IN THE COURT OF APPEALS OF IOWA

No. 1-895 / 10-2078
Filed December 21, 2011

SANTOS ROSALES-MARTINEZ,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Buena Vista County, Patrick M. Carr, Judge.

Santos Rosales-Martinez appeals from the denial of postconviction relief from his 2002 conviction for second-degree sexual abuse. **AFFIRMED.**

Darren D. Driscoll of Johnson, Kramer, Good, Mulholland, Cochrane & Driscoll, P.L.C., Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, David Patton, County Attorney, and James M. McHugh, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

POTTERFIELD, J.

The applicant, Santos Rosales-Martinez, appeals from the denial of postconviction relief from his 2002 conviction for second-degree sexual abuse. On appeal Rosales-Martinez argues that the postconviction court erred in rejecting his ineffective-assistance-of-counsel claims based on trial counsel's failure to object to instances of alleged prosecutorial misconduct and trial counsel's stipulation to the protective order for testimony of the child witness.

I. Background Facts and Proceedings.

Mary Castillo met Santos Rosales-Martinez while living in California with her young daughter A.C. Castillo and Rosales-Martinez married in 1997 and moved to Storm Lake, Iowa, in June of 1999. There, Rosales-Martinez began working night shifts at the IBP plant. The family first lived in a motel room and then a two-bedroom apartment. All three shared one bedroom; the other bedroom was occupied by one of two of Rosales-Martinez's friends, Ruben ("Nacho") or Moses Vargas. Castillo stayed home with seven-year-old A.C. until August when A.C. started school. In September, Castillo began working at a hospital. Twice Castillo worked weekends, during which Rosales-Martinez cared for A.C.

On January 28, 2000, Iowa Department of Human Services (DHS) social worker Susan Garvin began a child abuse assessment concerning A.C. and allegations of sexual abuse. A no-contact order was entered prohibiting Rosales-Martinez from having contact with A.C. or Castillo. Garvin directed Castillo to move with A.C. out of the apartment.

Garvin first interviewed A.C. on January 31, 2000. A.C. told her about having "secrets" with Rosales-Martinez and that she was not supposed to tell about the "touching." Using an anatomical drawing, A.C. indicated that Rosales-Martinez had touched her vaginal area and buttocks with a finger.

On February 3, 2000, Castillo and Garvin drove A.C. to the child advocacy center in Sioux City for a physical examination. Ms. Garvin heard Castillo whispering to A.C. in the car and told Castillo to speak out loud and that there should be no more secrets. Dr. M.J. Jung examined A.C. and found no physical evidence of sexual abuse. A.C. was interviewed by a child protection worker while in Sioux City. Garvin observed the interview, during which seven-year-old A.C. made no statements about sexual abuse.

DHS removed A.C. from Castillo's custody that same month and placed her with a foster family.

Ms. Garvin interviewed A.C. a second time a year later, on February 27, 2001. Police Officer Chris Cole was present and took notes. A.C. told Garvin that Rosales-Martinez put his mouth on her private part and he put his private part in her mouth.

Following that interview, Officer Cole attempted to reach Rosales-Martinez, but was told he was in California. Officer Cole obtained a warrant for Rosales-Martinez's arrest for sexual abuse.

On March 2, 2001, Officer Cole learned Rosales-Martinez had returned to Iowa and he was arrested. Cole "tried to interview" Rosales-Martinez that day, but "learned he didn't want to speak with [Cole]." Rosales-Martinez denied the charges and requested an attorney.

On March 19, 2001, the State charged Rosales-Martinez with second-degree sexual abuse alleging he committed sex acts on A.C., a child under twelve years of age, between June 5 and October 5 in 1999.

Pursuant to Iowa Code section 915.38 (2001), the State moved for a protective order concerning the discovery deposition of A.C. On June 11, 2001, the district court held an evidentiary hearing on the motion. Finding "A.C. would suffer serious trauma caused by testifying in the presence of the defendant and that it would impair A.C.'s ability to communicate," the court ruled A.C. would be deposed using a one-way mirror, and that she would not be told defendant Rosales-Martinez would be watching.

