IN THE COURT OF APPEALS OF IOWA

No. 2-890 / 11-1807
Filed December 12, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEITH ALLEN NOE,
Defendant-Appellant.

Appeal from the Iowa District Court for Cedar County, Mark J. Smith (trial) and Paul L. Macek (sentencing), Judges.

A defendant appeals his conviction for sexual abuse in the third degree and distributing marijuana to a person under the age of eighteen.

AFFIRMED.

Mark C. Smith, State Appellate Defender, David A. Adams, Assistant Appellate Defender, and Emily R. Zerkel, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Jeff Renander, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

VOGEL, J.

Defendant, Keith Allen Noe, appeals his conviction and sentence for sexual abuse in the third degree, in violation of Iowa Code section 709.4(1)(2009), a class "C" felony; and distributing a schedule I controlled substance (marijuana) to a person under the age of eighteen, in violation of Iowa Code section 124.406(1)(a), a class "B" felony.[1] He claims there was insufficient evidence to support these two convictions, the State's sexual abuse expert was not qualified, and her testimony was prejudicial. He also claims his trial counsel was ineffective.

I. Background Facts and Proceedings

A reasonable juror could have found the following facts as true involving an incident which occurred on September 8, 2010.

Noe's family and M.H.'s family had known each other for several years. M.H. was sixteen years old, and Noe was thirty-nine years old. Noe lived in his parent's trailer home as did Noe's nephew. M.H. regarded Noe as a father figure and would occasionally "crash" on his bed overnight, as she felt safe in his presence. On the evening of September 8, M.H., with her mother's permission, intended to stay at a girlfriend's house overnight. Late in the evening, in the company of some friends, M.H. drank about six alcoholic drinks. At about 2:45 a.m., M.H. attempted to go to a different friend's house to sleep, but when she arrived, she could not awaken the friend to be let in the house. M.H. had no cell phone or car, and because she did not know where else to stay, she,

[1] Noe was also charged and convicted of providing an alcoholic beverage to a person under the legal age in violation of Iowa Code section 123.47(4), a serious misdemeanor. He does not challenge the sufficiency of the evidence of this conviction on appeal.

accompanied by a male friend, decided to go to Noe's home. Upon arriving Noe welcomed M.H. and her friend into his parent's home. The friend left after a few minutes.

Noe and M.H. soon went into his bedroom and began watching videos on his computer. Noe had been drinking vodka and Mountain Dew, and M.H. asked if she could have some. Noe gave her the rest of the drink in his cup and told her to pour another one for herself. He took a bag of marijuana from inside or behind his stereo unit, looked at M.H, and said, "One-hit-and-you're-gone." Noe then fashioned a pipe from aluminum foil, used it, and handed it to M.H., who also smoked some of the marijuana.

Around 4:30 a.m., Noe lay down on his bed while M.H. remained at the computer for a few more minutes. Noe then held out his hand over the computer desk, and M.H. responded to what she thought was Noe's request for a "high five" by extending her arm to him. However, Noe grabbed her hand, pulled her onto the bed on top of him, and started kissing her. M.H. struggled to free herself and pleaded for him to get off of her. Noe grabbed her arms, pushed her over onto her back, and removed her clothes. He put his finger in M.H.'s vagina while masturbating. M.H.'s struggling finally succeeded in getting Noe off of her, and she was able to put her clothes back on. Noe told her not to tell anyone what had happened, adding that when she turned eighteen he was coming to get her and do whatever he wants with her.

M.H. then went into the bathroom, where she sobbed for about twenty minutes until she returned to Noe's bed. She testified she did not leave the trailer at that point because she was scared yet had no other place to go. At

about 7:00 a.m., M.H. got up and left the trailer. When she arrived at her friend's home, she was crying, shaking, and told her friend that Noe had "touched [her] all over" and she could not get him to stop.

The following weekend, M.H. reported the incident to her boyfriend. Two weeks after the incident, M.H. told her mother what had happened. Her mother eventually took her to the sheriff's office, where she was interviewed by deputies. Several communications between Noe and M.H., including text messages, Facebook messages, Yahoo! chatting, and a phone call, were recorded and retrieved by law enforcement to assist in the investigation. Later, on law enforcement's advice, M.H. wore a wire transmitter to gather information when she met personally with Noe to discuss the incident. The jury, having the opportunity to examine this evidence, could have concluded several of Noe's comments were incriminating.

