IN THE COURT OF APPEALS OF IOWA

No. 3-206 / 12-0555
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTIN RAY HIATT,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

Martin Hiatt appeals his convictions of three counts of sexual abuse in the second degree and four counts of indecent contact with a child. **AFFIRMED.**

Chad Douglas Primmer of Primmer Law, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Daniel J. McGinn and Shelly Sedlak, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

I. Background Facts and Proceedings.

Defendant Martin Hiatt was charged by an amended trial information with five counts of sexual abuse in the second degree, in violation of Iowa Code sections 709.1(3) and .3(2) (2011), and four counts of indecent contact with the child, in violation of section 709.12(2). A jury found Hiatt guilty of three counts of second-degree sex abuse and four counts of indecent contact with the child. Thereafter, Hiatt filed a motion for new trial on numerous grounds, which the district court denied. Hiatt was sentenced to concurrent terms of imprisonment.

On appeal, Hiatt contends the district court erred in denying his motion for new trial because it (1) wrongly concluded the evidence weighed in favor of the jury's verdicts, (2) improperly sequestered family witnesses, and (3) improperly responded to a jury question. Additionally, Hiatt asserts his trial counsel rendered ineffective assistance (4) in failing to object to statements made by the prosecutor in her rebuttal closing argument and (5) in failing to object to the court's failure to administer an oath to a witness. We address his arguments in turn.

II. Motion for New Trial.

Generally, we review the denial of a motion for new trial for correction of errors at law. Iowa R. App. P. 6.907; *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). However, if the motion is based on a discretionary ground, we review for abuse of discretion. *State v. Serrato*, 787 N.W.2d 462, 472 (Iowa 2010). To the extent Hiatt asserts constitutional claims, our review is de novo. *See State v. Schaer*, 757 N.W.2d 630, 633 (Iowa 2008).

A. Weight of the Evidence.[1]

When the jury's verdict is contrary to the evidence, Iowa Rule of Criminal Procedure 2.24(2)(b)(6) authorizes the district court to grant a new trial. *See State v. Wells*, 738 N.W.2d 214, 219 (Iowa 2007). "[A] verdict is contrary to the evidence under this rule if it is contrary to the *weight* of the evidence." *Id.* (emphasis added) (internal quotation marks omitted). Unlike the sufficiency-of-the-evidence standard applied on a review of a motion for judgment of acquittal, the district court, in determining whether a new trial should be granted, has much broader power under the weight-of-the-evidence standard, including the ability to weigh the evidence and consider the credibility of witnesses. *Serrato*, 787 N.W.2d at 472 (citing *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998)); *see also State v. Taylor*, 689 N.W.2d 116, 133-34 (Iowa 2004). If the court determines the verdict is contrary to the weight of the evidence "and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted." *Ellis,* 578 N.W.2d at 658-59. Our review of a weight-of-the-evidence claim on appeal "is limited to a review of the exercise of discretion by the trial court," and we may not review "the underlying question of whether the verdict is against the weight of the evidence." *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003).

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[1] Although Hiatt uses both "sufficiency-of-the-evidence" and "weight-of-the-evidence" language in his brief, these terms are not interchangeable. *See State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). Based upon his reliance of Iowa Rule of Criminal Procedure 2.24(2)(b)(6), discussed above, in his motion before the district court, as well as in his prayer in his brief, we address this appellate claim as a challenge to the weight of the evidence.

The district court found the jury's verdict was not contradictory to the evidence. The court explained:

> The weight of this case clearly fell upon the child witness. There was no physical evidence. And the weight of that evidence could be something that would be and should be determined by the jury in the entire context of the case. This court finds that the weight of the evidence supports each and every count for which a conviction was entered, and very clearly this jury took their obligation seriously because they actually acquitted Mr. Hiatt on two of the counts.