The State renewed its motion for protective order as to the child's trial testimony. Rosales-Martinez resisted setting forth specific requirements for protection of his confrontation right, including that the child be informed Rosales-Martinez would be watching her testimony. The court approved the protective order prior to trial.

In early October 2001, the court granted the State's resisted motion to amend the trial information to allege the sexual abuse occurred between June 5, 1999 and January 28, 2000. A jury trial began on October 30, 2001, but resulted in a mistrial due to a deadlocked jury.

A second jury trial began on January 8, 2002. At this trial, defense counsel "continue[d] to object to the findings that were made in July 2001." The court ruled:

> [I]t is necessary to protect the minor child [A.C.] from trauma caused by testifying in the physical presence of the defendant in open court.

> It is therefore ordered that the testimony of the minor child [A.C.] will be taken in a room other than the courtroom and will be televised live by closed-circuit television for viewing by the jury in the court room.

At trial, the State's first witness was Officer Cole. Cole testified, without objection, that he "was contacted by an attorney that said he was representing Mr. Rosales," who told Cole "Mr. Rosales wasn't going to speak with me." He also testified, again without objection, that he "tried to interview" defendant in March 2001 but "he didn't want to speak with me," defendant denied the charges, and requested an attorney.

Castillo then testified. She stated she did not see the defendant often, though they both worked at IBP. She admitted having told A.C. to lie about the abuse in the past. She also testified she had been charged with child endangerment and was told the charges would be dropped if she agreed to testify truthfully against Rosales-Martinez.

On cross examination, defense counsel asked Castillo if anybody talked to A.C. about the abuse allegations. Castillo stated A.C.'s therapist, Karen Gotto, "talks to her about this, about this all the time" as did Karee Muilenburg, and Susan Garvin. Defense counsel also raised the following issues on cross-examination of Castillo: that the defendant was not charged after A.C. was physically examined; that other males lived in the apartment with Castillo, the defendant, and A.C.; and that Castillo had contact with defendant despite a no-contact order.

Defense counsel then asked Castillo,

> Q. When you moved out in January of 2000, Ms. Castillo, it was not because you thought Mr. Rosales was sexually abusing

> your daughter, correct? It was because of something else, was it not? A. We were fighting too much, and basically [A.C.] was seeing all that, and he—he struck my daughter.

As a result of this response, defense counsel moved for a mistrial. The court overruled the motion, stating:

> The record is clear that the witness Mary Castillo made reference to the defendant hitting the child [A.C.], and that comment should be prohibited by the ruling, court's ruling on the motion in limine [prohibiting evidence of prior bad acts]. However, the—the answer was given on cross-examination. Defense counsel had a—had previously deposed Mary Castillo and should have been aware that she might testify in basically the same manner that she testified to on deposition, where she says that he—the defendant was hitting [A.C.] So I—I view this as not being any flagrant violation of the motion or order on motion in limine. I am not too sure the jury even picked upon the statement.
>
> After the state was—statement was made in open court, defense counsel requested a sidebar. We discussed the matter of the witness Mary Castillo making the statement in the presence of the jury. At that time I informed defense counsel if he—if he wanted to, if he wanted it, I would give the jury an instruction telling the jury to disregard that particular portion of the witness's testimony. Defense counsel elected not to have the court give the jury such an admonition.

Defense counsel continued to cross-examine Castillo and she admitted having lied previously to social workers about the sexual abuse allegations.

Prior to A.C.'s testimony, defense counsel stated "we agree to be bound by the findings of the court on July [2001]." The prosecutor noted that "the statute is fairly specific about some requirements" and procedures were discussed with the court. A.C. then testified via closed circuit television.

