IN THE COURT OF APPEALS OF IOWA

No. 1-744 / 10-1814
Filed December 7, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KELVIN LEE PLAIN, SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

Kelvin Plain appeals from his conviction for assault with intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin S. Lies, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

VOGEL, P.J.

Kelvin Plain was charged with assault with intent to commit sexual abuse under Iowa Code section 709.11 (2009), following an incident between himself and T.T. We conclude the district court did not abuse its discretion in admitting testimony regarding T.T.'s mental deficiencies, nor testimony as it pertained to Plain's roommate's demeanor when the police inquired about the incident. The record also contains sufficient evidence to uphold the jury's guilty verdict, and the district court properly refused Plain's motion for judgment of acquittal. Finally, Plain's ineffective-assistance-of-counsel claim fails because no prejudice resulted from trial counsel's failure to preserve error on the admission of testimonial evidence regarding the roommate's demeanor. We therefore affirm.

I. Background Facts and Proceedings

Based on the evidence presented at trial, a jury could have found the following facts. On April 9, 2010, T.T. was playing games at the Cedar Valley Community Services Support Club (the Club), which provides support services to adults with disabilities. Kelvin Plain, who had met T.T. a few times before when she was working at Goodwill, came to the Club and asked T.T. to go to his apartment with him for dinner and a movie. T.T. accepted the offer. Once at Plain's studio apartment, Plain gave his roommate, Steven Murphy, a check and told him to cash it, get food for them, and keep half the money. Murphy left and Plain asked T.T. what kind of movies she liked to watch. T.T. responded that she liked romance and comedy movies. Plain told her he had the perfect movie for her and began playing a pornographic film.

T.T. was “weirded out” by Plain’s film choice and tried not to look at the television, as it was not the kind of movie she wanted to see. When she looked up again, Plain had disrobed and was completely naked. T.T. felt scared, uncomfortable, and wanted to leave. Plain attempted to touch T.T.’s vaginal area, breasts, hair, neck, and back. He also tried kissing her neck and attempted to get his hands underneath her clothes. T.T. pushed Plain’s hands away and repeatedly told him “no,” but he persisted. When T.T. tried to get up and leave, Plain pushed her back down on the bed. At one point, Plain offered T.T. twenty-five dollars if she would have sex or oral sex with him. T.T. was eventually able to get around Plain and to the door—which was locked—unlock the door, and leave. Still scared, T.T. returned to the Club, and her service coordinator, Mackenzie Flot, was contacted.

T.T. spoke with Flot, and Flot contacted the police to report the incident. Flot observed that T.T. was scared and “a little shaken up.” Monica Blakeman, an officer with the Waterloo Police Department, took statements from both T.T. and Flot. After the incident was reported, Waterloo police officer Edward Savage went to Plain’s apartment. Plain was gone and only his roommate, Murphy, was home. Murphy was observed as being nervous and agitated when Officer Savage was at the apartment.

On May 13, 2010, Plain was charged by trial information of assault with intent to commit sexual abuse under Iowa Code section 709.11. Prior to the August 3, 2010 trial, the court sustained Plain’s motion in limine that testimony as to Murphy’s demeanor was not relevant and could be prejudicial. A mistrial resulted when a witness for the State testified in a manner inconsistent with the

court's ruling. On August 11, Plain again moved in limine to exclude, among other things, (1) any testimony as to Murphy's[1] state of mind or physical reaction or demeanor when confronted by police, and (2) the testimony of Mackenzie Flot as to T.T.'s "learning disability or inappropriate demeanor." The matter came on again for trial on October 5, 2010, after which the jury returned a guilty verdict. Prior to sentencing, the court denied Plain's motions for new trial and in arrest of judgment. Plain was sentenced to serve a term of imprisonment not to exceed two years. Plain appeals.

