IN THE COURT OF APPEALS OF IOWA

No. 9-536 / 08-1564
Filed October 7, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ARMANDO OROZCO, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

The defendant appeals from his conviction for kidnapping in the first degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Patrick Jennings, County Attorney, and Drew Bockenstedt and James Loomis, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Mansfield, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

Armando Orozco appeals from his conviction for kidnapping in the first degree, in violation of Iowa Code sections 710.1 and 710.2 (2007). He contends the evidence was insufficient to prove beyond a reasonable doubt he committed first-degree kidnapping. He also contends the district court erred in overruling his motion for new trial, admitting evidence, and instructing the jury. Because we conclude there was substantial evidence of Orozco's guilt and no error was committed, we affirm.

I. Background Facts and Proceedings. On December 22, 2007, seven-year-old J.G. was playing alone at a park near her home in Sioux City. While she was on the swings, a man grabbed her and took her into an apartment building across the street from the park. He took her to apartment number seven and locked the door.

J.G. was led to the bedroom. Her pants and underwear were removed and the man put his finger in her private parts, which J.G. refers to as her "middle." The man also inserted his penis inside her, which hurt. The man allowed J.G. to leave after warning her that if she told anyone, he would kill her or her family.

After leaving the apartment, J.G. went home and told her father and brother that she had been raped. She stated that the man who raped her drove a blue or "gray-blue" car. J.G. then led them to the apartment building where the assault had occurred. J.G.'s father called the police to report the crime.

J.G. told a police officer that a man had "grabbed" her from the park, "drug" her to the apartment, and put his finger in her "middle." She described the man as "Mexican." She reported he has a mustache and goatee, but did not wear glasses. He was wearing a white coat with blue down the sleeves and blue lettering.

J.G. was examined at Mercy Medical Center. She told an emergency room nurse that she had pain "in her middle," and that a man had put his finger in her "middle" and then put "his middle" in her "middle." J.G. described the perpetrator as "Mexican."

J.G. was then taken to the Child Advocacy Center. She told the nurse there that a man had taken her to a house, removed her clothing, and put his fingers "up [her] middle." J.G. also told the nurse the man put his "middle" in her "middle." She reported that this occurred in a bedroom, on the bed, and described the bed as having a dark blue blanket with suns on it. J.G. stated she did not know the man, but that he was always "pulling up at [her] neighbor's house." She described the man as "Mexican" because he knew how to speak Spanish.

A physical examination revealed bruising on J.G.'s hymen and two tears on her perineum, the area between the vagina and anus. The injuries were consistent with vaginal penetration.

In a videotaped interview, J.G. spoke with a mental health counselor from the Child Advocacy Center. In the interview, she stated she was playing at the park when a man came up behind her and grabbed her from the swings. She

said he took her to a yellow apartment building, made her go upstairs, and then took her inside apartment number seven. J.G. said the apartment did not belong to the man and he did not live there. She described climbing two flights of stairs and told the counselor that once the stairs were climbed, apartment seven was on the right. J.G. stated that the man removed their clothing and then put his "middle" up her "middle" and put his finger up her "middle." She said he told her that if she told anyone, he would come at night and kill her family.

J.G. described the man as "Mexican" and "kind of black." She said he had a mustache that was small in the middle and went all the way around his mouth on the outside. J.G. described the man as wearing a shirt that was "kind of brown" and a coat that was white and blue, with the blue "going on the way up, and on the side, too, and it had words." In the videotaped interview, J.G. described the man as driving a "blackish-brown" four-door car.

Police suspicions focused on Armando Orozco, who lived with his mother in the apartment at which J.G. claimed the assault took place. He matched the physical description J.G. had given. Orozco was also the sole driver of a blue Honda Civic, owned by his mother.

At approximately 9:33 p.m. that night, Orozco was observed driving toward the apartment. He was stopped and arrested for driving with a suspended license. In the trunk of the car, officers discovered a white hooded sweatshirt with black stripes down the outsides of the sleeves and lettering on the front.

Hours after J.G.'s assault, a police officer showed J.G. a photographic array that included a picture of Orozco. She glanced at it, but continued playing with toys and did not identify the perpetrator. The officer observed J.G. was tired.

