IN THE COURT OF APPEALS OF IOWA

No. 1999-327 (9-580) / 98-1404
Filed January 12, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEREMY JORDAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, William L. Thomas, and Patrick R. Grady, Judge.

The defendant appeals his conviction and sentence, following a jury trial, for second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

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MILLER, J.

Defendant Jeremy Jordan appeals his conviction after jury trial for sexual abuse in the second degree. He claims that his attorney was ineffective, the court abused its discretion in admitting certain evidence, and that there was no substantial evidence to support the jury's verdict. We affirm.

I. Factual and Procedural Background

The jury could find the following facts from the evidence presented at trial. On April 7, 1997, Shannon Bohnsack first met Jeremy Jordan at a tattoo party. At this party, he wrote poetry, his name, address, and phone number in her address book with a request to "call me." Bohnsack came under the impression at this party that Jordan could obtain drugs for her, namely marijuana and methamphetamine.

On April 22, 1997, Bohnsack called Jordan, who invited her over to his father's house. The two of them proceeded to drive to the house of a friend of Jordan's to buy some marijuana. After that transaction was completed, Jordan and Bohnsack went to the roller dam to smoke the marijuana. At some point while at the roller dam, Bohnsack got nervous and asked to leave. Bohnsack testified she became nervous because Jordan offered to show her a "shotgun." Apparently, Bohnsack took this to mean a gun, but Jordan explained that it was a method of smoking marijuana. Jordan had a black bag with him, the contents of which were unknown to Bohnsack.

Exactly where they went next is unclear from the testimony of the victim, Bohnsack. At trial, she testified that Jordan asked her to pull into the parking lot of Regis High School. In earlier statements to the police, Bohnsack had named another

location. Wherever they stopped, Jordan asked Bohnsack to take off her seat belt and get comfortable. Bohnsack complied. Jordan then tried to kiss her, but Bohnsack pushed him away, explaining that she was not attracted to him and that she did not date black guys. Jordan responded by telling her that the least she could do for his procuring the marijuana that evening was to accept his advances. Bohnsack then again tried to resist, but Jordan put his hand around her throat, choking her, and held his other hand up in a fist, threatening to punch her. He then tried to kiss her again, and told her to take her pants off. Bohnsack finally took one leg out of her pants. When Jordan started to take his pants off, Bohnsack exited the vehicle, but Jordan followed her and wrestled her down to the ground, despite her screams. Jordan continued to choke her. He then threatened to get his gun out if she did not get quiet. Bohnsack complied with this request. During this struggle, Bohnsack received numerous scratches around her neck from Jordan's long fingernails, and was also cut on her leg by the rocks and gravel on the pavement.

Bohnsack then got back in the car, and Jordan followed. She let him drive, and they began to leave the area. However, Jordan stopped the car about two blocks away, and tried kissing her again. Jordan had not allowed Bohnsack to put her pants back on. He began touching her "all over." She continued to verbally protest. Bohnsack testified after he grew tired of what he was doing, "he went ahead and had sex with me." She further testified it was unprotected sex. During this act, Bohnsack testified, she had to open the door and throw up. At that point, Jordan drove her back

to his house. There, Jordan got her a glass of water and a rag to clean her neck, which was bleeding. Bohnsack continued to ask to go home, but each time Jordan replied "in a minute." Bohnsack then got up to get her keys, at which point Jordan's brother woke up. Jordan and his brother went into another room, and when he returned, told her that she could leave. Jordan warned her, however, if she told anybody about what had happened, he would kill her.

Bohnsack then went home, arriving at about 4:00 a.m. After talking with a friend the next day, Bohnsack reported the incident to the police. She then went to Mercy Hospital where a rape examination was performed. Bohnsack had showered since the incident, and the results were negative. She identified Jordan as the perpetrator.

Sometime after Bohnsack reported the incident to the police, Jordan called her twice. The first time was to offer some methamphetamine to make up for what he had done. The second time was to ask whether she had turned him in to the police. Without Jordan's knowledge, Bohnsack recorded the second conversation on her answering machine. She turned this recording over to the police, who typed a transcript of the conversation.

Trial commenced January 20, 1998. After the prosecution rested, Jordan moved for acquittal. The motion was overruled. Jordan's brother then was called as a witness for the defense. He testified he did not see Bohnsack in the house that evening, as she had claimed. Melana Doolin then testified she had been with Jordan

during the period in question. Judy Crouch verified the fact Jordan had spent the night with Doolin. Jordan then testified. He denied ever sexually abusing Bohnsack, or threatening her with a gun. Jordan then testified that he had spent the time in question at the residences of Doolin and Crouch. The defense then rested, and moved for acquittal. The court overruled the motion. The jury returned a guilty verdict on January 22, 1998. Jordan was sentenced to a term not to exceed twenty-five years. Other facts as they are relevant to the issues on appeal will be discussed below.