II. Standard of Review

Our review of evidentiary rulings is for an abuse of discretion. *State v. Nelson*, 791 N.W.2d 414, 419 (Iowa 2010). Sufficiency of the evidence challenges are reviewed for correction of errors at law. *State v. Hearn*, 797 N.W.2d 577, 579 (Iowa 2011). "The district court's findings of guilt are binding on appeal if supported by substantial evidence." *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008). We review ineffective-assistance-of-counsel claims de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

III. Evidentiary Rulings

A. Error Preservation

Plain contends the district court erred in overruling his objections to Flot's testimony regarding T.T.'s mental deficiencies and Officer Savage's testimony as to Murphy's demeanor when he went to the apartment, asserting the evidence was irrelevant and prejudicial. The State argues error was preserved only as to

[1] The motion refers to Murphy as "Mr. Stevens," which was clarified as a typographical error at the hearing on the motion.

Flot's testimony, and not Officer Savage's as Plain did not lodge a relevancy objection to questions regarding Murphy's demeanor at trial.[2]

We agree with the State that the objection to the testimony of Officer Savage, which referenced Murphy's demeanor while in the presence of the police, did not preserve error. Although Plain re-asserted the motion in limine prior to the second trial, he failed to secure a ruling on the motion. The district court stated, "At this point, I'm going to delay ruling on that and take that as an objection to the evidence." Because Plain did not object to the testimony when offered during trial, the district court did not resolve whether the testimony would be admitted, and the general error preservation rule applies. *See Quad City Bank & Trust v. Jim Kircher & Assocs., P.C.*, 804 N.W.2d 83, 89–90 (Iowa 2011) (explaining the general error preservation rule for a motion in limine, and the exception). This general rule provides, "'error claimed in a court's ruling on a motion in limine is waived unless a timely objection is made when the evidence is offered at trial.'" *Id.* at 90. Therefore Plain's claim regarding this testimony was not preserved for our review.

B. Admission of Testimony of T.T.'s Mental Capacity

Plain alleges the district court erred in overruling his objection to Flot's testimony regarding T.T.'s mental deficiencies. Plain claims this evidence was irrelevant and highly prejudicial. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

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[2] Counsel did lodge an objection to this testimony, but asserted only that the matter had "already been covered."

Iowa R. Evid. 5.401. However, 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Iowa R. Evid. 5.403.

The only person who testified as to T.T.'s mental capacity was her service coordinator, Mackenzie Flot. Flot testified that T.T. was diagnosed with "anxiety disorder nonspecified, panic disorder, and bipolar disorder," and agreed that T.T. is fairly low functioning such that her ability to understand is limited. Plain's assertion focuses on the fact that he was *not* charged under Iowa Code section 709.1(2), defining sexual abuse as, "Any sex act between persons . . . when such other person is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters." The State responds that using the broader category of sexual abuse under section 709.11, "does not limit the presentation of the case." Under section 709.11, "Any person who commits an assault, *as defined in 708.1*, with the intent to commit sexual abuse . . . is guilty of an aggravated misdemeanor if no injury results." (emphasis added). Our supreme court has explained:

> The overall purpose of Iowa's sexual abuse statute is to protect the freedom of choice to engage in sex acts. The sex abuse statute exists to protect a person's freedom of choice and to punish "unwanted and coerced intimacy." A person who imposes a sex act on another by force or compulsion under any circumstance violates the other's protected interest. . . . This concept of imposition has not been narrowed in any way by our legislature over the years, but it remains at the heart of the statute to capture both case-specific circumstances of an "actual failure of consent" as well as

> circumstances when the legislature has declared "consent as incompetent" or nonexistent.

