IN THE COURT OF APPEALS OF IOWA

No. 7-357 / 06-0780
Filed October 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICK ALAN WHITMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, Kim M. Riley, District Associate Judge.

Rick Alan Whitman appeals his conviction for indecent contact with a child. **AFFIRMED.**

Charles J. Kenville and Gerald Feuerhelm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Randall J. Tilton, County Attorney, and Harry L. Haywood III, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Defendant Rick Allan Whitman appeals his conviction for indecent contact with a child, in violation of Iowa Code section 709.12 (2005). Specifically, he claims: (1) the videotaped interview with the victim admitted into evidence constituted inadmissible hearsay, (2) the district court should have granted his motion for new trial, (3) he was denied his constitutional right to confront witnesses against him and have effective assistance of counsel when the trial was permitted to proceed without an interpreter for his hearing disability, and (4) he was denied effective assistance of counsel when trial counsel failed to object to evidence consisting of prior bad acts and instead made reference to those acts. We affirm.

I. Facts and Prior Proceedings

On June 4, 2005, twelve-year-old H.S. was spending the night with Whitman's ten-year-old daughter, L.W. The girls were staying at Whitman's mother's house where he and L.W. were living at the time. H.S. had known Whitman and L.W. all her life and described them as a part of her family. She had spent the night with L.W. at Whitman's residence on numerous prior occasions, mostly without incident. However, once within the previous year Whitman gave H.S. a back rub which made her feel uncomfortable because he moved his hands too close to her breasts. After that, H.S. turned down Whitman's subsequent offers for back rubs, and Whitman complied with her refusals.

According to H.S., Whitman got home around 10:00 p.m. on June 4, 2005, and drank one or two beers before lying on the living room floor with H.S. and

L.W., who were preparing to watch a movie. Both girls proceeded to give Whitman a back rub at his request. H.S. testified Whitman then gave L.W. a back rub before all three fell asleep on the floor after watching the movie. H.S. testified that Whitman was lying on the floor between her and L.W. She was later awakened by the feeling of "hands in [her] pants" touching her buttocks near her "crotch," inside her shorts and underwear. H.S. described the hand as rough, and knew Whitman's hands to be rough. When she rolled over she saw Whitman moving from the floor to the couch. At some point shortly thereafter H.S. attempted to leave the residence and go home. Whitman asked her where she was going. H.S. told him she was sick and wanted to go home. He gave her an umbrella to protect her from the rain, hugged her, and told her "we love you."

H.S. was sobbing and clinging to her father as her father and aunt drove her to the police station where she was interviewed by Sergeant Michael Littschwager that night. During the interview, H.S. continued to be upset and crying. Two days later H.S. was interviewed by Stacy Mitchell at the Child Protection Center at St. Luke's hospital in Cedar Rapids, Iowa. The interview was videotaped. Whitman was arrested on June 21, 2005.

Whitman waived his right to a jury trial and subsequently made a motion in limine to have the videotaped interview of H.S. excluded. The district court withheld its ruling until trial. At trial the district court admitted the videotape. The district court found Whitman guilty of indecent contact with a child, an aggravated misdemeanor in violation of Iowa Code section 709.12, and sentenced him to a term not to exceed two years, ordered him to register with the Sex Offender Registry, fined him $500 plus court costs, and recommended Whitman be placed

in the Sex Offender Treatment Program at the Mount Pleasant Correctional Facility. Whitman's motion for a new trial and arrest of judgment was denied. This appeal followed.

II. Standards of Review

Although a district court's rulings on evidentiary matters are generally reviewed for abuse of discretion, we review admission of hearsay testimony for errors at law. *State v. Dullard,* 668 N.W.2d 585, 589 (Iowa 2003). "[W]e give deference to the district court's factual findings and uphold such findings if they are supported by substantial evidence." *State v. Long,* 628 N.W.2d 440, 447 (Iowa 2001).

We review a district court's ruling on a motion for new trial for abuse of discretion. *State v. Reeves,* 670 N.W.2d 199, 202 (Iowa 2003). To establish an abuse of discretion, the appellant must show the district court exercised its discretion on grounds or for reasons untenable or clearly unreasonable. *Id.* The district court has broad discretion in ruling on a motion for new trial. *Id.* If it determines the weight of the evidence is contrary to the verdict and a miscarriage of justice has occurred, the verdict may be set aside and a new trial granted. *Id.* (citing *State v. Ellis,* 578 N.W.2d 655, 658 (Iowa 1998)).

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann,* 600 N.W.2d 311, 313 (Iowa 1999).

