IN THE COURT OF APPEALS OF IOWA

No. 2-540 / 11-1262
Filed August 8, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KAREN HUSTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee County, John G. Linn, Judge.

Karen Huston appeals the judgment and sentence entered following her conviction for child endangerment causing serious injury as a habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Michael P. Short, County Attorney, and Clinton R. Boddicker, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Karen Huston appeals the judgment and sentence entered following her conviction for child endangerment causing serious injury, in violation of Iowa Code sections 726.6(1) and 726.6(5) (2009), as a habitual offender under section 902.8. Huston contends the district court erred in admitting testimony that there was a founded child abuse report against her. Huston further argues her trial counsel was ineffective. Upon consideration of both issues raised on appeal, we affirm Huston's conviction and sentence.

I. Background Facts and Proceedings.

A jury could have found the following facts from the evidence presented at Karen Huston's trial.

T.H. was born in January 2005. T.H.'s parents are Brandon Holmes and Christie Pohlans. In November 2008, T.H. began living with Brandon and his wife, Mandy Holmes, in Fort Madison, Iowa. In December 2008, Brandon, Mandy, T.H., and Mandy's four children moved in with Mandy's parents, Huston and her husband, Fred. In April or May 2009, Brandon and Mandy and three of Mandy's children moved out of Huston's home and into a home of their own. T.H. and her step-sister, Sabrina, continued to live at Huston's residence. The Iowa Department of Human Services initiated eighteen child abuse investigations on this family over the course of several years; six of those investigations involved T.H.

Dr. Frank Artinian II and Dr. Christopher Youngman are pediatricians practicing at the Fort Madison Community Hospital. When Dr. Youngman saw

T.H. in May 2009, T.H. weighed thirty-nine pounds and was between the 50th and 75th percentiles for weight and between the 25th and 50th percentiles for height; within the "normal range." In November 2009, Dr. Artinian noticed T.H.'s weight had dropped from thirty-nine pounds to thirty-four pounds in five months. Dr. Artinian considered T.H.'s weight loss (approximately 12% of her body weight) to be "significant" and "extreme." Dr. Artinian was "very concerned" about T.H. and suggested to T.H.'s step-mother Mandy that T.H. be hospitalized for testing and evaluation. Mandy declined.

Dr. Artinian contacted DHS with his concerns. Thereafter, Mandy agreed to weekly follow-up appointments to check T.H.'s weight and test for any diseases that might be causing the weight loss. T.H. had six more appointments through December 2009. During that time, T.H.'s weight "stabilized" and Dr. Artinian ruled out "disease processes which could cause weight loss."

T.H. came to the attention of DHS again in October 2010, when DHS became aware T.H. was not wearing eyeglasses prescribed for her crossed eyes and T.H. had missed an eye appointment at the University of Iowa. Child Protection Worker Sharon Andrusky recognized the child's name from prior abuse investigations. Andrusky contacted Mandy, and Mandy brought T.H. to Andrusky's office. T.H. was wearing glasses, and Mandy reported T.H. had received eye care.

However, "it was immediately apparent" to Andrusky "that there was something wrong with [T.H.]." Andrusky observed T.H.'s skin coloring was "pale and gray" and "was not a healthy tone." Andrusky further noticed T.H. "had

extensive hair loss on the top of her head." T.H. "held her head down" and "would not make eye contact." T.H. had a "flat affect," "no interaction at all," and would not speak "except to repeat something that might have been said to her."

Andrusky contacted Dr. Artinian's office. Dr. Artinian indicated he had not seen T.H. within the past ten months. DHS prompted Mandy to schedule a physical examination for T.H. On October 29, 2010, T.H.'s weight was thirty-four pounds, the same it had been the last ten months. T.H.'s weight fell below the 5th percentile. Dr. Artinian was "extremely concerned" about T.H.'s lack of weight gain and overall appearance. T.H.'s belly was "protuberant and puffing out a little bit" and her extremities were "very small and emaciated," which, according to Dr. Artinian, were "signs of malnutrition." T.H.'s "skin was sagging and very loose on her body," "hanging from her arms and from her thighs and from her calves." T.H.'s hair "looked terrible" and "patches [were] falling out off of her scalp." In addition, Dr. Artinian described T.H's demeanor as "very abnormal" for a child and that T.H. had "very little emotion" and was "very subdued."

