

IN THE COURT OF APPEALS OF IOWA

No. 6-413 / 05-0596
Filed November 16, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JULIO ERNESTO BONILLA,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Julio Bonilla appeals from his conviction for first-degree kidnapping.

AFFIRMED.

Kevin Hobbs, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan M. Horvat, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

BEEGHLY, S.J.

Julio Bonilla appeals from his conviction for first-degree kidnapping, in violation of Iowa Code sections 710.1 and 710.2 (2003). We affirm.

I. Background Facts and Proceedings.

From the evidence introduced at trial, a reasonable juror could have found the following. According to Elizabeth, who was then sixteen years old and pregnant, on the evening of December 31, 2002, she had babysat for her aunt, who lived one and one-half blocks from her home. After her aunt returned home at approximately 1:30 a.m. the next morning, Elizabeth began walking home when a dark-colored car approached, and two young Hispanic males who she did not know got out and pulled her into the car.

Elizabeth found herself wedged in the back seat between two males. In addition, two males were in the front seat of the car. She claimed that she was afraid for her life and that she would eventually spend nearly four hours in the car. Soon after forcing her into the car, the driver pulled up to another vehicle and asked four men if they had drugs for sale. Unable to purchase drugs from them, the driver proceeded to a convenience store, where two of the males went into the store. One of them who remained with Elizabeth told her he had a gun. While in the parking lot, Elizabeth saw her sister's former boyfriend, but was unable to convey her danger to him.

At some point in the evening, the men asked Elizabeth if she knew where they could buy drugs. She directed them to a home, in which she knew the Crawford family resided, intending to go inside and call the police; but when they arrived there, nobody was home. After this, they proceeded to a secluded area

where Elizabeth claimed she was raped by the males vaginally, anally, and orally. She claimed they also forced her to drink alcohol during this time. Some time between 4:00 and 5:00 a.m., the men dropped her off on East 12th Street in Des Moines, where Elizabeth sought help at a stranger's house. After knocking on the door, Teresa Eggenberger answered it. Elizabeth told her she had been raped by four Mexicans. After reaching Elizabeth's boyfriend by phone, Eggenberger and the other resident of her house drove Elizabeth to her boyfriend's home, where they called police.

The State eventually charged Julio Bonilla with first-degree kidnapping based on this incident. After a bench trial, the court entered its Findings of Fact, Conclusions of Law, and Ruling in which it found Bonilla guilty as charged. After denying Bonilla's motion for a new trial, the court sentenced Bonilla to life in prison. Bonilla appeals from this ruling.

II. Motion for New Trial.

Bonilla first maintains the court erred in denying his motion for new trial.¹ He contends the trial court, as fact finder, should have disregarded Elizabeth's testimony as too inconsistent to be believed. He further argues that two of the court's specific findings of fact are inaccurate.

We review a district court's ruling on a motion for a new trial for an abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 658 (Iowa 1998). A district court should grant a new trial where a conviction is contrary to the weight of the evidence. *Id.* at 659. The court should weigh the evidence and consider the

¹ Although Bonilla initially references "sufficiency-of-the-evidence" language, we find that he is actually challenging the court's ruling on his motion for new trial, and thus, the "weight" of the evidence.

credibility of witnesses. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Unlike the sufficiency-of-the-evidence analysis, the weight-of-the-evidence analysis is much broader, in that it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other. *Id.* The court should grant a new trial only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id.*

A. *Elizabeth's Testimony.* Bonilla maintains the trial court should have "disregarded Elizabeth's testimony because it was too inconsistent to be believed." In support of this, he points to the following testimony. First, he asserts that her explanation of directing Bonilla and his friends to the Crawford house is not believable because there were better alternatives in which to have attempted an escape. Second, he argues Elizabeth was untruthful about a telephone call she made from Teresa Eggenberger's house, in that she testified to making two calls while Eggenberger said she made only one. Third, Bonilla points to Elizabeth's failure to inform nurses and doctors that she had engaged in sexual relations with her boyfriend on the previous day. Fourth, he asserts Elizabeth's versions of the rape are inconsistent. Fifth, he believes Elizabeth's alleged confinement in the car is not supported by a convenience store surveillance tape. Finally, Bonilla contends the description of the house at which she was dropped off is misleading.

Although Bonilla questions the consistency and veracity of a great deal of Elizabeth's testimony, questions of credibility and weight are matters for the finder of fact. *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 785-86 (Iowa 2002). The inconsistencies relied on by Bonilla

are not so substantial as to require the court to disregard the substantial portions of Elizabeth's evidence that support the guilty verdict. See *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997) (noting that it is only when a witness's testimony is "so impossible, absurd, and self-contradictory that the court should deem it a nullity"). As the State notes, while some of Elizabeth's testimony clearly is inconsistent, such is understandable considering the distress and trauma caused by the rape. Moreover, the court was aware of these inconsistencies and found that they did not destroy Elizabeth's overall credibility. The court did not abuse its discretion in failing to grant a new trial on this count.

B. Erroneous Factual Findings. Bonilla contends the court erred in its recitation of certain facts in its Findings of Fact, Conclusions of Law, and Ruling. In those findings, the court noted that seminal fluid was found belonging to Bonilla, Elizabeth's boyfriend, and "very likely at least one other person who ejaculated leaving, more than likely, seminal fluid on Elizabeth's clothing" Bonilla notes that the State's DNA expert, Kristin Evans, actually testified that she could not determine whether the DNA was semen, blood, or saliva.

