IN THE COURT OF APPEALS OF IOWA

No. 2-288 / 11-0355
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MATTHEW LOUIS BANKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Sean W. McPartland, Judge.

Matthew Banker appeals from his convictions of sexual abuse and assault. **AFFIRMED.**

Kent Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

Matthew Banker appeals from his convictions of sexual abuse and assault. He contends the evidence was insufficient to convict and his attorney was ineffective in failing to urge severing the counts for trial and failing to request a jury instruction on propensity evidence. We affirm.

I. Background Facts and Proceedings.

One Saturday night in October 2009, Banker and his roommate, Andrew, attended a party at the house of a neighbor, Collins. They arrived around 2:30 to 3:00 in the morning, after leaving a downtown bar. Collins's girlfriend, Nikki, and one of her coworkers, Ashley, also attended the party. Both women spent the night at Collins's house—Nikki in Collins's bedroom with Collins, Ashley on a couch in the living room with her friend, Jennifer. Nikki and Ashley each awoke during the night when they sensed someone touching them.

When Nikki awoke Sunday morning, she found a cell phone lying open on the floor next to the bed. She took the phone with her to work and called the number for "Mom" to determine whose phone it was. She learned it was Banker's phone. On Monday evening Nikki went to the police station to report what had happened to her. She gave the phone to the police.

When Ashley awoke on Sunday morning, she and Jennifer drove home. A few days later she learned Nikki had reported a sexual assault. Ashley then went to the police station and reported what had happened to her.

In December 2009 Banker was charged by trial information with sexual abuse in the third degree and assault with intent to commit sexual abuse. Following a jury trial in November 2010, Banker was found guilty of sexual abuse

in the third degree concerning Nikki and assault, a lesser-included offense of assault with intent to commit sexual abuse, concerning Ashley.

Banker filed a motion for new trial and a motion in arrest of judgment, in part challenging the sufficiency of the evidence of sexual abuse. The court denied the motions.

In February 2011 the court entered convictions on the two offenses and sentenced Banker to incarceration for a term not to exceed ten years on the sexual abuse conviction and thirty days in jail on the assault conviction.

II. Scope and Standards of Review.

Challenges to the sufficiency of the evidence are reviewed for correction of errors at law. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). We examine the evidence in the light most favorable to the State and draw all fair and reasonable inferences that may be deduced from the evidence. *State v. Hennings*, 791 N.W.2d 828, 832-33 (Iowa 2010). "If a verdict is supported by substantial evidence, we will uphold a finding of guilt. Substantial evidence is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005). "The State must prove every fact necessary to constitute the crime with which the defendant is charged. The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011) (citation omitted).

For claims of ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). To establish an ineffective-assistance-of-counsel claim, a

defendant must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice, with performance being measured against an 'objective standard of reasonableness,' 'under prevailing professional norms.'" *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citation omitted).

III. Merits.

A. Insufficient Evidence. Banker contends the evidence was not sufficient for the jury to find him guilty on either count. Concerning the sexual abuse of Nikki, Banker asserts there is not sufficient evidence of the perpetrator's identity. Concerning the assault of Ashley, Banker asserts there is not sufficient evidence of the perpetrator's identity or of the specific intent required.

Nikki. Banker's argument revolves primarily around the cell phone Nikki found on the floor by the bed. He argues she assumed the person who touched her used the phone as a light and she assumed the owner of the phone brought it into the bedroom. He contends the evidence provided by these assumptions is not sufficient for a jury to find he was the perpetrator.

The jury had additional evidence pointing to Banker as the perpetrator. He returned to Collins's house the day after the party to find his phone. He went directly to the bedroom to look for it. The jury could infer Banker left the phone in the bedroom. Banker spoke with Nikki the day after the party and said "he was sorry for what he did" and he "did something bad." When she told him he had "put his fingers inside of me" he said he was "really sorry." Collins later recorded

a conversation with Banker. In response to Collins's question "Did you do anything more than finger her?" Banker replied "I honestly don't think so." Even if, as he argues in his reply brief, he was too drunk at the party to remember what he did so he could not admit to doing something he doesn't remember, the apologies to Nikki point to Banker as the perpetrator as does his recorded response to Collins. We conclude there was sufficient evidence for the jury to find Banker was the perpetrator of the sexual assault on Nikki.