State v. Meyers, 799 N.W.2d 132, 143 (Iowa 2011) (internal citation omitted). The State requested an instruction based on section 709.1(2), but the district court denied the request, finding that since T.T. resisted Plain's advances, she clearly did not consent to his actions. Nonetheless, the testimony characterizing T.T. as a person who is easily manipulated and suffers from various mental illnesses was relevant to demonstrate how she was lured to Plain's apartment, yet was able to recognize the disturbing nature of Plain's actions toward her. In addition, Plain conceded relevancy in closing arguments, explaining:

> Ms. Flot talked about how [T.T.] doesn't necessarily react well in social situations. She might be, you know—he might be showing her a pornographic movie, and she might be smiling about it. Well, the common person might think, "Well, she's enjoying it if she's smiling about it."
>
> If I ask her to come over, and she smiles at me and says, "Sure, I'll come over and have dinner with you," you know, that's why I think her disability is relevant to this case, because there's a common sense thing that if she's not reacting appropriately, Kelvin may get the wrong impression as to what her intentions are, okay? . . .
>
> And her behaviors may have had an influence on what Kelvin thought was going to happen that night. . . . Her bipolarism causes her to get a little excited one way or the other. That may have had an effect on the level of intensity that she had.

Plain appears to have used T.T.'s mental capacity to his strategic advantage in explaining why he "got the wrong impression" and continued his advances. Having all the circumstances surrounding the incident explained—including T.T.'s mental abilities—served to aid the jury in determining whether the elements of sexual abuse under section 709.11 were proved. *See id.* (noting that *Bauer* illustrates it is proper to consider a victim's mental state in determining whether a

sex act is nonconsensual). The district court did not abuse its discretion in deeming testimony regarding T.T.'s mental deficiencies relevant.

Moreover, the testimony regarding T.T.'s mental deficiencies was not more prejudicial than probative. *See* Iowa R. Evid. 5.403 (stating relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). Evidence is deemed unfairly prejudicial where it

> [a]ppeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.

State v. Rodriguez, 636 N.W.2d 234, 240 (Iowa 2001). While the jury's knowledge that T.T. suffered from mental deficiencies might appeal to the jury's sympathies, it would not cause the jury to "base its decision on something other than the established propositions of the case" because T.T.'s mental capacity was not at issue in determining whether Plain's actions proved assault with intent to commit sexual abuse under Iowa Code section 709.11. *See id.* (explaining when evidence is unfairly prejudicial). T.T. herself testified, thus allowing the jury to make its own determination of T.T.'s mental capacity and her credibility in relaying the details of the incident. Additionally, even if prejudice were found it would not outweigh the probative value of such evidence in illustrating that T.T., a person suffering from mental deficiencies, clearly understood the "insulting" or "offensive" nature of Plain's actions. *See* Iowa Code § 708.1(2) (defining assault as "[a]ny act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act"). The district court did not abuse its discretion

as testimonial evidence regarding T.T.'s mental deficiencies was more probative than prejudicial. Iowa R. Evid. 5.403.

IV. Sufficiency of the Evidence

Plain also maintains the district court erred in overruling his motion for judgment of acquittal, as the evidence failed to prove that he intended to commit a sex act against T.T.'s will. "The jury's findings of guilt are binding on appeal if the findings are supported by substantial evidence. Substantial evidence is evidence that could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt." *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). In reviewing a challenge to the sufficiency of the evidence, "we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record." *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

When Plain moved for a judgment of acquittal, the State had presented the following evidence. Flot testified as to the work she did with T.T., her observations of T.T. leaving the Club on April 9, 2010, and T.T.'s return to the Club later that day, noting that T.T. was "scared" and "a little shaken up," when discussing the incident with Flot. T.T.'s testimony included Plain coming to the Club, inviting her to his place for dinner and a movie, and the subsequent playing of a pornographic movie, Plain disrobing himself, groping T.T., and T.T. feeling scared and trying to leave. T.T. testified that during the incident she pushed Plain away with her hands and repeatedly said no when he attempted to touch her—both over and under her clothes; when she tried to exit the locked apartment, she was thwarted at least twice by Plain pushing her back onto the

bed. When she eventually was able to leave the apartment, T.T. returned to the Club and requested to speak with Flot. Officer Blakeman testified that she took statements from T.T. and Flot, and both identified Plain as the person who allegedly sexually assaulted T.T. The State also presented the testimony of Officer Savage, who upon receiving the report of the possible assault went to the place where T.T. said the incident occurred—Plain's apartment. When Officer Savage arrived at the apartment, Plain was not there, but his roommate was home. Officer Savage observed "a large bed in the middle of the room, a black female on the left-hand side, and a television on the right-hand side—a larger television, where an X-rated movie was being played." Officer Savage did not enter the apartment, but only peered in from the outside.

