

IN THE COURT OF APPEALS OF IOWA

No. 6-1063 / 06-0421
Filed February 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS MICHAEL CHITWOOD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, William A. Price,
District Associate Judge.

Thomas Chitwood appeals from his conviction and sentence following a
jury verdict of guilty for failing to register as a sex offender. **AFFIRMED.**

Thomas P. Graves of Jackowski & Graves, Clive, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney
General, John P. Sarcone, County Attorney, and Susan Cox, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Thomas Chitwood appeals from his conviction and sentence following a jury verdict of guilty for failing to register as a sex offender, in violation of Iowa Code sections 692A.2, 692A.3, and 692A.7 (2005). He contends there is insufficient evidence to convict him, the district court erred in continuing the trial, the State's rebuttal witnesses should not have been allowed to testify, and that he was entitled to surrebuttal. He also contends he should have been granted probation.

As a result of two prior convictions for sexual offenses against adult women, Chitwood was required to register as a sex offender. Iowa Code § 692A.2. Before being discharged from prison in June 2003, Chitwood registered his residence at his mother's address in Runnells.

On February 1, 2005, Chitwood signed a lease agreement with the Sunnybrook Mobile Home Community in Berwick. The following day, he purchased a mobile home for the lot from the trailer park manager. Chitwood registered this new address with the Polk County Sheriff on April 13, 2005.

Chitwood was charged with failure to comply with the sex offender registry on June 9, 2005. On January 23, 2006, the charge was amended to failure to register as a sex offender and a jury trial was held the same day. He was convicted on January 25, 2006.

Chitwood contends there is insufficient evidence to support his conviction. We review claims of insufficient evidence for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which

a rational finder of fact could find a defendant guilty beyond a reasonable doubt.”

Id.

In order to find Chitwood guilty of failing to register as a sex offender, the jury was instructed it had to find beyond a reasonable doubt that:

(1) The defendant was required to register with Iowa’s sex offender registry.

(2) On or about February 2005 through April 7, 2005, the Defendant changed his residence. The jury does not have to agree as to a specific date, so long as the jurors unanimously agree that the date falls within that range of dates.

(3) The defendant did not notify the sheriff or the county in which he was registered within five days of changing his residence in writing on a form provided by the sheriff.

The jury was further instructed, “The term residence . . . means the place where a person sleeps, which may include more than one location and may be mobile or transitory.”

Chitwood contends there was insufficient evidence to prove he moved into the mobile home prior to April 8, 2005. He argues the State was unable to present testimony from any witness who knew he was sleeping in the mobile home prior to that date. In his defense, his mother, sister, and his brother-in-law testified respectively that Chitwood moved into the mobile home on April 10, 2005, the second week of April 2005, and during April 2005.

While no prosecution witness could directly testify that Chitwood was sleeping in the mobile home prior to April 8, 2005, there was sufficient evidence for the jury to reach that conclusion. Chitwood’s boss testified he told her prior to his March 11, 2005 termination that he was ready to move into the trailer. Chitwood began utility service on February 3, 2005. He applied for a post office box in Berwick on February 9, 2005. He transferred his vehicle title, listing his

bona fide residence as the Berwick address on February 10, 2005. On February 22, 2005, he provided the power company his Berwick post office box number. He started telephone service at the trailer on March 5, 2005, but asked that his phone number and address not be listed. Witnesses testified as to their belief that Chitwood was living in the mobile home prior to April 8, 2005. Although this testimony conflicts with the testimony of his relatives, and is circumstantial, the jury was free to believe or disbelieve any testimony it chose and to give as much weight to the evidence as it determined the evidence should receive. See *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). Circumstantial evidence is just as probative as direct evidence. Iowa R. App. P. 6.14(6)(p). Resolving conflicts in the evidence is for the jury, and the jury can believe all, some, or none of the testimony of the witnesses. *State v. Forsyth*, 547 N.W.2d 833, 836 (Iowa Ct. App. 1996).

Chitwood next contends the district court erred in denying his motion for a continuance. He argues a continuance was required because on the day of jury selection a front-page article appeared in the local newspaper with the headline, "Twice as many sex offenders missing." Furthermore, another front-page article described the start of the murder trial of Roger Bentley, a convicted sex offender charged with the kidnap and murder of a child. Finally, on the day of trial the newspaper "prominently covered the sex offender registry including a full page on the editorial page concerning the registry." Chitwood argues this publicity denied him a fair trial. We review this issue for an abuse of discretion. *State v. Artzer*, 609 N.W.2d 526, 529 (Iowa 2000).

