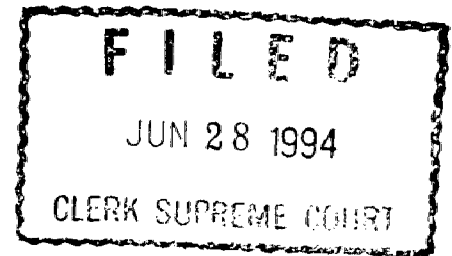


IN THE COURT OF APPEALS OF IOWA

No. 4-142 / 93-0694



STATE OF IOWA,

Plaintiff-Appellee,

vs.

THOMAS EARLE MAISE, JR.,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Roger F. Peterson, Judge.

Defendant appeals from his conviction, following a jury trial, for third-degree sexual abuse in violation of Iowa Code section 709.4 (1991). **AFFIRMED.**

Barbara H. Liesveld of Thinnes & Liesveld, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, Kasey Wadding, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

Defendant, Thomas Maise, appeals from his conviction, following a jury trial, for third-degree sexual abuse in violation of Iowa Code section 709.4 (1991).

On June 22, 1992, the victim, Sherrette Pearson, sought medical attention for injuries she stated she suffered during a physical and sexual assault. She told a medical social worker, a doctor and a police officer that her boyfriend, Thomas Maise, was the perpetrator. Pearson did not want to file charges at that time and refused to provide an official statement.

On September 1, 1992, Pearson gave officers a statement implicating Maise. On November 2, 1992, Pearson wrote a letter which she delivered to defense counsel wherein she denied the truth of her earlier allegations. At a December 7, 1992, bond review hearing for Maise, Pearson testified under oath that her initial allegations were false.

Maise filed a motion for preliminary determination, arguing the State could not call Pearson as a witness knowing she was going to provide unfavorable testimony. At a hearing on this matter, Pearson testified her previous recantations were false and were made in response to Maise's requests. She further testified her initial statements accusing Maise were true. The district court found that it was for the trier of fact to determine whether Pearson's statements were true or false and overruled Maise's motion to exclude Pearson's testimony.

At Maise's trial on the charge of third-degree sexual abuse, Pearson testified Maise tied her up, and inserted a long neck beer bottle into her vagina. In addition, he performed sexual intercourse on her. She testified she had not consented to this behavior and had asked Maise to stop.

Maise was found guilty as charged and sentenced to a term not to exceed fifteen years. Maise appeals.

I. Admissibility of Testimony of Victim.

Maise contends the district court erred in allowing Sherrette Pearson to testify. Maise claims that under State v. Tracy, 482 N.W.2d 675, 678-79 (Iowa 1992), Ms. Pearson should not have been allowed to testify as part of the State's case in chief because it was known she intended to recant earlier testimony given under oath.

Our scope of review is for the correction of errors at law. Iowa R. App. P. 4. On this evidentiary issue, we review for an abuse of discretion. State v. Helm, 504 N.W.2d 142, 146 (Iowa App. 1993).

We find Tracy inapplicable. In Tracy, our supreme court condemned prosecutorial maneuvering in which the State places a witness on the stand who it expects to give unfavorable testimony solely for the purpose of introducing impeachment evidence that would otherwise be inadmissible. Id. at 679. In the present case, Ms. Pearson's trial testimony was not unfavorable to the State. Nor did the State call her for the purpose of introducing impeachment

evidence. Ms. Pearson provided key testimony incriminating Maise. Maise's claim of improper impeachment is without merit.

II. Sufficiency of the Evidence.

Maise next claims the district court erred in denying his motion for a directed verdict and a motion for a judgment of acquittal because the evidence was not sufficient to generate a jury question or to support the jury's verdict.

In reviewing motions for a directed verdict and a judgment of acquittal based upon sufficiency of the evidence in criminal cases, we view the evidence in light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Similarly, a jury verdict of guilty is binding upon this court unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of evidence. Id. Substantial evidence means such evidence as could convince

a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

Maise claims there was not substantial evidence of his guilt because the State's key witness, Ms. Pearson, was not credible because she had previously testified under oath at the bond reduction hearing that her accusations against Maise were false.

Generally, the credibility of a witness is to be determined by the jury. State v. Frank, 298 N.W.2d 324, 329 (Iowa 1980).

