**IN THE COURT OF APPEALS OF IOWA**

No. 3-967 / 12-2224
Filed November 6, 2013

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**DAKOTA VINCENT HERNANDEZ,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Plymouth County, Jeffrey A. Neary, Judge.

Defendant appeals his conviction for sexual abuse in the third degree, alleging ineffective assistance of counsel. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Darin J. Raymond, County Attorney, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

**TABOR, J.**

Dakota V. Hernandez appeals his conviction for sexual abuse in the third degree on a claim of ineffective assistance of counsel. He asserts his trial attorney was remiss in failing to argue the correct standard when seeking a new trial. Because the greater weight of the evidence supports the jury's verdict, Hernandez cannot show he was prejudiced by counsel's performance. Accordingly, we affirm the conviction.

## I. Background Facts and Proceedings

On June 19, 2011, Paul Peterson was fired from his job. To drown his sorrows he and several friends gathered at Shennon Herbold's house in Kingsley to drink. Peterson asked his girlfriend, O.N., to bring hard liquor. She purchased Wild Turkey 101. Peterson's friends, Dakota Hernandez and Jose Ramirez, also came to the gathering. O.N. had never met Hernandez before that night. The group played beer pong and "chugged" turkey bombs.[1] O.N. testified she drank at least three turkey bombs and possibly as many as four or five.

The heavy drinking took its toll, and later that night Peterson and many of the guests were passed out or getting sick. Twenty-two-year-old O.N. said she had not been that drunk since her twenty-first birthday. Herbold and Ramirez testified O.N. appeared intoxicated. O.N. did not recall parts of the evening but did remember Hernandez helping her walk to the bathroom when she needed to throw up. O.N. remembers Hernandez holding her hair back while she got sick. After this, Hernandez helped O.N. back to bed.

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[1] The witnesses described turkey bombs as Wild Turkey whiskey mixed with Monster energy drinks.

O.N. also recalled lying on the bed, opening her eyes, and seeing Hernandez leaning over her. She said Hernandez had a "shocked expression" and told her to "shut the fuck up." O.N. told the jury she saw Hernandez's hand coming toward her face and felt his penis inside her vagina. O.N. also testified she and Peterson were in a monogamous relationship and they had no other "partners."

Ramirez testified that earlier that night he saw Hernandez angrily stare at the bedroom where Peterson and O.N. were passed out. "He was just sitting there. Looked like he was pissed off at the world." Ramirez slept on the couch for an hour or two until he heard screaming coming from the bedroom. All he could make out was O.N. saying: "Paul, help me." When Ramirez entered the bedroom, he saw Peterson passed out on the floor, O.N. on the bed, and Hernandez pulling up his pants. Hernandez told Ramirez he should go back to bed and Hernandez would "take care of everything."

Herbold also heard O.N. calling for Peterson. From the main floor of his house, Herbold sent a text message to Hernandez urging him to leave the basement bedroom because Peterson and O.N. were in there. Herbold received no response. Later, Herbold went down to the bedroom and asked what was going on. Hernandez said, "I didn't do anything." When Herbold found O.N., her t-shirt had been pushed up, and her vaginal area was exposed.

O.N. told Herbold what happened, and he convinced her to go to the hospital. Once there she met with Kingsley Police Chief Daniel Kremer. The hospital staff conducted a sexual assault examination and sent the kit to the

Division of Criminal Investigation lab. The lab's testing showed the DNA sample belonged to Hernandez with a scientific certainty of one out of one hundred billion.

Following the investigation, the Plymouth County Attorney charged Hernandez with sexual abuse in the third degree, pursuant to Iowa Code sections 709.1, 709.4(1) and/or 709.4(4) (2011). The matter went to trial on November 7, 2012. Hernandez asserted the sex act was consensual. The jury returned a verdict of guilty. On November 30, 2012, the defense attorney asked for a new trial "based on insufficiency of the evidence." The court denied the defense motion and sentenced Hernandez to serve an indeterminate term of ten years in prison. Hernandez now appeals.

