IN THE COURT OF APPEALS OF IOWA

No. 2-836 / 11-1949
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID ALAN MCCULLOUGH,
Defendant-Appellant.

Appeal from the Iowa District Court for Humboldt County, Joel E. Swanson, Judge.

David McCullough appeals his conviction of sexual abuse in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, Andrew W. Craig, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Kate Cigrand, Legal Intern, Jon Beaty, County Attorney, and Jennifer Benson and Jordan Brackey, Assistant County Attorneys, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

A jury found David McCullough guilty of sexual abuse in the second degree for engaging in sex acts with his ten-year-old stepdaughter. McCullough appeals his conviction, asking for a new trial on two grounds. First, he claims the district court abused its discretion in granting the jury's request during deliberations to review a video recording of his interview with investigators. McCullough equates the recording with a deposition, which jurors may not take with them upon retiring for deliberations. Second, he argues trial counsel was ineffective for failing to argue the verdict was against the weight of the evidence.

Because the reference to "depositions" in Iowa Rule of Criminal Procedure 2.19(5)(e) does not encompass video recordings of unsworn statements, the district court had discretion to entertain the jury's request to watch the interview again during deliberations. We find no abuse of that discretion. On the question of ineffective assistance of counsel, we find no reasonable probability the district court would have granted a new trial had counsel raised a challenge to the weight of the evidence. Accordingly, we affirm.

I. Factual Background and Procedural History

The jury heard the following facts.

On a school night in early October 2008, ten-year-old L.K.S. awoke to her stepfather David McCullough kneeling beside her bed, touching and licking her vagina. She yelled at him to "knock it off." After she told him to stop, L.K.S. recalled McCullough putting his arm around her, saying he was sorry, and repeatedly imploring her not to tell. But that same night, L.K.S. did tell her

mother what had happened. Her mother banished her stepfather from the house—but only for two weeks. Her mother and stepfather convinced L.K.S., then a fifth grader, not to tell anyone else about the sexual contact. The mother, who had two younger children in common with McCullough, was afraid of her "family falling apart" if she reported L.K.S.'s abuse to law enforcement.

By May 2010, L.K.S. could no longer live with the secret and told her biological father about the abuse. Her father went to authorities. On June 2, 2010, Humboldt County Sheriff's Deputy Cory Lampe called McCullough to the law enforcement center for an interview. The deputy and Department of Human Services case worker Christa Zinnel spoke with McCullough for about forty-five minutes.

During the recorded interview, McCullough recalled the October 2008 night in question. He said he had been drinking whiskey at his father's house and returned home quite drunk. He talked briefly with his wife, who to his surprise was not mad about his late return, and then went to bed. He told the deputy that "the next thing he remembered" was his stepdaughter yelling: "Dave, what are you doing?" He then realized he was in the girl's bedroom, and she was crying. McCullough said the girl told him he was "licking" her "in the crotch area" and then "licked his finger." He told her: "I'm sorry. It's not your fault. I thought you were your mom." McCullough figured that maybe he "got turned around" in his house due to his intoxicated state. McCullough said he and L.K.S. decided together to tell her mother about the incident. He also confirmed leaving

the house for two weeks and only being allowed home after promising to curtail his alcohol consumption.

Near the end of the interview, McCullough told the investigators he just did not remember what had happened: "I cannot tell you I didn't do it. I cannot tell you I did it."

The deputy arrested McCullough about a week later. The State filed a trial information on July 26, 2010, charging McCullough with sexual abuse in the second degree, in violation of Iowa Code section 709.3(2) (2007). He filed a motion in limine seeking to exclude the video recording of his interview with investigators, alleging its probative value was outweighed by its prejudicial impact. The court ruled: "The DVD is going to stay in." McCullough's jury trial began on October 19, 2011, and the jury returned a guilty verdict on October 21, 2011. His counsel filed a motion for new trial on November 3, 2011, which the court denied on November 9, 2011. McCullough received a mandatory sentence not to exceed twenty-five years. He now appeals his conviction.

II. Scope and Standards of Review

Submission of exhibits to the jury after it has retired for deliberations is a matter resting in the considerable discretion of the district court. *State v. Baumann*, 236 N.W.2d 361, 366 (Iowa 1975). We will reverse only for an abuse of that discretion. *See State v. Gathercole*, 553 N.W.2d 569, 575 (Iowa 1996).