DNA testing was performed on swabs taken from Orozco's right hand. It showed J.G. was a possible contributor of DNA found on his hand. The probability that the same DNA profile would be matched to a random individual from the population was one out of 300,000. A DNA test was also performed on a sample from the crotch-area of the sweatpants J.G. was wearing on the day of the assault. The sample contained DNA for which Orozco was a possible contributor with a one out of 400,000 probability the DNA would match a random individual from the population.

A neighbor in the apartment complex, whose living room shared a common wall with the bedroom in apartment number seven, testified that he arrived home around 2:40 p.m. on December 22. Through the walls he heard Orozco, whose voice he identified with "one hundred percent" certainty, speaking to a girl. Also, this neighbor testified that Orozco's blue car was in the parking lot when he arrived, but was gone when he left around 3:00 p.m.

On January 8, 2008, Orozco was charged with kidnapping in the first degree. Orozco waived his right to a speedy trial and a jury trial was held in July 2008. On July 30, 2008, the jury returned a verdict finding him guilty of first-degree kidnapping.

II. Sufficiency of the Evidence. In order to convict Orozco of kidnapping in the first degree, the State was required to prove: (1) he removed J.G. from the park, (2) he did so with the specific intent to subject her to sexual abuse, (3) he knew he did not have the consent or authority to do so, and (4) as a result of the removal, J.G. was sexually abused. *See* Iowa Code §§ 710.1, 710.2.

Orozco contends the evidence was insufficient as a matter of law to convict him of first-degree kidnapping. Specifically, he claims there was insufficient evidence to prove J.G.'s removal from the park was more than incidental to the underlying charge of second-degree sexual abuse, or that a sex act occurred. He also claims there is no proof beyond a reasonable doubt that he was the perpetrator of the crime.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *Id*. A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006). If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *Lambert*, 612 N.W.2d at 813.

"Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to

the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

A. Evidence of Removal. We first address Orozco's claim there was insufficient evidence to prove he removed J.G. from the park. He claims the removal was merely incidental to a second-degree sexual abuse charge.

In order to be guilty of kidnapping, Orozco's removal of J.G. from the park had to be more than an inherent incident of commission of the crime of sexual abuse. *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981).

> Although no minimum period of confinement or distance of removal is required for conviction of kidnapping, the confinement or removal must definitely exceed that normally incidental to the commission of sexual abuse. Such confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse. Such confinement or removal may exist because it substantially increases the risk of harm to the victim, significantly lessens the risk of detection, or significantly facilitates escape following the consummation of the offense.

Id.

We find sufficient evidence Orozco removed J.G. from the park. J.G. was playing on the swings in an open area, visible to anyone. Orozco came up behind her and grabbed her. He took her across the street, up two flights of stairs, and into an interior bedroom of a locked apartment. By doing so, he was able to assault J.G. without risk of detection. Viewing the evidence in the light most favorable to the State, we find substantial evidence Orozco removed J.G. from the park.

B. Evidence of the Perpetrator's Identity. Orozco next contends there was insufficient evidence to prove he was the perpetrator of the crime. He

argues the evidence shows he could not have committed the offense because of the limited amount of time between his departure from his girlfriend's residence and his arrival at work that afternoon.

Melissa Hernandez testified Orozco was at her residence when she left at approximately 2:15 p.m. on the afternoon in question. Orozco's time card reflects that he arrived at work at 2:57 p.m. Orozco cites the testimony of Detective Bertrand that it could take as long as seventeen minutes to drive from Hernandez's residence to the apartment building. He claims this evidence precludes him from being considered the perpetrator.

Detective Bertrand testified seventeen minutes would not be an unreasonably long time to drive from Hernandez's residence to the apartment building. However, he also testified he made a test drive in just seven minutes, which would provide Orozco adequate time to remove J.G. from the park to the apartment and assault her before going to work. The evidence Orozco cites does not exclude him as the perpetrator.

Viewing all the evidence in the light most favorable to the State, there is sufficient evidence by which a reasonable jury could find beyond a reasonable doubt Orozco was the perpetrator. Although J.G. described the perpetrator's vehicle as brownish-black in the videotaped interview, she had stated to other witnesses it was blue or gray-blue, the color of Orozco's vehicle. She also described the perpetrator as a man who matched Orozco's appearance, and described that he wore a coat similar to a sweatshirt found in Orozco's trunk. She identified the apartment at which Orozco lived with his mother as the one to

which she was taken, and described the inside of the apartment, including the blanket that covered the bed on which she was assaulted. Finally, J.G.'s DNA was found on Orozco's right hand and Orozco's DNA was found on the crotch of the pants J.G. was wearing.

