**IN THE COURT OF APPEALS OF IOWA**

No. 3-741 / 12-0995
Filed September 5, 2013

**KIM ARCHER,**
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Clinton County, Charles H. Pelton, Judge.

Applicant appeals the district court decision denying his application for postconviction relief on his convictions for second-degree sexual abuse and third-degree sexual abuse. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Kim Archer, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Wolf, County Attorney, and Ross Barlow, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Danilson, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**MILLER, S.J.**

## I. Background Facts & Proceedings

In 2008, a teenage girl, A.A., reported that her father, Kim Archer, had sexually abused her over the course of many years. A Clinton police officer, Dannie Howard, asked A.A. to telephone her father in an effort to generate more evidence to support a criminal prosecution of Archer. A.A. agreed to allow officers to record a telephone conversation between A.A. and Archer, and her mother was aware that the recording would occur.

Kim Archer was charged with sexual abuse in the second degree and sexual abuse in the third degree. The State alleged there had been incidents both before and after A.A. was twelve years old.[1] During the jury trial defense counsel did not object to the introduction of a recording of the telephone conversation between A.A. and Archer. A.A. testified, describing acts of sexual abuse perpetrated upon her by Archer beginning when she was five years of age and ceasing only when she was thirteen years of age. A jury found Archer guilty of second-degree and third-degree sexual abuse. He was sentenced to twenty-five years and ten years in prison, to be served concurrently.

Archer filed an application for postconviction relief, claiming he had received ineffective assistance of defense counsel, and his convictions should be overturned due to newly discovered evidence. Archer's defense counsel testified he did not object to the introduction of the recording of the telephone

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[1] Sexual abuse involving a victim under the age of twelve is sexual abuse in the second degree, while sexual abuse in the third degree may be committed if the victim is twelve or older. Iowa Code §§ 709.3(2), 709.4(2).

conversation because he believed it would be admissible and he wanted to avoid making excessive objections in the presence of the jury. Archer's son, Brandon Archer, testified that about two or three years previously, he had asked A.A. if Archer had sexually abused her and she told him, "No." Brandon also stated he saw what he believed was A.A.'s diary, in which she wrote, "Why did I put him away, since he didn't do it?" Brandon did not have the diary at the time of the postconviction hearing. At the postconviction hearing Howard testified he had received the consent of A.A. and her mother prior to recording the telephone conversation.

The district court denied Archer's application for postconviction relief. The court determined Archer had not shown he received ineffective assistance of counsel. The court also denied Archer's claim of newly discovered evidence, finding Brandon was not a credible witness and his testimony was "entitled to very little weight, if any." Archer now appeals the decision of the district court denying his application for postconviction relief.

**II. Ineffective Assistance of Defense Counsel**

Archer claims he received ineffective assistance of counsel in several different ways. We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we

avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, a defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

**A.** Section 808B.2(2)(b) provides:

> It is not unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, if the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

If a communication is intercepted in violation of chapter 808B, the evidence may not be used in any court proceeding. Iowa Code § 808B.7.

Archer claims he received ineffective assistance because his defense counsel did not object to the introduction of a recording of the telephone conversation. He claims the recording was illegal because neither he nor A.A. consented to the recording. He points out that when asked during the criminal trial about the recording, A.A. testified, "I didn't want to do it at first, but then I just did it." He argues that this statement does not show she consented to recording the conversation.

We believe A.A.'s statement, "I didn't want to do it at first, but then I just did it," shows she was reluctant at first, but then agreed to allow officers to record the telephone conversation. We do not believe her statement shows she did not consent to the recording. We also note Howard testified that A.A. agreed to make the telephone call, knowing that it was being recorded. We conclude the evidence shows A.A., a party to the communication, consented to the recording of the telephone call.

Archer also claims A.A. was unable to consent because she was a juvenile.[2] He points out minors cannot consent to a name change, Iowa Code section 674.6; to an abortion without parental notification, section 135L.3; or, when under the age of fourteen, to sexual relations, section 709.4. We note these statutes involve acts that could be harmful to a minor, and so the law prohibits minors from giving consent. There is nothing in chapter 808B which would specifically prohibit minors from consenting to the recording of a telephone conversation.

Furthermore, at the postconviction hearing, Howard testified A.A.'s mother "knew that we were going to do this." Under certain circumstances, a parent or guardian may vicariously consent for a minor child if the parent believes the recording of a telephone conversation is in the child's best interests.[3] *State v. Spencer*, 737 N.W.2d 124, 134 (Iowa 2007).

We conclude the recording of the telephone conversation between A.A. and Archer was not unlawful under section 808B.2(2)(b). We determine Archer has not shown he received ineffective assistance due to counsel's failure to

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[2] In his appellate brief Archer states A.A. was only fourteen years old at the time of the recording. The record, however, shows she was just shy of her sixteenth birthday when the recording was made.

[3] Our supreme court has ruled:

> [A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.