II. Merits

A. Ineffective Assistance of Counsel

Jordan first argues that his counsel was ineffective for not objecting to questions asked by the prosecution he feels were in violation of the court's ruling on a motion in limine, and thus not preserving the error for appellate review. Before trial, on motion of the defendant, the trial court ruled the State could not refer to any prior convictions or bad acts by the defendant in its case-in-chief. Further, the court ruled Jordan was not to be referred to as a drug dealer, nor was there to be any reference to his tattoos being gang related. The following colloquy occurred between the assistant county attorney, defense counsel, and the court:

> Mr. Vander Sanden: "I'm just going to have her describe those tattoos and what they look like and where she saw them." The Court: "Does that meet your concerns, then, Mr. Jones?" Mr. Jones: "Yes, Your Honor. We just wanted to make sure that there was not a blanket reference to Mr. Jordan as being a drug dealer. . . .We are just worried about the reference to [the tattoos] being gang-related. And as long as she's been instructed not to testify to that, that is what we're looking

> for. The Court: The Court then, based on the record made, sustains each Division of the Motion in Limine . . ."

To prevail on a claim of ineffective assistance of counsel, Jordan must show counsel failed to perform an essential duty and that he was prejudiced by counsel's omission. *State v. Wissing*, 528 N.W.2d 561, 563-64 (Iowa 1995). Jordan has the burden to prove both of these elements by a preponderance of the evidence. *Id.* at 563. Further, rarely will failure to preserve error be found to be sufficiently egregious to deny a defendant the right to the effective assistance of counsel. *State v. Halstead*, 362 N.W.2d 504, 508-09 (Iowa 1985).

The test for the first element is whether the attorney's performance was outside the range of normal competency. *Wissing*, 528 N.W.2d at 564. To sustain his burden of proof on the first prong, Jordan must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). "[R]easonableness under prevailing professional norms" is the standard by which counsel's performance is measured. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L. Ed. 2d 674, 694 (1984). "Effective assistance of counsel 'means conscientious, meaningful representation.'" *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995) (quoting *State v. Aldape*, 307 N.W.2d 32, 41-42 (Iowa 1981)).

The test for the second element is whether there is a reasonable probability that but for trial counsel's unprofessional errors, the resulting conviction and sentence

would have been different. *Wissing*, 528 N.W.2d at 564. In defining prejudice, the Supreme Court of the United States said:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674, 698 (1984). We may dispose of an ineffective-assistance-of-counsel claim if Jordan fails to meet either the breach of duty or the prejudice prong. *Wissing*, 528 N.W.2d at 564.

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *State v. Farnham*, 554 N.W.2d 716, 720 (Iowa App. 1996). However, they may be resolved on direct appeal when the record adequately addresses the issues. *Id.* Our review is de novo based upon an evaluation of the totality of the circumstances. *Id.*

Jordan claims the following exchange, and certain other references to Jordan's involvement with drugs, violated the court's ruling on the motion in limine. He claims that because trial counsel did not object to such evidence, trial counsel did not perform an essential duty, and he was prejudiced thereby:

> Mr. Vander Sanden [the prosecutor]: . . .was there any other reason . . . why you were spending time with Mr. Jordan at this time? Ms. Bohnsack: . . . he could get drugs for me and my friends . . . Q: And why did you care about that? A: Because at the time I was interested in drugs. Q: What kind of drugs were you using back then? A: Methamphetamines and marijuana. Q: Mr. Jordan told you he could get those for you? A: Yes.

For two reasons we find this claim to be without merit. First, the evidence in question contains no express reference to Jordan as a drug dealer, and with one limited and somewhat ambiguous exception the evidence concerning Jordan's drug activities related solely to Bohnsack and her friends. Second, even if this line of questioning was objectionable as violative of the court's ruling on the motion in limine, Jordan has not shown that he was prejudiced by its admission. His ability to procure and deliver drugs to Bohnsack was integral to his defense. He testified that he and Bohnsack met at a tattoo party, Bohnsack took an interest in him because he could procure drugs for her, and when she got mad at him and attacked him for not providing her with some drugs, he caused physical injury to her in defending himself. This testimony explained, from Jordan's point of view, how Bohnsack received certain injuries to her neck and legs.

