IN THE COURT OF APPEALS OF IOWA

No. 7-154 / 96-806

000567

STATE OF IOWA,
Appellee,

vs.

RANDY ALLEN ANEWEER,
Appellant.

FILED
JUN 26 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch and Jon Fister, Judges.

Defendant appeals the judgment and sentences entered upon his convictions for three counts of second-degree sexual abuse in violation of Iowa Code sections 709.1(3) and 709.3(2) (1995), and one count of possession of a controlled substance in violation of section 124.401(3). **AFFIRMED.**

Alfredo Parrish of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeffrey Harris, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Cady and Vogel, JJ.

VOGEL, J.

On September 27, 1995, a trial information was filed charging defendant, Randy Allen Aneweer, with three counts of second-degree sexual abuse and one count of possession of a controlled substance. He was alleged to have sexually abused his girlfriend's eight-year-old daughter.

Defendant appeals the judgment and sentences entered upon his convictions for three counts of second-degree sexual abuse in violation of Iowa Code sections 709.1(3) and 709.3(2) (1995), and one count of possession of a controlled substance in violation of section 124.401(3). He argues: 1) there was insufficient evidence to support the sexual-abuse convictions; 2) the trial court abused its discretion in excluding all defense and alibi witnesses; 3) the trial court abused its discretion in excluding the defendant's expert witness; 4) it was an abuse of discretion to impose consecutive sentences; and 5) he was denied the effective assistance of trial counsel.

Sufficiency of evidence. Aneweer argues there was insufficient evidence to support his convictions on the three counts of sexual a abuse. We review denials of motion for summary judgment of acquittal based on the alleged insufficiency of evidence on a "substantial evidence" standard. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). We review the evidence in the light most favorable to the State. *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988).

Aneweer contends "the direct evidence in this case is inconsistent, at times impossible and simply does not make sense. It is also in direct contradiction with

itself and with the circumstantial evidence." We disagree. In this case, substantial evidence based on the testimony of witnesses, primarily the young victim, was presented to the jury. Through this testimony the jury was able to determine Aneweer committed the acts of sexual abuse. Generally, it is for the jury to determine the credibility of the witnesses. *See State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). The collective testimony presented constituted substantial evidence upon which a jury could rationally determine Aneweer was guilty beyond a reasonable doubt. We accordingly find there was sufficient evidence to support Aneweer's conviction on three counts of second-degree sexual abuse.

Exclusion of defense witnesses. Aneweer argues the trial court abused its discretion by granting the State's motion to exclude all defense witnesses. We review a trial court's ruling on a motion to exclude witnesses for an abuse of discretion. *State v. Babers*, 514 N.W.2d 79, 82 (Iowa 1994). In this case, we review the rulings of both Judge Bauch (pre-trial) and Judge Fister (trial).

Trial was originally set for November 28, 1995. Upon defendant's request, the trial date was continued five times to April 9, 1996. The victim and her mother were deposed on January 19, 1996. Six days prior to trial, defendant filed lists of twenty-four defense and five alibi witnesses. The State filed a motion to exclude the witnesses. *See* Iowa R. Crim. P. 10(11)(a),(d), 12(4). At a pretrial hearing, Judge Bauch reasoned:

> It is unreasonable and unfair to require the victim and their families to be repeatedly subjected to getting ready for trial and then [five] continuances at the defendant's request to the point where justice becomes a mockery, especially in regard to children in sexual abuse.

Additionally, Judge Bauch stated in his pre-trial Order:

> This case has been continued a minimum of six times all occurring at defendant's requests and spanning approximately seven months. The victim and her mother were deposed on January 19, 1996. This is a straight forward case in which the victim and her mother gave sworn testimony and the Minutes of Testimony are complete. The State did not receive a list of the defense witnesses until April 5th and they incorrectly state addresses, do not have telephones, contain no reference as to what they might be testifying to and the list is exceedingly long and contains references to people who aren't personally identified. The alibi defense notice was first given on April 3, 1996. The Court finds that this is not acceptable and has the effect of delaying trial and destroys the ability to have any certainty in a trial date.