A.C. stated Rosales-Martinez touched her "private" with his hand more than once. She said Rosales-Martinez pulled her clothes down and took his boxers off—"He put his private in my private." In addition, A.C. testified that Rosales-Martinez touched her "buppy" with his hand and his "private." A.C. later

added that Rosales-Martinez's mouth also touched her privates. She circled areas on anatomical drawings of a male and female indicating what she meant by "private" and "buppy": A.C.'s "private" was her vaginal area, her "buppy" was her buttocks area; defendant's "private" was his penis. A.C. stated these incidents happened when Castillo was at work and Moses was in a different room.

DHS worker Susan Garvin then testified she had conducted the child abuse assessment concerning the allegations that Rosales-Martinez had sexually abused A.C. She testified, over defense counsel's hearsay objections, A.C. "talked about secrets in her home"; "[s]he said she was touched on her vaginal area and her buttocks"; and "talked about Santos Rosales touching her again, this time performing oral sex on her." Garvin stated A.C. indicated where she had been touched on anatomical drawings presented by Garvin.

On cross-examination, Garvin was asked "you have no physical evidence, physical evidence of sexual abuse upon [A.C.], isn't that true?" She responded, "The result of the exam was that there were no physical findings. That's correct." She also acknowledged that A.C. did not make any statements regarding sexual abuse at the February 3, 2000 interview with the child protective worker.

On redirect examination, the following occurred:

> Q. You were asked the question if [A.C.] had mentioned anything specific regarding the sexual abuse allegations in that—in that interview. Do you remember that question? A. Yes.
>
> Q. Did she make specific denials? A. She just said she didn't want to talk about it.
>
> Q. Mr. Murray [defense counsel] asked you about the findings of Dr. Jung's examination? A. Yes.
>
> Q. And you testified to that?

> MR. MURRAY: Objection, Your Honor. I didn't ask her about that. I just asked her if she had any physical evidence, and sort of physical evidence, Your Honor. I believe she volunteered that information.
>
> THE COURT: Overruled. She may answer.
>
> MR. KIMBLE [PROSECUTOR]: Were you surprised by that? A. Not at all.
>
> MR. KIMBLE: Why?
>
> MR. MURRAY: Objection, Your Honor. May we approach?

The court then sustained the objection based upon its ruling in limine that the State was prohibited from offering evidence from Dr. Jung (or another doctor) to the effect that a negative report of physical findings of sexual abuse is not uncommon. Defense counsel again moved for a mistrial, which was denied. The court found that the State "has technically violated the court's prior order on motion in limine, prohibiting the offer of evidence concerning the effect of the medical report and findings of Dr. Jung." Nonetheless, the court concluded "the defendant's rights have not been substantially prejudiced." The question and answer were stricken, and the jury instructed to disregard.

Defense witness Carlos Burgos's testimony was offered to discredit Castillo's testimony about her lack of contact with the defendant after moving out of the apartment. Burgos testified to seeing two or three friendly meetings between Castillo and Rosales-Martinez in the IBP cafeteria in November or December of 2001.

Rosales-Martinez then testified in his own defense, mostly through an interpreter. He stated he had seen A.C. twice since Castillo and A.C. moved out late January 2000. The first time, A.C. came to the apartment door briefly and hugged him and cried about wanting to see him. The second time, at a parade in the summer of 2001, he saw A.C. from across the street and waved to her. That

day A.C. looked "sad." Rosales-Martinez also said he saw Castillo daily at work and she called him often. Rosales-Martinez denied he had ever touched A.C.'s vagina or anus with his finger, penis, or mouth—calling the allegations "a bunch of lies."