On December 10, the State filed a trial information charging Noe with sexual abuse in the third degree, distributing a schedule I controlled substance (marijuana) to a person under the age of eighteen, and providing an alcoholic beverage to a person under the legal age. On June 3, 2011, the State filed an amended and substituted trial information to charge Noe as an habitual offender as defined in Iowa Code section 902.8.[2]

[2] On June 10, pursuant to plea proceedings with the State, Noe entered a written guilty plea. On July 19, Noe's counsel filed a motion in arrest of judgment asserting Noe did not make his guilty plea knowingly since Noe's counsel improperly informed Noe that he would only be required to register as a sex offender for ten years, not for his entire life, as required by Iowa Code Sections 692.101(l)(a)(5) and 692A.106(5). The district court granted Noe's motion, and the guilty pleas were withdrawn.

After a September 27, 2011 jury trial, Noe was found guilty on all counts. On November 4, Noe was sentenced on the sex abuse conviction to a term of imprisonment not to exceed fifteen years, lifetime registry as a sex offender, with lifetime parole. For the marijuana conviction, Noe was sentenced to no more than twenty-five years imprisonment, a minimum five years to be served. For the alcohol conviction Noe was sentenced to one year imprisonment. The district court ordered the sentences to run consecutively. Noe timely filed his notice of appeal

II. Sufficiency of the Evidence

Challenges to the sufficiency of the evidence are reviewed for errors at law. *State v*. *Hansen*, 750 N.W.2d 111, 112 (Iowa 2008). The district court's findings of guilt are binding on appeal if 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.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions that can fairly and reasonably be deduced from the record. *State v*. *Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.904(3)(p).

Noe claims there is insufficient evidence to satisfy the statutory elements of both the sex abuse conviction as well as the distributing marijuana to a minor conviction. Noe claims the testimony by the State's witnesses only raises suspicion, speculation, and conjecture, which is insufficient to support the convictions. *See State v*. *Speicher*, 625 N.W.2d 738, 741 (Iowa 2001). While there was some evidence in Noe's defense, the credibility of witnesses is for the

factfinder to decide except those rare circumstances where the testimony "may be so impossible, absurd, and self-contradictory that the court should deem it a nullity." *State v*. *Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997). This is not one of those rare circumstances.

To sustain a conviction of sexual abuse in the third degree, the State was required to prove beyond a reasonable doubt that Noe performed a sex act with M.H., and that sex act was performed by force or against M.H.'s will. *See* Iowa Code §§ 709.1, 709.4(1). A "sex act" includes any sexual contact between the finger or hand of one person and the genitals or anus of another person. *Id.* § 702.17.

We find there is sufficient evidence to sustain the conviction. M.H. described in detail what Noe said and did to her as he pulled her onto the bed, where he put each item of her clothing, and how she used her arms and legs to resist his attack. When he started to kiss her she kept pushing down on his chest, trying to lift herself off of him. When M.H. went to her friend's house the next morning, she was visibly upset. M.H.'s friend testified that M.H. was "crying heavily" and "shaking very badly." The friend needed to calm M.H. down, before she could understand what M.H. was saying—that something bad had happened to her; Noe touched her all over after requesting him to stop.

Noe challenges M.H.'s credibility pointing to alleged contradictions and inconsistencies in her testimony, particularly where her legs and arms were positioned at different points in the encounter. However, the slight variations in M.H.'s description of the incident are minimal as she struggled, using both her arms and legs, to fend off Noe's advances. Her testimony was consistent that

she resisted his actions, and her testimony as a whole was not "self-contradictory" or "bordering on the absurd" such that it should be rendered a nullity. The district court was correct in denying Noe's motion for judgment of acquittal, as there is sufficient evidence to support the conviction.