Jordan next claims the court's ruling on the motion in limine was violated when Jordan was asked, without an objection, to raise his shirt and show his tattoos. He claims because trial counsel did not object to such evidence, trial counsel did not perform an essential duty, and he was prejudiced thereby. We find this claim to be without merit, as the trial court's ruling only prohibited any statement or suggestion that Jordan's tattoos were "gang-related tattoos." There was no testimony that expressly stated or implied that the tattoos were gang-related. In proceedings on the motion in limine, Jordan and his attorney had acknowledged that the state had a right to have Jordan display the tattoos and did not object to the state doing so.

Jordan next claims that counsel was ineffective in not objecting to the display of his tattoos as irrelevant, without probative value, and serving only to inflame and bias the jury against him. The tattoos displayed to the jury were described on the record by the assistant county attorney:

> [A] tattoo in his upper right chest that appears to have a six-pointed figure in the middle with wings and pitch forks and a tail and on the right chest it looks like a money sign to me and perhaps a J to the right. He also has a tattoo across the stomach that looks like it reads thug.

Jordan urges that evidence of his tattoos was not relevant for the purpose for which it was apparently admitted, identification, because in opening statement his attorney admitted he and Bohnsack knew each other, and because Bohnsack admitted she had not seen the tattoos the night of the alleged assault, but on an earlier date at a tattoo party. Display of the tattoos was merely cumulative to Bohnsack's testimony regarding them, and that testimony was not objected to. Under such circumstances Jordan has failed to prove that any prejudice could have resulted from their display.

Jordan complains that his trial counsel failed to object to certain testimony of Dr. Torrey Nash, the physician who examined Bohnsack at Mercy Hospital the morning after the sexual assault. The testimony objected to is as follows:

> Q. Do you recall what it was that Shannon Bohnsack told you in regard to why she was there to meet with you on April 23rd? A. She basically was with a known male who apparently had forced her to perform intercourse--or he performed penile to vaginal insertion. Apparently had forced her down onto the ground and held her there, threatened her with a gun, although there was apparently no gun that was seen by the victim.

Further, on cross-examination Dr. Nash was asked where information as to what had happened to Bohnsack would have come from. The relevant portion of the question, and Dr. Nash's answer, were as follows:

> Q: ...Where would that information have come from, Doctor? A: From her. I should also state oftentimes--and I don't have that information in front of me. Oftentimes the nurse has already taken the history and I've reviewed it as well and then confirmed it with the patient, so I--you, I don't have that information in front of me, but it may have come from that as well.

(Emphasis added.) Jordan complains that Dr. Nash's testimony concerning what Bohnsack told him was hearsay, hearsay within hearsay if based on information received from the nurse, was objectionable for lack of personal knowledge (Iowa R. Evid. 602) and lack of authentication (Iowa R. Evid. 901), and that counsel was ineffective for not objecting on those grounds.

We disagree. While Bohnsack's statement may have originally been made to the nurse, Dr. Nash testified he would then review it and confirm it with the patient. He therefore had personal knowledge of the statement, and it was not double hearsay. The statement was clearly 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." It therefore came within the Iowa Rule of Evidence 803(4) exception to the hearsay rule. *See State v.* Mann, 512 N.W.2d 528, 535-36 (Iowa 1994) (stating a doctor may testify as to the patient's history, as an exception to the hearsay rule, because of the probability that the patient

will not fabricate statements made to the physician if the patient's future treatment and well-being are at stake). Further, Iowa Rule of Evidence 901's requirement of authentication was satisfied by Dr. Nash's testimony that he "confirmed . . . with the patient" any history Bohnsack had given the nurse.

Because there would have been no merit to the suggested objections, counsel did not fail to perform an essential duty by not objecting. Further, the substance of Dr. Nash's testimony concerning what Bohnsack told him was essentially cumulative to Bohnsack's testimony. Under such circumstances, even if Dr. Nash's testimony were objectionable on the grounds urged, Jordan would not be prejudiced by its admission.

Jordan next contends trial counsel was ineffective in failing to object, on Confrontation Clause grounds, to the admission of a taped conversation between Jordan and Bohnsack that occurred after the alleged sexual assault. Jordan's attorney objected to the admission of the tape on grounds that it was hearsay and "that there is . . . no verification that it is the defendant on the tape . . . ." We discuss those evidentiary objections at "B" below.