We conduct a de novo review of claims that trial counsel was constitutionally ineffective in failing to preserve an issue for appeal. *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011). To succeed on his

ineffective-assistance claim, McCullough must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). A defendant's inability to prove either element is fatal and therefore, we may resolve the defendant's claim on either prong. *See id.*

III. Analysis

A. Jury's Request to View Video Recording

Before trial, McCullough sought, through a motion in limine, to exclude the DVD of his interview with investigators on evidentiary grounds, specifically arguing it was "unfairly prejudicial" to his interests in a fair trial. The district court ruled the video recording was admissible. The State played McCullough's interview for the jury during Deputy Lampe's testimony. The court admitted a DVD of the interview into evidence as Exhibit 5. On their second day of deliberations, the jury asked: "May we have a DVD player to view Exhibit 5?" The defense objected to the jury's request. Defense counsel acknowledged the court had discretion in granting the request, but further argued: "The DVD itself is the evidence. The fact that there was a DVD done of an interrogation—It was presented to the jury as oral testimony and so, therefore, I would say it's no different if they're allowed to replay that than getting a transcript from [L.K.S.]."

The State lobbied for granting the jury's request and cited several considerations to guide the court's exercise of discretion, namely: (1) whether the material would aid the jury in proper consideration of the case, (2) whether any party would be unduly prejudiced by the submission, and (3) whether the material

would be subject to improper use. These considerations have been approved by our supreme court. *See State v. Shea*, 218 N.W.2d 610, 615 (Iowa 1974).

The district court considered the case law and ruled as follows:

> I'm not going to allow a DVD player to go back to the jury room so they can play this at their whim. I will allow, however, allow them to be escorted back to the courtroom with all of us. . . . Play it one more time. Off. And that's the end of it. I don't want them sitting back there and playing back and forth . . . . I think that's the way I'll let them view it, one more time and that will be the extent of it.

According to the court record: "The video was played for the jury at 9:32 a.m. [on October 21, 2011,] with silence from all parties." At 10:33 a.m. the jury announced its guilty verdict in open court.

On appeal, McCullough does not renew his original objection to admission of the video recording during trial, but concentrates on the court's decision to allow the jury to watch his interview for a second time during deliberations. He relies on the italicized passage in Iowa Rule of Criminal Procedure 2.19(5)(e), which states in pertinent part:

> Upon retiring for deliberations the jury may take with it all papers and exhibits which have been received in evidence, and the court's instructions; provided, *however, the jury shall not take with it depositions*, nor shall it take original public records and private documents as ought not, in the opinion of the court, to be taken from the person possessing them.

(Emphasis added.)

McCullough resurrects an argument based on *Baumann*, 236 N.W.2d at 366, that the recording "should be considered similar to depositions in a situation where the jury requests to listen to the tape during deliberations." Our supreme court discounted the same argument in *Gathercole*, 553 N.W.2d at 575, holding

the rule "does not prohibit the use of a tape recorder in the jury room; it specifically limits its proscription to depositions." McCullough asked our supreme court to retain this case and asserted in his brief: "The police interview tape in *Gathercole* should also have been treated similarly to a deposition and not supplied to the jury during deliberations."

In support of his assertion that a police interview is akin to a deposition, McCullough cites two Confrontation-Clause cases: *State v. Schaer*, 757 N.W.2d 630, 635-36 (Iowa 2008) and *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). Those cases refer to statements taken by police officers in the course of interrogations as "testimonial" for purposes of the Sixth Amendment Confrontation Clause despite the fact that they are unsworn. *Crawford*, 541 U.S. at 52; *Schaer*, 757 N.W.2d at 635-36. In construing the term "witnesses" against the accused in the Confrontation Clause, the *Crawford* court offered various formulations of what statements could be considered "testimonial"—having defined witnesses as those who "bear testimony." *Crawford*, 541 U.S. at 51. Efforts to describe "testimonial" statements for purposes of the Confrontation Clause are not the same as defining a "deposition" under our rules of criminal procedure. The word "deposition" is generally defined as "a written record of testimony of a witness questioned under oath before a judicial officer, with an opportunity afforded for cross-examination." *See State v. Hamilton*, 309 N.W.2d 471, 478 (Iowa 1981) (holding that statement obtained from witness as part of a prosecutor's investigation under rule 2.5(6) [then numbered as rule 5(6)] did not constitute a deposition). *Crawford* and *Schaer* do not help McCullough's case.

But even if we were persuaded by the comparison to Confrontation Clause cases, our court is not at liberty to upend *Gathercole*. *See State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves."). Under the holding of *Gathercole,* the district court properly exercised its discretion in responding to the jury's request. In fact, the district court here was even more protective of McCullough's interests than required under *Gathercole*—limiting the jury to a single viewing of the video-recording in the courtroom, rather than risking that the jurors would use the DVD player to replay parts of the interview multiple times, overemphasizing it in comparison to other evidence.

