

IN THE COURT OF APPEALS OF IOWA

No. 2-537 / 11-1010
Filed September 19, 2012

GERRY THOMAS JACOBSEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Applicant appeals from the denial of postconviction relief. **REVERSED AND REMANDED.**

Clemens A. Erdahl of Nidey Wenzel Erdahl Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews (until withdrawal) and Kevin Cmelik, Assistant Attorneys General, Thomas J. Ferguson, County Attorney, and James Katcher, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

Gerry Jacobsen appeals from the denial of his application for postconviction relief. He contends the court erred in not finding his trial attorney was ineffective and he was prejudiced. On de novo review, *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011), we reverse and remand.

Background Facts and Proceedings

In 2004 Jacobsen was charged in Black Hawk County with three counts of sexual abuse in the second degree and three counts of indecent contact with a child. The charges were based on statements from Jacobsen's eleven-year-old adopted daughter claiming between July 15, 1996, and July 15, 1999, Jacobsen had touched her inappropriately in bed. The daughter was five or six years old at the time. The jury in a September 2004 trial was unable to reach a verdict, resulting in a mistrial. A second jury trial, in January 2005, resulted in convictions on one count of sexual abuse in the second degree and one count of indecent contact with a child. The same attorney represented Jacobsen in both trials and pursued the same basic strategy and defense in both trials. This court upheld his convictions on direct appeal. *State v. Jacobsen*, No. 05-0835, 2006 WL 3313856 (Iowa Ct. App. Nov. 16, 2006).

Jacobsen filed an application for postconviction relief in 2008. He raised several allegations his trial attorney was ineffective, including failure to investigate properly and take photographs to counter photographs taken in Tama County by the State, failure to depose witnesses Jacobsen wanted deposed, failure to cross-examine effectively and impeach the State's witnesses, and failure to find a means to present testimony from Jacobsen's sister or make an

offer of proof. Jacobsen also alleged the combined effect of his attorney's failures was a failure to present the defense he wanted presented, which was the daughter's allegations were retaliation for discipline and restrictions Jacobsen imposed on her.

Kevin Engels, the attorney who represented Jacobsen in both trials testified at the postconviction trial, as did Jacobsen, his sister Leigh, and the police chief from La Porte City. The court considered the testimony and reviewed the transcript of the second trial. The court carefully considered and rejected each of Jacobsen's allegations, finding the attorney's decisions were either sound trial strategy or did not prejudice Jacobsen. Concerning the challenged photographs, the court found:

[T]hat evidence of the photographs from Tama County was relevant in that the pictures showed proof of motive, opportunity, intent, preparation, plan, and absence of mistake or accident. Any objection to the admission of the pictures would have been overruled. Any additional pictures would have merely brought more attention to the alleged "creep" factor. Therefore, counsel was not deficient in his representation as to this issue.

Scope and Standards of Review

We review postconviction proceedings raising constitutional claims counsel was ineffective de novo. *Castro*, 795 N.W.2d at 792. To prove a claim of ineffective assistance, an applicant must show by a preponderance of the evidence his trial attorney failed to perform an essential duty and prejudice resulted. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006). The prejudice element is satisfied if a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Martin*, 704 N.W.2d 665, 669 (Iowa 2005) (quoting *Strickland v.*

Washington, 466 U.S. 668, 694 (1984)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Discussion

We choose to consider Jacobsen’s claim concerning the Tama County photographs first because we find it dispositive of this appeal. In 2004, during the investigation of some of Jacobsen’s daughter’s allegations, a Tama County deputy sheriff took photographs in the family’s home in Tama County. They showed a crack in the bathroom door, a heating vent in the bathroom, and a room with a computer. The deputy removed a screw holding the crack in the door closed so the bathroom could then be seen through the crack. He also removed the cover from the heating vent, showing how the vent could be used to look into the bathroom. None of the photographs depicted the family’s home in Black Hawk County or anything related to the Black Hawk County charges Jacobsen touched his daughter inappropriately. The family lived in Black Hawk County before moving to Tama County. The photographs were taken five or six years after the alleged incidents in Black Hawk County. The ten photographs were admitted without objection in Jacobsen’s Black Hawk County trial.

In the postconviction trial, Jacobsen provided depositions from the deputy who took the photographs and the local police chief who accompanied him.

When questioned about the photographs of the vent, the deputy responded:

I remember the picture of the vent, and the reason I took that is because it was removable, and there was never any indication that he ever had peeked through there, but it was there, and it was an option for him, or someone, to peek through; that is why the photograph was taken.

