IN THE COURT OF APPEALS OF IOWA

No. 16-0887
Filed November 22, 2017

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROGER CRAIG KISSEL,
Defendant-Appellant.

Appeal from the Iowa District Court for Fremont County, Susan L. Christensen, Judge.

A defendant appeals his convictions for second-degree sexual abuse and lascivious acts with a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney General, for appellee.

Considered by Danilson, C.J., Tabor, J., and Scott, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

SCOTT, Senior Judge.

Following a jury trial, Roger Kissel appeals his convictions for one count of sexual abuse in the second degree and two counts of lascivious acts with a child. *See* Iowa Code §§ 709.1(3), 709.3(1)(b), 709.8(1), 709.8(2)(a) (2013). He claims his convictions are not supported by sufficient evidence because the child's and the mother's testimony are inconsistent. He asserts his Sixth Amendment right to confrontation was violated when the court permitted the State to introduce the video of the child's forensic interview, and he claims his counsel provided ineffective assistance by failing to request a limiting instruction related to that video. Finally, he claims his counsel was ineffective in failing to object to the court giving the jury an instruction regarding the use of his out-of-court statements that violated his right against self-incrimination.

I. Background Facts and Proceedings.

The child and her parents moved into the house Kissel shared with his wife in May 2013, just before child turned five years old. Kissel is the stepfather to the child's stepdad, and the child referred to Kissel as her grandpa. In early July 2013, the child told her mother that Kissel touched her private parts. The child also told the same thing to the mother's friend the next day. After that time, the mother took steps to ensure the child was never left alone with Kissel, and the child reported the touching stopped after she told her mother.

The mother, stepfather, and child moved out of Kissel's home in September 2013. Shortly after, the mother reported the child's statements to law enforcement. The child was taken to Project Harmony and was interviewed by one of the facility's forensic interviewers. The child disclosed during the interview that Kissel would

lick her "private parts" and that she licked his "private." She also described spanking Kissel with a wooden spoon with his pants down and Kissel spanking her.

Charges were filed against Kissel, and the matter proceeded to trial in March 2016. Both the child and the child's mother testified, as did the Project Harmony interviewer, the medical examiner, the investigating officer, and the mother's friend who heard the child disclose the abuse. The jury was also shown the video of the child's interview at Project Harmony. In his defense, Kissel and his wife testified, along with a family friend. The jury found Kissel guilty as charged. On the sexual-abuse conviction, the court sentenced Kissel to twenty-five years in prison, with a seventy-percent mandatory minimum, and on each lascivious-act conviction, Kissel was sentenced to ten years in prison. The sentences were ordered to run concurrently. Kissel now appeals his convictions.

II. Sufficiency of the Evidence.

Kissel asserts the child's testimony offered against him is "riddled with inconsistencies." In addition, he asserts the mother's actions "severely undercut" her testimony that she believed the child had been sexually abused. He notes the mother remained in the home with the child for another two months after the child disclosed the abuse to her before the mother reported the abuse to police, and he claims the mother took no steps to protect the child from contact with him.

Kissel's challenge to the sufficiency of the evidence is reviewed for the correction of errors at law. *See State v. Huser*, 894 N.W.2d 472, 490 (Iowa 2017). In evaluating the claim on appeal,

> [w]e consider the evidence in the record "in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence." We will, however, consider all evidence in the record, including evidence that does not support the verdict. Evidence raising only "suspicion, speculation, or conjecture is not substantial."

Id. (citations omitted).

The State asserts Kissel failed to preserve error on this claim at trial because his motion for judgment of acquittal was generalized and did not identify the deficiencies that he now challenges on appeal. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) ("To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal."). We agree; however, Kissel alternatively requests we analyze this claim on the basis of ineffective assistance of counsel. *See id*. at 616 ("A claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal."). We therefore proceed to review this claim through the ineffective-assistance lens. *See State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011) (noting a sufficiency challenge made through an ineffective-assistance-of-counsel claim is reviewed de novo).

