IN THE COURT OF APPEALS OF IOWA

No. 8-969 / 07-1833
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CASS LAWRENCE HESSE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jeffrey Harris, District Associate Judge.

Cass L. Hesse appeals his convictions, following jury trial, for three counts of indecent contact with a child. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook Jacobsen, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Doyle, JJ.

MILLER, J.

Cass L. Hesse appeals his convictions, following jury trial, for three counts of indecent contact with a child. He claims the district court erred in overruling his motions for judgment of acquittal and new trial, and in allowing testimony regarding privileged communications. He also claims his trial counsel was ineffective for failing to object to testimonial evidence that was outside the minutes of evidence. We affirm his convictions and preserve his ineffective assistance claim for a possible postconviction proceeding.

I. BACKGROUND FACTS AND PROCEEDINGS.

On April 19, 2007, the State charged Hesse with three counts of indecent contact with a child, in violation of Iowa Code section 709.12 (2007), based on allegations from three minor boys, their parents, and their church pastor that Hesse had engaged in indecent contact with the boys over the previous six months to a year. Hesse filed a motion in limine on August 6, 2007, seeking, in relevant part, to exclude any reference to any statements made by Hesse to Pastor Michael Davis, asserting such communications were privileged under Iowa Code section 622.10. Following a hearing the district court entered a ruling denying this portion of Hesse's motion in limine. In doing so, the court concluded the communications were not confidential in nature and, in addition, Hesse had waived any possible "clergy privilege." The case proceeded to jury trial.

From the testimony presented at trial a jury could find the following facts. J.D., S.D., and T.D. are brothers who were thirteen, twelve, and nine respectively at the time of trial. Hesse was twenty-eight years of age at the time of trial. He

finished high school, but had some learning difficulties. Pastor Davis described Hesse as "possibly a little slower than most [folks]." Hesse testified that while in high school he had learning difficulties as a result of "MR," and responded in the affirmative when his attorney asked if "MR" stood for "mental retardation."

The boys had met Hesse approximately six years earlier when he began babysitting them. At that time the boys were living with their biological mother and Hesse's sister. When their mother needed someone to babysit she arranged to have Hesse do so. Eventually the boys moved in with their father and stepmother, who apparently allowed Hesse to continue to babysit them. Hesse also continued to babysit the boys when they visited their biological mother every other weekend. Initially Hesse watched the boys at their mother's house, but Hesse testified he disapproved of the conditions at the mother's home and gradually started watching the boys at his own residence. According to the testimony of the boys and Hesse, eventually the boys were staying with Hesse overnight at his apartment almost every weekend.

S.D. testified that Hesse kissed him on the bare stomach and attempted to kiss him on the lips and grab his buttocks. Hesse had never succeeded in kissing him on the lips, only the cheek, because S.D. would always push Hesse away when Hesse tried to kiss him. S.D. further testified that when he was lying on his back on the floor watching television Hesse would sometimes "plop down on" him, sometimes would sit on S.D.'s back and have him try to do push-ups, or Hesse would be in a "push-up pose" and would slowly let himself "fall" onto S.D.

without actually touching him. S.D. also stated Hesse would sometimes have him sit on his lap and would bounce his knees and pat S.D.'s stomach.

J.D. testified Hesse "tried to hump" him and his brother S.D. He stated that every time Hesse got angry with J.D. he would make him stand in the corner and would "slam his private into my bottom." This happened "a lot." He further testified that he had observed Hesse "hump" S.D. in this manner a lot as well, and that when S.D. would sit on Hesse's lap he would "try to hump [S.D.] by pushing his private against his bottom." Hesse would move his legs up and down so that "it would hit it" and Hesse would make "grunting noises." J.D. stated that Hesse had done this to him and his brother T.D. as well. He testified he had also witnessed Hesse pinch S.D.'s "butt cheeks" on occasion and tell S.D. he was "cute," and kiss S.D.'s bare stomach while he was on Hesse's lap. He also saw Hesse lay over S.D., while S.D. was lying on his back, and "go up and down" in a push-up fashion but Hesse's body never actually touched S.D.'s, and sometimes he tried to kiss S.D. on the lips in the process. S.D. would not allow that however and would roll over to avoid it. All of this was consistent with S.D.'s own testimony. Finally, J.D. testified about a time when Hesse touched J.D.'s penis. He stated that he was taking a shower at Hesse's house and asked his brother to get him a towel but Hesse got it for him instead. When Hesse handed the towel to J.D. he touched J.D.'s chest and "went down, and he touched my private."

