

**IN THE COURT OF APPEALS OF IOWA**

No. 6-898 / 05-1740  
Filed March 14, 2007

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**DAVID ROYCE DESIMONE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Clinton County, Mark J. Smith,  
Judge.

Defendant appeals from his conviction of third-degree sexual abuse.

**AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and Stephan Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Ann Brenden, Assistant Attorney General, Michael L. Wolf, County Attorney, and Ross Barlow, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**SACKETT, C.J.**

Defendant-appellant, David DeSimone, appeals from his conviction of third-degree sexual abuse. He contends the court erred in overruling (1) his motion in limine concerning evidence he purchased alcohol and (2) his motions for judgment of acquittal based on the sufficiency of the evidence. He further contends trial counsel was ineffective in failing to object to certain evidence. We affirm.

**I. Background**

In October of 2004, Samantha, a minor, attended a birthday party for her friend, Ashley, at the defendant's house. Defendant had been given money by others to purchase a keg of beer for the party. Samantha drank six to twelve glasses of beer and admitted blacking out or passing out twice. Following the second episode, Samantha found herself naked in defendant's bed. She noticed her tampon was missing. She said the defendant forced her to engage in sexual intercourse and fellatio. She left defendant's house after midnight, went to a nearby store, and called a friend and the police.

After talking briefly with Samantha, the police took her to the hospital, where she was examined for sexual assault. She told police she had vomited on the defendant's bed, the bedroom floor, and her hair. She also said the defendant had grabbed her neck and choked her. The hospital examination did not find any evidence of trauma to her neck or genital area. The laboratory examination of the sexual abuse protocol kit returned no evidence of semen.

The police obtained a search warrant and seized bedding from the defendant's home. The laboratory examination of the items seized from the

defendant's home found evidence of the defendant's blood and dried semen. The tests did not reveal any blood, vomit, or other biological materials attributable to Samantha on the items seized.

The State charged the defendant with third-degree sex abuse and later amended the trial information to include an habitual offender allegation. The court granted the defendant's motion in limine to exclude hearsay and evidence of other bad acts, except to allow evidence the defendant provided the keg of beer. The case was tried to a jury. After the State's case, and again before the case was submitted to the jury, the defendant moved for judgment of acquittal, contending that "in our judgment the State has not made out a prima facie case that the evidence is lacking insofar as corroboration of the testimony of the complaining witness." The State resisted, asserting both that a victim's testimony does not need to be corroborated and that it was corroborated in this case by witnesses and physical evidence. The court overruled the motions, finding sufficient evidence to generate a jury question. The jury found the defendant guilty as charged. The court sentenced him to a term of incarceration not to exceed fifteen years.

On appeal, the defendant contends the court erred in overruling his motions for judgment of acquittal and partially denying his motion in limine. He also contends trial counsel was ineffective in not objecting to admission of (1) the tape of Samantha's 911 telephone call, (2) irrelevant testimony of a person who was not at the party, and (3) character or propensity testimony concerning the defendant.

## II. Discussion

A. *Motions for judgment of acquittal.* We review a trial court's ruling on a motion for judgment of acquittal for correction of errors at law. Iowa R. App. P. 6.4; *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004). If, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, there is substantial evidence in the record to support each element of the crime charged, the evidence is sufficient to withstand a motion for judgment of acquittal. *State v. Reynolds*, 670 N.W.2d 405, 409 (Iowa 2003). Substantial evidence means evidence that "could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *Id.* at 410 (quoting *State v. Bayles*, 551 N.W.2d 600, 608 (Iowa 1996)).

Iowa Code section 709.4 (2003) defines sexual abuse in the third degree. In relevant part, it provides that a person who performs a sex act "by force or against the will of the other person" commits sexual abuse in the third degree. *Id.* Section 702.17 provides this definition of "sex act":

The term "sex act" or "sexual activity" means any sexual contact between two or more persons by: penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; . . .

"The function of the jury is to weigh the evidence and 'place credibility where it belongs.'" *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006) (quoting *State v. Blair*, 347 N.W.2d 416, 420 (Iowa 1984)). Samantha's testimony was not so "impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993) (quoting *Graham v. Chicago & Nw. Ry. Co.*, 143 Iowa 604, 615, 119 N.W. 708,

711 (1909)). Although the evidence in the record is disputed, we conclude, as did the district court, there is sufficient evidence to generate a jury question on each of the elements of the crime charged. See *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995) (holding there is sufficient evidence to convict where the only direct evidence is the victim's testimony). We affirm the district court's denial of appellant's motions for judgment of acquittal.

*B. Motion in limine.* Appellant contends the district court erred in overruling his motion in limine concerning testimony he purchased alcohol for the party. He argues the testimony was irrelevant and was improper in that it "could only be used by the jury as action in conformity with character." See Iowa R. Evid. 5.404(b). The State responds that appellant did not preserve error on this issue or, if error were preserved, the testimony was admissible under rule 5.404(b) to show motive, opportunity, preparation, plan, and knowledge. It also argues it is entitled to present the whole story of the crime, even if it means introducing evidence of other crimes. See *State v. Veal*, 564 N.W.2d 797, 812 (Iowa 1997), *overruled on other grounds by State v. Hallum*, 585 N.W.2d 249, 253 (Iowa 1998).

We review rulings on motions in limine for correction of errors at law. Iowa R. App. P. 6.4. Rulings on the admissibility of prior-acts evidence are reviewed for an abuse of discretion. *State v. White*, 668 N.W.2d 850, 853 (Iowa 2003). In the case before us, the defendant moved to exclude "any evidence of prior acts of the defendant" and "any mention of guilty plea to providing alcohol to a minor." The district court ruled:

[T]he fact that he pled guilty to providing alcohol to a minor should be left out. However, the facts and circumstances surrounding the

event itself, if the victim will testify that the Defendant provided alcohol to her leading to her intoxication, that is relevant and the Court will allow her testimony

At trial Samantha testified she was intoxicated at the party. Ashley, whose birthday party at the defendant's house was attended by Samantha, testified without objection that she provided the money and the defendant picked up the keg. We conclude the district court did not abuse its discretion in allowing the testimony that the defendant picked up the keg. See Iowa R. Evid. 5.404(b). We also conclude the testimony was not unfairly prejudicial to the defendant. See Iowa R. Evid. 5.403.

C. *Ineffective assistance of counsel.* Appellant raises several claims counsel was ineffective either in not objecting to certain evidence or in introducing evidence. "Ordinarily we preserve claims of ineffective assistance of counsel raised on direct appeal for postconviction proceedings to allow full development of the facts surrounding counsel's conduct." *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa Ct. App. 2004). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

To prevail on an ineffective-assistance-of-counsel claim on direct appeal, the defendant must establish as a matter of law that counsel failed to perform an essential duty and prejudice ensued. If the record is adequate to determine as a matter of law that the defendant will be unable to establish one or both of the elements of his ineffective-assistance claim, we will affirm his conviction without preserving such claims. If it is necessary to more fully develop a factual record, we preserve the ineffective-assistance claim for a possible postconviction relief action.

*State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004) (citations and internal quotation marks omitted). We conclude the record is not adequate for us to

determine as a matter of law whether counsel was ineffective. Consequently, we preserve appellant's ineffective-assistance-of-counsel claims for possible postconviction relief proceedings.

**AFFIRMED.**