Upon our review of the record, we conclude sufficient evidence supports the convictions. The child's testimony in this case is far from the testimony this court found to be insufficient in *State v. Smith*, 508 N.W.2d 101, 105 (Iowa Ct. App. 1993). There, we found the children's testimony was "self-contradictory," was "almost completely devoid of any experiential detail," and described scenes "that

border on the surreal." *Smith*, 508 N.W.2d at 104. In this case, the minor inconsistencies Kissel points out between the child's deposition testimony and her trial testimony pale in comparison to her consistent testimony regarding the fundamental facts of the abuse she endured. The child was consistent every time she discussed the abuse regarding the location in the house, the description of Kissel, and the acts committed. We thus leave the credibility determination to the jury, where it belongs. *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997) (noting the jury is to determine credibility unless the testimony of a witness is so "impossible, absurd, and self-contradictory that the court should deem it a nullity").

In addition, the evidence does not support Kissel's argument on appeal that the mother "took no precautions to protect" the child after the disclosure of the abuse. The mother testified she could not move out of Kissel home at the time she became aware of the abuse because she had nowhere else to live, but she stated she took steps to ensure the child was never left alone in the house with Kissel. The child confirmed that the abuse stopped once she disclosed it to her mother.

Kissel's claim that counsel was ineffective in failing to make an adequate motion for judgment of acquittal is denied. The evidence is clearly sufficient to sustain the conviction; therefore, counsel was not ineffective for "failing to pursue a meritless issue." *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999).

III. Forensic Interview Video.

Next, Kissel raises two claims related to the child's forensic interview video that was played for the jury at trial. He claims his constitutional confrontation right was violated because the video was testimonial and he had an inability to

effectively cross-examine the child. He also claims the video was cumulative and highly prejudicial because it unduly emphasized the child's testimony. In addition, Kissel asserts his counsel was ineffective in failing to request a limiting jury instruction regarding the "accusatory questions" the interviewer asked of the child. He asserts the questions were hearsay and, without a limiting instruction, the jury was able to consider the questions for the truth of the matter asserted. Because both of Kissel's claims here allege a constitutional violation, our review is de novo. *See State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012) ("'[W]e make an independent evaluation [based on] the totality of the circumstances as shown by the entire record.' 'Each case must be evaluated in light of its unique circumstances.'" (alterations in original) (citations omitted)).

A. Sixth Amendment. "[T]he general rule is that 'when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.'" *State v. Tompkins*, 859 N.W.2d 631, 640 (Iowa 2015) (citation omitted).

In this case, both the child and the forensic interviewer were present for trial, testified, and were cross-examined by Kissel's counsel. During the cross-examination of the child, Kissel pointed out the inconsistencies between the child's forensic interview, her deposition, and her trial testimony. The child indicated that her testimony in certain respects changed from her deposition to the trial testimony because she had recently watched her forensic interview, which helped her remember things. In addition, Kissel's counsel pointed out during cross-examination that the child's answers to the State's questions came quickly but the child was slow to answer his questions. In response, the child indicated that she

had discussed the State's questions with the prosecutor "a lot" and knew what her answers were supposed to be. Defense counsel also asked whether the child had been told to answer "I don't know" to his questions.

During the testimony of the forensic interviewer, the State offered the video of the child's interview into evidence under Iowa Rule of Evidence 5.801(d)(1)(B), as a prior consistent statement of a witness offered to rebut an express or implied charged of recent fabrication or improper influence or motive. Kissel does not challenge the basis on which the State was permitted to admit the video into evidence. However, he claims his confrontation rights were violated. We disagree. "[W]here the witness takes the stand and is available for cross-examination, the Confrontation Clause places no constraints on the use of the witness's prior testimonial hearsay statement." *Tompkins*, 859 N.W.2d at 640. While he makes a general claim that he was not able to cross-examine the child or the interviewer effectively, "[t]he Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.*

Kissel also appears to claim we should interpret the Iowa Constitution differently from the U.S. Constitution on this issue and asserts the admission of the video was cumulative and prejudicial; however, these claims are not preserved for our review, and we see no reason to depart from precedent. We conclude Kissel's rights under the Confrontation Clause were not violated in light of the facts both the child and interviewer testified at trial and Kissel was able to cross-examine them.