T.D. testified Hesse would have him stand in the corner facing the wall with Hesse right behind him, with Hesse's legs touching his and Hesse's chest

touching his back, and Hesse would "hit his private against my butt." He stated that while Hesse was "humping" him, T.D.'s whole body slammed into the wall and he was saying "ow" because it made his head hurt to hit the wall. Hesse did this only on one day, but did it about five times that day with each episode lasting about one minute. He saw Hesse do the same thing to his brothers, only a couple of times to J.D. but "lots of times" to S.D., and that they were always in a corner when Hesse would "hump" them. T.D. stated Hesse would not talk during these incidents, but would say "ah" each time "he humped us." Hesse would also put T.D. on his lap about three times each weekend and would bounce his knees while he was on his lap. T.D. testified he saw Hesse try to kiss S.D. on the lips "almost every single time we were there" but had never seen him do so successfully. He also had seen S.D. lying on his stomach on the floor and Hesse would sit on S.D.'s back and use one hand to try to pinch S.D.'s bottom. T.D.'s testimony thus was largely consistent with S.D.'s and J.D.'s regarding what Hesse had done to the boys.

T.D. testified that he finally decided to tell his stepmother about what Hesse had been doing, and by the time he told her these things had been going on for about a year. He stated Hesse had told him not to tell anyone about it but he finally told because he was getting tired of keeping it all a secret. They did not tell anyone sooner because they were "worried about [Hesse] hurting us."

J.D. also testified these incidents had been going on at Hesse's house for approximately six months to a year before he and T.D. spoke up and told their stepmother about it. He stated he decided to tell because he got tired of Hesse

slamming him and T.D. into the wall, and had not told sooner because he was scared of Hesse going to prison or his family getting "threatened and stuff, like blackmailed."

Pastor Michael Davis testified that the boys' family had belonged to his church for about five years and Hesse had been a member for around four years. In October or November 2006 the boys' stepmother contacted Davis and informed him that the boys had told her that something inappropriate had happened with Hesse. Davis spoke with each of the boys individually at their home. He asked them to tell him what happened and they did so.

After church services the following Sunday evening Pastor Davis and one of the church deacons met with Hesse to discuss the boys' allegations. Specifically, Davis told Hesse the boys had alleged he would pull them onto his lap, "hump their butt", lay on them on the floor, kiss their lips, and he had pushed J.D. up against the wall and pushed his private into his rear. Davis testified Hesse only specifically denied that he had pushed J.D. up against the wall. When Davis asked him what should be done about the situation Hesse replied he would need to "get saved." Pastor Davis then had a discussion with Hesse about what the scripture says about homosexuality. Davis testified he specifically asked Hesse whether he had "humped the boys' butts" and Hesse's response to him was that "he had the evil thoughts and things."

Hesse spoke with Davis again the following Wednesday at church and asked if he could go before the church to apologize for "what he had done." Davis told him he could not. Davis met again with Hesse the next Saturday. A

church deacon was present at this meeting as well, a different deacon than had been present at the meeting the previous Sunday. Davis discussed possible church disciplinary actions with Hesse at this meeting.

Hesse also testified at trial. He stated he had been babysitting the boys for several years, and eventually they began to stay with him at his apartment almost every weekend. Hesse testified he had difficulty controlling and disciplining the children, and they did not respect him or obey his rules. Initially he apparently had permission from their parents to spank the boys, but eventually the parents told him he could no longer spank them so he would punish the boys by having them stand in the corner or at the table. Hesse admitted he would hold the boys on his lap at times, but denied he ever did so to arouse himself or the boys sexually. He also admitted he had to pin J.D. in the corner once to calm him down, but denied ever "humping" the boys in the corner or bumping or pressing against them in a sexual way. Hesse denied ever kissing the boys on the lips, pinching their buttocks, or walking in on J.D. while he was in the shower and touching his penis. He denied any sexual desire whatsoever towards any of the boys.

Hesse further testified he recalled telling Pastor Davis that he had "evil thoughts," but explained that he meant he was having sexual thoughts about finding women online and wanting to sleep with women. He further stated that because of his mental handicap he had trouble understanding some of Davis's questions because they were "combination-type questions," i.e. compound questions.

