IN THE COURT OF APPEALS OF IOWA

No. 2-862 / 11-1827
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VICTOR LAWRENCE PELLETIER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, C.H. Pelton, Judge.

Defendant appeals his conviction, arguing his trial counsel was ineffective.

AFFIRMED.

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Michael J. Walton, County Attorney, and Kimberly Shepherd, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

EISENHAUER, C.J.

Victor Pelletier appeals his third-degree sexual abuse conviction arguing his trial counsel was ineffective in not objecting to the district court's competency inquiry of the victim. We affirm.

I. Background Facts and Proceedings.

Pelletier was charged with sexual abuse based on allegations he put his mouth on the penis of C.H., the twelve-year-old neighbor he was babysitting while C.H.'s mother was away overnight. Another neighbor, Doug Peiffer, testified he was at home around 5:30 a.m. on a cold winter morning when he heard C.H. pounding on the door while screaming, "He's raping me. He's raping me." When Doug opened the door, a hysterical C.H. darted into the house. C.H. was carrying his coat and shoes and wearing one sock. Doug called the victim's mother, who called the police. Officer Thompson arrived, talked with C.H., and testified to C.H.'s demeanor—being in shock.

Kathleen Wiseman, Doug's mother, testified she was sleeping and was awakened by C.H. banging on the door. Further, C.H. "came running in and crying, 'That man raped me. That man raped me.'"

Later that morning, Officer Crouch interviewed Pelletier at the police station. Officer Crouch testified Pelletier stated he and C.H. were on the couch underneath a blanket watching a movie and they both fell asleep. Pelletier denied abusing C.H., and he asserted the incident was C.H.'s dream or C.H. was just out to get him. Further:

> Mr. Pelletier stated . . . he woke up . . . got up to go to the bathroom, went to the bathroom, got a cigarette, came back to the living room to where the couch was located, [C.H.] was gone.

> [C.H.'s] pillow was still on the couch, and the door was unlocked and open.
>
> At trial, after C.H. was sworn in, he was questioned by the court:
>
> THE COURT: Let me ask you another question. Do you know the difference between the truth and a lie?
> C.H.: Yes.
> THE COURT: Do you promise to tell the truth?
> C.H.: Yes.

C.H. testified to the events at issue. Pelletier watched a movie with him, and they sat together on the couch. When C.H. fell asleep on the couch, Pelletier was in another room with his girlfriend, Heather Anderson. C.H. awoke to Pelletier lifting up the blanket and "trying to cuddle" with him. C.H. "just immediately froze" and Pelletier pulled down C.H.'s pants and underwear. After Pelletier sucked on C.H.'s penis, Pelletier stood up and walked into the bathroom. C.H. pulled up his underwear and pants and ran to the closest neighbor's house—Doug Peiffer's house. C.H. pounded on the door and "I told him the babysitter raped me."

A DNA expert, Kristin Evans, testified the enzyme amylase is found in saliva as well as in minute amounts in other bodily fluids. She analyzed the physical evidence and detected a strong presence of amylase on the inside of the back of C.H.'s underwear. The substance contained a mixture of DNA from two different sources. Assuming C.H. as one source, the remaining and major contributor of genetic material was consistent with the DNA profile of Pelletier. Because this profile was incomplete, Evans did not testify to a "match." However, she testified the likelihood another person would have the same

genetic profile discovered on the inside of C.H.'s underwear[1] and *consistent* with Pelletier's DNA profile was 1 in 470 million. Evans stated: "When it is on the inside of the victim's clothing, then yes, it is probative." A slightly elevated level of amylase was also found on the fly and crotch of C.H.'s jeans, but a profile could not be developed.

Anderson, Pelletier's girlfriend, testified she awoke during the night and saw Pelletier and C.H. sleeping on the couch.

During rebuttal closing argument, the State argued:

> What is Mr. Pelletier's DNA doing on the inside of [C.H.'s] boxer shorts, whether it was in the front or the back, along with a whole bunch of amylase, a substance that's found in saliva? There is only one explanation for that. Whether you're looking at [C.H.] and what he told you, what he testified to under oath when Judge Pelton said, "Do you know the difference between the truth and what's not true?" And [C.H.] said, "Yes." "Do you agree to tell the truth?" "Yes."
>
> And [C.H.] sat here and he told you what happened. And then you hear physical evidence that supports what happened, and you hear testimony from other people that supports what happened, that it all falls in line together.

The jury returned a guilty verdict and this appeal followed.

II. Scope and Standards of Review.

"Ineffective-assistance-of-counsel claims have their basis in the Sixth Amendment to the United States Constitution." *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010). We review de novo. *Nguyen v. State*, 707 N.W.2d 317, 323 (Iowa 2005).

[1] Evans testified fecal stains were detected on the front inside portion of C.H.'s underwear, leading her to conclude C.H. had worn his boxer shorts backwards. C.H. denied ever wearing his underwear backwards, but his mother testified to the contrary.

To prevail, Pelletier must prove by a preponderance of the evidence his trial attorney failed to perform an essential duty and this failure resulted in prejudice. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). "Because proof of both prongs of this test is required, should [Pelletier] fail to prove prejudice we need not consider whether his trial counsel failed to perform an essential duty." *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004). Generally, ineffective-assistance claims are resolved by postconviction proceedings to enable a complete record to be developed. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). Sometimes, the appellate record is adequate to resolve the issue on direct appeal. *Id*. We believe the record is adequate to resolve the issue.

III. Merits.

Pelletier argues his trial attorney was ineffective in not objecting to the two questions the district court posed to C.H. Pelletier notes C.H.'s competency as a witness was not challenged by the defense and asserts any competency inquiry should have occurred outside the presence of the jury. Pelletier claims the court's questioning "enhanced the credibility of C.H. to [his] detriment." Pelletier was prejudiced because the questioning "unduly emphasized his age and testimony by extracting an additional promise to tell the truth from him." Further prejudice occurred when the "State took advantage of this inquiry in its rebuttal argument."

The State argues the court's questioning was cumulative of the oath taken by the victim and Pelletier cannot prove prejudice due to the overwhelming evidence of guilt.

We first address the prejudice element. Pelletier must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The governing question is "whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id*. at 695. Where the evidence of guilt is overwhelming, we will find no prejudice. *See id*. at 696; *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) ("The most important factor under the test for prejudice is the strength of the State's case").

After our de novo review of the record, we conclude the evidence of guilt is overwhelming. The victim's neighbor and the neighbor's mother both testified the upset victim arrived at their home partially dressed on a cold winter morning stating he had been raped. The DCI criminologist testified to the presence of amylase (saliva) consistent with Pelletier's DNA on the *inside* of the victim's underwear. The victim testified to awaking to Pelletier removing clothing and placing his mouth on the victim's penis. The victim testified he fled when Pelletier went to the bathroom. Pelletier admitted he and the victim slept together on the couch and the victim left abruptly while Pelletier was in the bathroom. The jury was free to reject Pelletier's assertion the victim was "dreaming" or "out to get him." Based on this evidence, we conclude Pelletier cannot establish *Strickland* prejudice, and his ineffective-assistance-of-counsel claim therefore fails.

AFFIRMED.