

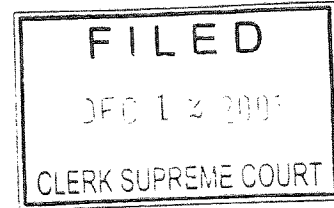
IN THE COURT OF APPEALS OF IOWA

No. 1-437 / 00-1129
Filed December 12, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RANDY TODD ESTABROOK,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, D. J. Stovall, Judge.

Defendant appeals from the judgment and sentence entered following his convictions of first-degree burglary and second-degree sexual abuse.

AFFIRMED.

Ivy Ross Rivello and Maggi Moss of Parrish, Kruidenier, Moss, Dunn, Montgomery & Boles, L.L.P., Des Moines for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat and George Karnas, Assistant County Attorneys, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Randy Estabrook appeals his convictions for first-degree burglary and second-degree sexual abuse following a jury trial. He contends the district court erred in (1) allowing substitution of an alternate juror during jury deliberations, and (2) denying his motion for judgment of acquittal based upon an alleged insufficiency of the evidence. He further maintains he was denied the effective assistance of trial counsel in a number of respects. He also asserts the trial court abused its discretion in imposing consecutive sentences. Finally, he claims the cumulative effect of the errors alleged denied him his right to a fair trial. Finding no merit in any of his contentions, we affirm.

I. Background Facts and Proceedings

The State charged Estabrook with first-degree burglary in violation of Iowa Code sections 713.1 and 713.3 (1999) and second-degree sexual abuse in violation of sections 709.1 and 709.3. The defendant's trial began April 17, 2000. The State presented evidence that Estabrook forced his way into the home of an eleven-year-old girl and compelled her to engage in sexual acts at gun-point and knife-point.

The record reflects that closing arguments were completed and court was adjourned at 4:00 p.m. on Friday, April 21, 2000. Immediately following adjournment, the trial judge met briefly with the jurors and asked them to decide whether they wanted to start deliberations then, or wait until the following Monday. They were also informed that they could pick a foreperson if they wished. The court indicated the choice was theirs.

The jury met for ten or fifteen minutes, and then informed the judge they would wait until Monday to begin deliberating. They did not select a foreperson. The court abided by their wishes, and the jurors were sent home for the weekend. The alternate juror was not dismissed. Before the jurors were excused, the court reminded them that they were not to discuss the case until deliberations began on Monday.

At 8:15 on Monday morning, the trial judge learned that one of the regular jurors had to undergo emergency oral surgery. After confirming the juror was unavailable to deliberate the case, the court substituted the alternate juror. Defense counsel objected and moved for a mistrial, which the court denied.

The jury found Estabrook guilty as charged. Estabrook filed a motion for new trial reiterating his claim that the court should not have substituted the alternate juror after deliberations had begun. The court, concluding deliberations did not begin until the alternate juror sat on Monday morning, overruled the motion. The court entered judgment and sentenced Estabrook to a term not to exceed twenty-five years on the conviction for sexual assault in the second-degree and twenty-five years on the conviction for burglary in the first-degree. The terms of imprisonment were ordered to be served consecutively.

Estabrook raises five claims on appeal. First, he asserts the trial court erred in allowing substitution of an alternate juror during jury deliberations. Second, he claims the trial court erred in concluding there was sufficient evidence to support his convictions. Next, he claims he was denied effective assistance of trial counsel because counsel failed to have voir dire reported, failed to have opening and closing statements reported, failed to object to

improper comments by the prosecution during closing arguments, and failed to raise a weight-of-the-evidence challenge in his motion for new trial. He also asserts the district court abused its discretion in imposing consecutive sentences. Finally, he claims the cumulative effect of these alleged errors denied him his right to a fair trial.

II. Substitution of Alternate Juror

We first address our scope of review on this issue. On appeal, Estabrook contends the trial court's substitution of an alternate juror denied him his right to trial by a fair and impartial jury as required by the constitutions of Iowa and the United States. The record reveals Estabrook did not preserve a constitutionally based challenge to the substitution of the alternate juror. Estabrook's complaints during and after trial were based solely on an alleged violation of Iowa Rule of Criminal Procedure 17(15). A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. *State v. Delaney*, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994). The review of a motion for new trial is for corrections of error at law. Iowa R. App. P. 4. The district court has broad, but not unlimited discretion in ruling on new trial requests and its decision will be reversed only for a demonstrated abuse of discretion. *State v. O'Shea*, 634 N.W.2d 150, 154 (Iowa Ct. App. 2001).

Iowa Rule of Criminal Procedure 17(15) provides that "alternate jurors shall, in the order they were drawn, replace any juror who becomes unable to act, or is disqualified before the jury retires, and if not so needed shall then be discharged."