Dr. Artinian was "actually worried about [T.H.'s] life at that point in time." Dr. Artinian felt T.H. needed to be hospitalized for further testing. T.H. met both criteria for failure to thrive.[1] Dr. Artinian believed "something catastrophic was going on to prevent [T.H.] from gaining weight." As a result of his examination, Dr. Artinian wrote a letter to DHS dated November 1, 2010, that requested that

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[1] According to Dr. Arinian, "failure to thrive" is defined as (1) crossing one or more of the major percentiles on the child's growth chart, such as going from the 50th percentile to the 25th percentile, or (2) being below the 5th percentile on the child's growth chart.

DHS intervene and recommended T.H.'s placement in the hospital. Dr. Artinian's letter stated in part, "As a pediatrician, I have grave concerns regarding the physical and mental health of [T.H.]. I am very concerned that she is undergoing abuse/neglect in her home. DHS absolutely needs to take action to help this child."

The district court entered an ex parte order authorizing removal of T.H. for placement in the hospital. On November 2, 2010, Andrusky contacted Mandy and Brandon, T.H.'s parents, to find T.H. A law enforcement officer accompanied Andrusky for the removal. Andrusky followed Mandy to Huston's home where T.H. was living. Mandy went into the home and brought T.H. out while Andrusky waited in the patrol car outside. Andrusky noticed T.H. was "very dirty," "[h]er clothing was dirty," and "[h]er hair was matted." Andrusky observed T.H.'s skin was "very gray and loose appearing." T.H. did not talk, except to say that she was hungry. T.H. was taken directly to the Fort Madison Hospital.

T.H. began to improve immediately. Nurses reported T.H. ate everything presented to her. When Andrusky visited T.H. the next day, T.H. looked "incredibly better." T.H.'s "skin tone was better," and she was clean. T.H. was "smiling, laughing," and "very talkative." When Andrusky visited T.H. again on November 4, 2010, T.H. was "[m]uch more alert," doing puzzles, and was able to provide detailed information to Andrusky. T.H. seemed more like a "normal child at that point."

Dr. Youngman also noticed T.H.'s "significant improvement." Although Dr. Youngman noted that T.H. still had a "foul odor" even after bathing, but "her skin

turgor had significantly improved." T.H.'s hair "no longer looked as thin." As T.H.'s skin regained color and moisture, Dr. Youngman noticed that "linear bruising" began to appear on her arms.

T.H. stayed at the hospital for five days. T.H. was not given any medication, but her environment and caloric intake were controlled. T.H. gained nine pounds during her five-day stay at the hospital. According to Dr. Artinian, it was "extremely unusual to gain that much weight in that amount of time." Dr. Artinian noted that in this case, however, T.H.'s weight gain was sustained over a period of time. Ultimately, Dr. Artinian concluded within a reasonable degree of medical certainty T.H.'s failure to thrive was "the result of not receiving enough food."[2] As Dr. Artinian opined:

> [T]he reason why [T.H.] was failing to grow properly and gain weight over time was that she was not receiving an adequate amount of calories, meaning she was not getting enough food. This was—this was determined by ruling out the other problems that could cause it, but more than that, by hospitalizing her for five days, we were able to control her environment and control her caloric intake, and when given calories, she gained weight. We did no other intervention for her. We gave her no other medicine or therapies that would cause weight gain, and during that five days, [T.H.] came into the hospital at 34 pounds and was discharged at 43 pounds, which is a nine pound weight gain in five days, which is—just speaks to the fact that when given calories, she was able to grow.

Dr. Youngman concurred in Dr. Artinian's diagnosis.

Upon T.H.'s release from the hospital, she weighed forty-three pounds. Her behavior had exhibited a "significant change." T.H. was "very outgoing" and "very playful." T.H. was placed in the home of a foster family. T.H. continued to

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[2] Extensive testing had ruled out other possible causes of T.H.'s failure to thrive.

have regular weight checks: she weighed thirty-eight pounds on November 12, 2010; forty-one pounds on November 29, 2010; forty-five pounds on December 29, 2010; and forty-six pounds on January 28, 2011, which put her back between the 50th and 75th percentiles for weight. By January 28, 2011, T.H. had also grown two inches, which put her height between the 5th and 10th percentiles.