C. Evidence of a Sex Act. Orozco also challenges the sufficiency of the evidence to prove he committed a sex act on J.G. He did not raise this issue before the district court and therefore error is not preserved with respect to this claim. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (noting that in order to preserve error on a claim of insufficient evidence for appellate review in a jury-tried criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal). Orozco alternatively requests this issue be addressed under an ineffective-assistance-of-counsel rubric.

We review ineffective-assistance-of-counsel claims de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prevail on an ineffective assistance of counsel claim, Orozco must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). While we often preserve ineffective-assistance-of-counsel claims for postconviction proceedings, we consider such claims on direct appeal if the record is sufficient. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We find the record sufficient to address Orozco's claims.

To prove that counsel breached an essential duty, a defendant must overcome a presumption that counsel was competent and show that counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove that prejudice resulted, a defendant must show there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *Ledezma v. State,* 626 N.W.2d 134, 143 (Iowa 2001).

The jury was instructed that the term "sex act" means any sexual contact:

> 1. By penetration of the penis into the vagina or anus.
> 2. Between the genitals of one person and the genitals or anus of another.
> 3. Between the finger or hand of one person and the genitals or anus of another person.
>
> You may consider the type of contact and the circumstances surrounding it in deciding whether the contact was sexual in nature.

We conclude Orozco's trial counsel had no duty to raise the issue of whether the State had proved a sex act occurred. J.G. recounted multiple times to multiple people that the same two sex acts occurred: the perpetrator put his finger inside her and the perpetrator put his penis inside her. The physical examination of J.G. showed bruising and tearing consistent with her version of events. Because there is substantial evidence a sex act occurred, trial counsel had no duty to raise the issue. *See State v. Hochmuth*, 585 N.W.2d 234, 238 (Iowa 1998) (holding trial counsel was not ineffective for failing to pursue a meritless issue).

III. Motion for New Trial. Orozco also contends the district court erred in denying his motion for new trial. He argues the verdict was contrary to the

weight of the evidence. He also argues a new trial was warranted because an email not admitted into evidence was included in an exhibit that went to the jury room.

Our scope of review for rulings on motions for new trial is for errors at law. Iowa R. App. P. 6.4. When a defendant argues the trial court erred in denying a motion for new trial based on the claim that the verdict is contrary to the weight of the evidence our standard of review is for abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

A. Weight of the Evidence. Orozco first argues the verdict was against the weight of the evidence. "The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.'" *Id*. at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-38, 1025 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). The court made it clear in *Ellis* that the contrary to the weight of the evidence standard was not the same as the sufficiency of the evidence standard, contrary to a previous holding. *Id*. at 659. The power of the trial court to grant a new trial on the ground the verdict was contrary to the weight of the evidence should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id.*

Based on the evidence in the record set forth above, we conclude ample evidence supports the verdict. This is not an exceptional case where witness credibility is so questionable or the evidence against the defendant's guilt so

strong as to preponderate heavily against the verdict. Accordingly, the district court did not abuse its broad discretion by denying Orozco's motion for new trial.

B. Exhibit. Orozco contends the court erred in denying his motion for new trial because a hard copy of an email string not admitted into evidence was stapled to an exhibit that was given to the jury. The document consisted of an email from the prosecutor to the State's DNA expert, Amy Pogge, and Pogge's answer. The email to Pogge requested that she send files to Orozco's expert witness. In her reply, Pogge wrote:

> Just a word of caution about having the defense "re-analyze" the data. It is very common for the "liars for hire" experts out there to re-analyze data using different settings, or even different programs that do not meet the DCI standards or follow our SOPs and then come back with a report of all sorts of contamination or "bad analysis. . . ." If their expert is an ethical scientist, and not just in this for the money, it won't be an issue at all.

Orozco's expert at trial gave an opinion that the evidence of J.G.'s DNA on Orozco was most likely the result of contamination.

