IN THE COURT OF APPEALS OF IOWA

No. 2-498 / 11-1064
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JACQUE LOUIS MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, John D. Ackerman, Judge.

Jacque Miller appeals from conviction of three counts of sexual abuse in the third degree. **AFFIRMED.**

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

Jacque Miller, Fort Madison, appellant pro se.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Patrick Jennings, County Attorney, and Jill Esteves, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DANILSON, J.

Jacque Miller appeals from conviction of three counts of sexual abuse in the third degree. We affirm his convictions and preserve his ineffective assistance of counsel claims for possible postconviction proceedings.

I. Background Facts and Proceedings.

Upon allegations he had sex with two teenage girls—B.P., born in 1995, and A.W., born in 1996—twenty-nine-year-old Jacque Miller was charged with three counts of sexual abuse in the third degree, in violation of Iowa Code sections 709.4(2)(b) and 709.4(2)(c)(4) (2009).

During jury selection, the court rejected the defense's request to strike juror number 28 for cause. The potential juror was a teacher who knew Officer Jeremy McClure. McClure is a crime prevention officer and a technical investigator for the Sioux City Police Department.[1] He came to the juror's school to teach drug abuse prevention. The defense used a peremptory strike to remove the juror.

In November 2010, B.P.'s sister, who was Miller's girlfriend, found sexual text messages from Miller to B.P. on B.P.'s cell phone. B.P.'s mother read the messages and called police. When B.P. learned her mother called police, she was "frantic," crying hysterically, and her "whole body was just trembling." B.P. told her mother Miller had "fucked her" and "that he wouldn't stop and that if she told that he was going to kill the—her and hurt the kids and her sister."

[1] McClure, using a computer system known as Cellebrite, downloaded information from, and prepared reports noting text messages found on B.P.'s one cell phone and Miller's two cell phones. Officer Mike Simons testified as to the results of those reports.

B.P. testified she would babysit her sister's children when her sister was at work. B.P. testified that the first sex act with Miller occurred when she was thirteen. She stated that after she put the children down to go to sleep, she was laying down and Miller came in and "then he started rubbing my legs and stuff and then he got on top of me and—yeah. . . . We had sex," by which she meant his penis entered her vagina. She testified the next time was a "couple days later" and she had her period so "[h]e put it in my butt." She stated, "I wanted him to stop because it hurt." She also testified she and Miller engaged in oral sex, but she could not state how many times this occurred because "I don't want to remember it." B.P. also testified Miller threatened he would hurt B.P. or her sister if B.P. told anyone about the sex acts. B.P. stated that sex acts occurred after she turned fourteen "[m]ore than once." Without objection, B.P. stated Miller and she would smoke marijuana together and that she took her sister pain pills.

In May 2010, A.W.'s mother intercepted a letter from Miller to A.W. in which he asked A.W. if she was pregnant. The mother turned the letter over to police. A.W. testified she met Miller in 2010 when she was fourteen. She stated they became "smoking buddies," smoking marijuana together. A.W. testified she and Miller had vaginal intercourse "more than a couple of times." At one point, she told Miller she believed she was pregnant with his child.

At trial, Officer Mike Simons testified about statements Miller made to him during a November 23, 2010 interview. During that interview, Miller admitted seeing and punching B.P.'s "big tits"; talking to her about having sex; texting her; and that B.P. thought he was cute and sexy and wanted to have sex with him.

Miller told Officer Simons he did not have sex with B.P. because it was his girlfriend's "little sister, she's 14; he didn't want to do that to her." During that same interview, Miller admitted he engaged in sex acts with A.W. though he thought she was eighteen. A recording of the interview was played for the jury.

Kelcey Stubbe of the Sioux City Police Department testified she interviewed Miller on November 1, 2010. Stubbe testified Miller initially denied having had sex with A.W., but when confronted with the letter A.W.'s mother intercepted,[2] Miller told Stubbe he had engaged in vaginal sex with A.W. on just one occasion on May 2, 2010. However, Miller later stated there were three occasions of sexual contact.

