IN THE COURT OF APPEALS OF IOWA

No. 9-023 / 08-0628
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENIS JEROME GAILEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Joel Swanson, Judge.

Defendant appeals from his convictions of first-degree kidnapping, first-degree burglary, and second-degree arson. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, and Timothy Schott, County Attorney and Sarah Smith, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Potterfield and Mansfield, JJ.

SACKETT, C.J.

Defendant, Denis Jerome Gailey, appeals from his convictions of first-degree kidnapping, first-degree burglary, and second-degree arson. He contends that (1) there is insufficient evidence to support a conviction of first-degree kidnapping, (2) he is entitled to a new trial because the court erroneously admitted evidence of his prior bad acts, and (3) the court used improper factors to determine his sentence. We affirm.

I. BACKGROUND.

The charges at issue in this case arose from a series of events that occurred on April 25, 2007. At the time, Gailey was under a protective order prohibiting contact with his wife, Dawn, and step-daughter, Jane Doe II. Dawn, accompanied by the police, went to the family home to retrieve some belongings. Inside they discovered diesel fuel poured throughout the home and several suicide notes apparently written by Gailey. Dawn went to the elementary school to pick up the couple's six-year-old daughter, Jane Doe I. After driving away from the school, Gailey appeared in a car and blocked Dawn's path with it. He approached the driver's side window of Dawn's van, pointed a gun at her, and told her to open up the door and that he was going to blow her head off. He showed her the bullet in the gun and told her he was not playing around. He then ordered Dawn to get out and pull his car over to the side of the road. Dawn complied, Gailey climbed into the back of the van with their daughter, and Dawn returned to the driver's seat. He then told Dawn to drive out to a farm. When

Dawn asked him what he was doing he said that he was going to kill her, their daughter, and himself. He was yelling, swearing, and saying nonsensical things.

During the drive, both Gailey and Dawn received calls on their cell phones. During one call, Gailey told his father that everything was his father's fault and had he not found Dawn and Jane Doe I, he would have killed his father and brothers. At the farm, he ordered Dawn to park the van behind a shed so they could not be seen and to shut off the headlights. He then stated that they "were going to relive some childhood memories," took the headrest off the driver's seat, pointed the gun at Dawn's head and asked "do you want it in the head or in the heart." When Dawn asked him not to do it and urged that it was not the right thing to do and that there were other ways to handle the situation, Gailey got angry and told her to quit begging. Dawn kept talking to Gailey and was able to convince him not to kill them and that they could all leave town together. Gailey then made a call to retrieve some money he had asked a friend to hold for safekeeping.

They left the farm, exchanged the money in a parking lot, and began driving again, with Dawn driving and Gailey and Jane Doe I in the back seat. An officer began following them and a high speed chase ensued. Dawn suggested they stop but Gailey demanded otherwise. He then told her to stop but ordered her to back up toward the officer. She did this but stopped before hitting the officer. Gailey then climbed into the front seat and the chase continued at even higher speeds. Dawn convinced Gailey to throw the handgun out the window

and shortly thereafter, the officers rammed the van into a ditch. Dawn picked up Jane Doe I and fled to an officer's vehicle.

Gailey was charged with multiple crimes, including two counts of first-degree kidnapping, and one count of first-degree burglary, and second-degree arson. At trial, the State introduced into evidence a tape recording Dawn made of a phone conversation she had with Gailey on April 21, 2007, several days before the alleged kidnapping. During the phone conversation Gailey made incriminating statements when Dawn confronted him about whether he sexually abused Dawn's daughter from a previous relationship and his step-daughter, Jane Doe II. The court admitted the taped conversation and a transcript of the recording over the defense's objection. Following a jury trial, Gailey was convicted on all counts and later pleaded guilty to additional charges of two counts of sexual abuse in the third degree, possession of a firearm as a felon and habitual offender, and eluding law enforcement while committing a felony as a habitual offender.