A motion for continuance for trial may be granted only “upon a showing of good and compelling cause.” Iowa R. Crim. P. 2.9(2). Otherwise, the date assigned for trial is considered fixed. *Id.* The decision to grant or deny a motion for continuance rests in the sound discretion of the trial judge. *State v. Leutfaimany*, 585 N.W.2d 200, 209 (Iowa 1998). It will not be disturbed on appeal unless an injustice has resulted. *Id.*

We conclude the district court properly denied the motion for continuance. None of the articles complained of referenced Chitwood or his trial. The jury was admonished to avoid media coverage of the sex offender registry or other sexual abuse trials. The jury was informed that Chitwood’s prior offenses involved adult women, not children. There is also no indication any prospective juror was aware of, or influenced by, the media coverage. No injustice resulted from the court’s denial of the motion.

Chitwood also contends the State’s witnesses called in rebuttal should not have been allowed to testify because they did not rebut any of the testimony of defense witnesses. Chitwood objected to the testimony of rebuttal witness Dorota Toporek, but not to the testimony of Irene Cameron. Chitwood asks that if this court determines he has not preserved error in regard to the testimony of Cameron, we address the issue as an ineffective assistance of counsel claim. Because appellate counsel was also Chitwood’s trial counsel, we preserve the question of ineffectiveness regarding counsel’s failure to object to Cameron’s testimony for postconviction relief.

Rebuttal evidence is evidence that explains, repels, controverts, or disproves evidence produced by the opposing party. *State v. Weaver*, 608

N.W.2d 797, 806 (Iowa 2000). The trial court has considerable discretion in admitting rebuttal evidence, including the discretion to include evidence that could have been offered as a part of the case in chief. *Id.* We will only disturb such a ruling on a showing of clear abuse of discretion. *Id.*

We conclude the district court did not abuse its discretion in allowing Toporek's testimony. Defense witnesses testified that Chitwood did not move into the trailer in February or March of 2005 because of the amount of overtime he was working. Toporek, president of the company employing Chitwood at the time, testified to the amount of overtime Chitwood worked, thus rebutting the defense witnesses. This testimony was proper rebuttal.

Chitwood contends the district court erred in denying him surrebuttal. He argues the prosecutor argued for the first time in closing argument regarding his motives for registering as a sex offender at the Berwick address on April 13, 2005. We review this claim for an abuse of discretion. *State v. Van Hoff*, 371 N.W.2d 180, 186 (Iowa Ct. App. 1985).

In closing argument, defense counsel claimed Chitwood voluntarily notified the sheriff of his new address. In rebuttal, the prosecutor questioned why Chitwood, who the State alleged had moved into the trailer more than five days earlier, decided to finally register his new address. The prosecutor stated:

Why on April 13th, 2005 did he finally notify the registry?
Why at that point in time did he come forward to the authorities and tell them I've moved? It's because he got caught. He got caught. He submitted a form to the State of Iowa on April 3rd or 4th asking for money from the state government for unemployment benefits.

At the close of the rebuttal argument, Chitwood moved for surrebuttal on the grounds that there was no evidence at trial that Chitwood "got caught."

We conclude the court did not abuse its discretion in denying the motion for surrebuttal. Chitwood argued that he registered his new address because he had moved within the five days prior to his registering. The State presented a theory as to why Chitwood, who it had argued moved more than five days prior to registering, had now decided to register.

Finally, Chitwood contends the district court's decision to deny him probation at sentencing was based on his refusal to acknowledge his crime to the presentence investigator, in violation of his right against self-incrimination. We review his claim for an abuse of discretion. *State v. Boltz*, 542 N.W.2d 9, 11 (Iowa Ct. App. 1995).

The district court explained its reason for denying Chitwood probation as follows:

The granting of probation in this matter is denied because probation would not provide reasonable protection of the public and maximum opportunity for rehabilitation of the defendant.

The court has further considered the defendant's extensive criminal record and the fact that the defendant never successfully completed sex offender treatment.

The court has considered the age of the defendant, as well as the defendant's prior criminal record, and that probation would lessen the seriousness of the crime.

Although the presentence investigative report notes that Chitwood did not feel he had done anything wrong in relation to his failure to register as a sex offender and he accepted no responsibility for his past offenses, there is no evidence that the court relied on these factors in denying Chitwood probation. The reasons given by the court were adequate to support its decision to deny probation. Because the court did not abuse its discretion, we affirm.

We affirm Chitwood's conviction and sentence and preserve for postconviction consideration his claim of ineffectiveness of counsel for failing to object to the testimony of Irene Cameron.

AFFIRMED.