IN THE COURT OF APPEALS OF IOWA

No. 3-1080 / 10-1931
Filed January 9, 2014

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDGAR CONCEPCION JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Floyd County, Bryan H. McKinley, Judge.

Edgar Concepcion appeals his convictions to murder in the first degree, sexual abuse in the first degree, sexual abuse in the second degree, and child endangerment, as well as his sentence to life without parole. **CONVICTIONS AFFIRMED; SENTENCES VACATED; AND REMANDED FOR RESENTENCING**.

Judith O'Donohoe of Elwood, O'Donohoe, Braun, White, LLP, Charles City, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Norman Klemesrud, County Attorney, and Becky Goettsch and Andrew Prosser, Assistant County Attorneys, for appellee.

Bryan Stevenson and Aaryn Urell, Montgomery, Alabama, and Philip Mears of Mears Law Office, Iowa City, for amicus curiae Equal Justice Initiative.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

VOGEL, P.J.

Edgar Concepcion Jr. appeals his convictions following a jury trial to murder in the first degree, sexual abuse in the first degree, sexual abuse in the second degree, and child endangerment, as well as his sentence to life without parole. On appeal, he asserts forty-seven claims, including constitutional challenges to various aspects of the proceeding, a sufficiency of the evidence challenge, and a claim his sentence to life without parole constitutes cruel and unusual punishment. We conclude the majority of Concepcion's claims are either waived, not preserved, or without merit. However, pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013), Concepcion's sentence to life without parole must be vacated. Consequently, we affirm his convictions but vacate his sentences to first degree murder, first degree sexual abuse, and second degree sexual abuse, and remand for a new sentencing hearing as to those three counts.

I. Factual and Procedural Background

Concepcion was born in January of 1995, and at the time of the crime was fourteen years old. He moved to the United States from the Philippines in 2006. His first language is Ilonggo and second language is Tagalog. By eighth grade his English language skills were considered advanced intermediate.

At trial, the jury could have found the following facts. In 2009, the parents of K.B., then a three-year-old child, entrusted Concepcion and his cousins to watch K.B. while they were at work. Over a period of approximately three weeks, Concepcion repeatedly sexually abused K.B. On July 10, 2009, Concepcion was again watching K.B. while her parents worked. K.B. informed Concepcion she

had to vomit, so Concepcion took her to the bathroom where he put his penis in her mouth and fingers in her vagina. While K.B. was lying on the floor of the bathroom, Concepcion sat on her torso and pushed "hard" on her chest. Concepcion strangled K.B. until her "eyes rolled back in her head" and she was "weak." Concepcion then carried K.B. upstairs and his sister called 911. At that point, Concepcion described K.B. as "her eyes are like closing and then her mouth's like purple." An ambulance arrived and transported K.B. to the hospital, where she was pronounced dead.

Concepcion and his family went to the hospital where he as well as various family members were interviewed by police. No *Miranda* warnings were given to Concepcion nor was an official translator provided; however, Concepcion's interview was recorded. Concepcion made incriminating statements.

A petition alleging delinquency was filed on July 13, 2009, charging Concepcion with first-degree sexual assault and first-degree murder. This was later amended to include second-degree sexual abuse and child endangerment, as well as a second count of first-degree sexual abuse. The State filed a motion to waive the juvenile court's jurisdiction and proceed to district court. The State moved the court to order a psychological evaluation of Concepcion, which Concepcion resisted. The juvenile court denied the motion. Concepcion also filed a motion to suppress evidence at the waiver hearing, which was denied. A hearing on the waiver was held on October 7, and the juvenile court issued a ruling on December 14 waiving its jurisdiction.

