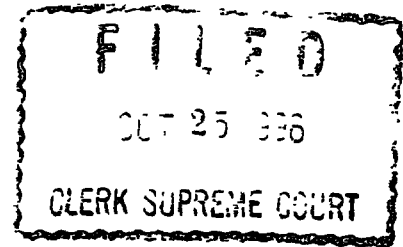


IN THE COURT OF APPEALS OF IOWA

No. 6-439 / 95-0719



STATE OF IOWA,
Appellee,

vs.

LIONEL SCOTT JOHNSON a/k/a JONATHAN JOHNSON,
Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Defendant appeals from judgment and sentence, following jury trial, entered upon his conviction of third-degree sexual abuse, in violation of Iowa Code section 709.4(1) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Denver D. Dillard, County Attorney, and Todd T. Tripp, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Streit, JJ.

HUITINK, J.

Defendant Lionel Scott Johnson, a/k/a/ Jonathan Johnson, appeals from his conviction and sentence for third degree Sexual Abuse in violation of Iowa Code section 709.4(1). We affirm.

Johnson was convicted, following a jury trial, based on the following evidence:

On May 12, 1994, a nineteen-year old woman, D.B., encountered a man in a Hy-Vee parking lot in Cedar Rapids, Iowa. The man forced his way into her car and told her that he had a gun. He directed D.B. into an alley where he sexually assaulted her several times. After the assault, the man demanded her name and phone number. D.B. complied by writing her name and a false telephone number on a piece of scrap paper. D.B. dropped the man off at a place he designated and drove to a friend's house. D.B.'s friend took her to the hospital and summoned police officers.

D.B. gave police a description of her assailant and told them where she dropped him off. At the place she indicated, police found a man later identified as Johnson fitting the description of D.B.'s assailant. Johnson was brought to the hospital to determine if D.B. could identify him as the man who sexually assaulted her. Accompanied by officers, Johnson stood in the hallway in front of a bulletin board across from the room where D.B. was being treated. She viewed Johnson through the window and immediately identified him as her assailant. A piece of paper with D.B.'s first name and a phone number was found in Johnson's pocket.

Johnson, proceeding pro se with his court appointed attorney acting as co-counsel, moved to suppress D.B.'s pretrial identification of him as her assailant. Johnson argued the "show-up" procedure used in this case was unduly suggestive and inherently unreliable. He cited the fact that he was the only African-American suspect shown to D.B., and that he was required to stand next to two police officers during the "show-up" as evidence supporting his contention. The district court denied Johnson's motion to suppress finding no inherent unreliability in the "show-up" procedure.

The State offered Johnson blood and DNA testing prior to trial. Johnson declined this offer and proceeded to trial. At trial, Johnson and his court-appointed counsel argued D.B. was not a credible witness. They also cited the absence of any scientific or medical evidence identifying Johnson as the person who sexually abused D.B. The jury found Johnson guilty of the lesser-included offense of third degree sexual abuse.

On appeal, Johnson contends the district court erred in failing to suppress D.B.'s pretrial identification. He also contends his conviction lacks sufficient evidentiary support, and his court appointed co-counsel was ineffective.

I. Identification of Defendant.

Johnson's challenge to the "show-up" procedure used in this case implicates his constitutional right to due process under the fifth and fourteenth amendments. Our review of these constitutional issues is de novo. *State v. Riley*, 501 N.W.2d 487, 488

(Iowa 1993); *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993). We consider the entire record including evidence presented at the suppression hearing as well as evidence presented at the trial. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995).

An unreliable witness identification is not admissible. *State v. Bruns*, 304 N.W.2d 217, 219 (Iowa 1981) (citing *Manson v. Braithwaite*, 432 U.S. 98, 112, 97 S.Ct. 2243, 2252, 53 L.Ed. 2d 140, 152 (1977)). An identification is unreliable if it results from an impermissibly suggestive out-of-court procedure and the totality of the circumstances indicates the procedure “gave rise to a very substantial likelihood of irreparable misidentification.” *State v. Holderness*, 301 N.W.2d 733, 738 (Iowa 1981).

Factors relevant to the evaluation of the reliability of the identification include:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness’ degree of attention, [3] the accuracy of the witness’ prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

Holderness, 301 N.W.2d at 738 (citations omitted); *see also State v. Moore*, 469 N.W.2d 269, 273 (Iowa App. 1991).