The court sentenced him to consecutive life terms on each kidnapping conviction. He was ordered to serve fifteen years on the arson conviction and twenty-five years for burglary, and these were to be served concurrent to the kidnapping sentences and to each other. He was sentenced to serve fifteen years for each count of sexual abuse, to be served consecutive to the kidnapping sentence. For possession of a firearm and eluding law enforcement, he was sentenced to serve fifteen years on each count, to be served concurrent to each other, but consecutive to the kidnapping and sexual abuse sentences. Gailey

appeals arguing several errors occurred at trial and sentencing. We consider each in turn.

II. FIRST-DEGREE KIDNAPPING.

We review challenges to the sufficiency of the evidence to support a kidnapping conviction for correction of errors at law. *State v. Bentley*, 757 N.W.2d 257, 261-62 (Iowa 2008); *State v. Astello*, 602 N.W.2d 190, 197 (Iowa Ct. App. 1999). The jury's verdict is binding on us unless it is not supported by substantial evidence. Iowa R. Civ. P. 6.14(6)(*a*); *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). "Evidence is considered substantial if, viewed in the light most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). The jury is entitled to accept certain evidence and reject other evidence. *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). It is also free to weigh the evidence as it chooses and assess the credibility of witnesses. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

Gailey maintains there is insufficient evidence to support his conviction for first-degree kidnapping because there is no evidence he tortured his wife or daughter. "Kidnapping is kidnapping in the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse." Iowa Code § 710.2 (2007). Since there is no evidence Dawn or Jane Doe I were physically injured or sexually abused as a result of the kidnapping, the State had to prove they were intentionally subjected to torture to support the first-degree kidnapping conviction.

In *State v. Cross*, 308 N.W.2d 25, 27 (Iowa 1981), the court determined that torture ordinarily means "the intentional infliction of pain (either) mental or physical . . . and the deliberate infliction of severe pain." In *State v. White*, 668 N.W.2d 850, 856 (Iowa 2003), the court evaluated for the first time whether mental torture alone satisfied the element of torture in Iowa Code section 710.2. It concluded that mental torture unaccompanied by physical injury or sexual assault is "torture" under the statute. *White*, 668 N.W.2d at 860.

Gailey argues the conduct of the defendant in *White* was much more violent, cruel, and took place over a longer period of time. Though he admits his actions as presented to the jury were serious, they do not rise to the level of intentional infliction of mental torture as identified in *White*. In *White*, the defendant hid in his estranged wife's home while she was gone and after she returned, he snuck up on her with a shotgun. *Id.* at 857. He threatened to kill her and cocked and uncocked the gun repeatedly. *Id.* He also forced her to watch a videotape of himself ranting for two-and-a-half hours about accusations against her, calling her names, and threatening to kill her. *Id.* at 857-58. His wife screamed and pleaded for her life at times and the ordeal lasted several hours. *Id.* at 853, 857-58.

Gailey argues that his actions toward his wife and daughter and their reactions to him do not indicate that he inflicted intentional mental torture on his wife and daughter. He notes his actions were more impulsive rather than deliberate. He also argues that Dawn did not display the hysteria that the victim in *White* did because she was able to talk to others, on the phone and in person,

without alerting them that she was in danger. He also contends the confinement of his wife and child was brief in relation to the several hours of mental anguish endured in *White*.

Although the circumstances before us can be distinguished from those in *White*, we find Gailey's desperate actions, enraged threats, and desperate disregard for the lives of others as well as himself demonstrate intentional infliction of mental torture on both Dawn and Jane Doe I. Several acts exhibit deliberation. He bought a gun the day after the protective order was issued, and ammunition the following day. He left suicide notes and poured diesel fuel in the family home. He threatened to kill other family members and stashed a large quantity of money with a friend in case he needed it for bail.

