IN THE COURT OF APPEALS OF IOWA

No. 3-328 / 10-1641
Filed May 30, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ABRAHAM HILDRETH,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

A defendant appeals his convictions on two counts of sexual abuse in the second degree. **AFFIRMED.**

Jesse A. Macro Jr. of Gaudineer, Comito & George, L.L.P., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John Sarcone, County Attorney, and Michael T. Hunter, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013)

HUITINK, S.J.

I. Background Facts & Proceedings.

Our review of the record discloses the following. In October 2009, James Hildreth was living with a woman who had a daughter, B.P., who was then six years old. On October 24, 2009, the mother and an older sibling were staying overnight with friends. B.P. testified that Hildreth woke her up in the night, placed a blindfold and a blanket over her head, and put her on the floor. She stated he took off her pajama bottoms, rubbed a "medicine" on her private parts, and then placed a buzzy thing inside her.

B.P. testified that Hildreth then picked her up and put her on the bed in the bedroom of the sibling who was gone that night. He put the blindfold over her eyes again, but she was able to look out and see Hildreth's penis sticking out of his underwear. She stated Hildreth put his penis inside her for about two or three minutes, which hurt and caused her to cry. B.P. stated Hildreth then put some more "medicine" on her private parts and put the buzzy thing inside her again. Hildreth then took B.P. to her room and told her to put her pajamas back on. He gave her some milk and a cookie, and she went back to bed.

The next morning, B.P. noticed that she had blood in her underwear. She changed her underwear several times because of the bleeding. When the mother returned, B.P. immediately told her what had happened. The mother saw B.P. was bleeding from the vagina and took her to the hospital. An examination showed the child had bruising of the hymen and vaginal wall, which was consistent with blunt-force, penetrating trauma.

The police were contacted from the hospital. The mother had a relative collect the bloody underwear to give to officers. When the mother got home she found a vibrator had blood on it. She wiped off the vibrator with a tissue. Officers collected both the vibrator and the tissue. A laboratory examination showed sperm and DNA attributable to Hildreth on two of the pairs of underwear. Also, DNA that matched that of Hildreth and B.P. was found on the tissue.

Hildreth was charged with two counts of sexual abuse in the second degree, in violation of Iowa Code sections 709.1 and 709.3(2) (2009). The case was tried to the bench. Shortly before the trial, and again on the second day of trial, Hildreth requested the appointment of different court-appointed counsel. His requests were denied by the court.[1] During the trial, evidence was presented as outlined above. The district court denied Hildreth's motion for judgment of acquittal. Hildreth testified that B.P. had a rash on her bottom so he put diaper cream on her. He also claimed B.P. had been kicked by a sibling and this may have injured her private area.

The district court issued a written ruling on June 23, 2010, finding Hildreth guilty of two counts of second-degree sexual abuse. The court found he committed two separate sex acts: one in the child's bedroom and another in the sibling's bedroom. Hildreth filed a motion for new trial. That motion was denied by the court. Hildreth was sentenced to a term of imprisonment not to exceed twenty-five years on each count, to be served concurrently. Defendant appeals his convictions.

[1] Hildreth filed an interlocutory appeal of the court's ruling before the trial denying his request for substitute counsel. His request for interlocutory review was denied by the Iowa Supreme Court.

II. Sufficiency of the Evidence.

Hildreth asserts there is not sufficient evidence in the record to support his convictions. He claims B.P. was not a credible witness. He asserts the child's genital injuries could have been caused by a kick from a sibling. He also claims the DNA evidence should not have been considered because there was not a good chain of custody before the items were tested.

We will review a challenge to the sufficiency of the evidence for the correction of errors at law. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). The fact-finder's verdict will be upheld if it is supported by substantial evidence. *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). Substantial evidence means evidence that could convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *State v. Heuser*, 661 N.W.2d 157, 165-66 (Iowa 2003). In reviewing challenges to the sufficiency of the evidence we give consideration to all the evidence, not just that supporting the verdict, and view the evidence in the light most favorable to the State. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

We determine there is sufficient evidence in the record to support Hildreth's convictions. The district court had the ability to observe the witnesses while they were testifying, and thus was in a better position to judge their credibility. *See State v. Hatter*, 342 N.W.2d 851, 854 (Iowa 1983). By finding defendant guilty, the court found B.P. was a credible witness. The child's testimony was supported by the physical evidence that she had bleeding from the vagina and bruising of the hymen and vaginal wall. The testimony of the pediatric nurse practitioner who examined B.P. was that her injuries were not

consistent with being kicked, which could have caused injury to the external area of the genitals, while B.P.'s injuries were internal, which was consistent with blunt-force, penetrating trauma.

