IN THE COURT OF APPEALS OF IOWA

No. 8-352 / 06-1916
Filed July 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GREGORY THOMPSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Gregory Thompson appeals from his judgment and sentence for second-degree sexual abuse. **AFFIRMED.**

Gary Dickey Jr. of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Gregory Thompson appeals a judgment and sentence for second-degree sexual abuse. He argues the district court violated his right to a speedy trial. He also challenges the sufficiency of the evidence and raises several other claims.

I. Background Facts and Proceedings

The trial record, viewed in a light most favorable to the State,[1] reveals the following facts. Eleven-year-old K.J. ran away from a Des Moines youth shelter. She and a friend met forty-year-old Thompson on a street. Thompson approached the girls. He told them he "was staying at the Holiday Inn in room 1025." Thompson returned to his hotel room and drank alcohol with his two roommates. That night, K.J., by herself, knocked on Thompson's hotel room door. Thompson let K.J. in the room. His roommates left because they "were uncomfortable with the girl being there because she was a runaway and was young."

Thompson engaged in oral sex with K.J. When his roommates returned to the room, Thompson took K.J. to the bathroom of the hotel's empty fitness room, instructed K.J. to remove her clothing, and performed vaginal intercourse.

K.J. eventually left the hotel and told a maintenance worker across the street that she had been raped. The worker called 911 and police arrived shortly thereafter. An officer took K.J. back to the hotel, where she identified Thompson

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[1] This is the standard used when a defendant challenges the sufficiency of the evidence. *See State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). We acknowledge that Thompson disputed significant aspects of the State's case and has raised contradictions in the record as grounds for reversal. His arguments will be addressed in greater detail below.

as the perpetrator. Swabs taken during a sexual assault examination showed the presence of Thompson's semen in K.J.'s vagina.

The State charged Thompson with second-degree sexual abuse. Iowa Code §§ 709.1, .3(2) (2003). Before the initially scheduled trial date, Thompson wrote several letters to the judge complaining about his attorney's representation and the lack of progress in taking depositions of two police officers and one of his roommates at the Holiday Inn, identified as Dennis Ross.[2] The court held two hearings on Thompson's complaints. At the first hearing in early May 2006, the court confirmed that "[s]peedy trial would run sometime in early June." The court declined to remove Thompson's attorney and instructed the State and Thompson to schedule the remaining depositions before the speedy trial deadline. The court stated:

> I don't believe, from what I have heard, that there's been sufficient cause that would persuade me that [counsel] has not been acting appropriately or otherwise in the defendant's best interests.
> . . .
> To the degree the parties can schedule the remaining depositions and deal with the time that remains between now and either the existing trial date or the speedy trial deadline, you should continue to work on those efforts. But current counsel will remain on the case.
> . . .
> It sounds like the issues raised by the correspondence as concerns the status of depositions have also been addressed, at least in terms of the identification of the officers and the opportunity, if the defendant so wishes, to either take a discovery deposition or perpetuate testimony for trial from Mr. Ross in Lincoln.

At a second hearing addressing the same issues, Thompson's attorney explained that his attempts to contact Ross had been unsuccessful. He also

[2] Ross was also referred to as "Clinton Ross."

explained that the State had provided a new witness list and Thompson wished to depose at least one of those witnesses. The attorney continued:

> Mr. Thompson is going to have to realize that if he [wants certain witnesses deposed], it's going to cause another delay of the trial, in all likelihood. Nonetheless, though, as the case stands today, if we don't depose those witnesses, I will be ready for trial when the case comes up . . . .

The court found that "discovery in this case seems to be appropriately ongoing," and again denied Thompson's request to have his attorney removed. The court also declined to move back the trial date.

On June 1, 2006 the court issued an order rescheduling trial from June 5, 2006 to June 26, 2006, a date a little over two weeks past the speedy trial deadline of June 8. Later, the trial was postponed again based on Thompson's filing of an ethics complaint against his attorney and the district court's decision to then remove counsel. This postponement is not challenged on appeal. Near the end of July, Thompson filed a pro se "Motion to Dismiss Case" on the ground that his right to a speedy trial was violated. Following a hearing, the district court denied the motion.

The case proceeded to trial. On the first day of trial, Thompson asked the court to reconsider its ruling on the motion to dismiss. The court declined to do so. The jury returned a finding of guilt.

Thompson filed a motion for new trial and motion in arrest of judgment. The court denied these motions. Thompson was sentenced to a prison term not exceeding twenty-five years and a mandatory life sentence pursuant to Iowa Code section 903B.1. The Court subsequently amended its sentencing order to delete the mandatory life sentence.