The photographs of the door with the screw removed so the crack could be opened to look through the door into the bathroom also were taken to show Jacobsen could have peeked through the door at his daughter while she was in the bathroom. The police chief testified there was no way to really see anything through the crack in the door without pushing it past the breaking point. The photographs of the room with a computer purported to show how the door between that room and the daughter's bedroom was open slightly so someone could look into the bedroom.

Jacobsen's trial attorney testified he thought the photographs may have been from both the Tama County house and the Black Hawk County house. When asked, "Did those photographs add to what you referred to as the sort of creep factor?" he replied, "A little bit I think. I think that was the purpose for them." When asked whether he believed, in retrospect, an objection to the photographs should have been made, he replied, "I think in retrospect, certainly given the results, I wish, you know, we would have objected to the admission of any sort of photographs of something occurring in Tama County in a Black Hawk County case." He opined, however, such an objection probably would not have changed the result in the case.

The court considered the challenges to the photographs and how deposing the police chief could have provided more information the scene had been altered when photographed. It found,

Applicant finds these allegations concerning the photographs that were admitted at trial to be significant in that with proper cross-examination of [the police chief], potentially the photographs would not have been admitted in that they were altered states of the original positions of the door panel and the heat vent. The court

finds said allegations baseless in that the foundational aspect of the photographs, even if testified to by [the police chief], would have been met and were relevant given the earlier testimony of the accuser and the accuser's mother.

. . . .

Applicant alleges that trial counsel failed to object to and investigate into the photographs taken to illustrate events in Tama County. Applicant alleges that the evidence was irrelevant and if relevant that the evidence should still have been excluded as evidence as the probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. . . .

The court finds, for the reasons stated above, that evidence of the photographs from Tama County was relevant in that the pictures showed proof of motive, opportunity, intent, preparation, plan, and absence of mistake or accident. Any objection to the admission of the pictures would have been overruled. Any additional pictures [from the defense] would have merely brought more attention to the alleged "creep" factor.

On appeal, Jacobsen argues the court erred in finding there was foundation for admitting the photographs and they were admissible under Iowa Rule of Evidence 5.404(b) as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 5.404(b). He further argues the court failed to balance the probative value of the photographs against the substantial danger of unfair prejudice from portraying him as a peeping Tom. See Iowa R. Evid. 5.403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.").

We fail to see the relevance of the photographs of the family's Tama County home to Jacobsen's prosecution in Black Hawk County for acts allegedly occurring five or six years earlier and unrelated to peeking at his daughter while she was in the bathroom or her bedroom. Even if they were relevant, we conclude their probative value, if any, was substantially outweighed by the

danger of unfair prejudice or confusion of the issues. Jacobsen was on trial for allegedly touching his daughter in bed in their Black Hawk County home when she was five or six years old. The photographs were designed to show how Jacobsen could have peeked at his eleven-year-old daughter in their Tama County home. The heating vent cover in the bathroom was removed as was the screw holding the crack in the bathroom door closed, with the specific intent to show how it could have been possible to peek into the bathroom in Tama County. Jacobsen's trial attorney worked hard to keep any reference to Tama County allegations out of the Black Hawk County trial, yet allowed the photographs to be admitted without objection. Trial counsel failed in an essential duty. See *Strickland*, 466 U.S. at 687.

The evidence in this case is far from overwhelming. Jacobsen's eleven-year-old daughter's account of what occurred when she was five or six years old changed repeatedly. Soon after claiming he touched her improperly in bed, she recanted. Then she denied her recantation. She claimed his actions were repeated over a period and occurred once or sometimes twice a night. Then she claimed it was just once. There was evidence her mother asked leading questions, which could taint the daughter's description of what occurred. There was no physical evidence of the alleged abuse. The first trial ended in a mistrial because the jury failed to reach a verdict. Given the probable prejudicial effect of the Tama County photos, painting Jacobsen as a creepy, peeping Tom, years after he allegedly sexually abused his daughter, our confidence in the outcome is undermined. See *id.* at 694. "[T]here is a reasonable probability that, but for

counsel's unprofessional errors, the results of the proceeding would have been different." *See id.* at 687.

Jacobsen has demonstrated his trial attorney was ineffective in not objecting to the admission of the ten Tama County photographs. Because we conclude he is entitled to a new trial for this reason, we need not address the other issues raised on appeal. Accordingly, we reverse the decision of the district court and remand for new trial.

REVERSED AND REMANDED.