On December 18, Concepcion was charged by trial information with two counts of sexual abuse in the first degree, in violation of Iowa Code sections 709.1 and 709.2 (2009); murder in the first degree, in violation of Iowa Code section 707.2; sexual abuse in the second degree, in violation of Iowa Code sections 709.1 and 709.3; and child endangerment, in violation of Iowa Code section 726.6(6). A jury trial was held and guilty verdicts were returned as to one count of first-degree sexual abuse, first-degree murder, second-degree sexual abuse, and child endangerment. The jury acquitted on the second count of first-degree sexual abuse. Concepcion moved for judgment of acquittal and new trial, which were denied. On November 22, 2010, the district court sentenced Concepcion to life without parole on the murder and first-degree sexual abuse convictions, a term not to exceed twenty-five years on the second-degree sexual abuse conviction, and a term not to exceed five years on the child endangerment conviction. Constitutional challenges were made to the sentencing statutes, which were denied. Concepcion appeals.[1]

II. Waiver Proceeding

Under this heading, Concepcion asserts fifteen different arguments. The first is that the waiver proceeding violated Concepcion's equal protection and due process rights, and alternatively, current counsel was ineffective for failing to raise the issue in the juvenile proceeding. Constitutional challenges are reviewed de novo. *State v. White*, 545 N.W.2d 552, 554 (Iowa 1996).

[1] Concepcion first appealed the judgment and sentence on November 22, 2010. He then made constitutional challenges to his sentence before the district court and appealed that ruling on January 10, 2011. The appeals were consolidated to the case now before us.

Concepcion acknowledges this issue was not raised until jurisdiction had been waived to the district court, and so, because the juvenile court did not consider this argument, error was not preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). Additionally, the ineffectiveness claim contains no support or coherent argument and is thus waived. *See* Iowa R. App. P. 6.903(2)(g)(3).

Concepcion next states: "The Court's refusal to order a psychiatric evaluation providing a 5th Amendment privilege violated DP." This claim is without merit. The juvenile court correctly found under Iowa Code section 232.49(3)[2] that a psychiatric evaluation would not be ordered on the State's request, considering it was not in Concepcion's best interests. Then, when Concepcion requested the evaluation, he refused to undergo an evaluation by the State's psychiatrist. As the juvenile court noted, it "is in violation of the statute to require the child to submit to an evaluation by the State in which the child does not agree to all conditions." Therefore, the decision to not order a psychiatric evaluation was proper and in no way violated Concepcion's due process rights.

Concepcion further asserts the charges were not supported by probable cause. However, Concepcion waived a challenge to the finding of probable cause by stipulating there was in fact probable cause at the initial detention hearing. *See* Iowa Code § 232.45(6)(b) (stating the juvenile court may waive

[2] Iowa Code section 232.49(3)(a) provides:

> At any time after the filing of a delinquency petition the court may order a physical or mental examination of the child if the following circumstances apply:
>
> (1) The court finds such examination to be in the best interest of the child; and
>
> (2) The parent, guardian, or custodian and the child's counsel agree.

jurisdiction if "[t]he court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act"). Therefore, he cannot now assert this argument on appeal.

Concepcion also claims the State failed to prove he could not be rehabilitated through the juvenile system. We review the juvenile court's waiver to district court for an abuse of discretion. *State v. Tesch*, 704 N.W.2d 440, 447 (Iowa 2005). When considering whether a juvenile can be rehabilitated by the juvenile system, the court considers the following factors:

> a. The nature of the alleged delinquent act and the circumstances under which it was committed.
>
> b. The nature and extent of the child's prior contacts with juvenile authorities, including past efforts of such authorities to treat and rehabilitate the child and the response to such efforts.
>
> c. The programs, facilities and personnel available to the juvenile court for rehabilitation and treatment of the child, and the programs, facilities and personnel which would be available to the court that would have jurisdiction in the event the juvenile court waives its jurisdiction so that the child can be prosecuted as an adult.

Iowa Code § 232.45(8)(a)–(c). The juvenile court set forth the following reasoning when concluding Concepcion could not be rehabilitated as contemplated by Iowa Code section 232.45(6):

> On the date of her death, it is alleged that after becoming angry with [K.B.] for "puking all the time" and having to change her diaper, Edgar Concepcion, Jr., bit her on the stomach and chin, penetrated her vagina with his fingers, placed his penis in her mouth, got on top of her and pushed down on her chest, "rode her," and choked her around the neck until she quit breathing, quit fighting, and her eyes rolled back. [K.B.] had injuries to her vagina, a lacerated liver, and a perforated small intestine. The alleged choking caused her death by asphyxia.
>
> Available programs in the Juvenile Court could not possibly begin to address or rehabilitate a person who is found to have