Miller testified in his own defense. Miller testified he met A.W. through a mutual friend, they "smoked every now and then, and then later on we got into a relationship, started dating." He stated that in his interview with Officer Stubbe, he was nervous and scared because of prior dealings with police—he had two prior felony convictions. He stated he told Officer Stubbe about three instances of sexual contact with A.W. because that is "what I thought he wanted to hear." Miller testified his statements to Officer Stubbe were not true: "The touching and, you know, I guess fondling is true." But he denied actual intercourse with A.W. He also denied sexual contact with B.P. He stated B.P. was angry at him for

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[2] Exhibit 11 is a letter written by Miller to A.W., which reads in part:

> OMG!! I'm telling you I was tripping. I've been telling everyone I can get ahod of to get ahold of you . . . .
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> . . . .
>
> . . . Speaking of kids what's this I hear bout [sic] you being pregnant? You didn't say anything bout [sic] it in your letter, are you? You went to the doctor Friday right? In a way I hope you are but realistically that wouldn't be good not right now, not now ya know what I mean, but it is what it is, we'll deal wit [sic] it it's your parents I'm scared of . . . .

throwing her cell phone and breaking it during an argument between himself and B.P.'s sister.

The jury found Miller guilty of three counts of sexual abuse in the third degree. Because Miller was charged as a habitual offender, the court sentenced Miller to fifteen years on each count—counts I and II to be served consecutively, and count III to be served concurrently with counts I and II.

Miller appeals, contending the trial court erroneously denied his challenge for cause, which should necessitate automatic reversal. Miller next contends trial counsel was ineffective in failing to object to evidence of his prior drug and burglary convictions and in failing to object to the references in the record that he shared marijuana with minors.

Miller also asserts numerous claims of error in a pro se brief. He asserts there is insufficient evidence to sustain the convictions. He also argues the State did not timely produce text messages from B.P.'s cell phone; his trial counsel failed to call witnesses Miller wished to present testimony; and he was denied a fair trial because he was not allowed to testify he believed A.W. was an adult, or present evidence of the A.W.'s alleged prior sexual conduct. Miller also argues he was denied a fair trial because the three charges were tried in the same proceeding. Finally, he contends being sentenced on three counts of the "same charges" denied him due process, equal protection, and resulted in illegal sentences.

II. Scope and Standards of Review.

The district court's ruling on a challenge for cause is reviewed for abuse of discretion. *See State v. Tillman*, 514 N.W.2d 105, 107 (Iowa 1994).

We conduct a de novo review of constitutional issues such as claims of ineffective assistance of counsel. *See State v. Vance*, 790 N.W.2d 775, 780 (Iowa 2010).

We review sufficiency-of-the-evidence challenges for correction of errors at law. *Id.* at 783. We will sustain the jury's verdict if it is supported by substantial evidence. *Id*. "'Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.'" *Id.* (citation omitted).

III. Discussion.

A. Challenge for cause. Miller contends the trial court erred in failing to remove juror 28 for cause because, as a teacher, she knew Officer McClure and dealt with sexual abuse victims. Miller asserts a challenge for cause was appropriate under Iowa Rule of Criminal Procedure 2.18(5) subparagraphs (e) and (k) (stating a challenge for cause is appropriate when a potential juror stands in a relation of employer and employee (subparagraph 'e'), or has "formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent the juror from rendering a true verdict upon the evidence submitted on the trial" (subparagraph 'k')).

We agree with the State that Miller did not raise the issue of an employer-employee relationship between the juror and Officer McClure at trial and we do not address it here. *See State v. Musser*, 721 N.W.2d 734, 740 n.1 (Iowa 2006) (noting issues not raised in the district court cannot be raised for the first time on appeal).

We also reject Miller's challenge based upon rule 2.18(5)(k). Miller contends the juror did not "convincingly articulate her ability to be fair and impartial." To prevail on his claim for reversal, "the defendant must show (1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the defendant's use of all of the peremptory challenges." *Tillman*, 514 N.W.2d at 108. Even presuming the court abused its "broad discretion" in denying Miller's challenge for cause, *see id.,* Miller cannot prevail on his claim because the prospective juror did not serve on the jury, and Miller does not contend the remaining jury was biased.

In *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993), and again in *Tillman*, 514 N.W.2d at 108, the supreme court held that prejudice will not be presumed when a defendant is forced to use a peremptory challenge to correct an erroneous ruling on a challenge for cause. *See also State v. Mootz*, 808 N.W.2d 207, 222-23 (Iowa 2012) (explaining why prejudice will not presumed). Miller asks that these cases be overruled, asserting the erroneous denial of his challenge for cause should automatically result in a new trial. It is not for this court to grant such a request; rather, it is the prerogative of the supreme court, as the court of last resort in our state, to determine the law. *State v. Eichler*, 83 N.W.2d 576, 578 (1957);[3] *see McElroy v. State*, 703 N.W.2d 385, 393 (Iowa 2005).