Hesse challenged the sufficiency of the evidence by moving for judgment of acquittal at the close of the State's case-in-chief and again at the close of all the evidence. The court concluded there was sufficient evidence to generate a jury question and denied Hesse's motions. The jury found Hesse guilty as charged. Hesse filed a motion for new trial on October 7, 2007, contending, in relevant part, that the verdicts were contrary to the evidence presented because the court "improperly admitted the privileged testimony of Pastor Davis" and there "was not sufficient evidence that any action by [Hesse] was done to satisfy the sexual desires of any person." The court denied the motion for new trial, concluding that its prior ruling on the admissibility of Davis's testimony was correct as a matter of law, and substantial evidence was presented, through the testimony of the children, to lead the jury to conclude Hesse's actions were done for the purpose of satisfying his sexual desires. The court sentenced Hesse to a term of no more than two years imprisonment on each count and ordered the terms to run consecutively.

Hesse appeals his convictions, contending the district court erred in overruling his motions for judgment of acquittal and new trial because there was not sufficient evidence of inappropriate touching or that any action by Hesse was done to arouse or satisfy the sexual desires of any person, and erred in allowing the testimony of Pastor Davis regarding allegedly privileged communications. He also claims his trial counsel was ineffective for failing to object to testimonial evidence that was outside the minutes of evidence.

II. MERITS.

A. Privileged Communications.

Hesse contends the district court erred in allowing Pastor Davis to testify regarding incriminating statements he made to him at Davis's office in the presence of a church deacon. He claims these statements qualify as privileged communications under Iowa Code section 622.10 and therefore were inadmissible at trial. As set forth above, Hesse first attempted to prevent admission of these statements by a motion in limine prior to trial and later challenged their admission in his motion for new trial. In both instances the district court concluded that the statements were not privileged communications, and even if they were Hesse had waived that privilege by discussing the matter in the presence of a third party.

"Because evidentiary privilege in Iowa is based on statute, our review is on error. But, significantly, a trial determination on whether or not privilege attaches to a particular conversation is discretionary." *State v. Richmond*, 590 N.W.2d 33, 34 (Iowa 1999). Although the statute is to be liberally construed, we will strive to limit its application only to situations that foster the theory behind the privilege. *State v. Hartman*, 281 N.W.2d 639, 642 (Iowa Ct. App. 1979).

What has historically been described as our "priest-penitent" privilege, *see, e.g.*, *Richmond*, 590 N.W.2d at 33-34, provides in pertinent part,

> 1. . . . a member of the clergy shall not be allowed, in giving testimony, to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

Iowa Code § 622.10(1). The statute further provides that the privilege does not apply to cases where the person in whose favor the prohibition is made waives those rights. *Id*. § 622.10(2). In order to fall within the purview of section 622.10 a communication to a member of the clergy must be: (1) confidential; (2) entrusted to a person in his or her professional capacity; and (3) necessary and proper for the discharge of the function of the person's office. *Richmond*, 590 N.W.2d at 35; *State v. Alspach*, 524 N.W.2d 665, 668 (Iowa 1994).

For the following reasons, we do not believe Hesse's communications with Davis were confidential. First, Pastor Davis testified he did not consider either of his meetings with Hesse to be confidential and did not ever tell Hesse, or lead him to believe, they were going to be confidential. Davis testified he did not consider the meeting confidential because a third person was present. Davis discussed the meeting with his wife, other deacons, his former pastor, and the boys' family. He testified that if he believed the meeting to be confidential or privileged he would not have shared it with all of these people. Second, Davis made it clear to Hesse that the scripture says the church falls under the legal system so if a law had been broken it was his responsibility to turn the matter over to the legal system and it would then be for the authorities to deal with this as need be. Finally, Davis testified that Hesse himself generally knew of the church's discipline procedure and the fact that if Hesse were found to have done something that "brings public reproach to the name of Christ" the person either goes before the church to publically apologize or the pastor makes a recommendation and the church as a whole votes on the matter. Thus, Hesse

was aware that his statements would not be kept confidential based on these church practices. At their Saturday meeting Davis specifically told Hesse that it was going to be a matter of church discipline and Hesse continued to discuss the matter with Davis. Furthermore, Davis told Hesse the matter might be discussed with the police, the Department of Human Services, or both, also indicating to Hesse the statements were not considered to be confidential. Accordingly, we agree with the district court that Hesse's communications with Davis were not confidential in nature and thus do not fall within the purview of the priest-penitent privilege.