> purposefully committed these acts. The nature and circumstances of these alleged acts are of overriding concern to this Court in examining whether there are reasonable prospects for rehabilitating this child if he is adjudicated in Juvenile Court.
>
> Edgar Concepcion, Jr., is not in need of rehabilitation for conduct disorder concerns or for substance abuse concerns . . . . The alleged acts of Edgar Concepcion, Jr., if proven, are not acts of panic or impulse. The sexual abuse is alleged to have occurred over a period of time (several weeks), and the physical assault was multifaceted, including allegations of biting, pinching, and choking, occurring simultaneously with sexual abuse.
>
> . . . .
>
> [It is not in] the best interests of the community for the Court to settle on a course which may very well result in an inadequate and potentially dangerous plan of rehabilitation.

Given this course of events, the juvenile court did not abuse its discretion in finding Concepcion could not be rehabilitated and waiving its jurisdiction.

The arguments regarding the State's provision of information about K.B.'s autopsy, "allowing [Dr.] Schrodt to testify over objection about the autopsy rather than requiring [Dr.] Thompson to do so," the State's amendment to the delinquency petition, Concepcion's status as in custody at the time of his incriminating statements, the challenge to the use of probable cause as the evidentiary standard for waiver, and all other evidentiary claims are not supported by arguments, facts, or appropriate case law. String citations to the appendix and case law, without explanation, are not enough; we are not obligated to construct counsel's arguments for her. *See State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999); *see also United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs."). Therefore, these claims are waived. *See* Iowa R. App. P. 6.903(2)(g)(3).

III. Issues Arising from Trial in District Court

Concepcion first asserts his counsel was ineffective in failing to raise the question of Concepcion's competence to stand trial. This claim is not supported by any argument and so it is waived. *See id.*; *see also Jones v. Barnes*, 463 U.S. 745, 751–52 (1983) ("The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one . . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.").

Concepcion next argues his statement in his home to Officer Vetter, as well as the video recordings of his statements at the hospital, should have been suppressed because he was in custody at the time the statements were made and he did not receive any *Miranda* warnings. We review the constitutional aspects of this claim de novo. *State v. Freeman*, 705 N.W.2d 293, 297 (Iowa 2005). Though we are not bound by the district court's findings, we give deference to the findings of fact and "considerable weight" to the court's assessment on the issue of voluntariness. *Id.* When determining whether the defendant was in custody, we must determine "whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *In re J.D.F.*, 553 N.W.2d 585, 588 (Iowa 1996) (internal citations omitted). This same objective test applies to juveniles as well as adults, though weight is given to the juvenile's underage status. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2402 (2011).

Upon review of the record, the district court correctly decided Concepcion was not in custody at the time any of his incriminating statements were made. After the 911 call was placed, Officer Vetter arrived at the house, where he found several unattended children. With no indication of how K.B. had been injured or who had been witness to the incident, he asked Concepcion, "What happened?" Officer Vetter never told Concepcion he was under arrest, could not leave the house, or had to answer any of Officer Vetter's questions.

The same applies to the questioning that occurred at the hospital. All of the extended family members were free to move around the hospital as the initial investigation was unfolding. Food was brought in and movement was not restricted. Furthermore, the video of Concepcion's interview shows Agent Krapfl asking if Concepcion was "okay talking with us" and informing him he was "not under arrest, you're free to leave here at anytime and you guys can get up and walk out the door at any time you want, okay. Do you understand that?" Concepcion responded "Yeah." During the interview, Concepcion's father and adult sister were present at all times; after they were given a break to get up and walk around, all of them voluntarily returned to the interview. As the district court set out in a detailed analysis, there were no indicia of custody such that the *Miranda* warning should have been given. Nor is there any indication Concepcion's statements were involuntary. Therefore, we affirm the ruling of the district court denying Concepcion's motion to suppress.

Concepcion also challenges the district court's denial of his motion to suppress evidence seized from his home, as well as his clothing and DNA/biological samples. He claims probable cause did not support the issuance

of the search warrants, which formed the basis for collecting this evidence. We review challenges to the issuance of search warrants de novo and decide whether the issuing judge had a substantial basis for concluding probable cause existed. *State v. Green*, 540 N.W.2d 649, 655 (Iowa 1995). The issuing judge had the following facts to support the issuance of the search warrant of Concepcion's parents' residence and to collect his clothing and biological samples. A 911 call had been made from the house. First responders found an unresponsive child, who was taken to the hospital and pronounced dead. Preliminary examination of the body indicated death by asphyxiation and indications of sexual abuse. Concepcion had made incriminating statements. Given this information, a person of reasonable prudence would believe a crime was committed on the premises or evidence of a crime could be located there. *See State v. Weir*, 414 N.W.2d 327, 330 (Iowa 1987). Therefore, probable cause existed to issue the search warrant, and the district court properly denied Concepcion's motion to suppress.

