IN THE COURT OF APPEALS OF IOWA

No. 9-273 / 08-1139
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

APRIL BLANTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Kim M. Riley, District Associate Judge.

April Blanton appeals her conviction for malicious prosecution. She contends there was insufficient evidence to support her conviction and that her trial counsel was ineffective. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Jennifer Miller, County Attorney, and Paul Crawford, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

MILLER, J.

April Blanton appeals her conviction for malicious prosecution. She contends there was insufficient evidence to support her conviction and that her trial counsel was ineffective. We affirm her conviction and preserve her claim of ineffective assistance for a possible postconviction proceeding.

Based on the evidence in the record a reasonable factfinder could find the following facts. Blanton and Todd Wilkening are the parents K.W., born in January 2005. On June 9, 2007, Wilkening and his wife, Amy, drove from Marshalltown, Iowa to Springfield, Missouri to pick up K.W. for a week-long visit. Blanton was present when they picked her up and sent along a bag full of clothes for the child to wear during the visit.

On the way back to Marshalltown the Wilkenings noticed that K.W. had an odor of sour milk and perspiration about her. Her hair was somewhat dirty, her nails were long and dirty, and all the clothes in her bag were stained, wrinkled, and smelled of mildew. Although it was warm weather, most of the clothes Blanton had packed were more appropriate for colder weather. There was only one pair of shorts packed. Within fifteen minutes of picking up K.W., Wilkening called the Missouri social services agency that deals with child abuse issues (hereinafter the Department) about his daughter's condition and requested someone from the department check on his daughter. Because the Department did not consider this "serious abuse" it informed Wilkening it could take up to a day to respond to his call and suggested he videotape the child's appearance and clothing for them, which Wilkening did. The Wilkenings then drove to a

friend's house, bathed K.W., put clean clothes on her, and waited for someone from the Department to show up so they could give the Department the videotape of K.W. Once this happened they returned to Marshalltown with K.W.

On June 11, 2007, Blanton called Wilkening and left a message on his answering machine. He returned the call and taped the conversation. Blanton was angry with Wilkening for calling the Department regarding K.W. On June 13, 2007, the Iowa Department of Human Services (DHS) received a phone call from Blanton. According to the testimony of the DHS intake worker, Blanton reported that K.W. was staying with her father in Iowa and she was concerned about her safety because her behavior had changed over the last six months. Specifically, Blanton reported K.W. would stick her fingers in her vagina and make statements that "daddy does that." Later that same day a police officer and DHS worker went to Wilkening's home in Marshalltown and informed him they were there to investigate allegations that he had sexually abused K.W.

The DHS worker testified she saw no obvious signs of child abuse nor did she see any imminent danger to K.W. in the Wilkenings' home. She made a "safety plan" with Amy Wilkening that she would not allow her husband to have unsupervised contact with K.W. until K.W. could be seen by a doctor the next day. The next day a pediatrician examined K.W. and found nothing out of the ordinary for a two-year-old. There were no signs of physical abuse, trauma, bruising, scarring, bleeding or drainage to or from her genitalia. The child's hymen was intact and there was no evidence of penetration.

Wilkening asked Blanton if she made the report to the DHS and she denied making the report. He did not return K.W. to Blanton at the agreed upon time and filed a petition for a change in custody.

On October 10, 2007, the State charged Blanton, by trial information, with malicious prosecution, in violation of Iowa Code sections 720.6 and 802.5 (2007). Jury trial commenced on May 22, 2008. At trial, Michele Pedraza, K.W.'s childcare provider in Missouri and a mandatory child abuse reporter, testified she filed a report concerning potential sexual abuse of K.W. with the Department in Missouri in late May or early June 2007. Pedraza testified that K.W. had been acting out in an aggressive manner for a few weeks, and on two separate occasions had exhibited some behavior she believed was indicative of sexual abuse. She stated she called and told Blanton about these incidents when they occurred.

Charlotte Nolan, who investigated cases for family court in Greene County, Missouri at the time of the incidents in question, also testified at trial. She stated there were no reported incidents of abuse in Missouri for K.W. in May or June 2007. The only report of abuse occurred in Iowa on June 13, 2007, which was Blanton's call regarding Wilkening. Nolan further testified Pedraza did call the Department in August 2007, at the Department's request, regarding the allegations of abuse against K.W. At that time Nolan specifically asked Pedraza if she had seen K.W. act out in any sexual manner that would indicate possible sexual abuse and Pedraza told Nolan she had *not*.

The jury found Blanton guilty as charged. Blanton appeals, contending there was insufficient evidence to support her conviction and that her trial attorney was ineffective.