We also note that the first meeting was initiated by Davis, not Hesse, and Hesse merely thought Davis wanted to speak with him about a possible job. Davis testified the meeting was "not him coming to me to confess. It was me confronting him." The meeting was to investigate the allegations that had been made by the boys. Davis specifically denied that at least the first part of the meeting dealt with the spiritual needs of Hesse. Thus Davis did not intend, and Hesse did not consider, the meeting to be for Hesse to confess to Davis or to be for spiritual or pastoral purposes.

We also agree with the district court that even if the privilege could somehow apply to Hesse's statements to Pastor Davis, he waived the privilege when he made the statements in the presence of third parties. Although all the necessary elements for a communication to be privileged may be met, the privilege may be lost if the otherwise privileged statements are made in the presence of a third person. *State v. Deases*, 518 N.W.2d 784, 787 (Iowa 1994).

However, the presence of a third person during an otherwise confidential communication does not automatically destroy the privilege. If the third person is present to assist in the discharge of another's professional function or the third person's presence is in some other way necessary, then the privilege will protect confidential communications made in the presence of the third person. *Deases,* 518 N.W.2d at 788.

A deacon was present at both Hesse's Sunday and Saturday meetings with Davis. Thus, unless it can be shown the deacons' presence was to assist Pastor Davis in the discharge of his pastoral functions or was otherwise necessary in order for Davis to discharge his pastoral duties, any priest-penitent privilege Hesse would have was waived. Davis testified that none of the deacons in their church provide any kind of counseling services in an official capacity, they have no special responsibilities in the church, and that they were at the meeting simply as witnesses and not to aid in any kind of spiritual advisement. Further, Davis testified he believed the presence of the deacons was fatal to any claim that the communications with him were privileged. We conclude the deacons' presence at the meetings was not to assist Davis in the discharge of his pastoral functions or otherwise necessary to the discharge of his pastoral duties. Thus, their presence at the meetings waived any potential priest-penitent privilege.

We conclude the district court did not err in allowing Pastor Davis to testify concerning the content of Hesse's statements to him, as such communications were not privileged priest-penitent communications under section 622.10. The evidence before us demonstrates the communications between Hesse and

Pastor Davis were not confidential in nature and also demonstrates that Hesse waived any potential privilege by making his statements in the presence of third persons.

B. Motions for Judgment of Acquittal and New Trial.

Our scope of review of sufficiency-of-evidence challenges is for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). We will uphold a trial court's denial of a motion for judgment of acquittal if there is substantial evidence to support the defendant's conviction. *State v. Kirchner*, 600 N.W.2d 330, 333 (Iowa Ct. App. 1999). Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id*. at 334.

The jury was instructed here that in order to convict Hesse of indecent contact with a child, the State was required to prove that, with or without the consent of the victim(s), Hesse: (1) fondled or touched the inner thigh, groin, buttock, anus, or breast of the victim(s), or touched the clothing covering the immediate area thereof; (2) he did so with the specific intent to arouse or satisfy the sexual desires of himself or the victim(s); (3) Hesse was eighteen years of age or older; (4) the victim(s) were under the age of fourteen; and (5) Hesse and the victim(s) were not married to each other. *See* Iowa Code § 709.12; Iowa Criminal Jury Instruction 900.7. Hesse challenges both the sufficiency and the

weight of the evidence to establish that he made the required prohibited contacts with the boys and that any action done by him was done to arouse or satisfy his own sexual desires or the sexual desires of the boys.

Inherent in our standard of review of a jury verdict in a criminal case is the recognition that the jury was free to reject certain evidence, and credit other evidence. *State v. Arne,* 579 N.W.2d 326, 328 (Iowa 1998). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence and place credibility where it belongs. *Id.* at 673.

Here the jury clearly determined, as was within its discretion to do, that the boys' testimony regarding what Hesse did to them was more credible than Hesse's version of events. As set forth in detail above, each of the boys clearly and consistently testified to several acts by Hesse that could be found by a reasonable jury to be the impermissible contact required for convictions under section 709.12. In addition, the boys testified to facts that a reasonable jury could find supported an inference that Hesse made the prohibited contacts with the intent to arouse or satisfy his sexual desires, including the fact Hesse frequently tried to kiss S.D. on the lips, he would kiss S.D.'s bare stomach and tell him he was cute while pinching his buttocks, he made "grunting noises" while pushing his privates against S.D.'s buttocks, and would say "ah" when he "humped" the boys' buttocks in the corner.