We discussed substitution of jurors under Rule 17(15) in *State v. Escobedo*, 573 N.W.2d 271 (Iowa Ct. App. 1997). In considering the rule, the court stated:

There are a variety of circumstances that can arise during the course of a trial which require jurors to discontinue their service, and the availability of alternate jurors to replace dismissed jurors helps to avoid the time, expense, anxiety, and inconvenience associated with a mistrial....Our rules only permit the replacement of a regular juror prior to the commencement of the deliberations and require alternate jurors to be discharged after the deliberations begin.

Escobedo at 276.

We agree with Estabrook's contention that the district court was not authorized to replace a juror during deliberations unless Estabrook acquiesced in the replacement of the dismissed juror with an alternate. The fighting issue in this case, however, is whether deliberations had actually commenced when the alternate juror was substituted for a juror who was unavailable because of illness.

The events which occurred on April 21 following closing arguments were orally summarized by the trial court at the hearing held on Estabrook's motion for new trial. The court stated:

At the completion of closing arguments, the Court asked counsel to approach and had a side bar discussion relating to dismissing the alternate juror. The Court specifically recalls putting the question to counsel – or putting the issue to counsel at that point. Should I dismiss the alternate juror? A discussion ensued surrounding the circumstances, that the weekend was coming up, the lateness of the hour; and at the conclusion of the side bar, it was the Court's understanding after discussion that the State had specifically requested that the alternate juror not be dismissed and the defense was taking no position whether the Court should or should not.

I advised counsel that I would allow the jury to go to the jury room and then discuss with them whether or not they wished to proceed with the deliberations by having lunch brought in, or if they wanted to go to lunch and then return and begin deliberations, or if they wanted to suspend all activity and return Monday to begin deliberations.

Shortly after that the Court did go to the jury room and waited for all of the jurors to come to the jury room. Some were going to the rest room, et cetera, et cetera. But once they had gathered into the jury room, the Court then proceeded to inquire of the jury whether or not they wished to begin deliberations, have lunch brought in, go to lunch and come back and begin deliberations, or recess for the day and begin deliberations on Monday.

I directed them that they could do whatever they chose to do. I told them that they had the option of picking a foreperson - - if nothing else, picking a foreperson and going home, or they could pick a foreperson and begin deliberations or whatever. But the choice was left completely up to them, but that they had to let me know because counsel were waiting for their decision. The door was closed.

The Court left; the door was closed. And approximately 10 or 15 minutes later the Court was advised by the court attendant that the jury had elected to go home and come back on Monday to begin deliberations.

Upon the Court learning of that, I spoke to the jurors, gave them their instructions again to not discuss the case with anyone, to return on Monday at whatever time they chose. At that time I also specifically addressed the alternate juror, advised her, once again, that she was not being dismissed, that she should also abide by the Court's admonishment and that she should call the courthouse approximately one hour after the time set by the jury to return on Monday to make sure that all of the jurors had in fact returned on Monday.

Shortly thereafter, the Court advised counsel that the jury had elected to go home and come back on Monday to begin deliberations. It was the Court's understanding that when the jury returned on Monday, that they would at that time begin deliberations by electing a foreperson and then proceeding with discussion.

Following hearing on the defendant's motion for new trial, the court concluded the jury did not begin deliberating until the alternate sat on Monday. We agree. The record reveals the only decision the original jurors made on Friday the 21st was not to begin their deliberations until Monday. They did not elect a foreperson on Friday and there is nothing in the record to suggest the jury analyzed, discussed, or weighed the evidence against Estabrook on Friday before recessing for the weekend. We conclude the jurors had not begun to deliberate Estabrook's fate prior to the substitution of the alternate juror. Therefore no violation of Iowa Rule of Criminal Procedure 17(15) occurred.

III. Sufficiency of Evidence

Estabrook contends the evidence was insufficient as a matter of law to support his convictions. Evidence is sufficient if it could convince a rational trier of fact that the defendant is guilty of the crimes charged beyond a reasonable doubt. *State v. Veal*, 564 N.W.2d 797, 803-04 (Iowa 1997). The evidence must be viewed in the light most favorable to the State, making any legitimate inferences that may fairly and reasonably be deduced from the evidence. *Id.* at 804. A challenge to the sufficiency of the evidence is for corrections of errors at law. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001).

We find there was substantial evidence to support the jury's verdicts. The victim testified she was home alone on the morning of November 3, 1999, getting ready for school. She identified the defendant as the man who came to her door and asked to use the restroom. After realizing she did not know Estabrook, she refused to let him in. Despite her refusal, he entered the house. The victim testified Estabrook then showed her a knife, threatened to slit her throat, and demanded she take her clothes off.

The victim testified that he produced a gun, undressed, and forced her to perform oral sex on him. Estabrook then took her into the bedroom and forced her to have intercourse. He then took her back into the living room, where he forced her to perform oral sex again. The victim testified that her attacker then went to the hall closet, and found some baby oil. He then forced her back into the bedroom and had intercourse with her a second time. He also performed oral sex on her.