Upon our review, we find the district court applied the correct standard and did not abuse its discretion in determining that the greater weight of the evidence supported the jury's determination of guilt in this case. "Only in the extraordinary case, where the evidence preponderates heavily against the verdict, should a district court lessen the jury's role as the primary trier of fact and invoke its power to grant a new trial." *Taylor*, 689 N.W.2d at 134; *see also State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs," and it "is at liberty to believe or disbelieve the testimony of witnesses as it chooses and give such weight to the evidence as in its judgment the evidence was entitled to receive." *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984).

Although no evidence directly corroborates the victim's accounts, a sex abuse victim's accusations do not require corroboration to uphold a verdict. *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); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). Here, the victim testified that Hiatt started having inappropriate contact with her when she was around the age of six, and it lasted until she was around ten. She testified that Hiatt touched her with his

finger over and under her clothes, and this would happen when the two of them were watching television together. She testified that this happened more than one time but was unable to recall when the first time was. She testified that Hiatt touched her on her thigh, private area, buttock, back, and breasts. The victim testified that Hiatt sometimes went underneath her pants and would start moving his hands around on her thigh and vagina. She testified that Hiatt had licked her vagina on one occasion. There was certainly testimony to support the charges against Hiatt. Although there was also testimony from Hiatt denying the victim's accusations, as well as testimony on Hiatt's behalf that he had not abused others, the jury was free to believe the victim and disbelieve Hiatt. We also agree with the district court's assessment that the jury clearly undertook its duty earnestly, particularly given that the jury acquitted Hiatt on two counts. The district court did not abuse its discretion in determining the weight of the evidence presented at trial supported the charges for which Hiatt was convicted. Accordingly, we affirm on this claim.

B. Failure to Sequester Family Witnesses.

Several members of the victim's family testified. Prior to each witness's testimony in the State's case-in-chief, the family witnesses were sequestered. After the victim's sister testified, Hiatt requested the witness continue to be sequestered, in case he decided to recall her later for rebuttal purposes. Hiatt also requested the other family witnesses be sequestered after their testimony. Although the court ultimately denied his request, the victim's family witnesses were not allowed into the courtroom until after the State had rested its case.

On appeal, Hiatt claims his constitutional right to confront the witnesses was denied because “he never got a fair chance to examine them in an untainted light.” He further asserts that as a result, he was not provided a fair trial in violation of his due process rights. We disagree.

Courts have long recognized the practice of excluding witnesses from the courtroom when not testifying “as a means of preventing a witness from shaping his testimony to conform with that of earlier witnesses.” *State v. Sharkey*, 311 N.W.2d 68, 70 (Iowa 1981). As our supreme court has observed:

> The purpose of an order of exclusion is to lessen the danger of perjury, or at least of a suggestion to following witnesses of what their testimony should be to correspond with that previously given; to put each witness on his own knowledge of the facts to which he testifies rather than to have his memory refreshed, even guided, and his testimony colored by what has gone before.

State v. Pierce, 287 N.W.2d 570, 574 (Iowa 1980) (internal quotation marks and citation omitted).

“In Iowa, however, a party is not entitled as a matter of right to exclusion of witnesses from the courtroom.” *Id.* To that end, Iowa Rule of Evidence 5.615 provides that at the request of a party, or on its own motion, the court may exclude witnesses from the courtroom during testimony of other witnesses. Because the decision to exclude witnesses lies in the court’s discretion, our review is for abuse of discretion. *State v. Roby*, 495 N.W.2d 773, 775 (Iowa Ct. App. 1992). Where a defendant’s motion to sequester witnesses was denied by the district court, our supreme court requires the defendant to prove prejudice or harm resulted from the court’s denial. *See*, *e.g.*, *Sharkey*, 311 N.W.2d at 70 (“In short, defendant has failed to demonstrate that he was in any manner harmed by

the denial of the motion to exclude. In the absence of prejudice we cannot say that a reversal is required.").

