IN THE COURT OF APPEALS OF IOWA

No. 8-874 / 07-2048
Filed December 31, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ADAM ROY ALEXANDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

The defendant challenges the evidence to support his conviction, the trial court's denial of his motion for new trial, and the effectiveness of trial counsel. **AFFIRMED.**

Matthew Boles of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Bryan Tingle, County Attorney, and Tracie Sehnert, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

The defendant, Adam Alexander, appeals from his conviction, following a jury trial, of third-degree sexual abuse. He contends (1) the evidence is insufficient to sustain his conviction, (2) the court abused its discretion in denying his motion for new trial, and (3) trial counsel was ineffective. We affirm.

I. Background

The defendant and complaining witness engaged in a sex act in the early morning hours of March 2, 2007. The State contends defendant committed the sex act by force, defendant contends it was consensual.

The parties met in late 2006 at a bar where her boyfriend's band was playing. She gave defendant her telephone number. There was phone contact between the two. In response to a call from defendant during a snow storm that his car was in the ditch, she drove to rescue him. She testified that upon reaching defendant's car she opened the door to find him naked and the assault occurred. She escaped, returned to her car, and called authorities. Law enforcement went to the ditch and found defendant asleep in his car. The defendant told the officer their encounter was pre-arranged and consensual.

The defendant was arrested. At trial, the State presented testimony from the woman, the investigating police officers, and a nurse who examined the woman. The defendant did not testify. The jury returned a verdict on September 17, finding the defendant guilty. Sentencing was set for November 13. On November 8 the defendant filed a motion for new trial. The court considered the

motion for new trial at the sentencing hearing and overruled it as untimely and also stated it had read the motion and overruled it on its merits as well.

II. Scope of Review

We review claims the evidence is insufficient for correction of errors at law. Iowa R. App. P. 6.4. We view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). We review a district court's ruling on a motion for new trial for an abuse of discretion. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). We review claims counsel provided ineffective assistance de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

III. Merits

Insufficient Evidence. The district court denied the defendant's motion for judgment of acquittal. He contends the evidence is insufficient to sustain his conviction. He correctly recites the general rule that credibility determinations are the province of the jury, but argues the limitation on the application of the general rule should apply in this case because the testimony of the alleged victim "is so inconsistent, so contradictory, and at times, so absurd that the evidence is simply insufficient to support" his conviction. *See State v. Smith*, 508 N.W.2d 101, 102 (Iowa Ct. App. 1993) (finding accounts "inconsistent, self-contradictory, lacking in experiential detail, and, at times border[ing] on the absurd" not to be credible evidence to support a conviction); *see also State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005) (stating the general rule).

There are inconsistencies in the testimony of both people involved in the incident. We do not, however, find the complaining witness's testimony as to the events so wholly and completely unbelievable so as not to be credible evidence to support the conviction. While contradicted, we find substantial evidence from which a rational jury could find the defendant guilty beyond a reasonable doubt. *See State v. Petithory*, 702 N.W.2d 854, 856 (Iowa 2005). We affirm the district court's denial of the defendant's motion for judgment of acquittal and affirm the verdict rendered by the jury.

Motion for New Trial. The district court overruled the defendant's motion for new trial both because it was untimely and on its merits. Without addressing the merits of the motion, we agree with the district court the motion was untimely. *See* Iowa R. Crim. P. 2.24(3)(*b*) (requiring motion "not later than 45 days" after a guilty verdict). We affirm the district court's denial of the motion.

Ineffective Assistance of Counsel. In analyzing counsel's effectiveness, we look for proof by a preponderance of the evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). In order to demonstrate prejudice, the defendant must show there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. Generally we do not resolve ineffective assistance claims on direct appeal, preferring to give counsel an opportunity to explain his actions. *See State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004); *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980). When the district court record is sufficient to evaluate the

claim, however, we will resolve it on direct appeal. *See State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006).

The defendant contends counsel failed to object to the State's remarks during closing argument that suggested the jury could convict regardless of whose version of events it found more credible because the State proved both that there was a sex act and that it was against the will of the victim. He argues the State misstated the law and that the jury could have convicted the defendant solely on his version of the events, without the necessary corroboration. *See State v. Douglas*, 675 N.W.2d 567, 571-72 (Iowa 2004) (noting confessions or admissions require corroboration); *see also State v. Polly*, 657 N.W.2d 462, 466 (Iowa 2003) (noting confessions or admissions, standing alone, are insufficient to sustain a conviction).

The circumstances of the alleged victim's departure from the defendant's vehicle, the condition in which she was found by police, and the clothing evidence in the defendant's vehicle provide adequate corroboration for the defendant's statements that a sex act occurred and provide circumstantial evidence of the defendant's guilt by showing the act was not consensual. We conclude counsel did not fail in an essential duty in not objecting to the State's remarks during closing argument. This claim of ineffective assistance fails.

The defendant claims counsel was ineffective in not calling him to testify at trial. The decision whether to testify is a defendant's; the role of defense counsel is to provide advice so a defendant can make the decision. *See Taylor v. State*, 352 N.W.2d 683, 687-88 (Iowa 1984). Counsel did not fail in an essential duty.

The defendant also contends that if his attorney had made a timely motion for a new trial, there is a reasonable probability the court would have granted it on the ground that the verdict was contrary to the evidence. *See* Iowa R. Crim. P. 2.24(2)(*b*)(6). "[C]ontrary to the evidence" under this rule "means 'contrary to the weight of the evidence.'" *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). This is a more stringent standard than the sufficiency-of-the-evidence standard. *Id.* at 658.

> On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that 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.
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> . . . The motion [for new trial] is addressed to the discretion of the court, which should be exercised with caution, and the power to grant a new trial on this ground should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

Id. at 658-59.

We have reviewed the evidence presented at the defendant's trial. Weighing the evidence and considering the credibility of the complaining witness and the defendant, we conclude the greater amount of credible evidence supports the verdict. *See Tibbs v. Florida*, 457 U.S. 31, 37-38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982). We conclude this is not one of the "exceptional cases" where the evidence preponderates heavily against the verdict. *Ellis*, 578 N.W.2d at 659. We find no reasonable probability the district court would have granted a new trial had counsel made a timely motion. *See Nguyen v. State*, 707 N.W.2d 317, 328 (Iowa 2005). This claim of ineffective assistance fails.

Having found there is sufficient evidence to sustain the defendant's conviction, the court did not abuse its discretion in denying the untimely motion for a new trial, and trial counsel did not provide ineffective assistance, we affirm.

AFFIRMED.