Concepcion's next arguments regarding his motion to sever and the admission of Concepcion's interview are supported only by conclusory statements, without analysis and citation to applicable case law. Concepcion then asserts "[t]he Court's handling of the videotape over-laid with Krapfl's audio and the State's transcript was extremely prejudicial." There is also a vague foundation argument. However, none of these claims contain any coherent argument and therefore are waived. *See* Iowa R. App. P. 6.903(2)(g)(3).

Concepcion further argues the district court improperly allowed Jonathan Thompson, M.D., to testify as to his medical opinion regarding K.B.'s injuries and

cause of death. We see no evidence in the record indicating the district court abused its discretion in allowing Dr. Thompson to testify. *See State v. Rodriquez*, 636 N.W.2d 234, 245 (Iowa 2001). Therefore, the district court's ruling is affirmed.

Concepcion also asserts the district court erred in overruling his objection to the admission of the couch cushion found in the basement with his semen stains, claiming it was irrelevant. However, Concepcion admitted to engaging in sex acts with K.B. on the blue couch in the weeks before K.B.'s death. Therefore, this evidence was relevant and not more prejudicial than probative, and the district court correctly admitted it. *See* Iowa R. Evid. 5.401.

Concepcion's next claim argues the district court improperly allowed testimony that Concepcion had attempted to access pornography on the school computer. In allowing a limited inquiry into Concepcion's access to pornography, the court stated:

> [Y]ou have loaded this record with a number of witnesses talking about this general good character of the defendant from the time he's been in the Philippines to the time of July 10th, and now that the State has one incident that they want to bring up, I'm going to allow them that opportunity.

The specific testimony, when the State questioned Concepcion's adult sister, was as follows:

> Q: But you were aware that he did get into trouble at the school in November of 2007 regarding the computer? A: Yes.
> Q: And he was not allowed to use the computer for the entire semester? A: Yeah.
> Q: And are you aware what he was doing on the computer? A: No.
> Q: Would it change your opinion about whether or not he had any behavior problems if looking on the computer involved looking at pornography? A: No.

Given this record, and particularly Concepcion's mischaracterization of the evidence and testimony actually admitted, the district court properly allowed this series of questions.

Concepcion's next series of arguments—specifically, those regarding the testimony of David Tice (EMT), the testimony of Michael Freeman, Ph.D., the cross-examination of Dr. Thompson, the testimony of the defense's DNA expert, the testimony of the Ilonggo witnesses, the testimony of Antoinette Kavanaugh, Ph.D., the corroboration of Concepcion's confession, and the one sentence attack on nine jury instructions—are conclusory statements unsupported by argument and case law. Therefore, they are waived. *See* Iowa R. App. P. 6.903(2)(g)(3). Furthermore, Concepcion has not preserved error with regard to his constitutional challenges to the felony-murder charge and the criminalization of sex acts between minors, given they were not raised before the district court. *See Lamasters*, 821 N.W.2d at 864. Therefore, we decline to address the merits of these arguments.

IV. Sufficiency of the Evidence

Concepcion further claims sufficient evidence does not support each count of conviction, such that the district court erred in denying his motion for judgment of acquittal and motion for new trial. We review sufficiency of the evidence challenges for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We view the evidence in the light most favorable to the State, and make any legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). If sufficient evidence supports the verdict, we will affirm. *Id.* Evidence is

sufficient if it would convince a reasonable trier of fact the defendant is guilty beyond a reasonable doubt. *Id.*

Here, the evidence presented to the jury includes Concepcion's confession he sexually abused K.B. over a period of approximately three weeks, then on July 10, 2009, sexually assaulted her by inserting his fingers into her vagina before pressing on her chest and strangling her until her "eyes rolled back in her head" and she was "weak." This confession was corroborated by medical reports and the testimony of the examining doctors, who opined K.B. was strangled to death and her injuries were consistent with physical and sexual abuse. This provides sufficient evidence for the jury to conclude beyond a reasonable doubt Concepcion was guilty of sexual abuse in the first degree, sexual abuse in the second degree, and child endangerment. *See State v. Polly*, 657 N.W.2d 462, 466–67 (Iowa 2003) (holding that, while confessions must be corroborated by independent evidence, the independent evidence need not corroborate every element of the crime).