*Spencer*, 737 N.W.2d at 130-31 (quoting *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998). The court in *Spencer* was applying the consent provision in section 808B.2(2)(c), which involves recording by a person not acting under color of law. *Id.* at 134. We believe the same vicarious consent analysis could apply to section 808B.2(2)(b), which involves recording by a person acting under color of law.

object on the ground that the recording was illegal. We will not find ineffective assistance of counsel due to failure to pursue a meritless claim. *See State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

**B.** Archer also claims he received ineffective assistance because defense counsel did not object to the introduction of at least portions of the recording of the telephone conversation on the ground that his statements were the result of him being coerced, citing *State v. Cromer*, 765 N.W.2d 1, 9 (Iowa 2009). He claims the conversation was unduly prejudicial and could have confused the jury.

The issue addressed in the district court's ruling, however, is whether "trial counsel was ineffective in not resisting the admissibility of the recorded telephone call, grounded on coercion of A, because there is no credible evidence that she was coerced." Because the issue of possible coercion of Archer was not ruled upon by the district court, and Archer does not raise it within the context of a claim of ineffective assistance of postconviction counsel, we conclude it has not been preserved for our review.[4] *See Lamasters v. State*, 821 N.W.2d 856, 863-64 (Iowa 2012) (noting when an issue has not been considered by the district court error has not been preserved).

Even if we were to find error had been preserved, we would find that while Archer asserts defense counsel should have objected on the grounds that

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[4] Archer did file a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) after the district court's ruling denying his application for postconviction relief, but only asked the court to specify whether it had considered the Iowa Constitution, the federal Constitution, or both. The court amended its ruling to state it denied Archer's claims based on both the Iowa and federal Constitutions.

portions of the telephone conversation were inadmissible, he does not point out what portions he believes should have been suppressed. Furthermore, he does not claim he was coerced into making incriminating statements based on the emotional atmosphere of the conversation. Also, he does not set forth how he believes the conversation was confusing to the jury. If we were to address this issue, we would determine Archer has not shown he received ineffective assistance as a result of defense counsel not objecting to portions of the recording based on the factors found in *Cromer*.

**C.** During the criminal trial, A.A. was asked, "was there anything about that phone call that makes you tend to believe that you and your father were talking about past sexual abuse?" Defense counsel objected on the ground that the question asked A.A. to testify about the state of mind of another party and asked for speculation. The district court overruled the objection, finding A.A. could testify to her belief they were talking about sexual abuse. A.A. answered the question in the affirmative. Archer now claims he received ineffective assistance because defense counsel did not object to the question on the ground it was asking A.A. to testify to the ultimate issue of fact.

Iowa Rule of Evidence 5.704 provides, "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." However, "a witness cannot opine on a legal conclusion or whether the facts of a case meet a given legal standard." *In re Det. of Palmer*, 691 N.W.2d 413, 419 (Iowa 2005).

In this case, A.A. was not asked to express an opinion on the guilt or innocence of Archer. *See State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994). We determine Archer has not shown he received ineffective assistance because defense counsel failed to object to the question on the ground that it embraced an ultimate issue to be cited by the trier of fact.

**III. Newly Discovered Evidence**

Archer asserts the district court should have granted his application for postconviction relief and ruled he was entitled to a new trial based on newly discovered evidence. He asserts Brandon's testimony shows A.A. recanted her previous allegations of sexual abuse against him.

In order to prevail on a claim of newly discovered evidence, an applicant must show (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003). Our review is for the correction of errors at law. *Whitsel v. State*, 525 N.W.2d 860, 862 (Iowa 1994); *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997).

A witness's recantation testimony is looked upon with the utmost suspicion. *Jones v. State*, 479 N.W.2d 265, 275 (Iowa 1991). "[T]he postconviction court is not required to believe the recantation, and has wide discretion to view the matter in its entirety to determine if a defendant had a fair criminal trial and if a new trial would likely produce a different result." *Adcock v.*

*State*, 528 N.W.2d 645, 647 (Iowa Ct. App. 1994). We will not reverse the district court's decision unless there has been a clear abuse of discretion. *Id*.

The district court in this case specifically found Brandon was not a credible witness. The court found his testimony, "is entitled to very little weight, if any." We give weight to the district court's determination of the credibility of witnesses at the postconviction hearing. *Cox v. State*, 554 N.W.2d 712, 714 (Iowa Ct. App. 1996). This is because the district court is in a superior position to judge the credibility of the witnesses. *Carroll v. State*, 466 N.W.2d 269, 273 (Iowa Ct. App. 1990).

We note that Brandon, who testified about what A.A. told him, stated he had a better relationship with his father, Archer, than he did with his sister, A.A.[5] We also note that Brandon testified A.A. denied the allegations of sexual abuse two or three years before the postconviction hearing, and he told Archer about it soon afterward, but the issue was not raised in either Archer's original or first amended applications for postconviction relief. In addition, Archer admitted to the presentence investigator that he had committed the sexual abuse. He also admitted to the sexual abuse in a post-sentencing letter to the sentencing judge. We conclude the district court did not err in denying Archer's request for a new trial based on newly discovered evidence.

