

IN THE COURT OF APPEALS OF IOWA

No. 3-177 / 12-0722
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALEXANDER MENDOZA-ORTEGA,
Defendant-Appellant.

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

Alexander Mendoza-Ortega appeals his conviction for the crime of sexual
abuse in the third degree in violation of Iowa Code sections 709.1(1) and
709.4(1) (2011). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney
General, and Larry Brock, County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Alexander Mendoza-Ortega appeals his conviction for the crime of sexual abuse in the third degree, in violation of Iowa Code sections 709.1(1) and 709.4(1) (2011). Mendoza-Ortega argues the district court applied an improper standard in reviewing his motion for new trial, and his counsel was ineffective for failing to object to certain rebuttal testimony. Because we find that the district court applied the proper standard, and that counsel was not ineffective, we affirm.

I. Background Facts and Proceedings

On September 11, 2011, Mendoza-Ortega was charged with sexual abuse in the third degree for having sexually abused a fourteen-year-old girl. Mendoza-Ortega claimed that the girl, S.S., had consented to the sexual encounter.

In addition to offering a different explanation of events from the testimony of S.S., Mendoza-Ortega argued that S.S.'s action, of leaving the following day for church camp, was inconsistent with an assault. After S.S. arrived at camp, her mother became aware of the assault and traveled to meet with her. Following a counseling session with camp and church staff, S.S., and members of her family, it was decided that S.S. would remain at the camp for the remainder of the week. After returning home S.S. met with law enforcement officials. Mendoza-Ortega argues this is not the course of conduct one would expect following a sexual assault.

Lisa Gugel, the operator of the camp, met with S.S. and her family following the assault. On rebuttal Gugel testified concerning the reasons for the delayed reporting to law enforcement.

Mendoza-Ortega was convicted by a jury and, after his motion for new trial was denied, was sentenced to a term of imprisonment not to exceed ten years. This appeal follows.

II. Standard of Review

The standard of review on a motion for new trial depends upon the grounds raised in the motion. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.*, 714 N.W.2d 603, 609 (Iowa 2006). Where, as here, the grounds are discretionary, we review for abuse of discretion. *Id.*

Claims of ineffective assistance are reviewed de novo. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012).

III. Discussion

A. Motion for New Trial

Mendoza-Ortega filed a motion for new trial under Iowa Rule of Criminal Procedure 2.24(2)(b)(6) arguing the verdict was contrary to the evidence.

Following arguments on the motion, the court entered the following ruling:

I have considered the Motion for New Trial filed by the defendant through his attorney. I've considered that in the light most favorable to the defendant. Specifically, I've considered the argument that the verdict was contrary to the evidence, that I should make a credibility determination different from that of the jury, and that the rebuttal testimony of Ms. Lisa Gugel was inappropriate. For all the reasons stated by the State, and specifically on counts one and two, the court finds that the verdict was supported by satisfactory evidence, and reading the third prong, the court does determine that the testimony of Ms. Gugel

was appropriate. For all of those reasons, I will be denying the defendant's Motion for New Trial.

Mendoza-Ortega argues the court's reference to "satisfactory evidence" indicates that an improper standard was employed when reviewing his motion.

Iowa Rule of Criminal Procedure 2.24(2)(b)(6) allows the court to grant a new trial when "the verdict is contrary to law or evidence." Our supreme court has determined that contrary to the evidence means contrary to the weight of the evidence. *Nguyen v. State*, 707 N.W.2d 317, 327 (Iowa 2005). This standard requires the court to assess whether a greater amount of evidence supports one side or another. *Id.* When engaging in this process, the court is allowed to reweigh the evidence and consider the credibility of the witnesses. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). "If the court determines the verdict is contrary to the weight of the evidence and a miscarriage of justice may have occurred, it is within the court's discretion to grant a new trial." *Id.* The standard is more stringent, but also broader, than a sufficiency-of-the-evidence standard. *Id.*; *Nguyen*, 707 N.W.2d at 327. We are to reverse and remand when the district court has applied a sufficiency-of-the-evidence standard instead of the correct weight-of-the-evidence standard. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

The district court's ruling in this matter leaves room for disagreement on which standard was applied. We note, however, that the court stated the verdict was supported by "satisfactory evidence" and did not explicitly employ a sufficiency standard. The court did, however, adopt in total the State's arguments, which did apply the correct standard in precise terms. We are further

satisfied that the district court assessed the evidence and made credibility determinations which matched those of the jury.¹ This is not the situation found in *Ellis* where the district court explicitly employed a sufficiency standard. See *Ellis*, 578 N.W.2d at 659. Nor is this the situation we confronted in *State v. Root*, 801 N.W.2d 29, 31 (Iowa Ct. App. 2011), where the district court ruling was one line long and gave no indication as to which standard was applied. Though the district court should have used more careful and precise language, we are satisfied that the proper legal standard was employed.

B. Ineffective Assistance

Although we generally preserve claims of ineffective assistance of counsel for postconviction relief actions, we will consider their merits on direct appeal if the record is adequate. *State v. Bearnse*, 748 N.W.2d 211, 214 (Iowa 2008). We find this record adequate to decide the issue.

In order to establish a claim of ineffective assistance of counsel, Mendoza-Ortega must show that counsel failed to perform an essential duty and the failure resulted in prejudice. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998). Failure to perform an essential duty is shown by proving that counsel's representation fell below an objective standard of reasonableness. *State v. Madsen*, 813 N.W.2d 714, 724 (Iowa 2012). In evaluating the objective reasonableness of trial counsel's conduct, we examine "whether, in light of all the

¹ Though the district court does not explicitly state its credibility determinations, we are mindful of the fact that this case centers on the issue of consent. There were few credibility determinations to be made, and by recognizing the duty to assess credibility and denying the motion, the district court implicitly made the requisite credibility determination.

circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” *Id.* Prejudice is established by showing that, but for the unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. *Id.* at 727.

Mendoza-Ortega argues his counsel was ineffective by failing to object to rebuttal testimony offered by Lisa Gugel because the offered testimony was improper. Reviewing the offered testimony, we find Mendoza-Ortega has failed to prove either of the elements necessary to succeed on an ineffective assistance claim. There is not a reasonable probability that, had the testimony been excluded, the outcome of the trial would have been different.²

AFFIRMED.

² Mendoza-Ortega argues that prejudice only requires a showing that the objection to the testimony would have been sustained. We disagree. Prejudice requires a showing that the results of the *proceeding* would have been different. See *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997).