In his reply brief, Banker also argues Nikki was too drunk that night to know if she was sexually assaulted and just assumed she was because her belt and zipper were undone when she woke up. We do not consider arguments raised for the first time in a reply brief. *See Neitzel*, 801 N.W.2d at 626.

Ashley. Ashley testified to five "touches" at the party. Four of them occurred after she went to sleep on the couch. Banker argues his conviction of the lesser-included offense of assault "does not readily disclose which allegation of touching led to the result." Assault "includes an element of specific intent." *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). The jury was instructed the State had to prove Banker "did an act which was intended to result in physical contact which was insulting or offensive." *See* Iowa Code § 708.1(1) (2009).

The first touch while Ashley was on the couch was under her clothes on her abdomen, moving toward her breast. She said "no," pushed the hand away, opened her eyes, and saw Banker lying on the floor perpendicular to the couch with his hand moving away from the couch. We conclude a reasonable jury could find Banker guilty of assault from Ashley's testimony of this single touch. Banker's arguments concerning her level of intoxication, the dim lighting in the

room, and her added, mistaken detail at trial, that the perpetrator's eyes were blue, all go to her credibility and the weight to be given to her testimony. That is for the jury to determine, not an appellate court. *See State v. Hunt*, 801 N.W.2d 366, 377 ("The very function of the jury is to sort out the evidence and place credibility where it belongs."); *see also State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (noting a jury is free to believe or disbelieve the testimony of witnesses and to give as much weight to the evidence as, in its judgment, such evidence should receive).

B. Ineffective Assistance. Banker contends his attorney was ineffective in not moving to sever the two counts for separate trials and in not requesting a jury instruction on propensity evidence.

Motion to Sever. Iowa Rule of Criminal Procedure 2.6(1) provides, in relevant part:

> Two or more indictable public offenses which arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise.

Banker's attorney did not move to sever the trials on the two counts. Banker asserts he was prejudiced by this failure because the jury was allowed to consider evidence of both crimes when determining guilt on each separate charge. *See State v. Cox*, 781 N.W.2d 757, 762 (Iowa 2010) (prohibiting evidence of prior bad acts involving a different victim when admitted solely to demonstrate propensity). The State responds Banker's attorney was not ineffective because the court would not have been required to sever the trials, as

the two offenses were part of a common scheme or plan, or they are "inextricably intertwined." *See State v. Nelson*, 791 N.W.2d 414, 421, 424 (Iowa 2010) (allowing evidence of other wrong acts so the narrative of events would not be "unintelligible, incomprehensible, confusing, or misleading"). An attorney is not ineffective for failing to pursue a meritless issue. *See State v. Henderson*, 804 N.W.2d 723, 726 (Iowa Ct. App. 2011).

We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). Those proceedings allow for development of an adequate record of the claim, "and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). This is not the "rare case" allowing us to decide an ineffective-assistance claim on direct appeal without an evidentiary hearing. *See State v. Straw*, 709 N.W.2d 128, 138 (Iowa 2006). We preserve this claim for possible postconviction relief proceedings.

Jury Instruction on Propensity Evidence. In a closely-related claim, Banker contends his attorney was ineffective in not requesting a jury instruction limiting how the jury could use evidence of one assault when considering the other. As in the case of the severance claim, the record is insufficient for us to address this claim on direct appeal. Banker's attorney should have the opportunity to respond to the allegations in an evidentiary hearing. *See Biddle*, 652 N.W.2d at 203. We preserve this claim for possible postconviction relief proceedings.

AFFIRMED.