On appeal, Thompson and his appellate attorney raise several arguments in support of reversal.

II. Speedy Trial

Iowa Rule of Criminal Procedure 2.33(2)(*b*) states:

> If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

In applying this rule,

> [t]he decisive inquiry . . . should be whether events that impeded the progress of the case and were attributable to the defendant or to some other good cause for delay served as a matter of practical necessity to move the trial date beyond the initial 90-day period.

State v. Campbell, 714 N.W.2d 622, 628 (Iowa 2006).

In denying Thompson's motion to dismiss, the district court stated:

> It is clear from the record before this Court that the reason for delaying the trial of this case beyond the speedy-trial deadline was solely attributable to the repeated demands of the defendant for depositions of persons he believed to be beneficial to his defense. He made it unmistakably clear that the procurement of these depositions was essential to what he perceived as an adequate defense at trial, and that his defense counsel should be replaced if they were not so procured. Prior defense counsel acted appropriately in attempting to accede to his client's demands, and the state was equally accommodating in trying to get the requested depositions completed.
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> The logistical difficulties encountered in completing these depositions, especially those regarding the Ross deposition, were reasonable and constitute good cause for any delay beyond the speedy trial deadline. *State v. Winters*, 690 N.W.2d 903, 909 (Iowa 2005) (citing *State v. LaPlant*, 244 N.W.2d 240, 242 (Iowa 1976) (holding delay was reasonable to comply with the defendant's request for depositions and stating "a criminal defendant must accept the reasonable delay he instigates")). The delay in continuing this case beyond the speedy trial deadline was both attributable to the defendant and for good cause.

We discern no abuse of discretion in this ruling. *Id.* at 627 (reviewing a district court's ruling on a motion to dismiss based on speedy-trial grounds for an abuse of discretion but noting that "discretion is a narrow one, as it relates to circumstances that provide good cause for delay of the trial").

The speedy trial deadline was June 8, 2006. As noted, the district court issued an order on June 1, 2006, postponing the trial date from June 5 to June 26, 2006. At a status hearing on June 5, 2006, it became clear that the June 1 order was issued in consultation with the prosecutor and defense attorney. After the prosecutor stated that she was having trouble locating Ross for a deposition, defense counsel said,

> Your Honor, that's correct. *We did* select a new trial date of June 26. Depositions are now scheduled for June 14. Clinton Ross, the witness I am unable to get a good address for him. He will not return my calls. I've got no cooperation from the guy whatsoever, so I cannot help as far as securing him. He is located in Lincoln, Nebraska.

(Emphasis added). Defense counsel also confirmed that the remaining depositions were scheduled for the following week. This was after the speedy trial deadline.

Based on this record, we agree with the district court that the trial was postponed at the behest of Thompson to complete the depositions requested by him. Additionally, both the State and defense counsel made diligent but ultimately unsuccessful efforts to secure the attendance of witnesses prior to the speedy trial deadline. *Cf. State v. Winters*, 690 N.W.2d 903, 909 (Iowa 2005) (finding speedy trial violation where "the record failed to disclose any reason why the depositions could not have been completed prior to the expiration of the

speedy-trial deadline other than the bare assertion by the prosecutor.") Notably, the delay was short and, at the June 5 hearing, neither Thompson nor his attorney asserted that the delay would impinge on Thompson's right to a speedy trial. *Id.* at 908. For these reasons, we affirm the district court's denial of Thompson's motion to dismiss.

III. Sufficiency of the Evidence

Thompson challenges the sufficiency of the evidence supporting the jury's finding of guilt. Our review is for correction of errors at law, with the findings binding us if supported by substantial evidence. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

The State had to prove K.J. was a child under age twelve and Thompson performed a sex act with her. Iowa Code §§ 709.1, .3(2). As detailed above, the record contains more than substantial evidence to support these elements. Although Thompson accurately cites certain inconsistencies between K.J.'s testimony and other evidence, it is established that "the jury was free to reject certain evidence, and credit other evidence." *Id.* (quoting *State v. Anderson,* 517 N.W.2d 208, 211 (Iowa 1994)).

We recognize that a court may find testimony "so impossible, absurd, and self-contradictory" as to "deem it a nullity." *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997). K.J.'s testimony was not of this sort. While she admitted to lying in the past, key aspects of her testimony about Thompson's involvement were independently corroborated. Accordingly, we reject Thompson's challenge to the sufficiency of the evidence.

IV. New Trial Ruling

Thompson challenges the district court's denial of his motion for a new trial, arguing the jury's finding of guilt was contrary to the weight of the evidence. "On a weight-of-the-evidence claim, appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003).

