IN THE COURT OF APPEALS OF IOWA

No. 3-894 / 12-1900
Filed November 6, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

WILLIE DEXTER KIMBROUGH,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Edward A. Jacobson, Judge.

The defendant appeals from convictions for three offenses and his sentence as a habitual offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Patrick A. Jennings, County Attorney, and Drew H. Bockenstedt, Assistant County Attorney, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Willie Dexter Kimbrough was convicted by the district court of second-degree theft, neglect of a dependent person, and child endangerment without injury. These charges arose when Kimbrough fled from United States Marshalls attempting to arrest him on an outstanding warrant. Kimbrough escaped by driving away in a friend's car when the friend had stepped out and left the keys in the ignition. The friend's two-year-old daughter was still in the back seat of the car. The district court sentenced Kimbrough to imprisonment not exceeding fifteen years for second-degree theft as a habitual offender, fifteen years for neglect of a dependent person as a habitual offender, and two years for child endangerment. As a habitual offender, Kimbrough must serve a minimum of three years on each fifteen-year sentence. The district court ruled the fifteen-year sentences would run consecutively and the two-year sentence would run concurrently.

On appeal, Kimbrough raises three issues. First, he contends the court erred in finding there was sufficient evidence to support each conviction. Second, he contends the court erred in failing to articulate specific reasons for imposing consecutive sentences. Finally, in a pro se brief, Kimbrough contends the court erred in finding there was sufficient evidence to sentence him as a habitual offender.[1]

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[1] Kimbrough also filed a motion for leave to file amicus curiae brief. That motion is denied as untimely and as otherwise failing to satisfy the requirements of Iowa Rule of Appellate Procedure 6.906.

I. Sufficiency of Evidence to Convict.

The sufficiency-of-evidence arguments Kimbrough raises on appeal are the same as those raised in his motion for judgment of acquittal. In its ruling on that motion, the district court thoroughly addressed the sufficiency of evidence issues and correctly found the evidence was sufficient to support conviction on each of the three counts. The issues presented involve only the application of well-settled rules of law, and a full opinion would not augment or clarify existing law. Therefore, pursuant to Iowa Court Rule 21.26(1)(a), (b), (d), and (e), we affirm the district court's convictions on all three counts.

II. Failure to Articulate Reasons for Consecutive Sentencing.

Our review of a sentence within statutory limits is for abuse of discretion. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). An abuse of discretion exists when the court exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable. *Id.* The Iowa Rules of Criminal Procedure require that the district court state on the record its reason for selecting a particular sentence. Iowa R. Crim. P. 2.23(3)(d). Although the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). The court must also give reasons for imposing consecutive sentences. *Id.* "The reasons, however, are not required to be specifically tied to the imposition of consecutive sentences, but may be found from the particular reasons expressed for the overall sentencing plan." *State v. Delaney*, 526

N.W.2d 170, 178 (Iowa Ct. App. 1994). At the sentencing hearing, the following exchange occurred:

> THE COURT: Mr. Kimbrough, you have the right of allocation, which means you can tell me anything you want to tell me before judgment is imposed here.
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> KIMBROUGH: No.
>
> THE COURT: Pardon me?
>
> KIMBROUGH: I said no, Your Honor.
>
> THE COURT: It's hard hearing you. Did you say no, Your Honor?
>
> KIMBROUGH: Yes, yes. No.
>
> THE COURT: You don't want to make a statement?
>
> KIMBROUGH: I mean, just—I hope the court will see that I've been framed. Everything that been said, that be a lie and haven't been proved beyond a reasonable doubt that I made any type of theft, any child was in danger, any neglectful, wasn't—everything just was a lie. That's—I been accused of something I didn't do.
>
> THE COURT: Well you have already been found guilty. We are here to talk about sentencing.
>
> Do you have anything to say about that?
>
> KIMBROUGH: I just hope that I just get the least possible time and just get back out to my family.
>
> THE COURT: All right.
>
> The court is ready to pronounce judgment in this matter. I want to make sure the record reflects that in arriving at the court's sentencing, the court has considered the contents of the presentence investigation, the facts of the case, the statement by the victim, the defendant's age, his family circumstances, his work experience, his prior criminal record, the needs of the community to be protected from further criminal conduct by the defendant, the defendant's potential for rehabilitation, his failure at prior attempts at rehabilitation and all other factors brought to light in the presentence investigation.
>
> I also note that in the presentence investigation Mr. Kimbrough has other property crimes. He also has crimes involving guns, crimes involving violence, crimes involving drugs.
>
> As [the State] said, he's chosen the path of a career criminal in his life, even though he's only 26 years old.
>
> So the court is going forward now with sentencing.
>
> The defendant is convicted and stands guilty of the crimes that are listed here in the order. . . .

We recognize that the court gave reasons for the sentence without specifically tying any particular factor to its imposition of consecutive sentences. The court clearly, however, prefaced the declaration of its ultimate sentencing plan with a clear articulation of the reasoning in support of the sentence which it was about to impose. By doing so, the court exercised its discretion, made a thorough record of such exercise, and imposed a sentencing plan that complies with Iowa law. Accordingly, we affirm the district court's sentence.

