

IN THE COURT OF APPEALS OF IOWA

No. 2-535 / 10-1666
Filed July 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LONNIE R. BATES JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

Defendant appeals his conviction of sexual abuse in the second degree asserting there was insufficient evidence and the court improperly admitted evidence. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, Michael J. Walton, County Attorney, and Melisa Zaehring, Assistant
County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

MULLINS, J.

The defendant, Lonnie Bates Jr., appeals his conviction of sexual abuse in the second degree, in violation of Iowa Code section 709.3 (2009), contending his counsel rendered ineffective assistance during trial by failing to make an adequate motion for judgment of acquittal challenging the sufficiency of the evidence and failing to object to the admission of a photograph. For the reasons stated herein, we affirm.

I. BACKGROUND AND PROCEEDINGS.

In the early morning hours of February 20, 2010, Selena Armstrong was at a bar in Davenport with newly acquired friends. After the bar closed, Armstrong agreed to go home with Angie Roberts as Armstrong had missed the curfew of the homeless shelter where she was staying. On their walk to Roberts's house, the two women encountered Lonnie Bates. Armstrong testified she was initially wary of Bates, but Roberts assured her there was nothing to worry about.

Once the group entered Robert's house, Armstrong sat down in the middle of the couch and Roberts and Bates sat on either side of Armstrong. Armstrong testified when Bates placed his hand on her leg, she attempted to stand up but was pulled back down by Roberts and Bates. Armstrong was told she was not allowed to leave. Bates stood up in front of her and directed her to perform oral sex on him. Armstrong began to cry and asked several times to leave. Both Bates and Roberts repeatedly struck Armstrong in the head and demanded she do what she was told. Roberts told Armstrong that Bates had already paid Roberts thirty dollars, so Armstrong needed to do what he wanted.

Bates then directed Armstrong to perform oral sex on Roberts while he placed his finger in Armstrong's vagina and anus. Armstrong testified at that point she threw up on the floor. Armstrong stated Bates then pulled her up by her hair, bending her over the back of the couch. Then she heard someone yelling and realized she was no longer being held down by Bates. Armstrong turned to see Roberts's son, Joe, fighting with Bates, and Bates was bleeding from his face. Joe threw Bates out of the house. Armstrong put her clothes back on and then was directed to go to the bedroom and calm down as the police were on their way.

Bates was found by police a few blocks away and returned to the scene. Once Armstrong was able to separate from Roberts's presence, she told the police officers what occurred. Armstrong received medical attention, and the injuries to her head and arms were documented. When Joe became aware that the police had been called, he located his cell phone, and while deleting some information on it that he did not want police to see, he discovered a photograph on his cell phone of Armstrong performing oral sex. The photograph depicts Armstrong's face and the torso of an African-American male. Joe testified he did not take the picture, but his phone had been located in the living room where the incident took place.

Bates was charged with sexual abuse in the second degree.¹ A jury trial was held August 23, 2010, and the jury found Bates guilty as charged. Bates

¹ Bates was also charged with possession of cocaine. However, during the trial after the close of evidence but before the case was submitted to the jury, defense counsel informed the court Bates was willing to stipulate to the possession charge. The court

was sentenced on October 6, 2010, to a term of incarceration not to exceed twenty-five years. He was ordered to serve seventy percent of the sentence before being eligible for parole and was committed to the Department of Corrections for the rest of his life under section 903B.1. Bates appeals asserting there was insufficient evidence to prove he was the one that committed the offense. He also claims his trial counsel was ineffective in failing to object to the admission of the photograph taken by Joe's cell phone. Bates claims the photograph lacked foundation and was prejudicial.

II. SCOPE AND STANDARD OF REVIEW.

Claims challenging the sufficiency of the evidence are reviewed for correction of errors at law. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). We view all the evidence in the light most favorable to the State to determine whether substantial evidence supports the conviction. *Id.* Evidence is substantial if it would convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt. *Id.*

Ineffective-assistance-of-counsel claims are reviewed de novo. *State v. Madsen*, 813 N.W.2d 714, 721 (Iowa 2012). To prove an ineffective-assistance claim, Bates must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) this failure resulted in prejudice. *Id.* at 723. If either element is lacking, the claim will fail. *Id.* at 724.

found Bates guilty of possession of cocaine based on the minutes of testimony, the stipulation, and the evidence produced at trial. Bates does not appeal his conviction of this offense.

