponderance of the evidence that trial counsel was ineffective in failing to seek severance of the two counts.

After our de novo review, we agree with the postconviction court. Counsel's failure to file this motion was not an oversight but was an affirmative decision made in consultation with his client. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (stating the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"). Accordingly, Korschgen has not established trial counsel rendered ineffective assistance in failing to file a motion to sever.

IV. Failure to Depose Complaining Witnesses.

Korschgen testified he repeatedly requested counsel take the depositions of S.G. and J.H. and counsel was ineffective in failing to do so. Henson testified he had access to all of the interviews completed by the Iowa Department of Human Services in their investigation of the abuse. He thought deposing the witnesses would yield little additional information while allowing the alleged victims to practice their testimony, thereby improving their appearance before the jury. Additionally, Henson recognized if he took their depositions, then he would be required to list his witnesses and this would alert the State to the planned

defense. Henson told Korschgen why he believed depositions should not be taken, and Korschgen "didn't seem to have a problem with it. And so we didn't."

The postconviction court ruled: "The strategy to use the Department of Human Services reports and to prevent the prosecution from knowing in advance the defense witnesses was acceptable trial strategy." After our de novo review, we agree. There was no breach of duty because counsel's actions were a reasonable trial strategy that we will not second guess and did not fall outside the broad scope of conduct of a reasonably competent attorney.

V. Failure to Object to Testimony.

Korschgen asserts counsel erred in allowing S.G. to testify, without objection, to inappropriate touching at the Fairfield Inn in Burlington, Des Moines County, when the charges concerned sexual abuse occurring in Lee County. Henson testified he believed a motion and/or objection attempting to keep out this testimony would be unsuccessful. The postconviction court ruled this was an acceptable trial strategy. After our de novo review, we agree. *See State v. Reyes*, 744 N.W.2d 95, 102 (Iowa 2008) (stating evidence involving the same victim "has relevance on the underlying criminal charge because it shows the nature of the relationship between the alleged perpetrator and the victim").

Korschgen also argues counsel was ineffective in failing to make a hearsay objection to S.G.'s trial testimony of what Stacia, who did not testify at

trial, allegedly told S.G.,[3] and to J.H.'s response, "yes," after being asked: "And did Stacia tell somebody else?"

First, the State contends J.H.'s "yes" response is not hearsay. The question did not ask J.H. what she told Stacia, it simply asked her *if* Stacia told somebody else. J.H. did not repeat her statements to Stacia or Stacia's further statements. We agree with the State.

Next, we note Henson testified:

> Q. Would you agree that that is hearsay by Stacia . . . as to what she told [S.G.] and [S.G.] is relating it to the jury.
> A. Well, I thought she was relating it simply to show how the two cases came about—how the charges involving [J.H.] came about. And to me it seemed more like she was explaining the story and not offering it for the truth of the matter asserted.
> . . . .
> . . . A. Well, to me all it was showing was how the charges involving [J.H.] came to be—not that they were true—but how it was that charges involving [J.H.] were eventually filed.
> Q. Well . . . [the prosecutor] asked [S.G.] . . . "What else did Stacia state to you?" Would you agree that question is objectionable as hearsay? A. Well, again, how I saw that was that she was just explaining how [J.H.'s] charges came to be filed . . . I didn't feel it was being offered for the truth of the matter asserted. But I suppose I could have objected to it.
> . . . .
> Q. So, basically that testimony from [S.G.] about Stacia—that was the reason that this whole investigation got started, wasn't it? A. Yes.
> Q. And that testimony wasn't offered for the truth of those statements by [Stacia] was it? A. Again, not in my opinion. I mean, I viewed it more as making a complaint and explaining why the charges were filed rather than stating that this is what happened. I did not view it as being offered for the truth . . . .

Hearsay is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

[3] The State contends Korschgen failed to preserve error on this issue. Upon our review, we find the issue was raised by Korschgen and was decided by the district court. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

matter asserted. Iowa R. Evid. 5.801(c); *State v. Galvan*, 297 N.W.2d 344, 346 (Iowa 1980). Hearsay is not admissible except as provided by the Iowa Constitution, by statute, by other rules of evidence, or rules of the Iowa Supreme Court. Iowa R. Evid. 5.802. The erroneous admission of hearsay is presumed to be prejudicial unless the contrary is established affirmatively. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998).

We conclude the evidence was offered to explain S.G.'s delayed reporting leading to the investigation. The question to S.G. starting this line of testimony was: "Why did you end up telling somebody about this?" S.G.'s testimony concluded: "Q. Okay. So did you end up telling somebody? A. Yes." In the final set of questions, S.G.testified: "Q. . . . [D]o you think you'd ever told anybody about this if Stacia hadn't told you about [J.H.]? A. Probably not." We recognize "[w]hen an out-of-court statement is offered, not to show the truth of the matter asserted, but rather to explain responsive conduct, it is not regarded as hearsay." *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). We are persuaded the statements were offered to explain S.G.'s responsive behavior.

However, even if we *assume* testimony from S.G. that Stacia told S.G. Korschgen "had done stuff" and had touched J.H.'s vagina was offered for the truth of the matter asserted, this information was repeated by victim J.H. in her testimony. "[W]e will not find prejudice if the admitted hearsay is merely cumulative." *See id*. (finding it was not prejudicial hearsay when parents testify to statements made by their sexually-abused child and the "testimony was repeated either by the social workers or in the testimony of [the victim] herself"); *see also State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997) (finding it was not

prejudicial hearsay when substantially the same evidence was in the record). We conclude the testimony was merely cumulative and, therefore, not prejudicial. Korschgen is not entitled to relief on this claim.

Finally, Korschgen argues counsel was ineffective in failing to make a hearsay objection to the following statement of J.H.: "Q. Did you ever see that [inappropriate touching by Korschgen] happen to [T.W.]? A. Yes."

The State argues, in context, J.H. first was asked whether she had been touched by Korschgen. She was also asked whether T.W. had seen this happen and whether she had seen this happen to T.W. The State contends there is no out-of-court statement offered for the truth of the matter asserted. J.H. was testifying to her personal knowledge of T.W.'s presence when J.H. was abused and to having witnessed T.W.'s abuse. We agree with the State.

Additionally, Henson testified he did not object because he knew T.W. was going to be a witness for the defense to rebut [J.H.'s] testimony and he knew T.W.'s expected testimony. Henson explained T.W. testified as expected, which "called into question the credibility of the State's witnesses," allowing him to argue credibility to the jury. The postconviction court denied relief on the asserted grounds of failure to object to hearsay and failure to object to evidence of other crimes, ruling:

> [A]ttorney Henson's trial strategy, or tactic, in allowing prosecution witnesses to testify [regarding] a witness he intended to call does not necessarily constitute ineffective assistance of counsel. Mr. Henson understood prior to the time of trial that the prosecution witnesses could possibly mention the testimony elicited at trial. Nevertheless, Mr. Henson believed that his witnesses would be found more credible by the jury than the young women testifying for the prosecution.

We conclude Korschgen has not established trial counsel rendered ineffective assistance and affirm his conviction. *See DeVoss*, 648 N.W.2d at 64 (stating "we avoid second-guessing and hindsight").

AFFIRMED.