III. Sufficiency of evidence to sentence as habitual offender.

Kimbrough raises one additional issue in his pro se brief: he argues there was insufficient evidence to support the district court's finding that he should be sentenced as a habitual offender. The State responds that the issue is not preserved for appeal because the pro se brief fails to conform to the requirements of Iowa Rule of Appellate Procedure 6.903(2)(g)(3). Rule 6.903(2)(g) states

> g. The argument section shall be structured so that each issue raised on appeal is addressed in a separately numbered division. Each division shall include:
>
> . . . .
>
> (3) An argument containing the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record. . . . Failure to cite *authority* in support of an issue may be deemed waiver of that issue.

Iowa R. App. P. 6.903(2)(g) (emphasis added).

The State argues, "Kimbrough discusses the facts of the case but fails to include citations to the record that support his claim. The failure to cite authority in support of an issue may be deemed a waiver of that issue." (Citation omitted.)

It is true that Kimbrough does not cite page numbers in his references to the record in the pro se brief. However, the State provides little support for the argument that omission of page numbers of the record alone is sufficient to deem an issue waived. *See State v. Corbett*, 758 N.W.2d 237, 240 (Iowa Ct. App. 2008) (finding State failed to state, argue, or cite authority for argument that motion to suppress was untimely, therefore, issue was waived and court addressed the merits); *Johnson v. State Farm Auto. Ins.*, 504 N.W.2d 135, 139 (Iowa Ct. App. 1993) (finding the issues waived where appellant raised several issues in brief but failed to cite any authority); *Phone Connection v. Harbst*, 494 N.W.2d 445, 449 (Iowa Ct. App. 1992) (finding issue waived where appellant argued there was insufficient consideration in a contract but cited no authority to counter existing law).

Failure to adhere to the substantive briefing requirements does not always result in waiver. In *State v. Crone*, 545 N.W.2d 267, 271 n.1 (Iowa 1996), Crone argued the State had waived an issue by failing to argue or cite to any authority in its brief. The court noted that failure to argue or to cite authority may be deemed a waiver, however, it did not find a waiver where "the State's position on the issue clearly ha[d] merit and its failure to cite authority or argue the issue ha[d] not hindered [the court's] review or consideration of the issue." *Id.* Failure to adhere to non-substantive or structural briefing requirements also may be excused where the noncompliant party does not make the court its advocate or hinder the court's ability to consider the issue. Here, the State cites *State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999), where the court found that a party

clearly had failed to comply with the appellate briefing rules.[2] The court noted that "where a party's failure to comply with the appellate rules requires the court to assume a partisan role and undertake the [party's] research and advocacy, we will dismiss the appeal." *Id.* (internal citations and quotation marks omitted). The *Stoen* court also found that the party's omission "ha[d] not hindered [its] review or consideration of the issues" and stated, "[W]e are able to reach the merits without having to undertake the appellant's research and advocacy and without having to assume a partisan role." *Id.*[3]

Although none of the preceding cases deals directly with the assertion that failure to include page numbers to the record alone is grounds for waiver and dismissal of a brief issue, we need not decide that point because we find Kimbrough's pro se explanation of the issue does not require us to undertake his research or advocacy or assume a partisan role. Therefore, we will address the argument.

The district court held a hearing and took evidence to determine Kimbrough's habitual offender status. The State offered court records from Cook County, Illinois and Woodbury County, Iowa, as well as oral testimony of

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[2] Specifically, the rules required "that each division of a party's brief begin with a discussion of the applicable scope of review and an identification of how error was preserved, with citation to the place in the record where the issue was raised and decided." *Crone*, 545 N.W.2d at 507.

[3] *See also Wedeking Const. v. Hillebrand Const.*, No. 03-1670, 2005 WL 597028 (Iowa Ct. App. March 16, 2005), where this court declined to hear an issue when a party supported its proposition by citing a witness's testimony in its entirety rather than any particular page. Reaching the merits of the argument would have required the court to assume a partisan role and undertake the party's research and advocacy.

witnesses from the Woodbury County Clerk of Court and Sheriff's Office. The district court found that Kimbrough was a habitual offender and imposed judgment accordingly. Kimbrough argues on appeal the State failed to meet its burden of proving his habitual offender status. Upon our review of the record, the district court's ruling thoroughly addressed the issue raised in the pro se brief and correctly ruled that Kimbrough was a habitual offender based on the State's evidence of two prior felony convictions in Illinois and two in Woodbury County. Pursuant to Iowa Court Rule 21.26(1)(b), (d), and (e), we affirm the district court's finding that Kimbrough was a habitual offender.

IV. Conclusion.

We find the evidence was sufficient for conviction and for a finding that Kimbrough was a habitual offender. We further find the district court gave sufficient reasons for imposing consecutive sentences. Therefore, we affirm the district court's judgment and sentence.

AFFIRMED.