IN THE COURT OF APPEALS OF IOWA

No. 6-1053 / 05-1547
Filed May 9, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK JARED CONDIT,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Mark Jared Condit appeals his judgment and sentences for three counts of third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Mark Jared Condit, Anamosa, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Janet Lyness, County Attorney, and Victoria Cole, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

A jury found Mark Jared Condit guilty of three counts of third-degree sexual abuse. Iowa Code §§ 709.1, 709.4(1) and 702.17 (2003). On appeal, Condit's appellate counsel argues (1) the evidence was insufficient to support the findings of guilt, (2) the district court abused its discretion in admitting certain medical evidence, and (3) trial counsel was ineffective in several respects. Condit also filed a pro se brief raising additional grounds for reversal.

I. Sufficiency of the Evidence

A jury's findings of guilt must be supported by substantial evidence. *State v. Leckington,* 713 N.W.2d 218, 221 (Iowa 2006).

The jury was instructed that the State would have to prove the following elements of third-degree sexual abuse:

> 1. On or about the 30th day of October, 2003, the defendant performed a sex act with [M.B].
> 2. The Defendant performed the sex act by force or against the will of [M.B.].

The jury was further instructed that "sex act" means sexual contact:

> 1. By penetration of the penis into the vagina.
> 2. Between the mouth of [M.B.] and the genitals of Mark J. Condit.
> 3. Between the genitals of one person and the genitals of another.

Condit concedes he engaged in sex acts with M.B. but argues the acts were consensual and, therefore, not "by force or against the will of M.B." A jury could have found otherwise based on the testimony of M.B. She stated Condit was referred to her as someone she "might get along with." She and Condit initially communicated via e-mail. After the two met in person, they decided to go to Condit's house to watch a movie. While watching the movie in Condit's

bedroom, Condit tried to kiss M.B. M.B. expressed some reservation, but soon acquiesced. Condit proceeded to put his hand under M.B.'s shirt. M.B. told him she was comfortable with kissing but did not want to do anything more. Condit did not stop. He made several attempts to unzip her pants. M.B. zipped them up but, at some point, Condit was able to pull her jeans off. He digitally penetrated M.B.'s vagina. M.B. objected. Condit also performed oral sex on her. M.B. again objected.

M.B. told Condit she wanted to walk home. Condit responded that it was too late in the evening. Condit straddled her and sat on her chest, with her arms pinned to the side. He forced his penis into her mouth. Condit told her he wanted to have sex with her. M.B. said no. She said she wanted to walk home but was afraid to do so alone, given the lateness of the hour.

At this point, Condit left the room for a few minutes. When he returned, the two had a discussion about sex, with Condit "trying to persuade" M.B. to have sex and M.B. stating she did not want to. The two agreed M.B. would stay at Condit's house rather than walk home, and they would "just go right to sleep." They began to kiss again. M.B. told Condit she was not going to have sex with him. Condit ignored this statement, grabbed M.B., and pulled her on top of him. M.B. resisted. Condit rolled on top of M.B. and had vaginal intercourse.

M.B. attempted to put on her jeans so she could leave, but Condit grabbed her arm and told her not to go. She agreed to stay and go to sleep. She stated her "plan was to act like I was agreeing with that and to pretend like I was going to sleep and actually wait for him to fall asleep and get up and sneak out so I could leave." Condit did not fall asleep.

At this point, M.B. told Condit she needed to go downstairs for a drink of water. Condit followed her downstairs, pushed her onto a couch, and had vaginal sex with her again. The two returned to Condit's bedroom, where M.B. got dressed and left.

On her walk back to her dorm, M.B. called her mother and told her that Condit made her do things she did not want to do. Later, she went to a clinic and obtained a contraceptive pill. During lunch with her cousin, M.B. said she was hurting in her vaginal area. She also told a friend "everything that had happened" with Condit. In the evening, that friend accompanied M.B. to the hospital, where M.B. underwent a sexual assault exam.

M.B.'s testimony amounts to substantial evidence in support of the jury's findings of guilt.

Condit acknowledges this testimony but points to evidence that M.B. wore suggestive clothing, brought a suggestive movie to Condit's house, voluntarily kissed Condit, did not immediately put her jeans on after the initial sex acts occurred, did not immediately leave Condit's home despite opportunities to do so and, in sum, gave Condit "mixed signals." He also notes that M.B. had the chance to seek help from a friend who called her while Condit was out of the room and from Condit's roommate, who was at home. Finally, he points out that M.B. did not advise the clinic from which she obtained the contraceptive pill that the sex was nonconsensual. While these facts are all in the record, so are M.B.'s explanations of these facts. It was the jury's function, not ours, to sort out this evidence. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the

evidence as in its judgment such evidence should receive.") The jury chose to believe M.B. This was its prerogative. *State v. Maring*, 619 N.W.2d 393, 395 (Iowa 2000) ("It is the function of the jury to sort out the evidence presented and place credibility where it belongs.").

