

**IN THE COURT OF APPEALS OF IOWA**

No. 7-205 / 06-1081  
Filed June 27, 2007

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**TRAVIS TAYLOR FREY,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Pottawattamie County, James Heckerman, Judge.

Travis Taylor Frey appeals from his convictions following jury trial of third-degree sexual abuse and domestic abuse assault causing bodily injury.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and James G. Tomka, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

**ZIMMER, P.J.**

Travis Taylor Frey appeals from the judgment and sentence entered by the district court after a jury returned verdicts finding him guilty of third-degree sexual abuse in violation of Iowa Code section 709.4 (2005) and domestic abuse assault causing bodily injury in violation of section 708.2A(2)(b). He contends his trial counsel was ineffective in several respects. We reject one of his ineffective assistance claims and affirm his convictions. We preserve his remaining claims for possible postconviction relief proceedings.

***I. Background Facts and Proceedings***

Based on the evidence presented at trial, a jury could have found the following facts: Travis and Ruth Frey were married in 1996. By 2004 their marriage was “rocky.” The couple often argued about religious issues. Travis was unhappy Ruth was attending Southview Bible Church, which he described as a “very fundamentalist church.”

In the fall of 2004, Travis and Ruth had an argument. Travis threw a set of keys at Ruth, hitting her in the back of the head. Later during the same weekend, he hit her on the head several times with a sofa cushion. Ruth called a domestic abuse hotline, but decided she did not want to leave Travis. She resolved to “hold [her] tongue and not argue” even when he criticized her about her family, her activities, and housework.

In 2005 Travis demanded that Ruth participate in anal intercourse. When she refused, Travis drafted a document of “wifely expectations” that listed his demands. The document included headings such as “Good Behavior,”

“Misbehavior and Noncomplian[ce],” “Sleep time and On Demand,” “Birthdays and Anniversary,” “Photos,” “Quarterly Negotiation,” “Dressing Up,” “Shaving,” “Sleepwear,” and “Fellatio, Intercourse & Other Sex Acts.” The document stated, “Intercourse includes anal and vaginal intercourse,” and under the heading “Misbehavior and Noncomplian[ce],” it stated if Ruth failed to comply with Travis’s demands, she would be tied to the bed. In the document, Travis stated he would do whatever he wished to Ruth, and “[t]his will continue every night until you are ready to be complian[t], at which time you will need to apologize and explain how you are ready to be my sex slave again.”

During the weekend of April 23-24, 2005, Travis and Ruth argued about Ruth attending church on Sunday. Travis told Ruth if she went to church, he would tie her to the bed, and she would “have consequences when . . . the night comes.” Despite Travis’s threats, Ruth went to church. Because she was afraid Travis would tie her to the bed and attempt to initiate anal sex as a “consequence,” she called her friend Amy Rambo for advice. Rambo suggested that Ruth meet with their pastor, Dwight Oswald. Ruth and Amy met with Pastor Oswald after an evening church service, and then Ruth returned home.

After Ruth went to bed that evening, Travis came to bed and said, “[Y]ou’re not naked; you know what the rules are. You need to get undressed.” When Ruth told Travis she was tired and wanted to sleep, Travis said, “[W]ell, we’ll just get this over then. Get the—the lube. We’re going to have anal sex.” Ruth told her husband she did not want to have anal intercourse, but Travis reached for lubricant in a drawer and forced Ruth’s left arm into a loop of rope he

had attached to the bed frame.<sup>1</sup> Ruth struggled with Travis and said, “Please stop. I love you. I don’t want you to do this. Please stop.” Despite his wife’s protestations, Travis held her right hand with his left hand above the bed, pried her legs apart with his knee, and penetrated her vagina with his right hand “really hard and rough.” He also penetrated her rectum with his fingers. While he assaulted Ruth, Travis said, “[S]top crying and just take my punishment and this would be better if [you] would cooperate and it wouldn’t be so hard and it wouldn’t hurt if [you] would just cooperate.” Ruth testified she never consented to any act of anal penetration.

The day after the assault, Ruth called Rambo, and they decided to meet with Pastor Oswald again. Because the pastor did not work on Mondays, Ruth contacted him Tuesday morning. After she met with the pastor, she decided to work on her marriage one more time. She returned home and slept in her stepdaughter’s bedroom for at least one month.