[3] The *Eichler* court stated,

> [I]t is the prerogative of this court to determine the law, and we think that generally the trial courts are under a duty to follow it as expressed by the courts of last resort, as they understand it, even though they may

B. Ineffective-assistance-of-counsel claims. Miller, both through counsel and in his pro se brief, contends trial counsel was ineffective in several respects: in failing to object to testimony that the defendant and the victims smoked marijuana together; in failing to object to defendant's prior convictions; and in failing to call witnesses defendant wished. The State responds that the issues may all be explained as trial strategy, i.e., the "smoking buddy" evidence explained the background of Miller's relationship with the adolescents and Miller claimed he was "too high" to perform any sex acts, and Miller introduced his prior dealings with law enforcement to explain why he was afraid of police and why he would say what they wanted to hear.

To prevail on a claim of ineffective-assistance-of-counsel, a defendant must establish counsel failed to perform an essential duty and prejudice resulted from such failure. *Strickland v. Washington,* 466 U.S. 668, 687 (1984); *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011). We presume counsel is competent and a "defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *See State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006) (citation omitted). "Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *Id.* at 786. We conclude the present

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> disagree. If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.

83 N.W.2d at 578.

record is inadequate to address the ineffectiveness claims and preserve them for possible postconviction proceedings.

C. Illegal sentences. Miller contends that being sentenced on three counts of the "same charges" in the same trial was illegal because the court imposed the sentencing enhancement of habitual offender status on "simultaneous convictions." Miller relies upon *State v. Hollins*, 310 N.W.2d 216, 217 (Iowa 1981), wherein our supreme court followed the general rule that to apply the habitual offender status, the succeeding conviction "must be subsequent in time to the previous convictions both with respect to commission of the offense and to conviction." The habitual offender status did not arise from the other sex offenses, but from Miller's prior convictions of burglary and possession with intent to deliver. We find no error in the application of habitual offender enhancement.

D. Other pro se claims. Miller claims his convictions were not supported by sufficient evidence, complaining it was "[j]ust their word against mine," which he contends "is not proof beyond a reasonable doubt." We disagree as corroboration of the complaining witnesses was not required. *See* Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of victims shall not be required."); *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("The alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt."). In any event, there is other evidence in the record that supports the witnesses' accounts: the sexual text messages from Miller to B.P.; Miller's admissions to the police; the letter from Miller to A.W. The record contains

sufficient evidence from which a rational trier of fact could determine the defendant was guilty beyond a reasonable doubt.

Miller complains the State did not produce B.P.'s text messages in a timely manner and therefore they were not available before B.P.'s deposition. However, the evidence was produced before trial and trial counsel did not file a motion to compel discovery or complain of its unavailability. This complaint is not properly preserved for our review. *See Musser*, 721 N.W.2d at 740 n.1.

As to Miller's complaints that he was not allowed to state his belief that A.W. was of legal age, or present evidence of the witness's purported prior sexual conduct, we simply note that the trial court properly ruled such evidence inadmissible. *See State v. Tague*, 310 N.W.2d 209, 212 (Iowa 1981) (rejecting defendant's claim that the trial court erred in refusing his proposed instruction that good faith reasonable mistake of fact (the victim's age) is a defense to the charge of sexual abuse in the third degree; "Defendant plainly bears the full risk of his conduct. Mistake of fact is not a defense and the trial court was correct in refusing defendant's instruction."); *see also State v. Mitchell*, 568 N.W.2d 493, 497-98 (Iowa 1997) (discussing Iowa Rule of Evidence 412, Iowa's rape shield law, which was "enacted to (1) protect the privacy of victims, (2) encourage reporting, and (3) prevent time-consuming and distracting inquiry into collateral matters"). Moreover, "assuming this statutory rape victim had sexual intercourse on a prior occasion or occasions, . . . such evidence [is] inadmissible on either the substantive issue of defendant's guilt or on the victim's credibility." *State v.*

Davis, 269 N.W.2d 434, 439 (Iowa 1978). Miller's remaining claims were not preserved for our review and we will not address them.[4]

We affirm Miller's convictions.

AFFIRMED.

[4] Miller has failed to specifically identify issues as required by Iowa Rule of Appellate Procedure 6.903(2)(g) (stating the appellant's brief must contain an argument section that identifies the issues raised, how they were preserved for review, the scope of review, and an argument "containing the appellant's contentions and the reasons for them with citations to the authorities relied on and the references to the pertinent parts of the record . . . .").

We are also in receipt of Miller's pro se "response" to the State's appellate brief. The filing is untimely and we do not consider it.