We find no error by the district court in this finding. First, the court only found that the DNA was "likely" semen. This is a fair inference from the record. Second, it acknowledged that Evans "could not state with certainty that the [DNA] came from seminal fluid, but it is possible that they were the result of seminal fluid."

Bonilla next challenges the accuracy of the court's finding that he did not "change his story" about completely denying the events in question. The State counters that, while Bonilla did admit to being in the car with three friends, the

relevant fact is that he never changed his initial total denial until trial, when he first admitted that he was with Elizabeth on the date of the incident. We conclude this observation is accurate and that the court appropriately considered this in making its ruling. No abuse of discretion occurred in failing to grant a new trial based on this finding.

III. Rebuttal Testimony.

Bonilla contends the court improperly allowed the State to offer the rebuttal testimony of Teresa Eggenberger. She testified, among other things, as to Elizabeth's comments upon knocking on her door, her demeanor, and her physical appearance.

Rebuttal testimony is "that which explains, repels, controverts, or disproves evidence produced by the other side." *State v. Miller*, 229 N.W.2d 762, 770 (Iowa 1975). We conclude the court did not abuse its discretion, *see State v. Bakker*, 262 N.W.2d 538, 543 (Iowa 1978) (setting forth the standard of review), in allowing this rebuttal evidence. Eggenberger's testimony rebutted Bonilla's testimony about Elizabeth's demeanor² when they parted and his testimony that she was fully clothed when she exited his car.

IV. Prosecutorial Misconduct.

Following the close of evidence, the State presented the court with a "Proposed Findings of Fact and Conclusions of Law" and a "State's Rebuttal." On appeal, Bonilla claims at least four statements made in these documents constitute prosecutorial prejudice and entitle him to a new trial.

² Bonilla testified that when they dropped Elizabeth off she was not upset and that she, in fact, asked him for his phone number.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that misconduct occurred, and that he was so prejudiced by the misconduct that he was deprived of a fair trial. See *State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002); *State v. Greene*, 592 N.W.2d 24, 30-31 (Iowa 1999). Thus it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial. *Greene*, 592 N.W.2d at 31. Whether the misconduct was isolated or pervasive and the strength of the evidence against the defendant are appropriate considerations for the trial court. *State v. Belken*, 633 N.W.2d 786, 802 (Iowa 2001); *Greene*, 592 N.W.2d at 32.

We do not believe Bonilla is entitled to relief on any of the three alleged instances of prosecutorial misconduct. He first argues the State improperly referred to Bonilla lying.³ While it is true that in *State v. Graves*, 668 N.W.2d 860, 875 (Iowa 2003), our supreme court disapproved of the practice of the prosecutor calling the defendant a liar, we believe the instance complained of here was non-inflammatory, based on facts and reasonable inferences, and was isolated in nature. As such, Bonilla suffered no prejudice by this comment.

Bonilla next complains of the State's references to the fact that prior to trial, although he spoke to police on several matters, he never claimed to have engaged in consensual sex with Elizabeth until the time of trial. First, it is significant that this was a bench trial, which served to reduce any potential prejudice attendant to the statements. This is generally true because legal training assists the fact finder in a bench trial "to remain unaffected by matters

³ The State claimed "The defendant readily admitted that in the past he has identified himself as Jose Hernandez, thus lying to police."

that should not influence the determination.” *State v. Matheson*, 684 N.W.2d 243, 244 (Iowa 2004) (noting courts are less likely to reverse when inadmissible evidence is introduced in a bench trial than in a jury trial). Moreover, we conclude that these references did not amount to a comment on Bonilla’s right to remain silent. As the State points out, while Bonilla did make a wealth of statements to police, those statements were inconsistent with his eventual story given at trial.

Third, Bonilla complains the State misstates the record and thus “play[s] to the emotions of the fact-finder” when it stated in its rebuttal that Elizabeth “has only been subjected to the sarcasms and ridicules of the defense.” Again, because this was a bench trial, *see id.*, and because this was an isolated comment made in the context of a lengthy trial and a voluminous record, we conclude Bonilla was not prejudiced by this statement. *See Greene*, 592 N.W.2d at 31.

V. Ineffective Assistance of Counsel.

Bonilla contends he received ineffective assistance of counsel in numerous respects. We review claims of ineffective assistance of counsel *de novo*. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). We normally preserve ineffective assistance claims to allow development

of the record concerning counsel's conduct. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). However, if the record is sufficient we may decide the issue on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006).

We conclude the record is inadequate to address the following claims, and therefore preserve them for a possible postconviction relief application: (1) that defense counsel should have called alibi witnesses; (2) that counsel should have called Elizabeth's family and friends to impeach her version of the events; (3) that counsel provided ineffective assistance by failing to retain an expert on DNA evidence; (4) that counsel should have pursued an intoxication defense; and (5) that counsel should have more adequately diagrammed the locations referred to in Elizabeth's testimony to emphasize the "implausibility" of her story.

However, we refuse to either address or preserve his claim that counsel failed to perform his duty to inform him of his right to contact his local consulate pursuant to the Vienna Convention on Consular Relations. In making this general claim, Bonilla fails to state any specific ways in which a "competent" attorney that raised this issue would have changed the outcome of his criminal case. See *State v. Astello*, 602 N.W.2d 190, 198 (Iowa Ct. App. 1999).

AFFIRMED.