In the fall of 2005, Travis told Ruth he had more sexual demands. He said, “[T]here would be a[nother] contract [and] anal sex would be part of it and [she] couldn’t refuse to sign” or he would post provocative pictures of her on the Internet. In November 2005 Travis attempted to photograph Ruth while she was showering and dressing and left another wifely expectations document on the foot of the bed. After those events occurred, Ruth called her pastor, spoke with Catholic Charities, contacted the police, and filed for divorce.

---

<sup>1</sup> Travis testified he had measured ropes while Ruth was sleeping to ensure they were the right length, and he attached them to the bed frame. Travis claimed he tied the ropes to the bed frame “to see if [his] wife was interested in being tied up . . . for sexual activities.”

On December 20, 2005, the State filed a trial information charging Travis with first-degree kidnapping and domestic assault causing bodily injury. Jury trial commenced on March 28, 2006. Travis testified in his own defense. He claimed he only tied ropes to the bed to see if his wife was interested in being tied up, but when she refused to participate, they had consensual "regular vaginal sex." Travis testified he digitally penetrated Ruth's rectum in April 2005, but he suggested Ruth had consented to that activity on prior occasions. Travis admitted he drafted the wifely expectations documents, but he claimed "it was things that [Ruth] mutually agreed upon and if she didn't they were taken out." The defendant also admitted he possessed numerous pornographic images, including pictures where he superimposed the faces of his wife and sister-in-law on the bodies of women engaged in anal intercourse. According to Travis, he and Ruth engaged in a lot of sexual experimentation.

The jury found Travis guilty of third-degree sexual abuse as a lesser-included-offense of the kidnapping charge and also found him guilty of domestic abuse. Travis was sentenced to ten years imprisonment on the sexual abuse conviction and sixty days on the domestic abuse conviction. Travis now appeals. He claims his trial attorney was ineffective in four respects. He contends his trial counsel was ineffective for (1) failing to object to the use of the term "victim" at trial, (2) failing to object to hearsay evidence, (3) failing to object to testimony about his wife's religious faith, and (4) failing to object to references to pornography.

## **II. Scope and Standards of Review**

A claim of ineffective assistance of counsel requires a de novo review because the claim derives from the Sixth Amendment of the United States Constitution. *State v. Collins*, 588 N.W.2d 399, 401 (Iowa 1998). Travis has the burden to establish by a preponderance of evidence that his trial counsel was ineffective. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). In order to prove his trial counsel was ineffective, Travis must prove his counsel failed to perform an essential duty and prejudice resulted. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). To establish breach of duty, Travis must overcome the presumption counsel was competent and prove counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove prejudice, Travis must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Travis's ineffective assistance claims if he fails to prove either breach of duty or prejudice. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

Usually, we preserve ineffective assistance claims for postconviction relief; however, if the record sufficiently presents the issues, we will resolve the claims on direct appeal. *State v. Martens*, 569 N.W.2d 482, 484 (Iowa 1997). We find the record in this case adequate to rule on Travis's claim that his trial counsel was ineffective for failing to object to the use of the term "victim" during trial.

Because we find the record inadequate to address his remaining claims, we preserve them for possible postconviction relief proceedings.

### ***III. Use of the Term “Victim”***

Travis contends his trial counsel was ineffective for failing to object to the use of the term “victim” in reference to Ruth Frey and women in general who have experienced domestic abuse. The record reveals Detective Cathy Shanno referred to Ruth as “the victim” on several occasions. Jean Brazda, a domestic violence expert, referred to “victims” of domestic violence generally, but she gave no opinion about Ruth and did not refer to her specifically as a “victim.”<sup>2</sup> The prosecutor referred to Ruth as “our victim” on one occasion, and defense counsel referred to her as a “victim” once during cross-examination.

Travis asserts his trial counsel had a duty to object to the label “victim” because it was irrelevant, it appealed to the jury’s sympathies, and it provoked the jury’s instinct to punish him. The defendant has cited no appellate case in support of his breach of duty argument, and we find it unnecessary to analyze his breach of duty claim in the context of this case. We reach this conclusion because we conclude Travis has failed to show he was prejudiced in any way by his counsel’s failure to object.

When raised in the context of an ineffective assistance of counsel claim, the degree of prejudice that must be shown is set forth in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). To sustain his claim, Travis must show “there is a reasonable probability

---

<sup>2</sup> Brazda’s testimony included general statements about women who experience domestic abuse, such as, “On average a victim will leave seven times before finally breaking all ties with their abuser.”