During the kidnapping Gailey sat next to his daughter and behind Dawn in the van. He screamed and ranted, threatening to kill Dawn and Jane Doe I. With the child watching, Gailey pointed the gun at Dawn repeatedly, and ordered her to drive out to a farm and park the van where no one would see them. He later switched seats and drove at dangerously high speeds with them in the van in his attempt to elude the police. During the approximate hour of their ordeal, Gailey confronted Dawn and Jane Doe I repeatedly with a real possibility of their death or serious injury numerous times, in addition to his threats to kill himself, law enforcement officers, and other members of his family. There is no requirement that torture be inflicted for any minimum period of time. Though Dawn somehow maintained her composure on the exterior, she testified that she was afraid for her life and the life of her daughter the entire time. Jane Doe I, a six-year-old

child, was seated next to Gailey as he pointed the gun at Dawn's head repeatedly and threatened to kill her and himself. At least once, Gailey stated that he was going to kill Jane Doe I also. The child wept and played with a game boy as her father threatened her mother's life. She pleaded with her father to obey the police officer's instructions. We conclude there is substantial evidence to support the jury's finding that Gailey intentionally subjected his wife and daughter to mental torture to support a conviction for first-degree kidnapping.

III. EVIDENCE ISSUES.

Gailey next contends that the district court erred in admitting evidence regarding Gailey's sexual abuse of his step-daughter, Jane Doe II. This evidence was introduced at trial in the form of a recorded phone conversation, and through Dawn's testimony about that recording. Gailey argues the evidence is inadmissible because some statements in the recording contain hearsay and it includes evidence of prior bad acts which should have been excluded under rule 5.404(*b*). The State claims any hearsay testimony was cumulative of other admissible evidence, and the defense did not make a challenge under rule 5.404(*b*) at trial so error was not preserved. The defense's objection was:

> Yes, Your Honor, I would object. No foundation, hearsay, confrontation rights, the prejudicial effect outweighs the probative value, the probative value is substantially outweighed by the danger of unfair prejudice to my client, and irrelevant. Now there are parts on the tape that may be relevant, there are parts that aren't relevant and there's clear hearsay involving the alleged statements out of persons that have not testified in this case, and therefore, which no exception to the hearsay rule has been established.

This objection makes no mention of "prior bad acts" or rule 5.404(*b*). While counsel alerted the district court to objections that the tape contained hearsay,

irrelevant information, and relevant information that was more prejudicial than probative, he failed to provide the court with an opportunity to determine the applicability of rule 5.404(*b*) to the references to sexual abuse. Nor did he ask the trial court to redact the references to sexual abuse while allowing the jury to hear other parts of the recording where Gailey expressed suicidal thoughts and his desire not to go to prison, and also alluded to getting rid of the family's house. The prior bad acts rule requires the trial court to conduct a distinct analysis of the proposed evidence and to place the burden on the State to prove the admissibility of prior bad acts. *State v. Mitchell*, 633 N.W.2d 295, 298-99 (Iowa 2001). Defense counsel's objection was not sufficiently specific to preserve error on this claim.

We also hold that defense counsel's hearsay objection was not sufficient to preserve error. Defense counsel did not specify the statements that constituted hearsay in his view. Also, it appears that trial counsel was actually objecting to statements by Jane Doe I (i.e., "persons that have not testified in this case"), whereas now Gailey's argument is that certain statements by Dawn should have been excluded.

Gailey alternatively argues his trial counsel was ineffective for not preserving error on his present evidentiary objections to the recording or for not attempting to have the references to sexual abuse redacted therefrom.

Our standard of review of ineffective assistance of counsel claims is de novo. *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). Ineffective assistance is established if the defendant proves trial counsel failed to perform an essential

duty and prejudice resulted. *State v. Lane*, 743 N.W.2d 178, 183 (Iowa 2007). We generally do not decide ineffective assistance of counsel claims on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We will decide the issue if the record is adequate or, if inadequate, we preserve the claim for postconviction relief proceedings. Iowa Code § 814.7(3); *Parker*, 747 N.W.2d at 210. Resolving the claim in postconviction relief proceedings gives trial counsel an opportunity to explain his or her acts or omissions. *Lane*, 743 N.W.2d at 183. We find the record is inadequate to address this claim on direct appeal and preserve it for postconviction relief. We need not address whether the challenged evidence contains inadmissible hearsay.