On cross-examination, the prosecutor asked the defendant,

> Q. Were you aware that there was a no-contact order between you and [A.C.] on either of those two occasions that you had contact with her? A. Yes, sir.
>
> Q. Sir, isn't it also true that in a prior situation, where you were providing information, that you said you had not known of the no-contact order until your arrest? A. I did know it.
>
> Q. I will ask you to please answer the question I am—that I—let me try this again. I will ask that you please answer the question that I am asking. The question I am asking you is, Wasn't there a time when you earlier provided information and you said—when you were under oath—that the first time you became aware of a no-contact order between yourself and [A.C.] was when you were arrested on the sexual abuse charge? A. The first time?
>
> Q. Have you ever said that? You don't need to indicate when. But it's true that you said that, didn't you? A. Yes, sir.
>
> Q. And that wasn't the truth, was it? A. No, sir.
>
> Q. So you lied? A. In respect who?
>
> Q. Well, you just told me it wasn't the truth, what you said when you were under oath, correct? A. Yes, sir.
>
> Q. So that would be a lie, would it not? A. Would you repeat the question again, please?
>
> Q. Yes. I will repeat it again. So this time when you say you didn't tell the truth, that would mean that you were lying, weren't you? A. You could say.
>
> Q. How close did you come to [A.C.] the second time that you had contact with her at this parade? A. It was simply in the parade that we saw each other. We said hi, and that was it.
>
> Q. I'll ask you the same question—
>
> [DEFENSE COUNSEL]: Asked and answered, Your Honor.
>
> [PROSECUTOR]: The answer was not responsive, Your Honor.
>
> THE COURT: I am going to let you answer—ask the question one more time.
>
> [PROSECUTOR]: Now please listen to my question. Physically, how close did you come to [A.C.] this second time when you claim you had contact? INTERPRETER JAIRO GARZA: From one side of the street to the other.

> Q. And you are saying that you just waved, said hi and left? A. Yes, sir.
>
> Q. Out of all the witnesses that have been before this court, you are the only one who got to listen to what everyone else had to say before you testified; isn't that right? A. Yes, sir.
>
> Q. And, in fact, before your testimony here today, you were able to meet with your attorney and review all of the evidence against you, correct? A. Yes, sir.
>
> Q. And that allows you, doesn't it, to wait until all other information is in and then tell what you want to say?

The court interrupted and called counsel to the bench. After the side bar, the prosecutor moved on to other questions.

The State offered rebuttal testimony from A.C.'s mental health therapist, Karen Gotto, and A.C.'s social worker, Karee Muilenburg. Both testified that although they met with A.C. almost weekly, A.C. had not spoken to them about the sexual abuse allegations and neither had questioned her on that subject. A.C. had discussed a "safety plan" concerning Rosales-Martinez with both of them.

Another rebuttal witness, A.C.'s foster mother Kay Andrews, recalled seeing Rosales-Martinez standing behind her at a parade in October of 2000. A.C. was in front of Mrs. Andrews and said Rosales-Martinez had tapped her on the head.

Rosales-Martinez again took the stand and trial counsel asked him, with regard to Andrews stating the parade happened in October of 2000, "[w]hat do you say to that?" Rosales-Martinez responded, "I think that was a lie. When that happened, it was the summer of 2001." The defendant also stated that it was "a lie also" that he was physically close to A.C. On cross-examination, the prosecutor asked:

> Q. So you are saying she just came in here and lied about how—about how close you were; is that right? A. All I am saying is what happened, the truth.
>
> Q. What you're saying is you were clear on the other side of the street? THE DEFENDANT: Yes, sir. INTERPRETER: Yes, sir.

The jury returned a guilty verdict. Rosales-Martinez's motion for a new trial asserting newly discovered evidence from Castillo was overruled following a hearing. He was sentenced to a term of imprisonment not to exceed twenty-five years.

On direct appeal, Rosales-Martinez argued the district court erred in overruling his motions for mistrial based on alleged prosecutorial misconduct; the court erred in approving the protective order for the child's testimony; trial counsel was ineffective in failing to object during the prosecutor's questioning of Officer Cole and Rosales-Martinez; and the court erred in denying his motion for a new trial. *See State v. Rosales-Martinez*, 2003 WL 21229134, No. 02-0399 (Iowa Ct. App. May 29, 2003) (unpublished opinion). This court held the alleged incidents of prosecutorial misconduct did not require mistrial; use of closed circuit television testimony by victim did not violate the defendant's confrontation rights; and the defendant was not entitled to a new trial based upon asserted newly discovered evidence. We preserved his ineffective-assistance-of-counsel claims for possible postconviction review.