III. Diagnosis or Treatment Hearsay Exception

Iowa Rule of Evidence 5.803(4) sets out the diagnosis or treatment hearsay exception:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The Iowa Supreme Court has held that statements made by a child to a social worker in connection with the child's diagnosis or medical treatment may fall within this hearsay exception if the social worker is sufficiently qualified to provide diagnosis or treatment. *State v. Hildreth,* 582 N.W.2d 167, 169 (Iowa 1998) (citing *United States v. Balfany,* 965 F.2d 575, 581 (8th Cir. 1992)). Mitchell testified that she has a master's degree in counseling as well as three and one-half years' experience in interviewing abused children at St. Luke's Hospital. In addition, she testified that a doctor was assigned to H.S. who could review the videotaped interview and do any follow-up examinations that were required to ensure H.S.'s health. We agree with the district court that Mitchell was sufficiently qualified to conduct the interview and assist the medical doctor in providing a diagnosis or treatment. However, that is not dispositive of the issue.

As the district court correctly stated, for evidence to be admissible under the medical diagnosis or treatment hearsay exception, the proponent must show (1) the declarant's motive in making the statement is to receive medical treatment and (2) the content of the statement is that which is reasonably relied on by a physician in treatment or diagnosis. *State v. Tracy,* 482 N.W.2d 675, 681 (Iowa 1992) (quoting *United States v. Renville,* 779 F.2d 430, 436 (8th Cir. 1985)). Whitman argues that the content of the interview was not reasonably relied upon for diagnosis or treatment and further argues the first prong has not been met.

Whitman argues that the purpose of the interview was to aid in the investigation of a crime rather than for purposes of diagnosis or treatment. Although law enforcement is present and the interview is relied on in their investigation, Mitchell testified that the interview also serves the purpose of ensuring treatment of any physical or mental health conditions as well as to ensure the future safety of the child. In addition, Mitchell is clearly qualified to diagnose and treat a child abuse victim given her education and experience. Finally, the interview took place at a hospital where medical care is the primary service rendered. The dual purpose of medical treatment and investigation does not defeat the admissibility of the evidence. It is what the declarant, not others, believes is the purpose of her statements that is relevant to admitting the hearsay under this exception. *See id*. There is no doubt one purpose of the interview was to aid the criminal investigation. This is a close case, however, on whether the sole purpose of this interview was investigatory since there is evidence to show H.S. was emotionally upset and a proper concern may have been mental health treatment.

We find it unnecessary to decide the hearsay issue because we agree with the district court and the State that the videotaped interview is cumulative of what H.S. herself testified to. We further agree that the district court's findings were based on what H.S. testified to in court and not what the videotape showed or what Mitchell testified to at trial. In ruling on the motion for new trial, the district court stated:

> Here the court received the videotape as well as the testimony of Stacie Mitchell and that evidence was basically cumulative of what the victim [H.S.] herself testified to. And also I think that if a close

> reading of the court's findings and conclusions is done, it will be fairly apparent that the findings were based on what the child testified to in court and not based on what the videotape showed or what Ms. Mitchell testified to at the trial.

There is no prejudice to the defendant if substantially the same evidence would be in the record in the absence of the challenged evidence. *State v. McGuire,* 572 N.W.2d 545, 547 (Iowa 1997). Therefore, even if the videotaped interview was inadmissible hearsay evidence, it was cumulative and did not prejudice the defendant.

IV. Motion for New Trial

Whitman argues his motion for new trial should have been granted. Specifically, Whitman argues the greater weight of the evidence failed to support the guilty verdict. Specific intent is rarely shown by direct proof. *State v. Venzke,* 576 N.W.2d 382, 383 (Iowa Ct. App. 1997). Specific intent can therefore be inferred from outward acts and attending circumstances. *Id.* In this case, the district court noted that it was very difficult to believe Whitman's hand would have inadvertently touched H.S. underneath both her shorts and her underpants. We agree with the district court when it concluded the greater weight of the evidence supports his conviction.

V. Ineffective Assistance of Counsel

Whitman claims he was denied effective assistance of counsel when (1) trial was permitted to proceed without the defendant having an interpreter for his hearing disability, violating his constitutional right to confront witnesses against him, and (2) his trial counsel failed to object to the admission of evidence of defendant's prior bad acts and instead made references to it.

To make a showing of ineffective assistance of counsel, "a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." *State v. Biddle,* 652 N.W.2d 191, 203 (Iowa 2002). Whitman must prove that a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Hildebrant,* 405 N.W.2d 839, 841 (Iowa 1987). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook,* 565 N.W.2d 611, 614 (Iowa 1997).

Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct. *State v. Atley,* 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil,* 264 N.W.2d 293, 296 (Iowa 1978). We will resolve ineffective assistance claims on direct appeal only when the record is adequate to decide the issue. *State v. Arne,* 579 N.W.2d 326, 330 (Iowa 1998). We have reviewed the record and determined Whitman's claims of ineffective assistance of counsel should be preserved for possible postconviction proceedings. We affirm Whitman's conviction and sentence.

AFFIRMED.