IV. SENTENCING.

Gailey contends the court imposed consecutive sentences for the kidnapping convictions based on impermissible considerations. When issuing Gailey's sentence, the court stated,

> First, whether we deal with the Kidnapping in the First Degree, Counts I and Count II, there are two separate victims involved in that. Again I'm going to use my term, that it seems like piling on, but I am considering and I am going to make Counts I and Count II consecutive. I do that because there are two victims, and also for kind of a personal reason. I've been an attorney long enough and been a Judge long enough to know that there does exist a possibility that at some time in the future a Governor of the State of Iowa is going to be asked to look at your case and maybe determine whether or not you should be pardoned and I want it to be a part of the record that I [w]as the Sentencing Judge and I was the Presiding Judge at the trial on all of these Counts I, II, III, and IV, I listened to all the testimony and I listened to everything else that took place and I've listened to the victim impact statement and I think that because there are two separate victims involved and the kind of a crime that it was that those two life sentences should not run together and that's why I'm going to make them consecutive.

Gailey contends the court's reference to a potential pardon by a future governor was an improper factor to use in issuing his sentence. The State contends the court's statement merely expressed an opinion and its order of consecutive sentences would not encumber a governor's ability to pardon Gailey. Therefore, the statement was not an attempt to interfere with the governor's power to grant pardons.

If a person is sentenced for multiple offenses, the sentencing judge may order the sentences to run concurrently or consecutively. Iowa Code § 901.8. However, the court does have a duty to explain its reasons for imposing consecutive sentences. *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994). A district court's decision to impose a particular sentence, if within the statutory limits, is presumed valid. *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). Yet, we will overturn a sentence if an abuse of discretion is shown or if the court considered inappropriate matters in sentencing. *State v. Pappas*, 337 N.W.2d 490, 494 (Iowa 1983).

In *State v. Remmers*, 259 N.W.2d 779, 785 (Iowa 1977), our supreme court held that it was impermissible for a court to consider a defendant's likelihood of being paroled in its sentencing decision. It found that this consideration allowed the sentencing court "to pass judgment on an issue foreclosed to the court and to prevent the proper body from deciding the issue at the proper time." *Remmers*, 259 N.W.2d at 785. This holding was limited in *State v. Bentley*, 757 N.W.2d 257, 265-66 (Iowa 2008), where the court considered whether it was improper to impose consecutive life sentences to

discourage a parole board or governor from granting an application for commutation. It distinguished defendants eligible for parole from those only eligible for commutation of sentence. *Bentley*, 757 N.W.2d at 266.

> Unlike parole, the date a person is eligible for commutation of sentence is independent of the length of the sentence imposed. *See* Iowa Code § 902.2; Iowa Admin. Code r. 205-14.3(1). Thus, the consecutive sentences imposed in this case do not affect the capacity of the board of parole to review a commutation application or the power of the governor to convert a life sentence into a term of years. *See* Iowa Const. art. IV, § 16 (conferring power of commutation on governor); Iowa Code § 914.1 (stating governor's power shall not be impaired). Accordingly, the message broadcasted by the sentencing court in this case is not improper because it does not bind or limit the board of parole or the governor in any future consideration of commutation of the sentences.

Id. Like Bentley, Gailey's life sentence renders him ineligible for parole unless his life sentence is converted to a term of years by the governor. *See* Iowa Code § 902.1 ("[A] person convicted of a class "A" felony shall not be released on parole unless the governor commutes the sentence to a term of years."). The sentencing court's reference to the parole board and governor will not impair the governor's power to commute Gailey's sentence or grant a pardon. We therefore find no impropriety in the court's sentence and affirm.

V. CONCLUSION.

We affirm Gailey's conviction and sentence. There is substantial evidence to support Gailey's convictions for first-degree kidnapping and the court did not improperly consider whether Gailey would be pardoned in issuing consecutive sentences. We preserve Gailey's claim that his counsel was ineffective in failing to object to certain evidence under rule 5.404(*b*) for postconviction relief proceedings. We have also reviewed and considered Gailey's remaining claims

concerning merger, mandatory minimum sentences, and habitual offender enhancements, and conclude they have no merit.

AFFIRMED.