IN THE COURT OF APPEALS OF IOWA

No. 6-587 / 06-0417
Filed August 9, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EVELYN MARIE MORROW,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Charles H. Pelton (plea) and David H. Sivright (sentencing), Judges.

Defendant appeals from the sentence imposed following her guilty plea to felony child endangerment. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, Michael L. Wolf, County Attorney, and Ross Barlow, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

Evelyn Morrow appeals from the sentence imposed following her guilty plea to child endangerment, a class "D" felony, in violation of Iowa Code sections 726.6(1)(a) and 726.6(6) (2005).[1] We affirm.

I. Background Facts and Proceedings

Morrow's two-year-old daughter, Alexis, sustained severe burns over forty-five percent of her body in December 2004. At the emergency room, Morrow told medical personnel that she filled up the bathtub in her home with extremely hot water while she and Alexis were in the bathroom. As the tub was filling, Morrow heard her second daughter crying in another room. Morrow went to attend to the other child and left Alexis alone in the bathroom. Morrow returned to the bathroom when she heard Alexis cry out, and found her sitting in the bathtub in hot water. Morrow pulled her out of the water and took her to the hospital.

Alexis was airlifted to the University of Iowa Hospitals and Clinics (UIHC) burn unit. Doctors who treated Alexis at the UIHC opined that based on the type and severity of the burns, her injuries were inconsistent with Morrow's version of events.

The State charged Morrow with child endangerment, a violation of Iowa Code sections 726.6(1)(a) or (b) and 726.6(5), a class "C" felony. Morrow entered into a plea agreement whereby she agreed to plead guilty to the lesser

[1] *See* 2004 Iowa Acts ch. 1004, § 1; ch. 1151, §§ 3, 4 (amending section 726.6 by adding a new subsection (4) and renumbering subsections (4) through (6) as (5) through (7), thereby renumbering the classification of child endangerment as a class "D" felony from subsection (5) to subsection (6)).

charge of child endangerment resulting in bodily injury, a class "D" felony, in violation of sections 726.6(1)(a) and 726.6(6).

At sentencing, the State made no recommendation as to sentence. Morrow objected to the "strong language" and "strong opinions" in a victim impact statement written by the social worker assigned to the case, and requested a suspended sentence with "strong provisions for probation." Morrow admitted to a lack of supervision over her child and negligence in failing to watch her, which resulted in a severe burn. The court sentenced Morrow to a five-year indeterminate term of imprisonment, gave her credit for time served, and imposed a $750 fine and court costs. The court informed Morrow it would reconsider the sentence in a year.

Morrow appeals, contending the district court relied upon improper factors in determining her sentence. She also claims her trial counsel was ineffective for failing to object to portions of the presentence investigation (PSI) report.

II. Improper Sentencing Factors

Morrow contends the district court abused its sentencing discretion by considering the unproven accusation, denied by Morrow, that she intentionally inflicted the injury to her daughter. The State argues Morrow failed to preserve error on this issue. We will assume without deciding that Morrow properly preserved error and proceed to the merits.

Our review is for the correction of errors at law. *State v. Sailer*, 587 N.W.2d 756, 758 (Iowa 1998). We will not disturb a sentence on appellate review unless the defendant demonstrates an abuse of discretion or a defect in the sentencing procedure, such as the district court's consideration of

impermissible factors. *Id.* at 758-59. An abuse of discretion is found only if the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

"It is a well-established rule that a sentencing court may not rely upon additional, unproven, and unprosecuted charges unless the defendant admits to the charges or there are facts presented to show the defendant committed the offenses." *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002). We will remand the case for resentencing if the court improperly considered unprosecuted or unproven additional charges. *Id.* In order to overcome the presumption the court properly exercised its sentencing discretion, the defendant must affirmatively show the court relied upon the unproven offenses. *Sailer*, 587 N.W.2d at 762.

At the sentencing hearing, the district court judge, who had not presided at the plea proceeding, inquired as to Morrow's admissions and the factual basis for the plea. Morrow's counsel informed the court she admitted to lack of proper supervision and negligence in not properly watching the child. The district court imposed the sentence and informed Morrow its reasons for the sentence were based on what was contained in the PSI report. The PSI included an "official version" of the circumstances surrounding the crime, which noted the doctors' opinions as to how the burns occurred, and "defendant's version" of events. The PSI also included a discussion of Alexis's health and the severity of the burns she sustained, and Morrow's background. The court continued:

> The doctors who examined your daughter feel that the severe burns suffered in this case – first, second, and third degree burns over forty-five percent of her lower body – are inconsistent with the statements given here.

> You have admitted child endangerment by lack of proper supervision. Your attorney and you have both indicated that you need counseling. The juvenile court is focusing on some of these needs – parenting skills. Maybe there are some mental health issues here. I see that – bipolar, taking medication for that. Maybe you need some coping skills for stressful situations.
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> But for all this work, I think a short period of incarceration is appropriate here. I have the ability within one year to reconsider your sentence. But I think that a short period of incarceration here is necessary for you to get the best chance of success in the programs that will be available to you for rehabilitation after your release.
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> We owe a tremendous responsibility to our children to protect them, and I think that is appropriate here – a short period of incarceration.

We conclude Morrow has failed to affirmatively show the district court relied on an unproven offense in sentencing her.[2] It is clear from the totality of the district court's statement that it was not relying on the doctors' opinions in determining its sentence. Rather, the court was merely noting a difference of opinion as to how the injury occurred. The remainder of the court's statement focused on Morrow and her need for counseling, parenting skills, and mental health treatment. The court indicated that incarceration would provide Morrow the best opportunity for rehabilitation and stress the severity of the crime. The court's statement does not rise to the level of an affirmative showing of reliance on an unproven offense. We affirm the district court's sentencing decision.

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[2] While it is not clear from Morrow's argument, we assume the "unproven offense" to which she refers is child endangerment by an intentional act, a violation of section 726.6(1)(b). We note, however, that the only difference in the level of the offense charged and the offense to which Morrow pled was the severity of the injury. *Cf.* Iowa Code §§ 726.6(5) (classifying child endangerment resulting in serious injury as a class "C" felony) and 726.6(6) (classifying child endangerment resulting in bodily injury as a class "D" felony). Therefore, whether Morrow's actions were "knowing" or "intentional" was irrelevant to the level of the offense charged or to which she pled.

III. Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Failure to demonstrate either element is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003). To prove prejudice, the defendant must show a reasonably probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). We will resolve ineffective-assistance-of-counsel claims on direct appeal "where the record is adequate to determine as a matter of law that the defendant will be unable to establish one or both of the elements of his ineffective-assistance claim." *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003).

Morrow argues she was denied effective assistance of trial counsel by counsel's failure to object to portions of the PSI report. She contends the information related to unproven offenses contained in the PSI influenced the district court in its sentencing decision. Because we have concluded the district court did not rely on unproven allegations when sentencing Morrow, she cannot satisfy the prejudice prong of her ineffective-assistance-of-counsel claim. Accordingly, we conclude her claim is without merit.

AFFIRMED.