The court then granted the motion to exclude, but ordered that defendant could have until the end of the day to file a basic summary of expected testimony of the listed witnesses, as well as provide the witnesses' correct phone numbers and addresses. Defendant did not timely comply with the order. On the date set for trial, at 8:45 a.m., Aneweer filed Minutes of Testimony. Judge Fister, the trial judge, reviewed the pre-trial Order of Judge Bauch. As Aneweer had failed to comply with the pre-trial Order of Judge Bauch and considering the extreme prejudice to the State, Judge Fister affirmed the pre-trial ruling to exclude Aneweer's witnesses.

As an alternative to excluding the witnesses, the court could have continued the trial for the sixth time. However, we note the Order dated March 13, 1996

granting Aneweer's fifth request for a continuance stated: "Counsel are advised that there shall be no further continuances and this trial must proceed on the date set for trial."

Some of the witnesses Aneweer intended to call were called by the State and Aneweer was given the opportunity to cross-examine them. Further, Aneweer was charged by Trial Information as having committed sexual abuse on "different dates between July 1, 1995 and August 18, 1995 . . . ." It is improbable Aneweer's alibi witnesses could successfully account for all of Aneweer's activities over the continuous and intermittent dates in question spanning one-and-a-half months. No offer of proof was given. As such, we find the testimony of the alibi witnesses would not have effectively refuted the charges, nor would the testimony materially alter the outcome of the case. Notwithstanding the preclusion of the alibi witnesses, we find there is overwhelming evidence in the record of Aneweer's guilt.

The district court similarly acted within its sound discretion when it excluded additional, non-alibi defense witnesses, and also when it excluded Aneweer's expert witness, Dr. Opdebeeck. We agree with the district court's reasons for not allowing Dr. Opdebeeck to testify following an offer of proof: The defense had failed to timely disclose her as a witness, and her testimony would not be helpful to a jury in this case. Dr. Opdebeeck would testify she found no physical evidence of penetration of the victim. The victim had initially stated that Aneweer was "in" her. Later, after learning the concept of "in and on her private parts," the victim said Aneweer was

000572

"on" her. The State did not introduce, nor put on any evidence, medical or otherwise, Aneweer "penetrated" the victim. For Aneweer to argue Dr. Opdebeeck's testimony was necessary to test the credibility of the victim would be to allow a fact not at issue to be the focus of impeachment.

Accordingly, we find the trial court acted well within its discretion both in the pre-trial and trial court's rulings to exclude the witnesses.

Sentencing. The court sentenced Aneweer to twenty-five year sentences on Counts I and II to be served concurrently, a twenty-five year sentence on Count III to run consecutively with the sentences on Counts I and II, and a one-year sentence on the possession charge which was to run concurrently with Counts I and II. Aneweer contends the court abused its discretion in imposing consecutive sentences. We will only disturb a sentence upon a showing that the trial court abused its discretion. *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). Aneweer must show that such discretion was "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* We find Aneweer has failed to make a showing in this regard.

The district court within its fair discretion considered all the appropriate factors in determining Aneweer's sentence. Moreover, Aneweer's waiver of consideration of the pre-sentence investigation report (PSI) at sentencing waives hi present objection that the court did not address his "individual" considerations sentencing him. *See State v. Thompson*, 494 N.W.2d 239, 241 (Iowa App. 1

(holding defendant who knowingly and voluntarily waived use of PSI could not subsequently complain of any alleged error).

Aneweer also objects to the sentencing court's references to his appeal and the possibility of parole. We note it was Aneweer and his counsel who raised these matters at sentencing and the court was merely responding to their statements.

We accordingly find the court did not abuse its discretion on this issue.

Ineffective assistance of counsel. Aneweer asserts he was denied the effective assistance of trial counsel because his counsel failed to: voir dire two of the State's witnesses; properly impeach the victim with her videotaped interview; and file timely notices of defense and alibi witnesses. Finally, defendant argues the cumulative effect of his trial counsel's errors constitutes the ineffective assistance of counsel and deprived him of a fair and impartial trial.

In reviewing claims of ineffective assistance of counsel, we review de novo the totality of the relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden of proof rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Generally, however, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). When the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*,

356 N.W.2d 237, 238 (Iowa App. 1984). We conclude there is an inadequate record for us to adjudicate Aneweer's claim without counsel's explanation for his conduct. We therefore preserve Aneweer's ineffective assistance of counsel claim for a later proceeding.

Having carefully considered all the foregoing arguments on appeal, we affirm the district court and uphold Aneweer's conviction and sentence; we preserve Aneweer's ineffective assistance of counsel claim for later proceedings.

AFFIRMED.