As defined under Iowa Code section 708.1(2), assault requires no physical pain or injury to result, but is based on placing a person "in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act." Iowa Code § 708.1(2). Because the evidence presented could lead the jury to conclude that Plain's act of disrobing, making sexual advances, twice pushing T. T. back on the bed, and offering to pay for sexual acts could be insulting or offensive, and that Plain had the apparent ability to execute such an act, there was sufficient evidence for the jury to find an assault occurred.

Iowa Code section 709.11 also requires proving Plain intended to commit sexual abuse. Although the State moved for an additional instruction to establish sexual abuse toward a person suffering from a "mental defect or incapacity," this motion was denied. The sexual abuse instruction given was therefore based on

section 709.1(1), which defines a sex act as "done by force or against the will of the other." As for proof of intent:

> Intent is a state of mind difficult of proof by direct evidence. It may, however, be established by circumstantial evidence and by inferences reasonably to be drawn from the conduct of the defendant and from all the attendant circumstances in the light of human behavior and experience.

State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992). Our case law supports, "a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a desire to engage in sexual activity," as sufficient to support a finding of guilt beyond a reasonable doubt of assault with intent to commit sexual abuse. *Id.*

The jury was free to conclude from the evidence presented, by inferences reasonably drawn from Plain's conduct, and from the attendant circumstances that Plain intended to commit a sex act against T.T.'s will. Plain disrobed, touched T.T. in sexual ways over her clothes, attempted to touch her underneath her clothes, pushed her twice, and eventually offered to pay for sex. Moreover, this all happened after Plain lured T.T. to his apartment, played a pornographic film, and caused his roommate to leave the apartment so he and T.T. were alone. We find sufficient evidence was presented to sustain the jury's verdict finding Plain guilty of intent to commit sexual abuse under section 709.11.

V. Ineffective Assistance of Counsel

Plain next asserts that if we determine trial counsel failed to properly preserve error on the evidentiary rulings and sufficiency-of-the-evidence claims argued above, trial counsel was ineffective and prejudice resulted.

In asserting an ineffective-assistance-of-counsel claim, Plain must establish (1) his counsel failed to perform an essential duty and (2) prejudice resulted from such failure. *See State v. Utter*, 803 N.W.2d 647, 652 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Both elements must be proved by a preponderance of the evidence. *Id.* The claim fails if either of the two elements is lacking. *State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010). "To establish prejudice, the defendant must show there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (internal quotation marks omitted).

Plain's trial counsel did not lodge a relevancy objection to Officer Savage's testimony that Murphy appeared "nervous," "agitated," and "fearful" when he went to Plain's apartment to investigate the allegations. However, Murphy explained his demeanor, testifying, "who isn't afraid of weapons and guns and stuff like that." We find no prejudice resulted because there is not a reasonable probability that, if the testimony had been stricken, the jury would have reached a different result.

Having addressed the sufficiency of the evidence and with no argument on appeal as to what may not have been preserved in Plain's motion for judgment of acquittal, we decline to address his general allegation of ineffective assistance of counsel.

Finding no prejudice that would affect the outcome of the proceeding, trial counsel was not ineffective. Failing to meet the prejudice prong of the two-part *Strickland* test, we need not determine whether trial counsel breached an

essential duty. *See Osborn v. State*, 573 N.W.2d 917, 922 (Iowa 1998) ("If the petitioner makes an insufficient showing on either prong of the two-part test, we need not address both components.").

We affirm Plain's conviction under Iowa Code section 709.11.

AFFIRMED.