Regarding the conviction of distributing marijuana to a minor, Noe claims there is no evidence that the substance was marijuana, or that it was consumed by M.H. Our supreme court has recognized that, for a person to be convicted of a drug offense, the State is not required to chemically test the purported drug. *State v*. *Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011). The finder of fact is free to use circumstantial evidence to find that the substance is an illegal drug. *Id.* The reason for this rule is that circumstantial evidence is not inferior to direct evidence. *State v*. *Blair*, 347 N.W.2d 416, 421 (Iowa 1984). In a given case, circumstantial evidence may be more persuasive than direct evidence. *State v*. *Stamper*, 195 N.W.2d 110, 111 (Iowa 1972). Circumstantial evidence is equally probative as direct evidence for the State to use to prove a defendant guilty beyond a reasonable doubt. *State v*. *O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979). *Brubaker* provides a nonexclusive list of factors that can be used to determine whether a substance is an illegal drug, such as whether the substance caused a change in behavior, whether the person referred to the substance as "very good stuff," whether the substance was used in the same manner as the illicit drug, and whether the odor of the substance identified it as an illegal drug. 805 N.W.2d at 173.

There is circumstantial evidence based on both M.H. and Noe's testimony that a reasonable juror could find the substance was marijuana and Noe shared it

with M.H. Several factors support the jury's verdict in this case. Noe was secretive about the marijuana: he hid it in or behind his stereo and brought it out when he wanted to use it. He used the substance in a way that was consistent with marijuana use: he fashioned a pipe out of aluminum foil, loaded a "bowl" in the pipe, "took a hit," and handed it to M.H. M.H. recognized it as marijuana: she testified she had smoked marijuana before and she knew the substance provided by Noe was marijuana by "the look, the smell, the color."

Substantial evidence also supports the jury's determination that the defendant gave the marijuana to M.H. As with her testimony regarding the sexual abuse, M.H. gave a detailed account of how Noe gave her marijuana, describing how he referred to it as "one-hit-and-you're-gone," and how they each "took two hits." The district court correctly overruled Noe's motion for judgment of acquittal on the charge of distributing marijuana to a person under the age of eighteen as the jury's verdict is supported by sufficient evidence.

III. Expert Qualifications

Noe next claims the district court erred by allowing Karla Miller, the executive director of the Rape Victim Advocacy Program in Iowa City, to testify as an expert for the State. We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *Hyler v*. *Garner*, 548 N.W.2d 864, 868 (Iowa 1996). Thus, we will reverse a decision by the district court concerning the admissibility of expert opinions only when the record shows "the court exercised [its] discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v*. *Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial

evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). Generally, we have been committed to a liberal view on the admissibility of expert testimony. *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 685 (Iowa 2010), reh'g denied (Feb. 23, 2010).

First, Noe attacks whether Miller was even professionally qualified to testify. Miller has worked with sex abuse victims for thirty-five years, and also with offenders for approximately eighteen years. She has Bachelor of Arts degree in psychology as well as literature, science, and the arts; a master's degree in social work; is licensed in the state as such; and is a certified sexual assault counselor. Noe's argument that Miller is not an expert because "she has no doctorate degree" and she is "only a social worker" is disheartening. Miller has an abundance of both education and experience, as was set forth in her curriculum vitae, and the district court did not abuse its discretion by allowing her to testify. Moreover, her testimony was only allowed after an offer of proof, with the district court setting certain parameters. She could testify as to how sex abuse victims react in general, without going into any specifics of this case and with special direction to avoid commenting on the credibility of M.H. *See State v. Chancy*, 391 N.W.2d 231, 233 (Iowa 1986) (finding a social worker, without a doctorate, had sufficient training and experience to offer expert testimony as to a sexual abuse victim).

