IN THE COURT OF APPEALS OF IOWA

No. 2-328 / 11-0774
Filed July 11, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN KELLY ALLISON,
Defendant-Appellant.

Appeal from the Iowa District Court for Keokuk County, Joel D. Yates, Judge.

The defendant appeals the district court's denial of his motion for new trial following his convictions for three counts of sexual abuse in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and John E. Schroeder, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Brian Allison appeals his judgment and sentences for three counts of sexual abuse in the third degree. He claims the district court applied the wrong standard in ruling on his motion for a new trial. We conclude Allison invited the error he now complains of and reject his alternate ineffective-assistance-of-counsel claim.

I. Background Facts and Proceedings.

Brian and Tina Allison were married in 1994. Brian had three children from a prior marriage. Tina had one child—three-year-old C.N. Brian and Tina later had a son together. When C.N. was twelve or thirteen years old, Allison began to sexually abuse her. Tina was working several nights each week at a residential care facility at the time. Her shift began at 3:00 p.m. and ended at 9:00 a.m. In her absence, Allison had C.N. sleep in his bed with him.

C.N. recalled four specific instances of abuse, though she stated it occurred every time her mother was at work. The first took place when C.N. was in seventh grade. She was wearing a purple nightgown with cartoon characters on it and sleeping with Allison in his bed. He told her he had "touched [her] in every spot but one, and then he touched [her] vagina." C.N. told police he then had sexual intercourse with her, though at Allison's jury trial she stated that did not happen until later.

The second incident occurred in the bathroom of the family's home when C.N. was a freshman in high school. C.N. stated she was on the floor in the bathroom, and Allison was having sex with her. She remembered her little

brother sticking his fingers underneath the door, trying to get in. C.N. said Allison kicked a towel by the door and finished having sex with her.

The third time described by C.N. took place in Allison's bedroom in the early evening. C.N. stated she was by the bed with her pants off. Allison also had his pants off and was having sex with her. His daughter, who had just arrived home from volleyball practice, knocked on the door. Allison instructed C.N. to leave the bedroom through the window and to tell her stepsister that she had been playing outside.

The final incident, which was offered by the State for the limited purpose of showing Allison's "passion or propensity for illicit sexual relations" with C.N., happened when the two left the house to get ice cream in a nearby town. On their way home, Allison stopped at an old barn off the highway and had sex with C.N. outside of the car.

A report was made to the Iowa Department of Human Services in December 2007. A social worker spoke with C.N. at school. She told both the worker and her mother that Allison had not sexually abused her. Tina nevertheless removed C.N. and her younger brother from the home and moved to Kansas. The Allisons later divorced. C.N. returned to Iowa to visit Allison several times in the following years, though she stated no further sexual abuse occurred.

In February 2010, Tina again questioned C.N. about whether anything inappropriate had occurred between her and Allison. This time, C.N. admitted that it had. Tina reported the sexual abuse to the police, and Allison was

arrested. He was charged with three counts of sexual abuse in the third degree. Tina was trying to regain custody of her son with Allison at the time of his arrest.

A jury trial was held in March 2011. At the close of the State's evidence, Allison moved for a judgment of acquittal on the first count of third-degree sexual abuse, arguing:

> The way that the State had structured their case there were basically three incidents which comprised the three charges: the first being an incident where the victim said that she was first touched on her vagina and then in the same incident had sexual intercourse; the second being I think what we call the pajama incident, or lack of a better description where she was wearing some purple pajamas; the third incident . . . being the incident in the bathroom where [C.N.'s brother] is putting his fingers under the door. . . .
>
> In Count I the trial testimony of [C.N.] was that, in fact, there are two distinct incidents: one being when he placed his finger on her vagina without penetration, and then on a later occasion first having sexual intercourse with her.
>
> If that's true, then the sexual intercourse becomes a separate incident rather than the one actually charged in the Trial Information, and since all she said that happened in that first incident with the hand was that touching alone, not penetration or anything else, that would not qualify under the definition of a sex act. So we do not believe there's sufficient evidence to generate a jury question as to Count I of the Trial Information.

The State disagreed, stating:

> Count I had to do with the time . . . the victim was wearing the purple pajamas in the bedroom. It was the first time that she remembered or described where the defendant placed his penis in her vagina. . . . She also talked about the same time he placed his hand underneath her panties on her vagina. That would all qualify as a sex act.
>
> The second was the bathroom incident where her brother had his fingers under the door. The third was where she was bent over the bed, and her sister came home and knocked on the door.

The trial court denied Allison's motion, finding "that there has been sufficient evidence presented to generate a jury question as to Count I."

The defense proceeded with its evidence, which included testimony from Allison denying C.N.'s allegations. He claimed C.N. fabricated the abuse at her mother's behest, testifying Tina had told him, "[I]f I didn't let her have custody of [our son] back at least until he was the age of fifteen, that she was going to have [C.N.] make allegations against me." The jury did not accept this story and found Allison guilty as charged.