II. Medical Evidence

A sexual assault nurse who examined M.B. testified that she detected two one-centimeter lacerations in the "the area of skin between the vagina and the rectum but very close to the vagina." The nurse agreed with the prosecutor that the lacerations were a "common injury" in other sexual assault cases. Medical records documenting the lacerations were admitted over Condit's hearsay objection.

Condit argues the nurse was unqualified to testify to the prevalence of the injury. He also maintains the testimony was irrelevant and prejudicial and the medical records should have been excluded as inadmissible hearsay.

With respect to the nurse's qualifications, the record reveals she was specially trained and certified as a sexual assault nurse examiner and had conducted thirty-three to thirty-four sexual assault exams. As for Condit's argument that her testimony was irrelevant, we conclude the evidence was relevant to the question of whether Condit performed a sex act "by force or against the will of M.B." *See* Iowa R. Evid. 5.401. Turning to the prejudicial effect of her testimony, the record contains detailed and graphic testimony of the sex acts. Given that testimony, we are not convinced the nurse's brief mention of the pervasiveness of M.B.'s type of injury would have inflamed the jury to act out of passion. *See* Iowa R. Evid. 5.403; *State v. Rodriquez*, 636 N.W.2d 234, 240

(Iowa 2001) ("Unfairly prejudicial evidence is evidence that 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.'" (quoting *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988))). We conclude the district court did not abuse its discretion in allowing the nurse's challenged testimony. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003) (setting forth standard of review). As for the medical records, we conclude they were admissible as business records. Iowa R. Evid. 5.803(6); *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006) (reviewing admission of hearsay evidence for errors of law).

III. Ineffective Assistance of Counsel

Condit contends trial counsel was ineffective in failing to (A) "use the proper standard for the motion for new trial," (B) "object to testimony regarding irrelevant and prejudicial evidence concerning statements attributed to Mr. Condit and related remarks from the prosecutor," and (C) "timely file the meritorious motion in limine."

Our review of these issues is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To prevail, Condit was required to show (1) a failure to perform an essential duty, and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984).

A. Motion for New Trial. Condit moved for a new trial. In his motion, he argued the district court "should not allow the verdict to stand which was contrary

to the facts of the case and the applicable law." The district court summarily denied the motion, stating:

> I have considered carefully the Motion for New Trial and the State's resistance to the Motion for New Trial and in Arrest of Judgment, and at this time the Court – I am going to deny the Motion for New Trial and the Motion in Arrest of Judgment.

See Iowa R. Crim. P. 2.24(2)(*b*)(6) (stating court may grant a new trial "[w]hen the verdict is contrary to law or evidence"). On appeal, Condit argues trial counsel "failed to urge the court to employ the correct standard for a motion for new trial." *See State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998) (holding weight-of-the-evidence standard applies to motions for new trial based on contention that finding of guilt is contrary to evidence).

We are not convinced trial counsel breached an essential duty by failing to cite *Ellis* in his new trial motion. Counsel did not cite an incorrect standard; he simply left it to the court to apply the correct standard. Under these circumstances, the fact that the district court did not cite or explicitly apply *Ellis* is not an omission that should be attributed to trial counsel.

B. Condit's Statements about California. Condit advised several witnesses that he had recent connections to California. However, his grandmother confirmed that he had lived in Iowa since he was eight or nine years old. In closing arguments, the prosecutor referred to this discrepancy. Condit argues trial counsel should have objected to the California-related evidence on the ground that it was "highly prejudicial." He also argues trial counsel should have objected to the prosecutor's remarks on the ground that they improperly insinuated Condit was a liar.

We conclude trial counsel did not breach an essential duty in failing to make these objections. The State had already highlighted inconsistencies in Condit's statements regarding his involvement with M.B. This evidence was far more pertinent and more damaging to Condit's credibility than the California-related evidence. Therefore, defense counsel reasonably could have concluded that objections to the California evidence would have served no useful purpose and would, indeed, have unduly magnified this evidence.

As for the prosecutor's references to the California evidence, we note that the prosecutor did not call Condit a liar, as prohibited by *State v. Graves*, 668 N.W.2d 860 (Iowa 2003) (holding it improper for prosecutor to call defendant a liar, to state defendant is lying, or to make similar disparaging remarks and concluding such remarks violate due process). Accordingly, counsel did not breach an essential duty in failing to object to her comments.

C. Motion in Limine. Condit maintains trial counsel was ineffective in filing a motion in limine outside the prescribed time frame. *See* Iowa R. Crim. P. 2.11(4). Despite the untimeliness of the motion, the district court ruled on the merits of the motion. Therefore, Condit was not prejudiced by the untimely filing.

IV. Pro Se Issues

Condit filed his own brief in which he argues that several additional errors were committed.

