IN THE COURT OF APPEALS OF IOWA

No. 7-188 / 06-0143
Filed June 27, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONOVAN ALLEN MABIE-BAHR,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Donovan Allen Mabie-Bahr appeals his conviction and sentence for enticing away a minor and third-degree sexual abuse. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Lisa K. Taylor, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Donovan Allen Mabie-Bahr appeals his conviction and sentence for enticing away a minor and third-degree sexual abuse in violation of Iowa Code sections 710.10(1), 709.1, and 709.4(2)(b) (2005). He argues the district court erred by (1) overruling his motion for judgment of acquittal based on insufficiency of the evidence and (2) denying his request for a jury instruction on mistake of fact. He also argues he received ineffective assistance when his counsel failed to adequately argue the motion for judgment of acquittal and request jury instructions on inconsistent statements. We affirm.

I. Background Facts and Proceedings

On February 25, 2005, Mabie-Bahr met twelve-year-old J.G. at a hotel in Burlington. The day before, J.G.'s mother called Mabie-Bahr to tell him her daughter was only twelve. Mabie-Bahr and J.G. had been conversing via Internet chat rooms and the telephone since late December 2004 or early January 2005. J.G. had been in Mabie-Bahr's hotel room for approximately two hours when she called home to tell her grandfather she was staying with a friend for the night. Her grandfather told her he knew she was lying and demanded she come home. J.G.'s grandmother was speaking to authorities when J.G. arrived home. Her grandfather stopped her from changing clothes and washing the clothing she had been wearing at the hotel. Officers came to the home to question J.G. She was examined at the hospital, where a rape kit was performed. Throughout this time, J.G. denied having sexual intercourse with Mabie-Bahr. The rape kit yielded no male DNA and no sperm on the vaginal smears or swabs. J.G. had no evidence of bruising, lacerations, or vaginal

trauma. No foreign pubic hairs were found. There was, however, both male-specific prostate antigen on J.G.'s underwear and a few sperm on the inside of her jeans.

When officers located Mabie-Bahr in his hotel room, he first denied having a young female visitor. Later, he admitted J.G. had been to his room. He told officers J.G.'s online profile stated she was eighteen. He denied having intercourse with her that evening. Instead, he told officers the two did not "click," he got bored with their conversation and began playing video games, and J.G. left in less than one hour.

A few weeks later, J.G., fearing she was pregnant, told authorities she had sex with Mabie-Bahr in his hotel room on February 25, 2005. Mabie-Bahr was charged with one count of enticing away a minor and one count of third-degree sexual abuse. At trial J.G. testified that though she had lied about her age on the Internet, Mabie-Bahr knew her true age. The two had exchanged pictures via email, talked in three-way conversations with two of J.G.'s friends, and discussed not telling anyone about their meeting because it was illegal. She stated Mabie-Bahr had "talked dirty" to her on the Internet and on at least one of the three-way phone conversations. The jury convicted Mabie-Bahr, and he was sentenced to ten years and fined $1000 for each count. Mabie-Bahr appeals.

II. Standard of Review

We review motions for judgment of acquittal for errors at law. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). We review the district court's refusal to give a jury instruction for abuse of discretion. *State v. Piper*, 663

N.W.2d 894, 914 (Iowa 2003). We review claims of ineffective assistance of counsel de novo. *State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004).

III. Merits

A. Judgment of Acquittal

Our supreme court recently outlined our review of a district court's denial of a motion for judgment of acquittal:

> In determining the correctness of a ruling on a motion for judgment of acquittal, we do not resolve conflicts in the evidence, pass upon the credibility of witnesses, or weigh the evidence. Instead, we ascertain whether the evidence could convince a rational jury of the defendant's guilt beyond a reasonable doubt. Evidence that raises only a suspicion or generates only speculation is not substantial. In evaluating the evidence, we consider all the evidence in the record, and we view it in the light most favorable to the jury's verdict.

Hutchison, 721 N.W.2d at 780 (citations and quotations omitted).