Nevertheless, a defendant has a constitutional right to confront witnesses against him or her. U.S. Const. Amends. VI, XIV; Iowa Const. art. I, § 10. "Two important policies underlie the Confrontation Clause: "a preference for face-to-face confrontation at trial and the right of cross-examination." *State v. Newell*, 710 N.W.2d 6, 24 (Iowa 2006). Moreover, Iowa citizens have the right to a jury trial and shall not "be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. "Due process of law" demands "fundamental fairness in a judicial proceeding." *State v. Becker*, 818 N.W.2d 135, 148 (Iowa 2012). In order to satisfy due process, Hiatt's trial must not have been fundamentally unfair. *See id.*

Here, the victim's family witnesses were sequestered prior to giving their testimony, and they were accordingly prevented from shaping their testimony to conform with that of the other witnesses or each other, satisfying the purposes of orders for exclusion. Moreover, Hiatt had a "fair chance" to cross-examine those witnesses "in an untainted light," as they were sequestered prior to giving their testimony. The witnesses were not allowed back into the courtroom until after the State had rested its case. Although he complains he might have recalled those witnesses on rebuttal later, he did not, and he cannot establish he was prejudiced by the district court's denial of his request to further sequester the victim's family witnesses after his opportunity to fully cross-examine them. Upon our de novo review of this issue, we conclude the Confrontation Clause and due

process requirements were satisfied in this case. Accordingly, we affirm the district court's denial of Hiatt's motion to dismiss on this issue.

C. Court's Response to the Jury's Question.

After the case was submitted to the jury, the jury advised it was having trouble reaching unanimous verdicts on all counts. The court advised the parties it intended to ask the jury if it had reached unanimous verdicts on any counts, and if so, it would instruct the jury to continue deliberating and return unanimous verdicts for the counts on which they agreed, while declaring a mistrial on the rest. Hiatt objected to this response, arguing the jury should be required to return unanimous verdicts on all of the counts or none of the counts, rather than returning unanimous verdicts on only a portion of the counts. The court denied Hiatt's objection and proceeded to direct the jury it could return verdicts on any of the counts upon which the jury had reached a unanimous decision.

On appeal, Hiatt now challenges the language used in the court's response to the jury, asserting the jury was swayed by the court's advisement of the case having to start all over on those counts resulting in a mistrial. The State points out Hiatt did not raise this particular issue before the district court, and it argues Hiatt failed to preserve error on this claim. We agree.

An issue must be raised and decided by the district court in order for error to be preserved. *Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012). Error preservation gives the district court an opportunity to correct its mistakes and provides us with an adequate record for review. *State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003). The district court's ruling need not be complete; it is only necessary that the ruling indicate that the court considered the issue and gave a

ruling upon it. *Lamasters*, 821 N.W.2d at 864. Because we are limited to objections made and issues presented to the district court, *see State v. Moses*, 320 N.W.2d 581, 585 (Iowa 1982), those issues not raised at the district court level are deemed waived. *State v. Sanford*, 814 N.W.2d 611, 620 (Iowa 2012).

Hiatt did not raise this argument before the district court. Accordingly, he has failed to preserve the issue for our review, and the claim is deemed waived.

III. Ineffective Assistance of Counsel.

We review ineffective-assistance-of-counsel claims de novo. *State v. Maxwell*, 743 N.W.2d 185, 189 (Iowa 2008); *see also 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."). We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011). However, where, as here, the record is adequate to address the allegations concerning counsel's performance, we will decide the claim on direct appeal. *State v. Fannon*, 799 N.W.2d 515, 519-20 (Iowa 2011); *see also* Iowa Code § 814.7(3).

A. Failure to Administer an Oath to a Witness.

At trial, Hiatt called a longtime friend as a character witness. As the witness was approaching the stand to be sworn, several jurors interrupted and advised the court that they knew the witness. After that matter was resolved, the witness took the stand and began answering questions. However, the witness was never sworn in. Hiatt did not object to the failure to have the witness sworn in at that time, but he raised the issue in his subsequent motion for new trial. The district court denied his motion on this ground, explaining:

> I believe that she felt she was under oath, that the entire courtroom thought she was under oath, and that there was no prejudice to the failure to administer the oath in this case. It sincerely is my belief that everybody thought she was under oath, to be honest with you.