A. Prejudicial Language. Condit contends the prosecutor committed misconduct by using and eliciting prejudicial language during trial. To establish a due process violation based on prosecutorial misconduct, a defendant must

establish (1) misconduct and (2) the deprivation of a fair trial. *State v. Musser*, 721 N.W.2d 734, 754-55 (Iowa 2006).

First, Condit challenges the prosecutor's use of the term "rape" in her opening statement. This term was contained in a quotation cited by the prosecutor. He objected to it outside the presence of the jury. The court ruled that the prosecutor could use the word. Under these circumstances, the prosecutor's statement did not amount to prosecutorial misconduct.

Second, Condit contends the prosecutor used and elicited the word "victim." However, the references were few and apparently inadvertent. The prosecutor specifically advised the court that she would be willing to refer to M.B. as a "complaining witness" rather than a victim. On one occasion, she corrected a witness who referred to M.B. as a victim.

Third, Condit argues the prosecutor "solicited highly prejudicial testimony from M.B. that, . . . 'I feel scared for other women that encounter Mark.'" However, the district court struck this testimony and instructed the jury: "Members of the jury, I am going to strike the answer that was given in response to the question that was just asked, and I am going to instruct you to please ignore the answer." Jurors are presumed to have followed the court's instructions. *See State v. Simpson*, 438 N.W.2d 20, 21 (Iowa Ct. App. 1989).

Fourth, Condit maintains that M.B. described him as a "wife beater." In fact, M.B. used the term to describe what Condit was wearing. She stated, "He changed his shirt so he was only wearing a – like a white tank top, wife beater type shirt." It is clear from the context that M.B. was not commenting on Condit's propensity for violence but was colloquially referring to a type of clothing.

We conclude the use of the language described above in connection with the State's case either did not amount to misconduct or was not sufficiently prejudicial to deprive Condit of a fair trial.

B. Violations of Ruling on Motion in Limine. Condit next argues that the prosecutor committed misconduct by making reference to certain testimony about medications M.B. was taking and about his attitudes toward women, in violation of the district court's ruling on his motion in limine.

With respect to the medication issue, the district court ruled, "there will not be testimony regarding how the medications that were administered to the complaining witness made [M.B.] feel." When the prosecutor questioned M.B. about how she felt during the vaginal exam at the hospital, defense counsel immediately objected and the prosecutor re-worded her questions. Although the district court did not make an on-the-record ruling on the objection, we conclude that this brief foray into prohibited territory did not amount to reversible error. *Musser*, 721 N.W.2d at 755 (stating severity and pervasiveness of misconduct relevant to prejudice component of prosecutorial misconduct claim).

Condit's attorney also sought the exclusion of evidence regarding Condit's "attitude toward women, whether he is capable of doing something of the nature of this allegation." The district court sustained this portion of Condit's motion. On appeal, Condit argues the prosecutor violated this order in her closing argument. We agree that the prosecutor made reference to Condit's attitude towards women. She stated,

> If [M.B.] was cooperating with what he was doing, why would he say, "Just let things happen naturally"? There wouldn't be a need for that. "You're acting weird. You're acting just like every other girl

> that I've actually met." They want to get to know someone before they actually engage in sexual acts with them. There wouldn't have been a need for that, not at all.

We are not convinced Condit's motion in limine was directed to the exclusion of this type of evidence regarding Condit's general attitudes toward women. Instead, defense counsel appeared to be seeking the exclusion of prior bad acts evidence such as evidence of whether Condit was "capable of doing something of the nature of this allegation." Based on our reading of the motion, we conclude there was no violation of the ruling on the motion. Accordingly, the prosecutor did not commit misconduct by citing Condit's general attitudes toward women.

Assuming that the motion in limine and the court's subsequent ruling were intended to exclude the type of evidence to which the prosecutor referred, we conclude the reference was isolated and, therefore, did not deprive Condit of a fair trial**.** *Id.* at 754.

C. Right to Remain Silent. Condit next argues the prosecutor commented on his decision not to testify, a right that is guaranteed by the Fifth Amendment to the United States Constitution. *Brewer v. State*, 444 N.W.2d 77, 84 (Iowa 1989).

The prosecutor stated, "The only person that can tell you and that told you from the stand what happened in the bedroom was [M.B.]." At first blush, this statement appears to be an inappropriate comment on Condit's silence**.** *Brewer*, 444 N.W.2d at 84. However, the prosecutor continued, "Defendant's side of the story is that the acts were consensual. Those are the only two people. Those are the only two stories that account for what happened in that bedroom." Viewed in context, we agree with the State that the prosecutor was attempting to

explain that there were two versions of events and her focus was on M.B.'s version.

D. Jury Instruction. Condit argues the district court erred in refusing to give a jury instruction based on our holding in *State v. Vander Esch*, 662 N.W.2d 689 (Iowa Ct. App. 2002). *Vander Esch* is inapplicable because this case does not involve consent obtained through deception. Additionally, *Vander Esch* was recently overruled by *State v. Bolsinger*, 709 N.W.2d 560, 565 (Iowa 2006).

AFFIRMED.