DHS Caseworker Leslie Boyer was assigned to T.H.'s case. Boyer conducted separate interviews with T.H., T.H.'s four school-age step-siblings, as well as Mandy, Huston, and Huston's husband, Fred. Boyer learned from the children that T.H. "had been staying with Karen [Huston] and Fred, and that they would only feed her one bowl of cereal a day" and forced her to do exercises. Boyer also learned that T.H. "had been tied to a chair where she slept at night and also time throughout the day, and that she was also tied to a wheelchair." T.H. was not allowed to use the bathroom while she was tied up and would soil herself. Boyer visited Huston's home and photographed the furniture and rooms as T.H. and the children had described. Boyer also noticed the home was "cluttered and dirty" with "belongings piled up in the corners and around the furniture" and that it contained an odor from the "three large dogs" living there.[3]

Huston denied that T.H. had ever lived in her home. Huston claimed T.H. had been living with Mandy and Brandon, and stated T.H. would come to her house for a couple hours here and there while Mandy and Brandon ran errands. Huston stated there was always food at her house and that the children would never go without food. Huston claimed T.H. had an eating disorder and that she

[3] Boyer was not allowed to see the kitchen because that is where the dogs were.

would eat to the point of vomiting. Huston also claimed T.H. had a mental disorder, that "something was wrong" with her, and that it was as if T.H. was in a "shell." Huston also claimed she never disciplined T.H. but sometimes "used time-out on the children." Mandy stated T.H. had lived with Huston, but that Mandy had fed T.H. most of her meals at the Huston home. Boyer's report resulted in a founded child abuse report against Huston, on the grounds of denial of critical care, failure to provide adequate supervision, physical abuse, and failure to provide adequate food.

On December 10, 2010, the State filed a trial information charging Huston with child endangerment causing serious injury (Count I) and child endangerment causing bodily injury (Count II). A jury trial commenced on June 20, 2011. After the State presented its case, Huston moved for judgment of acquittal. The district court granted the motion for judgment of acquittal on Count II. Huston renewed her motion for judgment of acquittal at the close of the evidence. The court denied the motion regarding Count I. The jury returned a verdict of guilty to child endangerment causing serious injury.[4] Huston stipulated to two prior felony convictions. On July 28, 2011, Huston filed a motion for new trial. Following a hearing, the court denied the motion. The court sentenced Huston for an indeterminate term of fifteen years. Huston now appeals.

II. Evidentiary Rulings.

Huston contends the district court erred in allowing testimony from DHS Caseworker Leslie Boyer regarding the "founded" child abuse report against

[4] Huston's case was consolidated with the case against her husband, Fred. Fred was found guilty of child endangerment with no bodily injury. Fred did not appeal.

Huston and the administrative procedure to appeal such a finding. Specifically, Huston argues "evidence of a founded child abuse report does not have any tendency to make the existence of any fact that was of consequence to the determination of the criminal child endangerment offense more or less probable than it would be without the evidence." Huston further alleges "any relevance of the agency finding and appeal process were outweighed by the danger of unfair prejudice."

Huston points to the following colloquy during direct examination of Caseworker Boyer as the basis for her argument on appeal:

> Q. [PROSECUTOR]: [D]id you—or were you able--, based on your investigation, to reach a conclusion [as to whether the child abuse report was founded or not confirmed]? A. [CASEWORKER BOYER]: Yes, I was.
>
> Q. And what was that conclusion?

At that point, Huston's attorney objected on the grounds of relevancy and "lower burden of proof." The court overruled the objection and directed Boyer to answer the question.

> A. [CASEWORKER BOYER]: My outcome of my report was a founded child abuse report, two separate, actually, reports: One on Karen Huston and one on Fred Huston. It was founded on denial of critical care, failure to provide adequate supervision, also on physical abuse, and failure to provide adequate food.
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> Q. Now, with this child abuse assessment process, once a report has been generated, is there an opportunity for a person who is the subject of the child abuse report—or let me clarify that. Is there an opportunity for somebody who's listed as a perpetrator to appeal that decision?