Further, a reasonable jury could have found Davis's testimony that Hesse in effect admitted to him he did all but one of the things the boys told Davis about and that his "evil thoughts" were about the things he was doing to the boys more credible than Hesse's testimony that he did not understand Pastor Davis's questions to him, that his "evil thoughts" were only about wanting to find women on line and sleep with women, and that he touched the boys only out of anger and to discipline them.

Accordingly, we conclude there is substantial evidence in the record that Hesse made prohibited contact with each of the boys and that he did so with the intent to arouse or satisfy his own sexual desires. There is sufficient evidence from which a rational jury could find Hesse guilty beyond a reasonable doubt of all three counts of indecent contact with a child. The district court did not err in denying Hesse's motion for judgment of acquittal.

Hesse also challenges the court's denial of his motion for new trial. Our scope of review for rulings on motions for new trial is for errors at law. Iowa R. App. P. 6.4. When a defendant argues the trial court erred in denying a motion for new trial based on the claim that the verdict is contrary to the weight of the evidence our standard of review is for abuse of discretion. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998)

"The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.'" *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37-38, 1025 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). The court made it clear

in *Ellis* that the contrary to the weight of the evidence standard was not the same as the sufficiency of the evidence standard, contrary to a previous holding. *Id.* at 659. The power of the trial court to grant a new trial on the ground the verdict was contrary to the weight of the evidence should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict. *Id*.

Based on the evidence in the record set forth above, we conclude this is not a case in which the testimony of a witness or witnesses which otherwise supports conviction is so lacking in credibility that the testimony cannot support a guilty verdict. Neither is it a case in which the evidence supporting a guilty verdict is so scanty, or the evidence opposed to a guilty verdict so compelling, that the verdict must be seen as contrary to the evidence. The evidence in this case simply does not preponderate heavily against the verdict. The district court did not abuse its broad discretion by denying Hesse's motion for new trial.

C. Ineffective Assistance of Counsel.

Finally, Hesse contends his trial counsel was ineffective for not objecting to testimony that was outside the minutes of evidence in violation of Iowa Rule of Criminal Procedure 2.5(3). More specifically, he claims his counsel should have objected to J.D.'s testimony regarding an incident when Hesse allegedly touched J.D.'s penis, because neither the minutes of evidence nor the attached summary of J.D.'s statement included any reference to the incident. The State argues the general and vague wording in the minutes of evidence, that J.D. would testify to "any other facts or circumstances surrounding this case," was adequate to put Hesse on notice that J.D. might testify to the challenged incident.

We review claims of ineffective assistance of counsel de novo. *State v. Martin*, 704 N.W.2d 665, 668 (Iowa 2005). To prove trial counsel was ineffective the defendant must show that counsel breached an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Griffin*, 691 N.W.2d 734, 736-37 (Iowa 2005).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

We conclude the record before us is inadequate to address Hesse's claim of ineffective assistance of counsel on direct appeal.[1] Under these circumstances, we pass on the issue of ineffective assistance in this direct appeal and preserve it for a possible postconviction proceeding. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

III. CONCLUSION.

[1] We note it would have been beneficial if the State had included more detailed information in the minutes of evidence, in order both to ensure proper notice to Hesse of the evidence against him and to promote judicial economy by avoiding appeal issues such as this.

For the reasons set forth above, we conclude Hesse's communication with Pastor Davis was not a privileged communication and even if privilege were otherwise to apply Hesse waived that privilege when he made his statements in the presence of third parties. Thus, the trial court did not err in allowing Davis's testimony. We further conclude there was sufficient evidence in the record for a rational jury to conclude beyond a reasonable doubt that Hesse was guilty on all three counts of indecent contact with a child, and that the evidence in this case does not preponderate heavily against the guilty verdict. Accordingly, the trial court did not err in denying Hesse's motion for judgment of acquittal and did not abuse its discretion in denying his motion for new trial. We affirm Hesse's convictions and preserve his specified claim of ineffective assistance of trial counsel for a possible postconviction proceeding.

AFFIRMED.