On appeal, Hiatt asserts his trial counsel was ineffective for failing to object to his witness not being sworn in. He asserts that

> [a]though there is no uniform description of what needs to be said, the law is clear that something needs to be said. It is admittedly difficult to say, after the fact, exactly what affect this had on the jury. However, any inference that can be drawn should be done in the favor of [Hiatt] to insure his fundamental rights to due process and a fair trial are preserved.

To prevail on his ineffective-assistance claims, Hiatt must prove by a preponderance of evidence that counsel failed to perform an essential duty and prejudice resulted. *See Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). However, a reviewing court need not engage in both prongs of the analysis if one is lacking. *See id.* at 159. "To establish prejudice, a defendant must show the probability of a different result is sufficient to undermine confidence in the outcome." *Id.* at 158 (citations omitted).

Iowa Rule of Evidence 5.603 provides that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the witness's duty to do so." Nevertheless, as Hiatt correctly points out, no specific form of oath or affirmation is required in Iowa as long as the oath or affirmation given impresses on the conscience of the witness the need for the truth. *See State v. Hulsman*, 126 N.W. 700, 701 (1910) ("The purpose of an oath is to secure the truth, and hence any form thereof which is ordinarily calculated to appeal to the conscience of the

person to whom it is administered, and by which he signifies that his conscience is bound, is sufficient."). Furthermore, our supreme court has held, in its review of a similar statute, that "failure to swear the officer in charge of the jury, while mandatory, is not a ground for a new trial nor is it reversible error when no resulting prejudice is shown." *See State v. Jensen*, 66 N.W.2d 480, 484 (Iowa 1954) (citing then Iowa Code § 5387 (1953)).

Here, even assuming without deciding his trial counsel breached his duty in failing to object, Hiatt cannot show he was prejudiced by this failure. In fact, Hiatt does not even explain how he was prejudiced beyond his statement that his trial counsel should have objected. The district court believed everyone thought the witness was sworn in, including the witness herself. Moreover, Hiatt does not claim here that the witness, his longtime friend called by him on his own behalf, was not truthful in her testimony. Hiatt has failed to show that there was any probability that the outcome of the proceedings would have been any different had his trial counsel objected. Accordingly, Hiatt's trial counsel was not ineffective, and Hiatt's claim fails.

B. Prosecutor's Closing Argument.

Hiatt's trial strategy was to portray the victim as a liar, emphasizing the victim's delayed disclosure as indicia of the victim's fabrication of her accusations. During the State's rebuttal, the prosecutor told an anecdote from her personal life wherein her own daughter was afraid to go off a diving board and her daughter explained she just was not ready to jump. The prosecutor analogized her anecdote to the victim in the case, stating: "We can sit here and assume and presume why—why didn't she tell? Why didn't she do this? She

told when she was ready. She told when she felt safe." Hiatt's trial counsel made no objection to the State's rebuttal.

On appeal, Hiatt contends his trial counsel was ineffective in failing to object to that rebuttal, asserting the State created evidence and interjected the prosecutor's personal beliefs. Hiatt states that "[t]rial counsel's failure to object allowed the jury's last impression to be the troubling analogy offered by [the State]."

Here, even assuming without deciding Hiatt's trial counsel had a duty to object to the rebuttal, Hiatt has again failed to show the requisite prejudice. A prosecutor is entitled to some latitude during closing argument and "may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented." *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006). The question of the credibility of the victim here was a matter for the jury, and as noted above, it clearly took its duty seriously. Hiatt has failed to show there was any probability that the outcome of the proceedings would have been any different had his trial counsel objected to the harmless anecdote. Accordingly, Hiatt's trial counsel was not ineffective, and Hiatt's claim fails.

III. Conclusion.

Because the district court did not err in denying Hiatt's motion for a new trial, and because Hiatt failed to establish his trial counsel was ineffective, we affirm Hiatt's convictions and sentence.

AFFIRMED.