## II. Legal Standards for Ineffective-Assistance-of-Counsel Claims

We review ineffective-assistance-of-counsel claims de novo. *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013).

To succeed on his claim, Hernandez must show counsel breached a duty and prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish a breach of duty, Hernandez must prove his attorney's performance fell below the standard of a "reasonably competent attorney." *Id.* "We will not find counsel incompetent for failing to pursue a meritless issue." *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). To demonstrate prejudice, Hernandez must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because Hernandez must prove *both* subpar

representation *and* prejudice before succeeding on his claim of ineffective assistance of counsel, we can affirm on direct appeal if he fails to prove prejudice, without deciding whether counsel's representation was incompetent. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992).

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 such claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow 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. But we will decide ineffective-assistance claims when the record is sufficient to resolve them. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

**III. Analysis**

Hernandez argues he received ineffective assistance of counsel when his lawyer incorrectly stated the standard when moving for a new trial under Iowa Rule of Criminal Procedure 2.24(2)(b)(6). At the sentencing hearing counsel said, "[W]e would submit a motion for judgment of acquittal or in the alternative for a new trial, based on insufficiency of the evidence, even when viewed in the light most favorable to the State."

Defense counsel further argued:

> There was no testimony regarding consent of the victim at the time of the act. The only testimony was after the fact, that later, after she had awoken in the morning, she said she didn't want it to happen, but she admitted in her own testimony that at the time she

> couldn't remember anything, so she couldn't really testify whether she consented at that time or not.
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> There were no other witnesses present at that point to testify as to that issue. There was additionally testimony that the victim had only had a couple of drinks, two, three drinks I think some of that was even her own testimony, which, again in the light even most favorable for the State, would not be sufficient to make a conviction based on incapacitation.
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> And then additionally, all the other witnesses again, were not there at the time of the act, were in and out of consciousness, were all, by their own admission, intoxicated to the point of passing out, and when looking at the totality of the evidence in that light, it's our contention that it's simply insufficient to merit a conviction on these charges.

The prosecutor responded, "The State resists, Your Honor. We believe under any legal standard the State's met its burden and the jury verdict should be upheld by this Court." The court ruled with the following, "[I]n anticipation of the motions that [defense counsel] has made on behalf of the defendant the Court readily recalls the evidence in this case and the strength of it as well, and the motion and/or, if it's considered as two motions, is denied or they're each denied."

It is undisputed that defense counsel misstated the standard for new trial motions. Counsel may not move for judgment of acquittal after the jury returns its verdict. A court is authorized to enter a postverdict judgment of acquittal only if it reserves ruling on such a motion. Iowa R. Crim. P. 2.19(8)(b); *State v. O'Shea*, 634 N.W.2d 150, 158 (Iowa Ct. App. 2001). On the other hand, rule 2.24(2)(b)(6) permits the district court to grant a new trial "[w]hen the verdict is contrary to law or evidence." "Contrary to evidence" means "contrary to the weight of the evidence," rather than not supported by substantial evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Our supreme court explained the

difference between "weight of the evidence" and "insufficient evidence" as follows:

> [A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

*Id.* at 658 (citations omitted). "The court made it clear in *Ellis* that the contrary to the weight of the evidence standard was not the same as the sufficiency of the evidence standard, contrary to a previous holding." *State v. Adney*, 639 N.W.2d 246, 252–53 (Iowa Ct. App. 2001). When considering a new trial motion, the district court is not to approach the evidence from the standpoint "most favorable to the verdict." *State v. Scalise*, 660 N.W.2d 58, 65 (Iowa 2003). Instead the court must independently consider whether the jury reached a verdict contrary to the weight of the evidence resulting in a miscarriage of justice. *Id.* at 65–66. The weight-of-the-evidence analysis focuses on credibility questions and refers to a determination that more credible evidence supports one side than the other. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006).