The district court acknowledged the conflicting nature of the evidence but concluded the conflict was not "so disproportionate to the verdict" as to warrant setting it aside. We find it unnecessary to detail that evidence again. Suffice it to say we discern no abuse of discretion in this ruling.

V. Ineffective-Assistance-of-Counsel

Thompson or his appellate attorney raise the following ineffective-assistance-of-counsel claims: (1) prosecutorial bad faith and destruction of evidence, (2) inadequate cross-examination of K.J., (3) counsel's failure to strike an allegedly impartial juror, (4) counsel's failure to seek an independent analysis of the DNA evidence, (5) counsel's failure to challenge the chain of custody of the sexual assault kit in light of "clearly inconsistent documentation," (6) inadequate cross-examination of a nurse, and (7) counsel's failure to investigate K.J.'s claim of sexual assault by another assailant, and counsel's failure to depose certain witnesses.

Thompson must show (1) counsel breached an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). On the prejudice element, Thompson

must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

Reviewing this constitutional issue de novo, we conclude the evidence of second-degree sexual abuse was overwhelming. Accordingly, we reject these ineffective-assistance-of-counsel claims.

VI. Batson Challenge

Under this heading, Thompson claims there were no black jurors in the jury pool. He cites to *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986) (holding that a potential juror may not be struck "solely on account of their race"). His argument, however, does not implicate *Batson*, but authority requiring jury panels to represent a "fair cross-section of the community." *State v. Huffaker*, 493 N.W.2d 832, 833 (Iowa 1992). Although the jury selection process was reported, no record was made on this "fair cross-section issue." Therefore, error was not preserved.

To the extent Thompson's argument could be read as a challenge to the State's exercise of peremptory strikes, the record contains no indication that the State exercised its strikes for constitutionally impermissible reasons. Accordingly, we reject this challenge.

Thompson also asserts that "most of the jurors he had to choose from were sexual assault victims, nurses, or women who were going to school to be a nurse and school teachers, and one sexual assault victim was left on the jury."

With respect to his claim about the nurses, potential nurses and teachers, we assume without deciding that error was preserved. The prosecutor established that these individuals' duties as jurors would not be affected by the fact that they were mandatory reporters of abuse. Therefore, we reject this claim.

Thompson correctly notes that one individual who claimed to have been sexually assaulted as a teenager was left on the jury. Defense counsel asked the district court to strike her for cause. The court denied the request following in-chambers questioning, stating "she has not come to any predetermined or unqualified conclusions prior to hearing the evidence as to the defendant's guilt."

The district court is afforded broad discretion in ruling on challenges for cause. *State v. Jones*, 464 N.W.2d 241, 243 (Iowa 1990). On our review of the in-chambers record created by the court and attorneys, we conclude the district court did not abuse its discretion in denying this challenge for cause. *Cf. State v. Hatter*, 381 N.W.2d 370, 372 (Iowa Ct. App. 1985) (stating that while the record was unclear as to whether a juror filed a complaint against the person she claimed sexually assaulted her, facts were sufficiently similar to facts at hand that district court abused discretion in refusing to strike her for cause).

VII. Police and Prosecution Fabrication

Thompson raises a number of challenges under the heading "Police and Prosecution Fabrication." The challenges based on contradictions in the record

are rejected because, as noted, it was the jury's prerogative to sort out those contradictions. The challenge based on prosecutorial bad faith and destruction of evidence was also raised by Thompson's appellate attorney as an ineffective-assistance-of-counsel claim. We have rejected that challenge above. A speedy trial challenge was addressed and rejected above.

VIII. Thompson's Sentence

Thompson argues that a special sentence "imposed on him by the district court . . . was contrary to law."

Shortly after the court imposed the special sentence, the Iowa Department of Corrections advised the district court that Thompson committed his offense prior to the effective date of section 903B.1. The court notified the parties of the Department's correspondence. The court also advised the parties of its belief that the statute did not apply to Thompson and of its intent to modify the sentence. The court gave the parties ten days to respond. On receiving no response, the court entered an order "deleting any and all language regarding the imposition of the special sentence pursuant to Iowa Code section 903B.1." As the court afforded Thompson the relief he is now requesting, we have nothing to correct.

IX. Cumulative Effect of Claimed Errors

Thompson asserts "a general claim that the cumulative effect of errors committed during trial deprived him of a fair trial . . . ." Having found no errors requiring reversal, we need not address this argument. *See State v. Burkett*, 357 N.W.2d 632, 638 (Iowa 1984).

AFFIRMED.