The jury is at liberty to believe or disbelieve the testimony of witnesses as it chooses . . . and give such weight to the evidence as in its judgment the evidence was entitled to receive. . . . The very function of a jury is to sort out the evidence presented and place credibility where it belongs.

State v. Brown, 466 N.W.2d 702, 704 (Iowa 1990) (quoting State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984); see also Frank, 298 N.W.2d at 330 (reconciliation of recantation with evidence corroborating the witness' prior testimony was matter properly for the jury when independent evidence corroborated recanted testimony).

Here, the jury was presented with Ms. Pearson's testimony at trial that she had been physically and sexually assaulted by Maise. Pearson admitted she had previously testified under oath that these allegations were not true. She stated she had said this because she was still in love with Maise and he was pressuring her. According to Pearson, Maise told her he did not want to be

in jail and that he was sorry for what he did. He told her he wanted to marry her. Letters were introduced that Maise had written to Ms. Pearson from jail prior to her recantation, apologizing and stating how much he loved her. See Frank, 298 N.W.2d at 329 (when alleged reason for recantation was explained to the jury, the jury had full opportunity to judge the credibility of the witness and ascertain the veracity or falsity of her testimony or any part thereof).

The jury was also presented with testimony of medical personnel that supported Ms. Pearson's trial testimony. Fern Kruger, a medical social worker testified that Ms. Pearson had a number of injuries including a swollen face, a laceration under her left eye, a red mark in the sclera of her right eye, and a bruise on her right arm. Ms. Pearson told Ms. Kruger she had been sexually assaulted but refused Kruger's suggestion to seek shelter because she claimed she was still in love with "Tom."

Dr. Charles Bolick testified he examined Ms. Pearson and she reported being sexually assaulted by her boyfriend. In addition to the injuries mentioned by Ms. Kruger, Dr. Bolick also noted circumferential bruising on Ms. Pearson's wrists and ankles, and mild tenderness in her abdomen and superpubic region. Bolick also observed redness around the os (part of the cervix). Bolick believed this redness could have been caused by intercourse or by vaginal penetration with an object. Dr. Bolick

testified that Ms. Pearson's injuries were consistent with the history she gave.

We find substantial evidence in which a rational fact finder could have been convinced beyond a reasonable doubt that the defendant was guilty of third-degree sexual abuse.

III. Ineffective Assistance of Counsel.

Maise also claims he was denied effective representation of counsel. In order to prevail on such a claim, appellant must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131. We now turn to Maise's specific claims.

A. Jury Note.

Maise contends the district court erred by responding to the jury's inquiry to the court when defense counsel was present but defendant was absent. Maise claims his trial counsel was ineffective in failing to object.

"[A]ll communications between court and jury are required to be given in the presence of the defendant and counsel." State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). Defendant's right to be present is derived from the Sixth Amendment and implemented by Iowa Rule of Criminal Procedure 18(5)(g). State v. Gardner, 490 N.W.2d 838, 842

(Iowa 1992). Also, Iowa Rule of Criminal Procedure 25 provides that in felony cases the defendant shall be present "at every stage of the trial" with exceptions not applicable here. See Gardner, 490 N.W.2d at 842.

The record reflects that the court and the attorneys discussed a note received from the jury. The record does not reflect whether Maise was in fact present or whether he waived his right to be present. The note read:

Point of concern --
Timing of events from 22 June 1992;
With respect to Sherrett[e]'s statement in Sept.
1992, when was defendant charged?

After consultation with the attorneys, the court wrote on the note, "I am not able to answer this question" signed it and returned it to the jury.

The information the jury sought was part of the court record, but it was not part of the admitted evidence. The court's answer was proper. Under such circumstances, we find the court's error in failing to secure defendant's presence or his waiver to presence was harmless beyond a reasonable doubt. See id. at 842-43.

B. Rule 412 Motion.

Maise next claims his trial counsel was ineffective in failing to file a Rule 412 motion requesting permission to explore Ms. Pearson's "past and current sexual behavior."

Maise contends his counsel should have attempted to introduce evidence Ms. Pearson was sexually assaulted by her ex-husband in the same manner as alleged here and that

she was sexually involved with another man on the night of the assault. He states such evidence would have cast serious doubt on her credibility.