The victim remembered her assailant had on blue Levis, a red flannel shirt, long underwear, boxer shorts, a black and blue coat, and a dirty blue and grey hat. She described him as having brown hair, a mustache, and two scars on his abdomen. She also described a tattoo, like an "X," between her attacker's pointer finger and thumb. She testified that his pubic hair was "prickly," like recently shaven legs. When examined shortly after the attack, the victim had a torn, swollen, and bleeding hymen.

When Estabrook was arrested a day after the attack, police found a red flannel shirt and long underwear hanging in his bathroom. He was sporting a mustache, brown hair, and had two abrasions on his abdomen. Estabrook has a swastika tattoo between his pointer finger and his thumb. Brenda Estabrook, the defendant's wife, testified that she shaved her husband's pubic hair on occasions prior to November 2000.

Estabrook was working at a construction site near the victim's house at the time of the incident. Records show he wrote a check at a "Kum and Go" near the victim's home on the morning of the incident. Investigators found Estabrook's fingerprint on a bottle of baby oil found in the victim's home.

Estabrook contends the evidence against him is insufficient due to a lack of DNA evidence linking him to the victim or her home. DNA evidence is not required to prove the defendant's guilt. Based on the victim's detailed description of the defendant's body, including his tattoo, scars and shaven pubic hair, and the fingerprint on the baby oil bottle at the victim's home, we find that substantial evidence exists to support the jury's finding of guilt on both the burglary and sexual assault charges.

IV. Ineffective Assistance of Counsel Claims

Estabrook complains he received ineffective assistance of counsel at trial. He claims his lawyer should have requested that voir dire and opening and closing statements be reported. He also claims his counsel should have objected to an allegedly improper statement by the prosecutor during closing statements. Finally, he claims his attorney should have argued the weight-of-the-evidence standard adopted in *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998), in his motion for new trial.

A defendant claiming ineffective assistance must prove, by a preponderance of the evidence, that his trial counsel failed in an essential duty and prejudice resulted. *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998). This prejudice must give rise to a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Carillo*, 597 N.W.2d 497, 500 (Iowa 1999). In evaluating counsel's performance, we presume counsel acted competently. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999).

Estabrook first claims his trial counsel was ineffective because he failed to request the reporting of voir dire, and opening and closing arguments. However, Estabrook is unable to establish his trial counsel had a duty to request that any of the proceedings at issue be reported. Counsel is not required to have all aspects of trial proceedings reported and can take appropriate measures to ensure that a record is made concerning any irregularities that occur. *See Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Absent a clear breach of duty, trial counsel cannot be deemed ineffective. Estabrook has also failed to demonstrate

prejudice. He has made no showing that he would have likely been acquitted of burglary and sexual abuse if the proceedings at issue had been reported.

Next, Estabrook argues his trial counsel was ineffective for failing to object to improper statements made during the State's closing argument. He argues the State's attorney "made statements which she knew would create a false impression of material fact not presented as evidence during trial." Because Estabrook gives no indication of what statements or impressions were objectionable, we find the issue is not sufficiently preserved to warrant consideration. See *State v. Dunbar*, 515 N.W.2d 12, 15 (Iowa 1994).

Finally, Estabrook contends his trial counsel was ineffective for failing to argue the *State v. Ellis* standard in his motion for new trial. Estabrook contends the "contrary to the weight of the evidence" standard is easier for a defendant to satisfy than the previously applicable "sufficiency of the evidence" standard. In this case, however, the defendant's motion for new trial was not based on any challenge to the evidence. As previously discussed, Estabrook's motion for new trial was based solely on the juror substitution issue. Due to the considerable evidence of guilt amassed against the defendant, we believe that trial counsel breached no duty by failing to challenge the sufficiency of the evidence in his motion for new trial.

V. Sentencing

The defendant argues the sentences imposed by the district court are contrary to law. He contends the court abused its discretion, or failed to utilize it, by considering only one factor in sentencing the defendant.

Iowa Rule of Criminal Procedure 22(3)(d) requires a trial court to state on the record the reasons for selecting a particular sentence. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000). Although the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action. *Id.* A trial court must also give reasons for its decision to impose consecutive sentences. *See Id.*

The trial court sentenced Estabrook to two consecutive twenty-five year terms of imprisonment. The defendant claims the district court relied only on the nature of the offense as the reason for its sentence. Upon review of the record, we reach a different conclusion. In explaining its reason for imposing consecutive sentences, the court referred to the seriousness of the offense, the age of the victim, subsequent trauma to the victim, and the defendant's prior criminal history. The trial court gave at least four specific and proper reasons for the sentence imposed. We affirm on this issue.

VI. Cumulative Error Argument

Estabrook asserts a general claim that the cumulative effect of errors committed during trial deprived him of a fair trial. Because we have determined that no errors were committed in the trial court, we reject this argument. The defendant is not entitled to a new trial.

VII. Conclusion

We have considered all claims raised by Estabrook on appeal. Finding no merit in his contentions, we affirm the judgment and conviction of the trial court.

AFFIRMED.