On April 27, 2004, Rosales-Martinez filed a pro se application for postconviction relief. He was appointed counsel, who filed an amended application asserting several claims of ineffective assistance of trial counsel.

Rosales-Martinez moved for summary judgment, which was denied on July 2, 2008.

An evidentiary hearing was held on February 25, 2010. On December 10, 2010, the postconviction court denied relief on all grounds.

II. Scope and Standard of Review.

Ineffective-assistance-of-counsel claims are constitutional in nature and, therefore, our review is de novo. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). We give weight to the lower court's determination of witness credibility. *Id.*

Our supreme court held:

> Iowa law regarding ineffective assistance of counsel is well established. In order to prevail on such a claim, the applicant must prove, by a preponderance of the evidence, that [1] trial counsel failed to perform an essential duty and [2] the applicant was prejudiced thereby.
>
> An attorney fails to perform an essential duty when the attorney performs below the standard demanded of a reasonably competent attorney. We presume the attorney performed competently, and the applicant must present an affirmative factual basis establishing inadequate representation. Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel. However, strategic decisions made after a less than complete investigation must be based on reasonable professional judgments which support the particular level of investigation conducted. Trial counsel has no duty to raise an issue that has no merit. We do not expect counsel to anticipate changes in the law, and counsel will not be found ineffective for a lack of clairvoyance. However, in situations where the merit of a particular issue is not clear from Iowa law, the test is whether a normally competent attorney would have concluded that the question was not worth raising.
>
> An applicant is prejudiced by counsel's failure to perform an essential duty when 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 one that is sufficient to undermine confidence in the outcome.

Id. at 721–22 (internal quotation marks and citations omitted).

We may dispose of the ineffective-assistance claims under either prong. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). *Id.*

III. Discussion.

The district court adequately summarized the applicant's ineffectiveness claims:

> His main argument is that because the charge against him was based almost entirely on the testimony of the child victim, then nine years old, the perceived credibility of Applicant would be of substantial importance to the jury in determining his guilt or innocence. Therefore, Applicant argues that trial counsel's failure to object to certain pieces of evidence; certain instances of prosecutorial misconduct; and stipulation to a protective order all constitute ineffective assistance of counsel.

A. Failure to object to prosecutorial misconduct. Rosales-Martinez complains trial counsel was ineffective in failing to object to prosecutorial misconduct. The district court found that "viewing the totality of Applicant's trial, he was not denied reasonable professional assistance." The court distinguished this case from *State v. Graves*, 668 N.W.2d 860, 882 (2003), where the supreme court found defense counsel's failure to object to the prosecutor's conduct was not justified as a trial strategy:

> The Court does not find that totality of the record demonstrates sufficiently objectionable questions to which trial counsel failed to object in order to show ineffective assistance of counsel. There is no evidence that the prosecutor attempted to "inflame" the jurors against the Applicant, or that the prosecution attempted to reduce the case to the jury's determination of whether Applicant or a law enforcement officer lied. Additionally, trial counsel had opportunities throughout the trial to respond to the State's evidence, and trial counsel made carefully considered objections to this end.

Addressing the specific claims of prosecutorial misconduct, the district court first found that while Officer Cole's testimony "infringed Applicant's constitutional rights," trial counsel had testified at the postconviction hearing he chose not to object because he wanted the jury to hear that Rosales-Martinez denied the charge from the beginning. The district court found trial counsel had articulated a reasonable trial strategy.

Second, with respect to the prosecutor's questioning of the defendant about the foster mother's testimony, the court observed that questioning a witness about another witness's veracity is generally improper, and therefore trial counsel's failure to object was a breach of duty. *See Graves*, 668 N.W.2d at 873 ("[W]e hold 'were-they-lying' questions are improper under any circumstance."). But the court found the applicant had failed to establish that prejudice resulted.

