IN THE COURT OF APPEALS OF IOWA

No. 0-742 / 10-0284
Filed November 10, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARC ALLEN MOHR,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, David H. Sivright Jr., Judge.

Marc Allen Mohr appeals his convictions and sentence for second-degree burglary and assault with intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Matthew Remissong, Student Legal Intern, Mike Wolf, County Attorney, and Ross Barlow, Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Marc Mohr appeals his convictions and sentence following a jury verdict finding him guilty of second-degree burglary and assault with intent to commit sexual abuse. *See* Iowa Code §§ 709.11, 713.1, 713.5 (2009). Mohr challenges the sufficiency of the evidence and also alleges the trial court improperly considered parole as a factor in sentencing. For the reasons discussed herein, we affirm his convictions and sentence.

I. Background Facts and Proceedings.

The trial revealed the following facts: On September 7, 2009, M.M., a fourteen-year-old girl, was staying at her grandmother's apartment in Clinton. Around 10:30 a.m., M.M.'s grandmother, two younger cousins, and younger sister left the apartment to go shopping at the Salvation Army. Because M.M. had stayed up late watching movies the night before and was still tired, she remained behind and slept on a futon in the living room at the front of the apartment.

M.M. was later awakened by the sound of her grandmother's voice outside the apartment building as she returned from shopping with the younger children. When M.M. opened her eyes, she saw Mohr running away from her toward the back door of the apartment. Mohr's pants were down, and M.M. could hear the sound of a belt buckle as Mohr attempted to pull up his pants while fleeing. M.M. heard the back door slam followed by footsteps up the apartment building stairs. After Mohr had left, M.M. realized her tank top had been cut in three places: One cut was to the strap over her shoulder, one near the armpit down the side, and one over the sternum. The cuts resulted in the exposure of one of her breasts.

M.M. immediately felt violated and scared. When her grandmother entered the apartment shortly thereafter, she found M.M. crying and in a state of shock. The grandmother called the police.

Based on information provided by M.M., the police sought out Mohr, who lived in an upstairs apartment in the same building. He was found in his apartment by the police. When asked if he had a pair of scissors, Mohr pointed out a pair of scissors located on top of a desk directly inside his front door. The officers also observed, on an end table in Mohr's living room, pornographic material featuring women with large breasts. Mohr was then asked to step outside the apartment building for additional questioning.

During this questioning, Mohr initially denied being in the grandmother's apartment, but eventually admitted he had entered the apartment and found M.M. alone. Mohr then stated he was only in the apartment for a second, but later admitted it could have actually been a minute or two. Mohr also initially denied having his pants down while in the apartment, but later stated, "They must have fell down. My belt must have come undone." Mohr repeatedly denied making any cuts to M.M.'s top, but did admit he stood over her while she slept on the futon. Mohr also admitted he was not wearing any underwear, but denied ever having an erection.

The grandmother added further details. She stated that the lock on the front door to her apartment did not work, and that she had mentioned this to Mohr prior to September 7 when they were both outside the apartment building smoking cigarettes. The grandmother also stated that Mohr saw her leave the apartment building that morning when she took the other children shopping.

The grandmother had allowed Mohr to watch TV in her apartment before, but never while she was not at home or while her grandchildren were around. Mohr did not have her permission to be in the apartment on September 7.

On September 18, 2009, the State charged Mohr by trial information with burglary in the first degree under the possession of a dangerous weapon alternative, and with assault with intent to commit sexual abuse. The case went to trial on December 14, 2009.

At the close of the State's evidence, Mohr moved for a directed verdict of acquittal. Mohr initially argued the scissors were not a dangerous weapon as required for first-degree burglary. The court reserved ruling on that argument. Mohr then challenged the evidence of intent to commit a sex act. The court overruled that challenge.

Mohr did not take the stand or present any additional evidence. The jury returned verdicts finding Mohr guilty of second-degree burglary (as a lesser-included offense of first-degree burglary) and assault with intent to commit sexual abuse.

On January 21, 2009, the district court entered judgment on the guilty verdicts and sentenced Mohr to a term of incarceration not to exceed ten years for second-degree burglary, *see* Iowa Code §§ 713.5, 902.9(4), and a term not to exceed two years for the assault with intent to commit sexual abuse. *See id*. §§ 709.11, 903.1(2). The sentences were ordered to run concurrently. Mohr was also given a special sentence under Iowa Code section 903B.2 and was advised of his obligation to register as a sex offender. In addressing Mohr's request for a suspended sentence, the court stated as follows:

> The application to suspend these sentences is denied. I thought long and hard about this for reasons stated by [defense counsel regarding Mohr's minor criminal history and mental health status]. But considering the nature of the offenses, the need of—Mr. Mohr's need for rehabilitation, his potential, I think, would be best for him to receive treatment in the structured environment and the programming available at the Department of Corrections. And I have faith once he completes that programming, he will be paroled.
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> If I thought for one minute he would have to serve a ten-year sentence, I would probably send him on the assault charge and suspend the burglary sentence, but I'm not going to do that.
>
> I think that I will leave it to the discretion of the Department of Corrections to work with him on the counseling and treatment that he needs, and when he's completed that to their satisfaction, I'm sure he will be paroled.
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> But to make sure that he has sufficient time to complete that programming, given the limited resources available to the Department of Corrections, I find that neither sentence should be suspended.
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> . . . .
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> The Iowa Medical and Classification Center at Oakdale is the reception center to which he will be delivered by the Clinton County Sheriff's Department.
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> And as I have said, I have carefully considered his record of convictions, the nature of the offense, the harm to the victim, his need for rehabilitation, and his potential for that, and also the need to protect the community from further offenses by him.

Mohr appeals both his convictions and his sentence. He argues: (1) there was insufficient evidence he assaulted or intended to assault M.M.; (2) there was insufficient evidence he intended to commit a sex act on M.M.; and (3) the district court, when sentencing him, improperly considered the likelihood of his receiving parole.

II. Sufficiency of Evidence of Assault and Intent to Commit Assault.

We review claims of insufficient evidence for correction of errors at law. *State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006). Jury findings of guilt are binding on appeal if supported by substantial evidence. *Id*. Substantial evidence is evidence that could convince a rational trier of fact that a defendant

is guilty beyond a reasonable doubt. *Id*. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *Id*.

Mohr contends there was insufficient evidence he committed an assault or intended to commit an assault, as required for both convictions. The State responds that Mohr failed to preserve error on these points, and we agree. Mohr's argument below was that the scissors could not be considered a dangerous weapon. That argument became moot when the jury failed to convict him of first-degree burglary. At no point during the colloquy with the district court did Mohr ask for a judgment of acquittal because the elements of an assault or intent to commit an assault were absent. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) ("[T]he motion for judgment of acquittal did not make reference to the specific elements of the crime on which the evidence was claimed to be insufficient, it did not preserve the sufficiency of the evidence for review.").

Mohr argues we should still address this claim under the rubric of ineffective assistance of counsel. "Generally we preserve ineffective-assistance-of-counsel claims for postconviction relief; however, we will address these claims on direct appeal if the record is sufficient." *State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010). Here we find the record adequate to address Mohr's claim.

To establish a claim of ineffective assistance of counsel, Mohr must show by a preponderance of the evidence that his trial counsel breached an essential duty and prejudice resulted. *Id*. "Counsel has no duty to raise an issue that has no merit." *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). Therefore, we

must first determine whether the record demonstrates the existence or absence of a meritorious claim or error. *Id*.

An assault includes any act "intended to result in physical contact which will be insulting or offensive to another." Iowa Code § 708.1(1). The evidence reveals that Mohr cut M.M.'s top with scissors in three places in order to expose her breast while she slept. The cutting of someone else's shirt constitutes physical contact sufficient to be an assault. *See* Restatement (Second) of Torts § 18 cmt. c (1965) ("Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person."). Moreover, cutting M.M.'s clothing to expose her breast was clearly offensive. M.M. testified that she felt "scared" and "violated" when she discovered her shirt had been cut open.

Mohr also challenges the sufficiency of the evidence that he intended the act to result in physical contact that would be insulting or offensive. Under Iowa law, the defendant must intend "to achieve the additional consequence of causing the victim pain, injury or offensive physical contact." *Fountain*, 786 N.W.2d at 265. Yet, "an actor will ordinarily be viewed as intending the natural and probable consequences that usually follow from his or her voluntary act." *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004). Here, Mohr committed the voluntary, and clearly offensive, act of cutting M.M.'s top with scissors in order to expose her breast. It requires no great leap to conclude he intended the act to be offensive, which indeed it was to M.M. once she awoke. *See State v. Keeton*, 710 N.W.2d 531, 535 (Iowa 2006) ("While [the victim's] testimony is not

dispositive, these perceptions are properly considered in determining intent."). Accordingly, we find Mohr's counsel had no duty to raise the absence of evidence on the elements of assault and intent to commit assault, because this would not have been a meritorious defense.

III. Assault with Intent to Commit Sexual Abuse.

Mohr also contends the evidence was insufficient, on the second count, to establish he intended to commit sexual abuse. This claim was properly preserved for our review.