Bohnsack testified that after the assault Jordan called her twice on the telephone. She testified she recorded the second conversation on her answering machine. She identified Jordan and herself as the participants in the second, recorded telephone conversation. In it Jordan made inculpatory statements. Bohnsack testified about how she made the tape and that she immediately took the tape to the police

detective who had earlier taken her statement. The state did not offer the tape as evidence during Bohnsack's testimony. Instead a copy of the tape was offered through Detective Choate.

Detective Choate testified that Bohnsack had brought the micro-cassette tape from her answering machine to him, and he copied it onto a regular cassette so it could be played in court, and he had it transcribed. He identified the regular cassette, which was offered and admitted, as a fair and accurate copy of the micro-cassette tape provided by Bohnsack. He testified he listened "over and over" to the tape that was provided by Bohnsack to be certain "exactly what was said on the tape," and produced a transcript in written form that detailed the actual conversation on the tape. He testified that the transcript, which was offered and admitted after conclusion of his testimony, was a fair and accurate depiction of the conversation as it is heard on the tape.

Jordan claims counsel was ineffective for not objecting to the cassette, and the transcript of its contents, on the grounds that their admission violated Jordan's rights to confront Bohnsack. He argues that this is because the tape and transcript were hearsay and he was unable to cross-examine Bohnsack after they were admitted in evidence. The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d

923 (1965). The Confrontation Clause bars admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. *Idaho v. Wright*, 497 U.S. 805, 813-14, 110 S. Ct. 3139, 3145-46, 111 L. Ed. 2d 638, 650-51 (1990). Although the hearsay rule and the Confrontation Clause are not coextensive, they were designed to protect similar values. *Wright*, 497 U.S. at 814, 110 S. Ct. at 3145-46, 111 L. Ed. 2d at 650-51.

Although we need not decide the question, Jordan's argument might bear consideration if the recording and transcript had been admitted for the contents of Bohnsack's statements. However, the record is clear they were admitted for the contents of Jordan's inculpatory statements. These constitute admissions of a party opponent, and are not hearsay. See Iowa R. Evid. 801(d)(2)(A). Because the contents for which the tape and transcript were admitted were not hearsay, the Confrontation Clause was not violated by admission of hearsay.

Even if the tape and transcript might be seen as having been admitted for the content of any statements made by Bohnsack, Jordan has not shown that he was unable to cross-examine her. His attorney had in fact cross-examined her at length, and asked some questions about the tape recording and her opportunity to review its contents. Further, Jordan makes no claim or showing that he could not have called Bohnsack as a witness during presentation of his defense after the recording and transcript had been admitted in evidence, if he or his attorney felt it desirable to do so.

Jordan's attorney did not breach an essential duty by failing to object to the tape and transcript on Confrontation Clause grounds.

Jordan contends that trial counsel was ineffective for not objecting to other testimony. We have reviewed these claims even though not discussed in detail herein, and find them to also be without merit.

B. Admission of Evidence

Jordan next argues that the court improperly admitted the cassette and accompanying transcript over the objection of trial counsel. Ordinarily, we review the district court's decision to admit evidence for an abuse of discretion. *State v. Rains*, 574 N.W.2d 904, 912 (Iowa 1998).

Jordan objected to admission of the tape on hearsay and authentication ("There is, in fact, no verification that it is, in fact, the Defendant on the tape") grounds. For reasons stated above, the tape was not hearsay. Bohnsack's and Detective Choate's testimony concerning the tape and transcript bears noting, in summary form. Bohnsack testified that the second time Jordan called her she recorded "our conversation" with her answering machine; that she took the tape she used right down to the detective who had earlier taken her statement, Detective Choate; and that she had the opportunity to listen to the tape or read the transcript of it. Detective Choate testified he had told Bohnsack to record any conversation she had with Jordan if he called her again; that Bohnsack brought him a micro-cassette tape that she said was a recording of the conversation she had had with Jordan; that he took it into custody and

re-recorded it on a regular cassette so it could be played in court; and the copy was a fair and accurate copy of the micro-cassette tape provided by Bohnsack. Choate testified further that he repeatedly listened to the tape provided by Bohnsack to be certain what was said, and he produced an accurate transcript that fairly and accurately depicted the conversation as it was heard on the tape.

In overruling the objections and admitting the tape the trial court stated:

> [T]here's sufficient circumstantial evidence where the jury can conclude that this is the Defendant on the phone, based on the victim's testimony that he had called and that she taped it and that's what she took to the police station and Detective Choate's testimony that that's the tape that he had transferred to the other tape.