At that point, Huston's attorney objected on the grounds of relevancy and argued the question was "highly prejudicial." The court overruled the objection and directed Boyer to answer the question "yes or no."

Boyer answered, "Yes." The prosecutor then asked Boyer to explain the process to appeal the report, to which Huston's attorney objected on the ground of relevancy. The court overruled the objection and directed Boyer to "answer the question, but please answer the question directly. Do not offer additional testimony."

> A. [CASEWORKER BOYER]: There is a process. A perpetrator who receives the outcome of the report has six months from that date to appeal the decision. . . . There is a process on the back of the letter sent to the perpetrator. They can write a letter and send that to our centralized unit in Des Moines, and they'll get notification if it's accepted to schedule a prehearing.

The prosecutor next asked Boyer whether Huston had appealed the founded report. Huston's attorney objected, and the court sustained the objection.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues." Iowa R. Evid. 5.403. "In determining whether evidence should be excluded from a trial under rule 5.403, we first consider the probative value of the evidence." *State v. Cromer*, 765 N.W.2d 1, 8 (Iowa 2009) (noting that the "probative" value of evidence is different than the "relevancy" of evidence). The probative value of evidence "gauges the strength and force" of the tendency to make a consequential fact more or less probable. *See State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). After considering the probative value of the evidence, we must then determine whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice. *Cromer*, 765 N.W.2d at 9. "In the context of a criminal case, unfair prejudice 'speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a

ground different from proof specific to the offense charged.'" *Id.* (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

On evidentiary questions such as the issue presented here, we review for an abuse of discretion. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). An abuse of discretion occurs when the district court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Upon our review, we find the district court did not abuse its discretion in admitting Boyer's testimony of the founded child abuse report against Huston. Boyer's testimony was relevant and probative to the State's case. Boyer's testimony regarding the report described T.H.'s weight loss, failure to grow, and poor condition—evidence consistent with intentional abuse or neglect, an essential element the State needed to prove. The testimony explained the investigatory and protective steps taken by DHS to determine whether evidence supported the initial information DHS received, and how the investigation resulted in a "founded" report. The testimony explained why further action was taken against Huston and what measures were taken to protect T.H.

We further find the probative value of the evidence outweighed any danger of unfair prejudice to Huston. Under these facts, evidence of a founded child abuse report is hardly the type of information that would arouse horror or surprise in the jury or lure the jury into declaring guilt on a ground different from proof specific to the offense charged. In addition, Boyer's testimony specifically explained the standard of proof for a founded report, in that DHS has "a

preponderance of the evidence, which is more than 51 percent, at that time to determine that a report is going to be founded."

Even assuming, *arguendo*, the court erred in admitting the testimony, any such error was harmless. Reversal is not required in cases of nonconstitutional error unless "the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice." *State v. Henderson*, 696 N.W.2d 5, 12 (Iowa 2005) (quotation marks omitted). If so, prejudice is presumed and we reverse unless the record affirmatively establishes otherwise. *Id.* Here, the record includes significant evidence, other than the founded report, that Huston committed child endangerment. The testimony of several witnesses, including T.H.'s two treating physicians and another caseworker, supported a finding that T.H. was denied critical nutrition and care. T.H.'s medical history sheet lists sixteen weight checks from May 29, 2009 to February 22, 2011, including T.H.'s weight of "34 lbs 0 oz" on December 8, 2009 and "34 lbs 0 oz" on October 29, 2010. Dr. Artinian's letter to DHS expressed his "grave concerns regarding the physical and mental health of [T.H.]" and stated he was "very concerned that she is undergoing abuse/neglect in her home."[5] Subsequently, when T.H. was removed from Huston's home in November 2010, she gained nine pounds in five days, without any intervention or treatment other than being provided with proper nutrition. T.H.'s treating physicians, Dr. Artinian and Dr. Youngman, agreed T.H.'s failure to thrive was the result of not receiving enough food. In addition, T.H. continued to grow after her placement in a foster home.

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[5] Huston admitted at trial T.H. lived in her home between May and November 2010 and that she was T.H.'s caretaker during that time period.

By February 2011, T.H. weighed “48 lbs 8 oz,” and had grown two inches in height since November 2011. Any error from the court’s admission of the testimony regarding the founded report was harmless.[6] We affirm on this issue.