Regarding the intent element of first-degree murder, Concepcion claims "[t]he gentle method of strangulation presented by Thompson as the cause of death is insufficient to prove beyond a reasonable doubt that [Concepcion] would know his actions could lead to K.B.'s death." In his interview, he admitted that when he was pushing on K.B.'s chest, "[i]t felt good at first." Later in the interview, the following exchange occurred:

> Q: You were choking her like that while she's laying down? . . . . A: Mm-hmm (indicating yes)
> Q: Did you put your fingers in her before or after that? A: I don't know, like before, I think.

Malice aforethought may be inferred if the defendant kills the victim during the commission of a forcible felony, or in this case, during the commission of sexual abuse. *See Schrier v. State*, 347 N.W.2d 657, 666 (Iowa 1984). This confession, combined with the injuries to K.B.'s body, present sufficient evidence for the jury to infer malice aforethought, such that the district court was correct in denying Concepcion's motion for judgment of acquittal and motion for new trial.

Having considered the sparse arguments presented by Concepcion, we affirm all four convictions.

V. Sentencing

Concepcion's final argument challenges his sentence to life without parole, claiming it constitutes cruel and unusual punishment. The State responds that, because the Governor of Iowa commuted Concepcion's sentence to sixty years following *Miller v. Alabama*, 132 S. Ct. 2455 (2012), this issue is now moot.

We review constitutional challenges to illegal sentences de novo. *Ragland*, 836 N.W.2d at 113.

Under *Miller*, a juvenile cannot be sentenced to life without parole unless there is an individualized hearing in the district court. 132 S. Ct. at 2475. Our supreme court in *State v. Ragland* interpreted *Miller* following the governor's commutation of the defendant's sentence to sixty years, with no possibility for parole until after the sixty years was served. 836 N.W.2d at 114. When analyzing whether the governor held the power to commute the defendant's sentence, the court declined to reach the issue, stating "we do not believe it is necessary to traipse into this constitutional thicket." *Id.* at 118. However, after

concluding the sentence was mandatory, the court "next analyze[d] whether the sentence, as commuted, remains a life-without-parole sentence targeted by *Miller*." *Id*. at 119. Specifically, the question posed was whether *Miller* applied "to the practical equivalent of life-without-parole sentences." *Id*. Because Ragland would not be eligible for parole until he was seventy-eight years old, and his life expectancy was 78.6 years, the court concluded the commuted sentence was the functional equivalent of life without parole. *Id*. at 119–21. The court then held:

> *Miller* applies to sentences that are the functional equivalent of life without parole. The commuted sentence in this case is the functional equivalent of a life sentence without parole . . . . Accordingly, Ragland's commutation did not remove the case from the mandates of *Miller*. The sentence served by Ragland, as commuted, still amounts to cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17 of the Iowa Constitution.

Id. at 121–22.

Due to our supreme court's holding in *Ragland*, we find the State's argument that the issue is now moot unpersuasive. Furthermore, under *Miller*, an individualized sentencing hearing is required before Concepcion may be sentenced to life without parole or the functional equivalent of life without parole. Consequently, we vacate Concepcion's sentences to the first-degree murder count, the first-degree sexual abuse count, and the second-degree sexual abuse count, and remand to the district court for a new, individualized sentencing hearing on those three counts. The term of imprisonment of five years for the child endangerment conviction does not constitute cruel and unusual punishment and is therefore affirmed.

Having considered all issues properly raised and preserved, we affirm Concepcion's convictions but vacate his sentence and remand for a new sentencing hearing as to the counts of first-degree murder, first-degree sexual abuse, and second-degree sexual abuse.

CONVICTIONS AFFIRMED; SENTENCES VACATED; AND REMANDED FOR RESENTENCING.