The court had earlier reviewed the transcript and stated its belief that what appeared to be statements by Jordan were "clearly admissions."

Authentication requires evidence sufficient to support a finding the matter in question is what its proponents claim. Iowa R. Evid. 901(a). We conclude, as the trial court did, that the evidence was sufficient to support a finding that the tape was a recording of a conversation between Jordan and Bohnsack. The trial court did not err in admitting it.

Jordan admitted during his testimony that the voice on the tape was his, although he did not remember saying everything that was on the tape. Therefore, even if the tape was admitted in error due to lack of sufficient authentication at the time of admission, Jordan's later testimony provided sufficient authentication and the tape's admission did not prejudice Jordan and reversal would not be required. *See*

State v. Williams, 574 N.W.2d 293, 298 (Iowa 1998) (to warrant reversal, error in admitting evidence must have prejudiced defendant).

Jordan next argues the transcript of the tape was improperly admitted. He objected to its admission on hearsay, best evidence, and accuracy ("I do not necessarily believe that this is an accurate transcript. . . . some of the things I thought I was listening to do not seem to be exactly the same.") grounds. We have previously dealt with the hearsay objection in relation to the tape recording itself.

For several reasons Jordan's "best evidence" and "accuracy" objections are without merit or do not justify reversal. First, the purpose of the best evidence rule was not compromised by admission of the transcript. That purpose is to secure the most reliable information as to the contents of a document or recording when the contents are disputed. *See State v. Khalsa*, 542 N.W.2d 263, 268 (Iowa App. 1995). Here, the transcript was not admitted instead of the tape from which it was derived, but in addition to the tape. The "best evidence" was in fact before the jury and the purpose of the rule was thus fully served. Second, the jury, who had heard the tape during presentation of evidence and again during closing argument, could address any questions or concerns about the accuracy of the transcript. We also note that the record on appeal does not in any manner show or suggest that the transcript did not in fact accurately reflect the contents of the tape. In fact, before admitting the transcript the trial judge listened to the tape and compared it to the transcript and found the transcript to be accurate. Third, the transcript was merely cumulative to the contents

of the tape. We conclude that even if admission of the transcript might be seen as improper, its admission did not prejudice Jordan.

C. Sufficiency of the Evidence.

Finally, Jordan argues the evidence was insufficient to support a verdict of guilty of Sexual Abuse in the Second Degree. Our review is on assigned error. *State v Phams*, 342 N.W.2d 792, 795 (Iowa 1983). We are bound by the jury's verdict unless there was not substantial evidence to support it. *State v. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995). In reviewing challenges to the sufficiency of the evidence, we view the evidence in the light most favorable to the state. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). We give consideration to all the evidence, not just the evidence supporting the verdict. *Id.* Evidence is substantial if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16). "However, whether the evidence is direct or circumstantial, it must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981) (citing *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981)).

Most of Jordan's argument, however, focuses not on the sufficiency of the evidence, but the credibility of the witnesses. The credibility of witnesses and the weight to be given their testimony are determinations properly reserved for the jury. *State v. Schertz*, 328 N.W.2d 320, 322 (Iowa 1982).

Jordan does argue, however, there was insufficient evidence to support the element of a "sex act." The relevant part of the jury instruction defining "sex act" stated a "'sex act' means penetration of the penis into the vagina or anus." Bohnsack testified that despite her protests and resistance, Jordan "went ahead and had sex with me," but Bohnsack never detailed exactly what sex act took place. She had, however, gone to Mercy Hospital where a history was taken and a physical examination performed. As part of that history and physical Bohnsack had told emergency room personnel, including the physician who examined her, Dr. Nash, what had happened to her. Dr. Nash's testimony was that she reported "she was with a known male who apparently had forced her to perform intercourse – or he performed penile to vaginal insertion." The testimony of Bohnsack and testimony of Dr. Nash, when taken together, constitute substantial evidence of the required "sex act."

Jordan further argues there was no substantial evidence of a sex act because the testimony of Dr. Nash was improperly admitted. Having found above that Dr. Nash's testimony on this matter came within the Iowa Rule of Evidence 803(4) exception to the hearsay rule, we reject this argument.

III. Post Conviction Relief Issues

We preserve for postconviction proceedings Jordan's claims of ineffective assistance of counsel for (1) not preparing Jordan's testimony for trial; and (2) not making reasonable investigation based upon information provided to counsel by Jordan and others. We affirm the trial court on all other issues raised in this appeal.

AFFIRMED.