Noe also argues that even if we find Miller was qualified—and we do—she impermissibly opined on matters that directly or indirectly rendered an opinion on the credibility of M.H. Expert opinion evidence is admissible if it is helpful to the

jury and bears on matters outside the realm of common knowledge and experience. *State v. Fox*, 480 N.W.2d 897, 899 (Iowa Ct. App. 1991). Accordingly, experts are generally allowed to express opinions on matters that explain relevant mental and physical symptoms present in sexually abused children. *Id.* Iowa Courts have found there is a "fine but essential line" between an opinion that is helpful to the jury and one that conveys a conclusion concerning defendant's guilt, and when opinion evidence could help the jury understand the delayed reporting symptom that often exists in children who are sexually abused. *State v. Tonn*, 441 N.W.2d 403, 405 (Iowa Ct. App. 1989); *see also State v. Griffith*, 564 N.W.2d 370, 375 (Iowa 1997) (finding expert testimony on the medical and psychological syndrome present in battered women was not impermissible testimony on the victim's credibility).

We find Miller's testimony, staying within the parameters set by the district court, was of the type helpful to the jury and did not comment or reflect on M.H.'s credibility. Miller testified only in general terms regarding sex abuse victims' various reactions to abuse. The matter about which she testified—why some victims delay reporting abuse, why some victims might not scream during the abuse, how some victims react after abuse—were subjects on which the average juror may not have adequate knowledge. Accordingly, the district court did not abuse its discretion in allowing the testimony and it was proper under Iowa Rule of Evidence 5.702, to assist the jury in understanding the evidence presented.

IV. Ineffective Assistance

Finally, Noe raises two ineffective-assistance-of-counsel claims. We review these claims de novo. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa Ct.

App. 2004). In order to succeed on a claim that counsel was ineffective, a defendant must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *State v*. *Graves*, 668 N.W.2d 860, 869 (Iowa 2003). A defendant's inability to prove either element is fatal and therefore, we may resolve the defendant's claim on either prong. *Id.*

A defendant need not raise an ineffective-assistance-of-counsel claim on direct appeal in order to preserve the claim for postconviction relief proceedings. *State v*. *Johnson*, 784 N.W.2d 192, 197 (Iowa 2010). Although not required, a defendant may raise a claim on direct appeal if he believes the record is adequate to address the claim on direct appeal. *Id.* If the defendant chooses to raise an ineffective-assistance-of-counsel claim on direct appeal, we may either determine the record is adequate and decide the claim or find the record is not adequate and preserve the claim for postconviction proceedings so that the defendant may develop a more complete record. *Id.* We find the record is adequate to reach the ineffective-assistance-of-counsel claims raised by Noe.

One of Noe's ineffective arguments is that counsel breached an essential duty in not objecting to Miller's testimony as he claims it bolstered the credibility of M.H. As we have already determined that Miller's testimony was appropriately admitted, this claim is without merit.

Noe's second ineffective assistance claim is that trial counsel failed to timely object to Deputy McGuinty's answer in the following exchange:

> Q: Did [Noe] ever deny that he inserted his finger into her vagina forcibly and against her will? A: No, he did not.
> Q. Is denial significant to you? A. Absolutely.
> Q: Why?

> [NOE'S ATTORNEY]: Objection. Irrelevant. The jury is free to decide what happened here. The witness's personal belief about the evidence is irrelevant.
>
> THE COURT: That's sustained.

Noe claims that by waiting to object until after the witness answered, the prejudicial statement "rang out in the presence of the jury." However, what the deputy intended by his statement was not probed before the objection was lodged, leaving substantial ambiguity as to what he meant. Any resultant prejudice must give rise to a reasonable probability the outcome of the proceeding would have been different, and based on such ambiguity in the use and meaning of the word "absolutely," Noe has failed to prove but for the possible error of trial counsel, the outcome would have changed. *See State v. Schaer*, 757 N.W.2d 630, 638 (Iowa 2008). Even if defense counsel should have lodged an earlier objection, the response was inconsequential when viewed in the context of the abundant evidence the jury was presented supporting Noe's guilt. On this record, we find Noe suffered no prejudice by the timing of the objection and therefore his ineffective assistance of counsel claim must fail.

V. Conclusion

There was sufficient evidence that a reasonable juror could have found Noe committed both the crime of sexual abuse in the third degree and distributing marijuana to a person under the age of eighteen. Furthermore, the district court did not abuse its discretion in allowing the well-qualified expert to testify as to general principles regarding reactions of sex abuse victims. Finally, trial counsel was not ineffective under either claim.

AFFIRMED.