Allison filed a combined motion for new trial and motion in arrest of judgment. The motion raised a similar argument about Count I as had been raised during trial, though this time under the guise of incorrectly instructing the jury under Iowa Rule of Criminal Procedure 2.24(2)(b)(5) and (7). Allison additionally claimed, under rule 2.24(2)(b)(6), that the verdict was "contrary to the weight of the evidence." The district court denied the motions before sentencing Allison to ten years on each count, to be served consecutively.

Allison appeals, claiming the court applied the wrong standard in denying the motion for new trial.

II. Discussion.

A court may grant a new trial pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b)(6) when "the verdict is contrary to law or evidence." The language "contrary to evidence" in rule 2.24(2)(b)(6) means "contrary to the weight of the evidence," rather than not supported by sufficient evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). In ruling on a motion for new trial, the district court "may weigh the evidence and consider the credibility of witnesses," as opposed to a motion for judgment of acquittal where the court is required to approach the evidence from a standpoint most favorable to the State. *Id.* at 658.

Our courts have repeatedly remanded cases to make certain the proper *Ellis* standard is applied. *See State v. Root*, 801 N.W.2d 29, 31 (Iowa Ct. App. 2011).

In this case, the district court addressed Allison's combined motions for new trial and in arrest of judgment at his sentencing hearing:

> Mr. Rigg, I have reviewed your . . . motions. . . . What record would you like to make in support of that?
>
> MR. RIGG: Your Honor, I don't have any record to make in support of it. Obviously, there's a brief filed which has presented the Court with the arguments that we have, and on two of the issues it was fully briefed. So unless the Court has any particular questions, I think we stand on the record.
>
> THE COURT: I do have one question for you, Mr. Rigg. Would it be an accurate and fair characterization that there are essentially no new issues raised, in that all of these issues have been addressed either before trial or at the time of trial?
>
> MR. RIGG: Correct.
>
> . . . .
>
> THE COURT: The Court has reviewed the motion and . . . resistance, and the Court will not be changing its mind on any of its previous rulings, and the Motion for New Trial and Motion for Arrest of Judgment are hereby denied.

Citing the above exchange between Allison's defense counsel and the court, the State asserts that Allison has waived his *Ellis* claim by inviting the error he now complains of. We agree. *See State v. Washington*, 257 N.W.2d 890, 893 (Iowa 1977) ("'A party to a criminal proceeding will not be permitted to complain of error . . . he himself has acquiesced in, committed, or invited.'" (citation omitted)).

This does not end our inquiry, however, as Allison has alternatively raised his claim under the rubric of ineffective assistance of counsel. Such claims are normally considered in postconviction relief proceedings in order to allow the development of an adequate record. *See State v. Clark*, 814 N.W.2d 551, 567

(Iowa 2012). But where the record is adequate, as we believe it is here, the claim may be resolved on direct appeal. *Id.*

To prevail, Allison must prove by a preponderance of the evidence that counsel failed to perform an essential duty and prejudice resulted. *Id*. A reviewing court need not engage in both prongs of the analysis if one is lacking. *Id.* We conclude Allison's claim fails on the prejudice prong, under which Allison must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

A verdict is contrary to the weight of the evidence where a greater amount of credible evidence supports one side of an issue or cause than the other. *See State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). If, after weighing the evidence and considering the credibility of the witnesses, "'the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.'" *Ellis*, 578 N.W.2d at 658-59 (citation omitted). Credibility of the witnesses is key in a weight-of-the-evidence determination. *State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003).

Allison argues C.N.'s testimony was not credible in several respects, including her initial denials of the abuse, her normal behavior during the time when the abuse was occurring, her return to Allison's home after the abuse ended, and her inconsistent testimony about the abuse. These aspects of C.N.'s testimony were addressed by the State through its expert witness, a licensed mental health counselor and forensic interviewer.

The State's expert testified delayed reporting of abuse is very common, as is an initial denial that the abuse occurred. A child like C.N., who has experienced intrafamily sexual abuse, is much more reluctant to acknowledge the abuse occurred because of the effect it may have on the family, as well as the effect it may have on the victim's relationship with the abuser. The expert explained,

> [I]t's not that every single contact with that person is sexual. In fact, perhaps the majority of the interactions are nonsexual, and yet they are being sexually abused.
>
> . . . .
>
> [B]ecause of grooming, the child may really feel very special to that individual, and they may have no other equivalent experience with any other person in their life that is that special to them.

The expert additionally said it is not uncommon for children to return to their abuser, even after the abuse has ended, because of the strong sense of loyalty cultivated by the abuser, as well as the place of importance occupied by the abuser in the victim's life. The child may also be drawn back to the abuser because of the individuals "surrounding that person. So, for example, there can be other family members that the child wants to be close to" or close friends.

Finally, the expert testified it is not unusual for a child to forget certain details of the abuse:

> First of all, as human beings we don't remember all the details of every moment of every day. . . .
>
> . . . If you're talking about a situation where a child has been abused over a period of time, oftentimes they'll focus on certain incidents that tend to be more . . . memorable to them. There was something about certain incidents that stuck out. . . .
>
> It can be that there was a deviation from other sexual experiences . . . .
>
> So, for example, as I'm interviewing a child, I might hear that someone interrupted the situation. . . . [T]hat just causes it to stick

> out in that child's mind better, and therefore, they may have . . . encoded more details about that particular incident and therefore be able to retrieve those details and report them.