In this case, D.B. was subjected to repeated acts of forced oral sex and sexual intercourse. Given the nature of the assault, the degree of her attention was presumably sufficient to accurately identify her assailant. D.B.’s physical description of her assailant was remarkably accurate and detailed. In fact, one witness observed it was “almost as if she had dressed him for the day.” The certainty of her identification was

evidenced by her immediate indication that Johnson was the man who abused her and her emotional reaction noted by her treating physician. Finally, the identification occurred within four hours of the time D.B. was abused. All of these factors underscore the reliability of D.B.'s identification. We find based on these circumstances that there was no likelihood D.B. misidentified Johnson as her assailant. Because we have found the pretrial identification at issue was reliable, we need not decide whether the "show-up" procedure in this case was unduly suggestive. *See Holderness*, 301 N.W.2d at 738.

Johnson also claims that the trial court's consideration of the minutes of testimony instead of hearing D.B.'s testimony at the suppression hearing violated his constitutional right to confront and cross-examine the witnesses. He cites no legal authority supporting this position and accordingly we reject the argument. *See Iowa R. App. P. 14(a)(3)*. He also asserts that the minutes of testimony alone do not support a finding of reliability. However, in considering the trial court's denial of the motion, we review not only the evidence presented at the suppression hearing but also the evidence presented at trial. *State v. Cook*, 530 N.W.2d at 731. We, therefore, reject this argument as well.

II. Sufficiency of the Evidence.

Johnson also asserts there is insufficient evidence to support his conviction. We review claims of insufficient evidence for errors at law. *Iowa R. App. P. 4*. A verdict of guilty is binding on appeal unless there is no substantial evidence in the record to

support it, or it is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id.* In determining the sufficiency of evidence, we view the record in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). All evidence is considered, not simply the evidence supporting the verdict. *Id.*

Johnson alleges the evidence was insufficient to positively identify him as D.B.'s assailant and he also generally attacks D.B.'s credibility. We find these arguments to be without merit. We have already concluded that D.B.'s identification of Johnson as her assailant was reliable. Johnson challenges D.B.'s credibility because she denied using marijuana despite a positive urine test for the drug that was obtained the night of the assault. He also suggests that D.B.'s friendships with other African-American males calls her integrity into question. We find that the jury was free to resolve any conflicts in the evidence regarding D.B.'s credibility and reject Johnson's assertions. *State v. Allen*, 348 N.W.2d 243, 247 (Iowa 1984). The jury was also free to reject the alibi defense presented by Johnson. We have reviewed the record and find sufficient evidence supports Johnson's conviction. We also affirm on this issue.

III. Ineffective Assistance of Counsel.

Johnson argues that his co-counsel was ineffective for failing to request blood type or DNA testing of the semen sample taken from D.B. He claims that the tests

could have provided exculpatory evidence and therefore his attorney's decision not to secure the testing resulted in prejudice.

Our ultimate concern in claims of ineffective assistance of counsel is with the "fundamental fairness of the proceeding whose result is being challenged." *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove counsel failed to perform an essential duty and the failure prejudiced the defendant. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). The defendant has the burden to prove both of these elements by a preponderance of the evidence. *Id.*; *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow counsel an opportunity to respond. *See State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We will, however, depart from this preference because the record in this case is sufficient to dispose of Johnson's claim. *See State v. Schoelerman*, 315 N.W.2d 192, 195 (Iowa 1982).

Based on our de novo review of the record, we find Johnson has not established that his attorney breached any essential duty. Johnson, in conjunction with his standby

counsel, declined to obtain the testing when the State offered because of the delay it would create. However, Johnson complains that he was not informed that unlike the DNA testing, the blood type testing could be processed quickly. We are not persuaded by Johnson's assertion that he declined the testing under a mistaken belief about delays in obtaining the results. Johnson acting pro se elected not to obtain the tests when offered, and he cannot now claim that the decision amounted to a failure on behalf of his co-counsel to perform an essential duty. In fact, the record indicates that Johnson relied on the absence of DNA or blood evidence as part of his defense strategy. To the extent that co-counsel was responsible for this decision, we find it was consistent with a reasonable trial strategy. *See State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995).

Furthermore, counsel has no duty to pursue every avenue that may lead to exculpatory evidence. *Heaton v. State*, 420 N.W.2d 429, 431 (Iowa 1988). We will not grant the requested relief based on the mere speculation that test results may have been exculpatory. *State v. Douglas*, 485 N.W.2d 619, 625 (Iowa 1992); *see also Thompson v. State*, 492 N.W.2d 410, 413 (Iowa 1992). Accordingly, we reject Johnson's claim and affirm the conviction.

AFFIRMED.