The State argues the evidence of the prior rape is not relevant.¹ It also points out that the jury was informed via State's Exhibit I that the victim at one point claimed she had consensual intercourse with another man on the night of June 21, 1992 and that is why she and Mr. Maise argued.

Iowa Rule of Evidence 412 states in part:

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, evidence of a victim's past sexual behavior . . . is also not admissible, unless such evidence . . . is:

(1) admitted in accordance with subdivisions "c"(1) and "c"(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision "c" and is evidence of:

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual abuse is alleged.

Rule 412, Iowa's "rape shield" law, is an exception to the general rule that relevant evidence is admissible. Thompson v. State, 492 N.W.2d 410, 414 (Iowa 1992)

1. Under Iowa's rape-shield rule, "past sexual behavior" includes prior sexual abuse of the victim. State v. Jones, 490 N.W.2d 787, 790 (Iowa 1992).

(citations omitted). Even relevant evidence is not constitutionally required to be admitted if the prejudicial effect outweighs the probative value. Id. The purpose of Rule 412 is to protect the privacy of victims, to encourage the reporting and prosecuting of sex offenses and to prevent time-consuming and distracting inquiries into collateral matters. State v. Clarke, 343 N.W.2d 158, 162 (Iowa 1984) (citation omitted).

We find Maise was not prejudiced by his trial counsel's failure to file a Rule 412 motion because the motion could have been correctly overruled and the evidence excluded even if counsel had timely filed such a motion.

C. Identity of Victim's Assailant.

Maise next argues his trial counsel was ineffective in failing to object to the testimony of the State's witnesses concerning the identity of the alleged victim's assailant.

The State argues the testimony was admissible under Iowa Rule of Evidence 801(d)(1)(B). Rule 801(d)(1) states in part:

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

During cross-examination of Ms. Pearson, Maise's trial attorney suggested the victim's trial testimony was motivated by fear that the county attorney would prosecute her for perjury if she did not provide favorable testimony

for the prosecution. Accordingly, the testimony of the other witnesses as to what Ms. Pearson had previously told them, including the identity of her assailant, was admissible to rebut the charge of recent fabrication. We find Maise's trial counsel did not breach an essential duty in failing to object.

D. Demonstrative Evidence.

Maise next contends his trial counsel was ineffective in failing to object to the introduction of a long-neck beer bottle as a demonstrative aid during Dr. Bolick's testimony.

Demonstrative evidence is usually admissible if it affords a basis for a reasonable inference on a point in issue provided it meets other relevant tests of admissibility. State v. Wallace, 259 Iowa 765, 771, 145 N.W.2d 615, 619 (1966) (citations omitted).

During Ms. Pearson's direct exam, the State established State's Exhibit A, a long-neck beer bottle, was shaped exactly like the bottle she claimed was used to assault her. During Dr. Bolick's testimony he was asked if that type of bottle could reach the os area (where he had observed redness). He stated it could.

We believe the trial court could have properly admitted the beer bottle as demonstrative evidence. We agree with the State that there is nothing inherently inflammatory about the sight of a beer bottle. We find Maise's trial counsel was not ineffective in failing to object.

E. Psychiatric Evaluation of Victim.

Maise's final assignment of error is that his trial counsel was ineffective in failing to request the court to order a psychiatric evaluation of the victim.

It is well settled that psychiatric examinations of sexual abuse victims are not constitutionally required. U.S. v. Riley, 657 F.2d 1377, 1387 (8th Cir. 1981). Therefore, if district courts have discretionary authority to grant discovery motions requesting psychiatric examinations of sexual abuse victims for the purpose of evaluating the victim's credibility, that authority must be found in the common law or statutes of Iowa. State v. Gabrielson, 464 N.W.2d 434, 436 (Iowa 1990).

In Gabrielson, our supreme court first determined that in Iowa there is no statutory authority permitting psychiatric examination of sexual abuse victims. Id. at 437. It then extensively reviewed the decisions of other jurisdictions and held trial courts in Iowa have no authority to order sexual abuse victims to undergo psychiatric examinations. Id. at 437-38. With that decision as our authority, we hold Maise's trial counsel did not breach a duty by failing to make such a request.

AFFIRMED.