Third, the district court rejected the claim that it was improper for the prosecutor to impeach the defendant with prior inconsistent statements.

Finally, as to the prosecutor's questioning of the defendant about his having been present throughout the trial before having to testify, the district court found such questions were permissible cross-examination. *See Portuando v. Agard*, 529 U.S. 61, 70, 120 S. Ct. 1119, 1125, 146 L. Ed. 2d 47, 57 (2000) ("Once a defendant takes the stand, he is subject to cross-examination impeaching his credibility just like any other witness." (internal quotation marks and citations omitted)); *id.* at 78, 120 S. Ct. at 1129–30, 146 L. Ed. 2d at 62 (Ginsberg, J. dissenting) (agreeing with the lower court's ruling where "on cross-examination, a prosecutor would be free to challenge a defendant's overall credibility by pointing out that the defendant had the opportunity to tailor his

testimony in general, even if the prosecutor could point to no facts suggesting that the defendant had actually engaged in tailoring").[1]

Upon our de novo review, we agree with the district court's reasoning and find that in view of the totality of the record here, the applicant has failed to establish the requisite prejudice. *See Nguyen v. State*, 707 N.W.2d 317, 326 (Iowa 2005) (stating "[t]he bright-line rule of *Graves* is not a bright-line rule for prejudice" and stating the court must "consider whether the effect of the misconduct was pervasive enough to undermine confidence in the verdict").

This case is not like *Bowman v. State*, 710 N.W.2d 200, 206–07 (Iowa 2006), where the court pointed out the "prosecutor initiated an all-out, name-calling attack on [the defendant's] credibility using an impermissible line of questioning at least eight different times during his cross-examination" and six additional improper comments in closing. There, the court concluded the focus of the case had impermissibly shifted from "the real issue—what really happened based on the admissible evidence." *Bowman*, 710 N.W.2d at 207. Nor do we believe the case is similar to *Graves*, 668 N.W.2d at 880, where the court found the prosecutor's attempt to reduce case to the issue of whether Graves lied or

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[1] The *Portuando* majority stated,

> In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

529 U.S. at 73, 120 S. Ct. at 1127, 146 L. Ed. 2d at 59.

police officer told the truth was improper, diverted the jury's proper focus, and distorted the State's burden of proof.

The applicant complains his credibility was attacked. But a defendant who takes the stand places his credibility at issue. *See Portuando*, 529 U.S. at 70, 120 S. Ct. at 1125, 146 L. Ed. 2d at 57; *State v. Parker*, 747 N.W.2d 196, 205 (Iowa 2008) (recognizing "that defendants in criminal cases who take the stand and testify in their defense place their credibility in issue and are typically subject to cross-examination the same as any other witness").

We conclude Rosales-Martinez has failed to establish trial counsel was ineffective.

B. Stipulation to Protective Order. Rosales-Martinez asserts it was improper for trial counsel to stipulate to the protective procedure implemented for closed-circuit testimony of the victim. As noted by the postconviction court, this court ruled in Rosales-Martinez's direct appeal that trial counsel was not ineffective in failing to raise a claim that the closed circuit testimony of the child witness violated the defendant's right to confrontation. *See Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 3169, 111 L. Ed. 2d 666, 685 (1990) (ruling, under limited circumstances and specified findings, the protection of a child witness from trauma may outweigh a defendant's right to face accuser in court); *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995). "Our decision on direct appeal is thus final as to all issues decided therein, and is binding upon both the postconviction court and this court in subsequent appeals." *Holmes v. State*, 775 N.W.2d 733, 735 (Iowa Ct. App. 2009).

Moreover, the applicant did not raise the procedural issues now raised prior to his postconviction hearing and cannot do so now. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Finally, we note a claim similar to that raised by the applicant was rejected in *State v. Shearon*, 660 N.W.2d 52, 55 (Iowa 2003).

We affirm the denial of postconviction relief.

AFFIRMED.