In addition, the DNA evidence supports Hildreth's convictions. On appeal, Hildreth raises chain-of-custody concerns, but prior to the trial the following exchange occurred on the record:

> DEFENSE COUNSEL: Your Honor, I've explained the chain of custody witnesses to my client. He has indicated to me that he would stipulate to those, so the State would not have to bring them in, and we would not be challenging chain of custody; is that correct, James?
> DEFENDANT: Yes, Your Honor.

The court then discussed the concept of chain of custody, and the prosecutor stated this involved "some of the evidence that was seized and taken to the DCI." The hearing continued:

> THE COURT: All right. So you understand the objects that they're talking about, and what I mean, and what has been explained to you about chain of custody?
> DEFENDANT: Yes, Your Honor.
> THE COURT: Okay. And you're willing to have the State not have to bring in all the witnesses to show the chain of custody; is that correct?
> DEFENDANT: That's correct, Your Honor.

We conclude Hildreth has failed to preserve error on his chain-of-custody challenge to the DNA evidence. *See State v. Bergmann*, 633 N.W.2d 328, 332 (Iowa 2001) (finding defendant had not preserved error when defense counsel had affirmatively stated there was no objection to certain evidence); *State v. Schmidt*, 312 N.W.2d 517, 518 (Iowa 1981) (finding defendant may waive an objection to evidence by an express assent to the evidence). We determine the DNA evidence was properly considered by the court.

We conclude there is sufficient evidence in the record to support Hildreth's convictions on two counts of second-degree sexual abuse.

III. Substitute Counsel.

Hildreth contends the district court should have granted his request for substitute counsel. He claims there was a complete breakdown in communication between himself and defense counsel. He asks for a new trial with different counsel. "Our review of a district court's denial of a request for substitute counsel is for abuse of discretion." *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001). An abuse of discretion occurs when a court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

The Sixth Amendment gives criminal defendants the right to the assistance of counsel, but it does not guarantee a defendant will have a meaningful relationship with his counsel. *State v. Tejeda*, 677 N.W.2d 744, 749 (Iowa 2004). "Where a defendant represented by a court-appointed attorney requests the court appoint substitute counsel, sufficient cause must be shown to justify replacement." *Id*. Sufficient causes for substitution include a conflict of interest, irreconcilable conflict, or a complete breakdown in communication. *Id*. at 749-50. In order to show a total breakdown in communication, "a defendant must put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible." *Id*. at 752.

When a defendant requests substitute counsel based on an alleged breakdown in communication, the court has a duty to inquire into the issue.

State v. Wells, 738 N.W.2d 214, 219 (Iowa 2007). A last-minute request for substitute counsel is disfavored if it is considered to be a delaying tactic. *Lopez*, 663 N.W.2d at 779. "[T]he court has considerable discretion in ruling on a motion for substitute counsel made on the eve of trial." *Id*. Additionally, when a defendant requests substitute counsel based on an alleged breakdown in communication, the defendant must show he was prejudiced by the court's decision denying his request. *Id*.

In this case, trial was scheduled for May 24, 2010, and Hildreth's pro se motion to dismiss counsel was filed on May 6, 2010. The court held a hearing on May 13 to address Hildreth's concerns. Hildreth stated he had asked for reports and did not believe he had timely received them. He also stated he and his family had filed an ethical complaint against his defense attorney.[2] Hildreth stated he did not want to speak to his defense attorney anymore. He also complained because his defense attorney would not speak to his family members, but would only communicate with him.

Defense counsel responded that he had talked to Hildreth two days earlier and Hildreth had not brought up any of his concerns at that time. Defense counsel pointed out it was Hildreth's mother who had filed the ethical complaint. Defense counsel stated it was "better to speak directly to a client than through their family members." He stated he was ready and willing to continue representing Hildreth. After considering the matter, the district court denied the motion for substitute counsel in a written ruling on May 18, 2010.

[2] The ethical complaint was dismissed May 14, 2010.

We conclude the district court did not abuse its discretion in denying Hildreth's request for substitute counsel. Hildreth's main complaint seemed to be that defense counsel was communicating directly with him, instead of going through his family. As defense counsel pointed out, there were good reasons for defense counsel to communicate directly with his client. The district court determined the motion to dismiss counsel was a delaying tactic. We find no abuse of discretion in the district court's decision. Furthermore, even if the court had abused its discretion, Hildreth has not shown he was prejudiced by the court's decision.

Hildreth contends he also requested substitute counsel on the second day of trial. The record shows that Hildreth made a pro se oral motion for a mistrial and for a stay of the proceedings. In part, his motions were based on his claims regarding a breakdown in communication with counsel. The district court denied his motion for a stay and his motion for a mistrial. To the extent Hildreth may have been renewing his request for substitute counsel, we determine the district court did not abuse its discretion in denying his motions. Hildreth's statements at that time were not supported by the facts or the law.

We affirm Hildreth's convictions on two counts of second-degree sexual abuse.

AFFIRMED.