Iowa Rule of Criminal Procedure 2.24(2)(*b*)(2) states that a court may grant a new trial when the jury has received "any evidence, paper or document out of court not authorized by the court." Furthermore, if material disseminated during the trial goes beyond the record and raises serious questions of possible prejudice, the trial court may on its own motion, or shall on the motion of either party, question each juror as to the event. *State v. Jones*, 511 N.W.2d 400, 408 (Iowa Ct. App. 1993). The defendant has the burden to prove jury prejudice. *Id.*

In denying Orozco's motion for new trial, the district court noted the exhibit in question was offered and admitted without objection, and that at no time was

the issue brought to the court's attention. The court also noted that it had specifically imposed the duty on both counsel before the exhibits went to the jury room to make sure they were correct. The court also found there was no evidence the jury considered the email. Finally, the court found Orozco failed to demonstrate the email's exclusion would have resulted in a different verdict.

In order to impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts concerning what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberations; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict. *State v. Arnold*, 543 N.W.2d 600, 605 (Iowa 1996). Orozco is unable to satisfy, at a minimum, the third condition. Even assuming the jury saw the document in question during its deliberation, Orozco cannot show he was prejudiced given the overwhelming evidence of his guilt. Accordingly, we find no error in the court's ruling.

IV. Evidentiary Matters. Orozco contends the court erred in overruling his objections regarding the testimony of Karin Ward, a Child Advocacy Center nurse. Ward testified regarding her examination of J.G. During the examination, she asked J.G. questions regarding the sexual abuse. At one point during her testimony, Ward asked to refer to her dictation in order to recall the next question she asked J.G. Orozco objected to Ward's testimony twice, claiming Ward was reading from her dictation.

After additional witnesses testified, Orozco's counsel again addressed the matter with the court, outside the jury's presence. Counsel argued Ward could have her memory refreshed by her dictation, but could not read from it. The court found the dictation and testimony were admissible under Iowa Rule of Evidence 5.803(4) as statements for the purpose of medical diagnosis or treatment.

On appeal, Orozco simply states the court issued an erroneous ruling. He notes he "objected to the court's rulings regarding the hearsay exception based on past recollection." After setting forth the general rules regarding hearsay, Orozco makes no further argument. He does not address the court's finding that the evidence was admissible under rule 5.803(4). Before the district court, Orozco only challenged the admissibility of Ward's testimony under rule 5.803(5). Given Orozco's failure to make any specific argument on appeal, as well as his failure to raise the issue of admissibility under rule 5.803(4) before either the district court or this court, we find Orozco has not preserved error on this issue and we need not address it on appeal. *See State v. Philpott*, 702 N.W.2d 500, 504 (Iowa 2005) ("Defendant's arguments on the evidentiary issues are too vague and indefinite to support the granting of relief based on the admission of improper evidence."); State *v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (stating issues must be presented to and passed upon by the district court before they can be raised and decided on appeal); *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) (noting that where error is not preserved on an issue there is nothing for an appellate court to review).

Even if error had been preserved, we conclude the district court did not abuse its discretion in admitting the testimony. Ward was a nurse and statements to her by the victim could be reasonably regarded as for the purpose of medical diagnosis or treatment. *See* Iowa R. Evid. 5.803(4). Moreover, Orozco's objection somewhat misses the point. At trial, various witnesses were allowed to testify as to what J.G. told them. J.G. herself testified at trial regarding the assault and the identity of her assailant. Orozco would have had no objection to Ward's testifying as to what J.G. told her, so long as Ward did so from her own recollection. Thus, the "hearsay" objection really relates to Ward's credibility, not J.G.'s. Yet, Ward was subject to cross-examination and Orozco's attorney had every opportunity to point out that she was relying on a report, rather than a contemporaneous recollection.

Furthermore, if any error occurred, it was not prejudicial. The testimony complained of was merely cumulative to other evidence already properly in the record and therefore Orozco was not prejudiced. *See State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) ("[E]rroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record.").

V. Jury Instructions. Finally, Orozco contends the court issued erroneous rulings regarding the jury instructions. He does not specify which of the instructions was erroneous or how the court erred. He cites no authority. Accordingly, we conclude Orozco has waived this issue. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of

an issue may be deemed waiver of that issue."). In addition, we note that at oral argument Orozco, through counsel, waived argument on the jury instruction issue, conceding the instructions were correct.

VI. Conclusion. We find Orozco's contentions on appeal to be without merit. Accordingly, we affirm his conviction for kidnapping in the first degree.

AFFIRMED.