III. SUFFICIENCY OF THE EVIDENCE.

A. Preservation of error. To preserve a claim of insufficient evidence, the defendant must make a sufficiently specific motion for judgment of acquittal at trial. *State v. Brubaker*, 805 N.W.2d 164, 170 (Iowa 2011). In this case at trial, counsel made a motion for judgment of acquittal attacking the sufficiency of the evidence to prove Bates was aided or abetted during the sex act. See Iowa Code § 709.3(3) (stating a person commits sexual abuse in the second degree if the person is aided or abetted by one or more persons and the act is committed by force or against the will of victim). On appeal, Bates now challenges the sufficiency of the evidence of his identity as the perpetrator. The State asserts and we agree that the motion for judgment of acquittal made at trial did not adequately articulate the specific elements of the offense Bates challenges on appeal. See *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (finding the failure to “make reference to specific elements of the crime on which the evidence was claimed to be insufficient, did not preserve the sufficiency of the evidence issue for review”). Thus we find Bates failed to preserve error on his claim.

B. Ineffective-Assistance-of-Counsel Claim. Anticipating the error preservation problem, Bates asks us to consider his sufficiency claim under the guise of ineffective assistance of counsel. See *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010) (“Ineffective-assistance-of-counsel claims are an exception to the traditional error-preservation rules.”). When an ineffective-assistance claim is raised on direct appeal, “the court may address it if the record is

adequate to decide the claim.” *Id.* As we find the record adequate, we will proceed to address Bates’s claim.

In support of his claim that counsel was ineffective in failing to challenge the sufficiency of evidence of his identity as the perpetrator, Bates points to the lack of foreign DNA found on Armstrong or her clothing. He calls our attention to the testimony of his fiancée, Martha Betts, who testified Bates was not the man pictured in the photograph taken by Joe’s cell phone because the man in the picture did not have a scar, which Bates has on his torso. He also cites to the testimony from Roberts’s eleven-year-old daughter, who was home the night of the incident but testified at trial, contrary to her initial report to police, no one was in her home that night with her except her mother and brother. She testified that the only time she saw Bates was after the police asked her family to come to the police station and Bates was seated in the back of a police car.

While this evidence alone may call into question the perpetrator’s identity, this was not the only evidence produced at trial. In evaluating the sufficiency of the evidence, the court must review all evidence and view it in the light most favorable to the State. *Meyers*, 799 N.W.2d at 138. At trial Armstrong identified Bates as the perpetrator, as did Joe and Joe’s girlfriend, Laquetta Dunn, who both witnessed the incident. Bates was found by police approximately a block and a half away from Roberts’s house. Bates admitted to police he had been at the home that night, had gotten in a fight with someone there and had left his cell phone. He then asked police to transport him back to Roberts’s house so he could retrieve his cell phone. Based on the evidence the State produced at trial,

we find there was sufficient evidence of Bates's identity as the perpetrator. As there was sufficient evidence, Bates's attorney was not ineffective in failing to make the challenge in his motion for judgment of acquittal. See *State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998) (finding counsel was not ineffective in "failing to pursue a meritless issue").

IV. ADMISSION OF EVIDENCE.

Next, Bates challenges the court's admission of the photograph from Joe's cell phone. As his trial counsel raised and then withdrew an objection to the admission of the photograph at trial, Bates also raises this challenge as an ineffective-assistance-of-counsel claim. Bates claims the State failed to lay a proper foundation for the photograph as no witness could identify who took the picture. He asserts he was denied the ability to attack the credibility of the person who took the picture. He also claims the picture was highly inflammatory and not relevant based on the State's failure to lay the proper foundation.

Because we find Bates has not proven the result of the trial would have been different had counsel objected to the admission of the photograph, he has not established prejudice, and we find his ineffective-assistance claim must fail. See *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) ("A defendant's inability to prove either element [of an ineffective-assistance-of-counsel claim] is fatal."). Even if the court had excluded the photograph upon a proper objection, we find the other evidence admitted at trial established beyond a reasonable doubt that Bates was guilty of sexual abuse in the second degree. The victim and two eye witnesses identified Bates and described the acts committed in great detail.

Bates admitted to police he was present in the home that night, had left his cell phone behind, and had been involved in a fight there. Even without the photograph taken with Joe's cell phone showing the victim performing oral sex on an African-American male, we find the result of the trial would have been the same.

As we find Bates failed to prove both of his ineffective-assistance-of-counsel claims, we affirm his conviction.

AFFIRMED.