IN THE COURT OF APPEALS OF IOWA

No. 8-862 / 07-1054
Filed November 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDALL LEE OVERMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Darrell Goodhue, Judge.

Defendant appeals his conviction for third-degree sexual abuse arguing his attorney was ineffective in failing to object to prior bad acts evidence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Wayne M. Reisetter, County Attorney, and Sarah C. Pettinger, Assistant County Attorney, for appellee.

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

EISENHAUER, J.

After a jury trial, Randall Overman was convicted of sexual abuse in the third degree. Overman, fifty-eight, regularly bought clothes and school supplies for C.W., his fifteen-year-old neighbor. C. W. testified Overman sexually abused her in his truck after a shopping trip in July 2006. After C.W. contacted the police, they arranged to tape a conversation with Overman, who made incriminating statements. At trial, Overman testified and denied the abuse while admitting to having fantasized about having sex with C.W.

On appeal, Overman argues trial counsel was ineffective by failing to object to evidence of prior bad acts. We review ineffective-assistance-of-counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). To establish ineffective assistance of counsel, a claimant must demonstrate by a preponderance of the evidence "(1) his trial counsel failed to perform an essential duty, and (2) this failure resulted in prejudice." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). Overman's inability to prove either element is fatal. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings to allow the defendant an opportunity to have an evidentiary hearing and develop a more complete record. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). However, resolution on direct appeal is appropriate when the record is adequate to determine as a matter of law that Overman will be unable to establish one of the two elements. *See id*. We can

resolve Overman's claim on direct appeal because we conclude, as a matter of law, his attorney's actions did not constitute breach of an essential duty.

Overman argues his attorney was ineffective for failing to object to the prosecutor's questions involving Overman's prior acts of sexually touching C.W. However, such evidence is admissible under a long-standing special exception in sex abuse cases which permits the use of prior acts "to show a passion or propensity for illicit sexual relations with the particular person concerned in the crime on trial" as long as the evidence is not unduly prejudicial. *See State v. Spaulding*, 313 N.W.2d 878, 880-81 (Iowa 1981). The jury was instructed:

> You have heard evidence that the defendant committed other acts with [C.W.] before July 17, 2006. If you decide the defendant committed these other acts, you may consider those acts only to determine whether the defendant has a sexual passion or desire for C.W. You may not consider them as proving that the defendant actually committed the act charged in this case.

The prior acts evidence illuminates the relationship between Overman and C.W. and is admissible as evidence establishing Overman's "passion or propensity for illicit sexual relations" with C.W. Additionally, the evidence was concise, direct, non-inflammatory, and concerned acts of a nature similar to the acts in the underlying charge. *See State v. Reyes*, 744 N.W.2d 95, 100 (Iowa 2008). Therefore, the evidence was not subject to exclusion on the grounds that its probative value was outweighed by the danger of unfair prejudice. *See id*. We conclude the evidence was admissible and Overman's attorney did not have a duty to make a meritless or frivolous objection to the evidence of prior bad acts. *See State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

AFFIRMED.