In order to prove count I, the State had to prove Mabie-Bahr, without authority and with the intent to commit sexual abuse or sexual exploitation upon a minor under the age of thirteen, enticed away a minor under the age of thirteen or reasonably believed to be under the age of thirteen. *See* Iowa Code § 710.10. The day before J.G. and Mabie-Bahr met, J.G.'s mother called Mabie-Bahr and told him her daughter was only twelve. Testimony indicates a copy of J.G.'s mother's phone records showing the call was entered into evidence. Though J.G. admitted that she represented herself as eighteen online, she also said she, Mabie-Bahr, and her friend spoke together and Mabie-Bahr knew her friend was fourteen. She and Mabie-Bahr also exchanged pictures. Mabie-Bahr reportedly told another hotel guest J.G. was "too young for him." The record indicates Mabie-Bahr had sexually explicit conversations with J.G. online and on the

telephone. He spoke to her about sex when one of her friends was on a three-way call with him and J.G. He asked her to spend the night with him at the hotel. The two discussed keeping the meeting secret. We conclude the evidence presented could convince a rational jury Mabie-Bahr intended to entice J.G. away.

On count II, Mabie-Bahr challenges the sufficiency of the evidence showing a sex act occurred. In order to prove a sex act occurred, the State had to show "penetration of the penis into the vagina or anus; contact between the genitalia of one person and the genitalia or anus of another person; or contact between the finger or hand of one person and the genitalia or anus of another person." *Id.* § 702.17. J.G. testified she initially told police she did not have sexual contact with Mabie-Bahr because she was in love with him and did not want him to be in trouble. She changed her story weeks later because she feared she was pregnant. She said Mabie-Bahr touched her breasts and vagina with his hands and penis. She also testified she had vaginal intercourse with Mabie-Bahr, but that he ejaculated on her stomach and breasts. He confirmed, as she told police, that he only wore boxer shorts. She also stated he told her he had a low sperm count and no sexually transmitted diseases. Further, J.G.'s grandfather caught her trying to change clothes before being examined, and trying to wash the clothing she was wearing during the encounter. We conclude the evidence presented could convince a rational jury a sex act occurred.

B. Mistake of Fact Instruction

Mabie-Bahr alleges the district court erred in rejecting his request for a mistake of fact jury instruction. He argues the instruction was necessary

because his defense relied partially on the assertion he was unaware of J.G.'s age. The requested instruction reminded the jury it was the State's burden to show Mabie-Bahr was not acting under a mistake of fact as to J.G.'s age.

Mistake of fact as to age is not a defense for third-degree sexual abuse, count II against Mabie-Bahr. *See id.* § 709.4. Two other jury instructions adequately informed the jury of the State's burden in count I, enticing away a minor. Instruction 25 informed the jury the State had to prove:

> 4. At the time J.G. was enticed away, the Defendant either:
>
> a) knew J.G. was under 13 years of age; or,
>
> b) reasonably believed J.G. was under the age of 13 years.
>
> If the State has proved all of the numbered elements, the defendant is guilty of Enticing Away a Minor With the Intent to Commit Sexual Abuse. If the State has failed to prove any one of the numbered elements, the defendant is not guilty of Enticing Away a Minor With the Intent to Commit Sexual Abuse and you will then consider the charge of Enticing Away a Minor With the Intent to Commit an Illegal Act. . . .

Further, Instruction 21 informed the jury:

> Concerning element No. 4(a) of Instruction No. 25, for the defendant to know or have knowledge of something means he had a conscious awareness that J.G. was under 13 years of age.

Because the mistake of fact instruction Mabie-Bahr requested would have only repeated this information, we conclude the district court did not abuse its discretion in refusing to give the instruction. *See Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004) (noting district court is only required to give requested instruction if the instruction correctly states an applicable rule of law and the concept is not otherwise contained in other instructions).

C. Ineffective Assistance of Counsel

Mabie-Bahr claims he received ineffective assistance of counsel when his attorney (1) made an inadequate motion for judgment of acquittal and (2) failed to request jury instructions on prior inconsistent statements. Generally, we preserve ineffective assistance of counsel claims for postconviction relief actions. *State v. Tate,* 710 N.W.2d 237, 240-41 (Iowa 2006). This practice ensures both that an adequate record of the claim may be developed and that the attorney charged with ineffectiveness may have an opportunity to respond. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We conclude the record here is inadequate to address Mabie-Bahr's claims. We therefore preserve the claims for possible postconviction relief proceedings.

Mabie-Bahr's conviction and sentence is affirmed.

AFFIRMED.