III. Ineffective Assistance of Counsel.

Huston also contends she received ineffective assistance of counsel due to trial counsel’s failure to move for judgment of acquittal. Our review of ineffective-assistance-of-counsel claims is de novo. *State v. Maxwell*, 743 N.W.2d 185, 189 (Iowa 2008); *see State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) (“Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules.”). To prevail on her claim of ineffective assistance of counsel, Huston must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Maxwell*, 743 N.W.2d at 189. The claim fails if either element is lacking. *Anfinson v. State*, 758 N.W.2d 496, 499 (Iowa 2008). If we determine the claim cannot be addressed on appeal, we must preserve it for a postconviction relief proceeding, regardless of our view of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). These claims are typically better suited for postconviction relief proceedings that allow the development of a sufficient record and permit the accused attorney to respond to

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[6] We further find any error in admission of Boyer’s testimony in regard to the appeal process of a founded report to be harmless. The court did not allow Boyer to testify whether Huston did or did not appeal. Huston was not prejudiced by the admission of this testimony.

the defendant's claims. *Id.* In this case, we deem the record adequate to address Huston's claim, and neither party suggests this issue should be preserved for postconviction proceedings. *See* Iowa Code § 814.7(3). We therefore turn to the merits of the claim. *See Johnson*, 784 N.W.2d at 198 ("If the defendant requests that the court decide the claim on direct appeal, it is for the court to determine whether the record is adequate and, if so, to resolve the claim.").

In order to convict Huston of child endangerment causing serious injury, the jury had to find: (1) Huston was a person having custody or control over T.H. during the period of time from April through November 1, 2010; (2) T.H. was under the age of fourteen; (3) Huston knowingly acted in a manner creating a substantial risk to T.H.'s physical, mental, or emotional health or safety, or Huston intentionally deprived T.H. of necessary food when Huston was reasonable able to provide it, and as a result, T.H. suffered substantial physical or mental or emotional harm; and (4) Huston's act caused serious injury to T.H. *See* Iowa Code § 726.6; Jury Instruction no. 16.

Huston's claim focuses on the fourth element of child endangerment causing serious injury, and argues her trial counsel was ineffective for failing to file a motion for judgment of acquittal because "there was insufficient evidence that T.H. suffered a serious injury." Huston alleges the State failed to establish Huston's acts "actually caused any serious injury" to T.H., and only presented evidence that Huston's acts "*could have* caused serious injury if left untreated." Huston seems to focus on the evidence *after* the critical point of T.H.'s removal

from Huston's home when T.H. was hospitalized and received medical attention, and contends that because T.H. *was* ultimately treated, then she could not have been at a substantial risk of death prior to the treatment. We disagree.

"Serious injury" means a "bodily injury which . . . creates a substantial risk of death." *See* Iowa Code § 702.18; Jury Instruction no. 15. In this case, Huston's persistent failure to provide food to T.H. was potentially lethal and subjected T.H. to serious injury. Dr. Artinian and Dr. Youngman were extremely concerned about T.H. and explained that malnutrition to this degree can cause organs to shut down and can be fatal. Indeed, Dr. Artinian and Dr. Youngman testified that T.H.'s condition would have created a substantial risk of death had T.H. not been treated. We decline to find, as Huston urges, that T.H. could not have been at a substantial risk of death prior to her hospitalization due to the fact her condition was ultimately not "left untreated." Indeed, Dr. Artinian stated that at the point when T.H. was removed from Huston's home to be hospitalized, he was "worried about her life." Dr. Artinian further opined that something "catastrophic" was preventing T.H. from gaining weight.

Under these facts and circumstances, there was sufficient evidence to prove Huston's actions caused a serious injury to T.H. Accordingly, trial counsel was not ineffective in failing to challenge the sufficiency of the evidence as to that element, and we affirm on this issue. *See, e.g.*, *Anfinson*, 758 N.W.2d at 499; *Maxwell*, 743 N.W.2d at 195 (requiring defendant to show both that counsel failed to perform an essential duty and that prejudice resulted in order to prevail on a claim of ineffective assistance of counsel).

V. Conclusion.

Upon consideration of the issues raised on appeal, we affirm Huston's conviction and sentence.

AFFIRMED.