The circumstances of McCullough's trial support the court's decision to allow the jury to watch the video recording a second time. First, it was reasonable to believe replaying the interview could aid the jury in proper consideration of the case. The jurors first saw the interview during the State's case in chief. McCullough subsequently testified that he told the deputy in the interview he did not remember the incident reported by L.K.S. and that he did not remember because: "My personal opinion, don't think it happened." McCullough's testimony contained enough obfuscation that the jurors were entitled to hear the interview again to compare his trial testimony with his recorded statements. Second, McCullough was not unduly prejudiced by submission of the exhibit to the jury a second time. He testified that he "tried to be as honest as [he] could on that video." McCullough cannot credibly maintain he was unduly prejudiced by the jury hearing his own honest statements. Third,

by arranging a single showing in the courtroom, the district court ensured the jury did not improperly use the DVD exhibit. The district court properly exercised its discretion under rule 2.19(5)(e). This issue provides no basis for granting a new trial.

B. Ineffective Assistance/Weight-of-the-Evidence Challenge

McCullough next argues the guilty verdict was against the weight of the evidence under Iowa Rule of Criminal Procedure 2.24(2)(b)(6). The State contends McCullough waived this argument by failing to raise a weight-of-the-evidence argument in his motion for new trial or at the hearing on that motion. Because the defense did not advance that ground for a new trial, the district court did not address the weight of the evidence in its ruling. We agree with the State that McCullough did not preserve error on the weight-of-the-evidence argument.

Anticipating we might find error was not preserved, McCullough alternatively claims his trial counsel was ineffective in foregoing that argument. When a defendant chooses to raise an ineffective-assistance-of-counsel claim on direct appeal, we may either determine the record is adequate and decide the claim or find the record is inadequate and preserve the claim for postconviction proceedings. *Neitzel*, 801 N.W.2d at 624. We find the record is adequate to reach McCullough's ineffective-assistance-of-counsel claim.

Faced with a weight-of-the-evidence challenge under rule 2.24(2)(b)(6), the district court must determine whether "a greater amount of credible evidence supports one side of an issue . . . than the other." *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). While the district court has wide discretion in deciding

motions for a new trial, it must exercise such discretion "carefully and sparingly" as not to "lessen the role of the jury as the principal trier of the facts." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). A new trial should only be granted in the "exceptional case" where the evidence "preponderates heavily against the verdict." *Reeves*, 670 N.W.2d at 202.

To prove the requisite prejudice, McCullough must show that had his attorney moved for a new trial under *Ellis*, a reasonable probability existed the district court would have found his to be the exceptional case meriting relief. *See Neitzel*, 801 N.W.2d at 626.

McCullough argues the verdict is not supported by the weight of the evidence because the only proof of sexual abuse comes from the testimony of L.K.S. McCullough also points to contradictions in the record regarding whether the alleged abuse occurred on a Tuesday or Thursday and whether it was midnight or 1:30 a.m. when L.K.S. awoke to find McCullough in her bedroom. Finally, he contends the delay in reporting detracts from L.K.S.'s credibility. He asserts L.K.S. and her mother may have "ulterior motives" for testifying against him.

We do not see the minor inconsistencies identified by McCullough as preponderating heavily against the jury verdict. The prosecution could have stood on the testimony of L.K.S. alone. *See State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The law has abandoned any notion that a rape victim's accusation must be corroborated."). But in this case, the girl's testimony was well corroborated. McCullough admitted he was in her room on the night in question.

L.K.S. reported the abuse to her mother the same night. McCullough left the house for two weeks because of the girl's allegations. When confronted almost two years later by investigators, McCullough recalled his immediate reaction to L.K.S.'s protestations that night was to apologize and say he thought she was her mother. He also told investigators he could not deny the sexual contact occurred.

L.K.S.—who was only ten years old at the time of the incident—explained that her mother and stepfather talked her out of reporting the abuse to the authorities. The mother confirmed she dissuaded her daughter from talking about the abuse outside of the family, telling L.K.S.: "[I]t's nobody else's business." Other than McCullough's own testimony, no evidence backs his allegation that L.K.S. had a motive to lie about the incident.

Our review of the record indicates the greater weight of the evidence supports the jury's verdict. Consequently there is no reasonable probability the district court would have granted a new trial on that ground. *See State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) (explaining prejudice exists where the defendant can prove by a reasonable probability that the result of the proceedings would have been different). McCullough is unable to show counsel was ineffective for not raising a weight-of-the-evidence challenge in his new trial motion.

AFFIRMED.