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

Other jurisdictions that have addressed the use of the term "victim" have not found such references prejudicial. See *State v. Wigg*, 889 A.2d 233, 236-38 (Vt. 2005) (finding a detective's use of "victim" was synonymous with "complainant" and did not prejudice the defendant); *State v. Nomura*, 903 P.2d 718, 722 (Hawaii Ct. App. 1995) (finding the use of the term "victim" in jury instructions did not prejudice a defendant). In this case, Detective Shanno used the term "victim" as synonymous with the term "complainant." Brazda only used the term to refer to a class of people who have experienced domestic violence. She did not apply the term directly to Ruth. The term "victim" was not used gratuitously at trial by the prosecutor, the trial court, or defense counsel, and the record provides no basis for concluding the jury was diverted from their fact-finding mission by occasional references to the term. Upon careful review of the record, we find no reasonable probability that the result of this proceeding would have been different if trial counsel had successfully objected to the use of the term "victim" during this trial.<sup>3</sup> Because we conclude Travis has failed to satisfy the *Strickland* standard for granting relief, we reject this assignment of error.

#### ***IV. Remaining Claims***

We now turn our attention to Travis's three remaining claims of ineffective assistance of counsel. Travis contends his trial counsel was ineffective for failing to object to testimony by Rambo and Pastor Oswald that he alleges was

---

<sup>3</sup> We recognize it is desirable to prevent misuse or overuse of the term "victim." In some circumstances, it would be better to use more neutral terms such as complainant, complaining witness, or alleged victim

improper hearsay. Rambo testified she told the pastor's wife that "Travis was expecting to enforce anal sex that night because [Ruth] had gone to church that morning." Pastor Oswald testified, "Because of what [Ruth] shared with me that night in terms of the nature of the assault that she had told me about, I was very concerned about her—her safety and well-being." Travis maintains both of these statements constitute hearsay, so his counsel should have objected to the testimony at trial.

Travis also claims his trial counsel was ineffective for failing to object to Ruth's testimony regarding her strong religious faith and his apparent lack of faith. Travis argues this testimony was irrelevant to any of the issues in the case, and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See Iowa R. Evid. 5.403.

The defendant also claims his trial counsel should have objected to testimony regarding pornography and documents discovered on his computer. Ruth testified about the titles of documents found on the computer, such as "hypnotic suggestions for the perfect wife," "subliminal programming for the perfect wife," "wifely expectations," "the submissive wife versus the modern wife," and "the one, two, threes of anal sex." Ruth also testified about pornographic photographs with her face superimposed on other women's bodies. Nathan Teigland, a computer forensic expert with the Iowa Division of Criminal Investigation, testified he discovered a large number of pornographic images on Travis's computer.

During trial, Travis admitted in his testimony he visited pornographic Internet sites and placed his wife's face on pictures where objects were inserted into women's rectums. These computer documents and photographs were not admitted into evidence. Travis contends the testimony regarding pornography and documents discovered on his computer was irrelevant, and the probative value was substantially outweighed by the danger of unfair prejudice.

In response to these claims of ineffective assistance, the State suggests that Travis's trial counsel "likely had a strategic reason for each decision challenged on appeal." As we stated previously, we generally preserve ineffective assistance of counsel claims for postconviction relief proceedings because of the seriousness of the claims to trial counsel whose performance is being challenged. *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980). "Even a lawyer is entitled to his [or her] day in court, especially when his [or her] professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Upon review of the trial record, we conclude that defense counsel's failure to object may well have been a tactical decision. We conclude the record is inadequate to determine whether the decision not to object was a reasonable tactical decision. We generally presume counsel competent, and we will not second guess a reasonable trial strategy. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1994). Accordingly, we affirm Frey's convictions and preserve these issues for possible postconviction proceedings where the record can be fully developed and defense counsel can be given an opportunity to explain his actions. *State v. Baker*, 560 N.W.2d 10, 15 (Iowa 1997).

**V. Conclusion**

We affirm Frey's convictions. We conclude Frey suffered no prejudice by use of the term "victim" during trial. We preserve the defendant's remaining ineffective assistance of counsel claims for possible postconviction relief proceedings.

**AFFIRMED.**