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[5] The parties have raised the issue of whether Brandon's testimony about what A.A. said to him constitutes hearsay which would be inadmissible under Iowa Rule of Evidence 5.802. Assuming A.A. was unavailable, as suggested by testimony presented at trial, then the statements would be admissible as an exception to the hearsay rule under rule 5.804(b)(3), because the statements were against A.A.'s penal interests, indicating she had lied under oath at Archer's criminal trial, and tending to expose her to criminal liability for perjury. *See State v. Paredes*, 775 N.W.2d 554, 565 (Iowa 2009).

## IV. Pro Se Claims

**A.** Archer claims he received ineffective assistance because his postconviction counsel failed to (1) present the diary at the postconviction hearing, (2) present the testimony of A.A. at the postconviction hearing, and (3) present evidence about A.A.'s criminal record.[6] We determine the record is insufficient to consider these issues, and we preserve these claims of ineffective assistance of counsel for a possible further postconviction proceeding. *See State v. Vance*, 790 N.W.2d 775, 790 (Iowa 2010) (noting when the record is inadequate, we may preserve ineffective assistance of counsel claims for possible postconviction relief proceedings).

**B.** Archer asserts he received ineffective assistance because postconviction counsel did not adequately raise the issues of ineffective assistance of his trial counsel. At the beginning of the postconviction hearing Archer's counsel stated the only issues being raised were those in his amended application for postconviction relief. Archer was given the opportunity to comment about that, but he did not say anything. The district court fully addressed the issues in the amended application, and so has this court. We have already determined Archer has not shown he received ineffective assistance from his trial counsel.

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[6] In the criminal trial, A.A. testified she had gotten into trouble for pulling a fire alarm in school. Also, A.A.'s brother Adam testified A.A. had been involved in multiple thefts. On the present record it is unknown whether Archer is discussing these incidents, which were brought out during the criminal trial, or other incidents. It is also unknown whether Archer is possibly referring to criminal charges against A.A. which arose after his criminal trial.

**C.** Archer claims he received ineffective assistance because his postconviction counsel did not argue that chapter 808B is not applicable in determining whether the recording of the telephone call is admissible. He argues the statute applies to intercepted communications, and this was a call orchestrated for a specific purpose by officers. Archer's argument is based on a dictionary definition of "intercept."

For purposes of chapter 808B, the term "intercept" is defined in section 808B.1(6) as "the aural acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device." The legislature may act as is own lexicographer. *State v. Fischer*, 785 N.W.2d 697, 702 (Iowa 2010). "When it does so, we are normally bound by the legislature's own definitions." *Id.* Based on the definition of "intercept" found in section 808B.1(6), Archer has not shown he received ineffective assistance due to postconviction counsel's failure to argue that chapter 808B did not apply in this case.

**D.** Archer asserts he received ineffective assistance because postconviction counsel did not argue that the recording of the telephone call was inadmissible because the State did not obtain a search warrant prior to recording the call. We have already determined the recording was not illegal under section 808B.2(2)(b) because one of the parties to the communication, A.A., consented to the recording. Due to the fact the recording was permissible under section 808B.2(2)(b), the State was not required to obtain a search warrant.

**E.** Archer contends the postconviction court should have corrected his illegal sentence. At the postconviction hearing, the parties noted that on appellate review, Archer's case had been remanded for resentencing and the matter had not yet been set for hearing. The court specifically asked, "Is there any way that can have any effect on this proceeding?" Postconviction counsel replied that the issues being raised in the postconviction proceeding did not have any impact on the sentencing issue. We determine the sentencing issue was not before the postconviction court, and the court did not err by not addressing it.

**F.** Archer claims he received ineffective assistance because postconviction counsel did not raise an issue as to whether trial counsel should have objected to evidence he committed a prior bad act. He does not, however, state what the prior bad act was, how it was introduced during the criminal trial, or how he was prejudiced. An applicant "must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). We determine Archer has not sufficiently raised this issue to merit us addressing it. *See id.*

**G.** Finally, Archer asserts there was "prosecutorial misconduct of State counsel at both the trial and post conviction levels of the proceedings." We note Archer is not raising this issue as a claim of ineffective assistance of counsel, but instead argues the acts of the prosecutor were harmful and prejudicial.

Postconviction proceedings "are not an alternative means for litigating issues that were or should have been properly presented for review on direct

appeal." *Everett*, 789 N.W.2d at 156. A claim that has not been raised on direct appeal may not be litigated in a postconviction action unless there is a sufficient reason or cause, such as ineffective assistance of counsel, for not raising the claim previously. *Id.* Archer does not assert this issue was raised on direct appeal or in the postconviction trial court, and we conclude this issue has not been preserved for our review.

We affirm the decision of the district court denying Archer's application for postconviction relief.

**AFFIRMED.**