B. Limiting Instruction. Kissel also claims counsel was ineffective in failing to request a limiting instruction be given regarding how the jury was to consider the statements the forensic interviewer made in the video. To prove counsel was ineffective, Kissel must show counsel failed to perform an essential duty and he suffered prejudice as a result. *See State v. Clay*, 824 N.W.2d 488, 495 (Iowa 2012). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Id*. (citations omitted). Normally, ineffective-assistance claims are preserved for possible postconviction-relief proceedings, but we will address them on direct appeal where the record is adequate to resolve the claim. *Id*. at 494.

In this case, we conclude the record is adequate to address this claim and Kissel has failed to prove he suffered prejudice. *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) ("[I]f the claim lacks the necessary prejudice, we can decide the case on the prejudice prong of the test without deciding whether the attorney performed deficiently."). To prove prejudice, Kissel must show "a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Clay*, 824 N.W.2d at 496 (citations omitted).

Kissel asserts counsel should have requested a limiting instruction that stated, "Statements and questions by Child Protection Center employees during interviews with T.S. are not evidence to be considered for their truth." The forensic interviewer's questions that Kissel complains about include, "What did Rodger do?"; "Who's idea is it?"; "Did any of Roger's clothes come down or come off when

he was touching you?"; Did Roger ever do anything . . . to your private with his fingers?"; and "Has he touched you since you've been in your new house?"

The interviewer's questions were open-ended or simple yes/no questions that followed up on disclosures the child had already made, and the child readily and appropriately answered the questions, including telling the interviewer "no" on multiple occasions. The questions did not suggest the interviewer had information not admitted into evidence that would suggest Kissel was guilty, nor were the questions "inflammatory" as Kissel asserts in his brief. *But see State v. Esse*, No. 03-1739, 2005 WL 2367779, at *4 (Iowa Ct. App. Sept. 28, 2005) (noting a limiting instruction regarding the law enforcement interview questions should have been given because the law enforcement agents asserted defendant was lying, said they knew the defendant was involved, and stated they had substantial evidence of his involvement). Because we cannot conclude there is a reasonable probability the result of the proceeding would have been different if the limiting instruction had been given, Kissel cannot prove his counsel rendered ineffective assistance.

IV. Self-Incrimination.

Finally, Kissel asserts his counsel was ineffective in failing to object to a jury instruction stating: "Evidence has been offered to show that the defendant made statements at an earlier time and place. If you find any of the statements were made, then you may consider them as part of the evidence, just as if they had been made at this trial." Kissel claims this is a misstatement of the law and a flagrant violation of his right against self-incrimination. While he concedes the statements he made to law enforcement are admissible under Iowa Rule of Evidence 5.801(d)(2)(A), he contends the instruction improperly allowed the jury to engage

in a legal fiction that he made the statements in court under oath. He contends his right against compelled self-incrimination has been violated and he should be given a new trial without the offending instruction.

As stated above, our review of his ineffective-assistance claim is de novo, and Kissel must prove both that counsel failed to perform an essential duty and that failure resulted in prejudice. *See Clay*, 824 N.W.2d at 494–95. While Kissel does not specify the out-of-court statements at issue, we assume he is referring to his admission to law enforcement that there were times he was at home alone with the child during the summer. This admission contradicted his defense counsel's efforts during trial to show the schedule of the adults in the house resulted in Kissel never being in the house alone with the child during the month of June.

Upon our review of the record in this case, we conclude that even assuming counsel breached an essential duty in failing to object to the instruction at issue, there is no reasonable probability the outcome of the case would have been different. Kissel concedes the statement he made to the officers was admissible evidence, and it is not reasonable to believe the result of the trial would have been different if the court had eliminated the instruction telling the jury it may consider the statement as if it had been made at trial. Because Kissel cannot prove he was prejudiced by the inclusion of this jury instruction, we deny this claim of ineffective assistance of counsel.

V. Conclusion.

We affirm Kissel's convictions because we conclude his convictions are supported by substantial evidence, his Sixth Amendment right to confrontation was not violated, and his counsel did not provide ineffective assistance by failing to

request a limiting instruction regarding the use of the forensic interview or by failing to object to the court's instruction regarding the use of his out-of-court admissions.

AFFIRMED.