Mohr asserts the exposure of M.M.'s breast was not a sex act, as is required for sexual abuse. *See* Iowa Code § 709.1. He maintains that the circumstances surrounding the exposure of M.M.'s breast only reveal "a voyeuristic cupidity for female breasts." Mohr argues that, at most, the record allows an inference he intended to masturbate while looking at M.M.'s breasts.

We agree the exposure of M.M.'s breast in and of itself was not sufficient to constitute a sex act. *See* Iowa Code § 702.17 (defining sex act); *see also State v. Baldwin*, 291 N.W.2d 337, 339-40 (Iowa 1980) (holding human breast not included in statutory definition of sex act). Nonetheless, the circumstantial evidence and reasonable inferences in this case allowed the jury to find Mohr's intentions went beyond voyeurism. A jury could have found Mohr intended to engage in some form of sex act with M.M., but was interrupted by the grandmother's return. A jury could have found it unlikely for Mohr to have believed he would be able to simply *watch* M.M. while she continued to sleep, and that Mohr really planned to engage in sexual activity with her. According to M.M., Mohr was standing with his pants down when she awoke. According to the

police, Mohr also admitted being "right up next to [M.M.] on the couch area, standing over her." Mohr's argument that he intended only voyeurism was a proper jury argument, but the jury was entitled to weigh the evidence and reject it. *See State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (stating the function of the jury is to weigh the evidence and place credibility where it belongs, and that a jury is free to accept or reject any evidence as it chooses).

> Intent is a state of mind difficult of proof by direct evidence. It may, however, be established by circumstantial evidence and by inferences reasonably to be drawn from the conduct of the defendant and from all the attendant circumstances in the light of human behavior and experience.

State v. Casady, 491 N.W.2d 782, 787 (Iowa 1992) (quoting *State v. Erving*, 346 N.W.2d 833, 836 (Iowa 1984)). For the foregoing reasons, we affirm Mohr's convictions for second-degree burglary and assault with intent to commit sexual abuse.

IV. Sentencing.

Our review of claimed sentencing errors is for correction of errors at law. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as the trial court's consideration of impermissible factors." *Id*.

Under Iowa's correctional scheme, the parole board is vested with the exclusive authority to determine the minimum term of a defendant's incarceration. *State v. Remmers*, 259 N.W.2d 779, 785 (Iowa 1977). "The judicial sentencing decision is not an appropriate means for attempting to circumvent this principle." *Id*.

In this case, the district court sentenced Mohr to a term of imprisonment not to exceed ten years on the burglary charge, and a term of imprisonment not to exceed two years on the assault with intent to commit sexual abuse charge. The court explained:

> Mr. Mohr's need for rehabilitation, his potential, I think, would be best for him to receive treatment in the structured environment and the programming available at the Department of Corrections. And I have faith once he completes that programming, he will be paroled.

The court added, "If I thought for one minute he would have to serve a ten-year sentence, I would probably send him on the assault charge and suspend the burglary sentence, but I'm not going to do that." The court then said, "I will leave it *to the discretion of the Department of Corrections* to work with him on the counseling and treatment that he needs, and when he's completed that *to their satisfaction*, I'm sure he will be paroled." (Emphasis added.)

We see this case as distinguishable from both *Remmers* and *State v. Thomas*, 520 N.W.2d 311 (Iowa Ct. App. 1994), cited by Mohr. In both of those cases, the appellate court held it was improper for the district court to formulate a particular sentence to avoid an early release under the parole system. *Remmers*, 259 N.W.2d at 785; *Thomas*, 520 N.W.2d at 314. That is not what happened here. The court did not try to "circumvent" the parole system by selecting a sentence that would deprive the parole board of discretion it would otherwise have. *Remmers*, 259 N.W.2d at 785; *Thomas*, 520 N.W.2d at 313. Instead, it simply recognized the reality that Iowa has a parole system and entrusted Mohr's fate to the discretion of that board.

In short, we do not read the precedents as invalidating any sentence where the district court refers to the possible effects of parole on the time the defendant will actually serve. That would be an odd rule of law, because a conscientious judge undoubtedly *thinks* about those matters. The district court, when it sentenced Mohr, concluded it would be "best for him to receive treatment in the structured environment and the programming available at the Department of Corrections," and that a ten-year sentence on the burglary charge would achieve that objective while also enabling Mohr to be paroled when he demonstrated he had completed the necessary counseling and treatment to the department's satisfaction. That was a proper sentence. *See State v. Vanover*, 559 N.W.2d 618, 635 (Iowa 1997) (holding a district court's statement comparing the amount of time the defendant would likely serve, given parole considerations, under the defendant's sentencing proposal to the amount of time he would serve under the sentence imposed by the court did not "interfere with [the defendant's] parole eligibility").

AFFIRMED.