Our scope of review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *Id*. A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *Lambert,* 612 N.W.2d at 813.

The district court instructed the jury that to prove malicious prosecution the State was required to show, (1) that on or about June 13, 2007, Blanton caused or attempted to cause Wilkening to be prosecuted for a public offense; and (2) that Blanton "had no reasonable grounds for believing that Todd Wilkening committed the offense." "No reasonable grounds" was defined for the jury as meaning that Blanton "lacked knowledge of a state of facts that would cause a person of ordinary caution and prudence, acting conscientiously, impartially, reasonabl[y], and without prejudice, to believe that Todd Wilkening had sexually abused [K.W.]." Blanton specifically contends the State failed to show beyond a reasonable doubt that she did not have reasonable grounds to believe Wilkening had sexually abused K.W.

Blanton argues she had reasonable grounds to believe Wilkening had sexually abused K.W. because K.W.'s child care provider, Pedraza, told Blanton about K.W.'s behavior. Pedraza testified she reported the behavior to the Department in late May or early June 2007. However, Nolan testified there were no reported incidents of child abuse in Missouri for K.W. in May or June 2007, and when Pedraza finally did call the Department (at the Department's request) in August 2007 she told Nolan she had *not* seen K.W. acting out in a sexual manner that would indicate abuse.

Furthermore, the record indicates that prior to the June 9, 2007 visit, Wilkening had not seen K.W. since April 2007, and he testified it had been at least six weeks between his April and June visits. The jury could reasonably find that if Blanton was concerned about her daughter's welfare based on her own observations, the unusual behavior she claims Pedraza had reported to her in May or June 2007, or both, she would have reported the suspected abuse prior to Wilkening's June visit. The jury might reasonably have believed that if Blanton's version of the facts, as presented through her testimony and that of Pedraza, were true then Blanton would have attempted to prevent Wilkening's June visit based on her alleged belief of abuse by Wilkening. Instead, she allowed K.W. to go for a week-long visit with Wilkening and did not report her alleged suspicion of abuse until two days after Wilkening reported K.W.'s possible neglect by Blanton to the Department.

"Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other

evidence." *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(*p*); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995).

A reasonable jury, as is in its discretion, could believe Nolan's testimony that Pedraza did not contact the Department until August 2007, and not in May or June 2007 as Pedraza testified, regarding K.W.'s purported behaviors. Further, a reasonable jury was free to believe Nolan's testimony that Pedraza told her she in fact had *not* seen K.W. acting out in a sexual manner that would indicate abuse. In addition, Blanton did not contact the Department when Pedraza allegedly first told her about K.W.'s unusual behaviors but instead waited until two days after Wilkening had contacted the Department about his concerns regarding K.W.'s appearance, hygiene, and possible living conditions. We conclude there is sufficient evidence for a rational jury to find Blanton did not have reasonable grounds to believe K.W. had been abused by Wilkening, but instead was retaliating against him because he called her ability to care for K.W. into question and reported his concerns to the Department. Thus, there was sufficient evidence for a rational jury to find Blanton guilty of malicious prosecution beyond a reasonable doubt.

Blanton also claims her trial counsel was ineffective by not objecting to the court's instruction to the jury that no inference could be drawn from the fact she

did not testify. The record does not show any request by Blanton for such an instruction. Absent an adequate explanation, under such circumstances the absence of an objection by counsel constitutes breach of an essential duty. *See State v. Morrison*, 183 N.W.2d 696, 697 (Iowa 1971) (noting that giving such an instruction constitutes reversible error unless the instruction is specifically requested by the defendant); *State v. Kimball*, 176 N.W.2d 864, 869 (Iowa 1970) (same). Our supreme court has recognized that such an instruction is a comment on the defendant's failure to testify and the instruction may be more harmful than helpful to the defendant by causing jurors to consider certain adverse inferences which they would not otherwise consider. *Kimball*, 176 N.W.2d at 869. Given this view of the nature of the instruction, we cannot say on the basis of the existing record that Blanton cannot have been prejudiced by the instruction.

In order to prevail on her claim of ineffective assistance of counsel, Blanton must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id.* at 392. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for a possible postconviction relief proceeding. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Such a proceeding allows an adequate record of the claim to be developed "and the

attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

An adequate record is important because "[i]mprovident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981). A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000).

Blanton's trial attorney has had no opportunity to explain his actions in not objecting to the challenged jury instruction or to inform the court of any discussions on the issue he may have had with Blanton. "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Accordingly, we preserve this claim of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.