C.N.'s testimony fit within these generalities. She testified that Allison sexually abused her frequently, from seventh grade until her sophomore year in high school. She admitted that she did not remember the details of all the abuse, though there were certain incidents that stuck out in her mind. Those incidents, like the expert witness opined, were ones in which the abuse was interrupted by another person, or deviated from a normal pattern, such as the trip for ice cream. C.N. also explained that she denied the abuse at first because Allison told her to. And she testified that she returned to Allison's home after moving to Kansas with her mother to be with her friends and her little brother.

C.N.'s testimony was inconsistent in certain respects, such as her account of the time she and Allison were interrupted by his daughter. C.N. stated Allison had her leave the bedroom through the window. She could not recall, however, whether Allison had to remove the screen before she could do so. And there was testimony the screen could only be removed from the outside of the house. C.N.'s description of the first time Allison sexually abused her was also inconsistent.

On direct examination, C.N. testified that when she was wearing a purple nightgown with cartoon characters on it, Allison put his hand inside her underwear and touched her vagina. She said, "He didn't touch me with his penis until later. When I was wearing the nightgown, he just touched underneath my panties with his hand." The prosecutor then presented her with a report from her police interview, after which C.N. testified that Allison did have sexual intercourse

with her when she was wearing the purple nightgown. But, on cross-examination, she reverted to her original testimony:

> Q. Okay. So either your recollection today when you walked in or your recollection then [during the police interview] apparently would be wrong, because it's one or the other; right? A. No. They happened at separate times, but [the officer] put that they happened at the same time.
>
> Q. Okay. So what you said initially was, in fact, what your recollection is; right, that they happened on separate occasions? A. Yes.
>
> Q. So when you were shown the report, why did you tell the jury, nope, the report is right? A. I don't know.

The jury was entitled to believe this explanation, especially considering the other evidence offered at trial that corroborated C.N.'s allegations of abuse. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive.").

Several witnesses who observed inappropriate contact between C.N. and Allison testified at trial. Two of those witnesses were coworkers of C.N.'s mother, Tina. They recalled that when C.N. was about fifteen years old, she and Allison came to visit Tina at work. One of the witnesses stated C.N. and Allison held hands on the way from the car into the facility. Once there, C.N. sat on Allison's lap, even though there were other chairs available, and caressed his arm. C.N.'s interaction with Allison was concerning enough that one of the coworkers spoke to Tina about it.

Two of Allison's friends also testified. They stated that C.N. often sat on Allison's lap and that he would sometimes rub her back while she was sitting with him. One of Allison's friends recalled arriving at Allison's house one afternoon

before he was expected. He called out to Allison, who replied from the bedroom. The friend went back to the bedroom and saw Allison and C.N. lying on the bed together underneath a blanket. When Allison got up, he was only wearing boxers; C.N. had on a pair of skimpy shorts and a low-cut shirt. These friends also testified Allison would frequently comment on the size of C.N.'s breasts.

Allison's daughter's boyfriend also testified. He remembered the ice cream incident described by C.N and testified that Allison and C.N. were gone for more than an hour, even though the place they bought the ice cream from was only ten minutes away. He said that when they returned, the ice cream was melted and had to be put in the freezer before it could be eaten. The boyfriend, who lived with the family for a period of time, also testified that he saw C.N. sleeping in Allison's bed at least ten or fifteen different times.

Allison admitted much of this conduct occurred. He stated C.N. would often sit on his lap and sleep in his bed. He saw nothing wrong with this. Allison also admitted that he had C.N. start taking birth control pills when she was fourteen or fifteen years old. He said he did so because he thought it would help with her acne. Tina testified that she saw Allison checking to make sure C.N. was taking her pills. She never saw him do the same with his own daughter, who was also on birth control pills.

Though there were inconsistencies in C.N.'s testimony, her allegations were, by and large, corroborated by the other evidence detailed above. *Cf. Reeves*, 670 N.W.2d at 207 (affirming district court's grant of new trial where there was no evidence contrary to defendant's version of events in the record and observing "[t]his is not one of those cases where the jury had to believe one

of two people in arriving at a verdict"). Given this evidence, we cannot discern a reasonable probability that the district court would have concluded a greater weight of the evidence preponderated heavily against the verdict had trial counsel asked for a specific ruling on Allison's motion for new trial. *See Ellis*, 578 N.W.2d at 659 (instructing trial courts to exercise their discretion in ruling on motions for new trial "carefully and sparingly"); *see also Reeves*, 670 N.W.2d at 203 (stating when the evidence is nearly balanced or such that different minds could reasonably arrive at different conclusions, the court should not disturb the jury's findings).

We accordingly reject Allison's ineffective-assistance-of-counsel claim and affirm the judgment of the district court.

AFFIRMED.