In the fifteen years since our supreme court decided *Ellis*, we have remanded scores of cases for application of the correct standard. *See State v. Root*, 801 N.W.2d 29, 31 (Iowa Ct. App. 2011). Given that history, criminal defense counsel should know better than to invoke the judgment-of-acquittal standard when challenging a jury verdict. But even if counsel performed below prevailing professional norms in articulating an incorrect standard for the new trial

motion, Hernandez must still show he suffered prejudice from his attorney's mistake.

Hernandez cannot show it was reasonably probable that the new trial motion would have prevailed if his attorney had argued the weight-of-the-evidence standard. "The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.'" *Ellis*, 578 N.W.2d at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37–38 (1982)). Only in the extraordinary case, where the proof preponderates heavily against the verdict, should a district court lessen the jury's role as primary fact finder and invoke its power to grant a new trial. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008).

The State prosecuted Hernandez under both the by-force-or-against-the-will and the incapacitated-or-physically-helpless alternatives[2] of sexual abuse. *See* Iowa Code § 709.4(1).[3] The fact that a victim has some sensory perception

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[2] The Iowa code defines "incapacitated" as "disabled or deprived of ability, as follows:

> 1. 'Mentally incapacitated' means that a person is temporarily incapable of apprising or controlling the person's own conduct due to the influence of a narcotic, anesthetic, or intoxicating substance.
>
> 2. 'Physically helpless' means that a person is unable to communicate an unwillingness to act because the person is unconscious, asleep, or is otherwise physically limited.
>
> 3. 'Physically incapacitated' means that a person has a bodily impairment or handicap that substantially limits the person's ability to resist or flee."

Iowa Code § 709.1A.

[3] Section 709.4 of the Iowa Code states:

> "A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances: 1. The act is done by force or against the will of the other person, whether or not the other person is the person's spouse or is cohabiting with the person. . . . [or] 4. The act is performed while the other person is mentally incapacitated, physically incapacitated, or physically helpless."

during the sex act does not preclude the trier of fact from finding she was asleep or otherwise physically helpless. *See State v. Tapia*, 751 N.W.2d 405, 407 (Iowa Ct. App. 2008).

Despite O.N.'s inability to remember certain parts of the night, the State offered strong evidence she did not, or was in no condition to, consent to the sex act. O.N. told the jury she drank three to five potent "turkey bombs." Both Ramirez and Herbold testified to their belief O.N. was intoxicated. Hernandez knew O.N.'s vulnerable condition because he drank with her and later helped her to the bathroom, even holding back her hair while she vomited. O.N. told the jury she and Peterson had an exclusive relationship—making it less likely she would have consented to having sex with someone she just met that night while her boyfriend was passed out in the same room. O.N. also testified that when she awoke to see Hernandez on top of her, he looked "shocked" that she had regained consciousness and told her to "shut the fuck up" as she yelled for her boyfriend. Other witnesses confirmed O.N. called out for Peterson. While pulling up his pants, Hernandez told Ramirez he would "take care of everything." Hernandez told a worried Herbold: "I didn't do anything." The jury could have interpreted these statements as inconsistent with Hernandez's claim of consensual sex.

Hernandez argues on appeal it is "entirely possible" O.N. consented to the sex act in question and has no memory of doing so. The *Ellis* standard does not indulge taking away a jury verdict on a mere possibility. The district court should not disturb the juror's findings where the evidence they considered is "nearly

balanced or is such that different minds could fairly arrive at different conclusions." *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). Here, the greater weight of the credible evidence supports the jury's conclusion that O.N. did not consent to having sex with Hernandez.

We would echo the conclusions from *Adney*:

> This is not a case in which the testimony of a witness or witnesses which otherwise supports conviction is so lacking in credibility that the testimony cannot support a guilty verdict. Neither is it a case in which the evidence supporting a guilty verdict is so scanty, or the evidence opposed to a guilty verdict so compelling, that the verdict can be seen as contrary to the evidence. The evidence is this case simply does not preponderate heavily against the verdict.

639 N.W.2d at 253.

Hernandez cannot show a reasonable probability the court would have granted a motion for new trial had counsel urged the correct standard.

**AFFIRMED.**