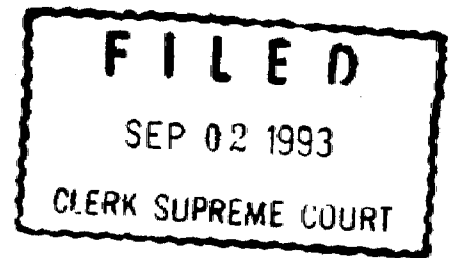


IN THE COURT OF APPEALS OF IOWA

No. 3-344 / 92-508



000843

STATE OF IOWA,

Appellee,

vs.

TERRY MONK, JR.,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Joseph Moothart, Judge.

Defendant appeals his conviction, following a jury trial, for second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3(3) (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Thomas Bower, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

HABHAB, J. 000844

Defendant, Terry Monk, Jr., appeals his conviction, following a jury trial, for second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3(3) (1991). Defendant argues the district court erred in failing to: 1) grant his motion for a directed verdict based on the insufficiency of the evidence; 2) allow the jury to consider his theory of defense by limiting trial counsel's closing argument and denying his requested jury instruction.

Monk was charged with second-degree sexual abuse following an incident at a party at which the victim, Ruben Howard, was anally assaulted with a broom stick handle. Ruben, Monk, Monk's girlfriend (Becky), Jim Barber, and Jim's girlfriend (Heather) all lived in a one-bedroom apartment. On the evening of August 18 or 19, 1991, the group had a party, and purchased two cases of beer. During the party, Ruben and Jim began wrestling, as Jim testified they often did. As they wrestled, Jim grabbed Ruben's shorts and either tore or cut them off. Jim then held Ruben to the floor and directed Monk to get a broom.¹ Jim's brother, Tim, dipped the end of the broom into a jar of Vaseline. At Jim's direction, Monk held Ruben down and stuck the end of the broom into Ruben's rectum. Ruben eventually pulled away, the others laughing as he left the

1. Jim Barber subsequently pled guilty to a lesser offense.

room. Shortly thereafter, Ruben moved out of the apartment.

Ruben did not report the incident to anyone initially because of his embarrassment. However, several weeks later, Ruben's uncle heard about the incident over his C.B. radio and urged Ruben to report the matter to the police. A subsequent doctor's examination revealed no trauma to Ruben's anus. The broom that was used was seized by the police and taken for analysis. However, Becky stated that she had wiped off the handle after the assault and therefore prevented any finding of fecal material.

Monk did not testify on his behalf at trial. His defense, however, was that the assault was not sexually motivated and was therefore not a sex act. Other witnesses at the party testified that there was no sexual activity going on that evening and that none of the men at the party were homosexuals. They also testified that they were extremely intoxicated that evening. The jury returned a verdict finding Monk guilty as charged. Monk was sentenced by the district court to a term of imprisonment not to exceed twenty-five years. Monk appeals. We affirm.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The

evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Monk argues the State failed to satisfy the "sexual contact" provision in the definition of "sex act" because the State presented no specific evidence that either Monk or Ruben was sexually aroused or that Monk had a "sexual motive." Monk contends the individuals participating in the incident did not intend to hurt Ruben but instead intended the incident as a "joke." He claims that the group always wrestled and joked with each other because they were all close friends. Monk also points out that all of the people at the party were extremely intoxicated.

The relevant part of Iowa Code section 702.17 (1991) defines "sex act" as follows:

The term "sex act" or "sexual activity" means any sexual contact between two or more persons . . . by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Here the defendant was accused of forcibly inserting a lubricated broom handle into the victim's anus. We find that a reasonable jury could find that the broom handle was a substitute sexual organ. We also find that a reasonable jury could find the defendant used the broom handle to make

sexual contact when he used it to forcefully penetrate the victim's rectum. The emphasis in the offense of sexual abuse is on the forcible nature of the assault, not on what device was used to carry out the sexual abuse. State v. Whetstine, 315 N.W.2d 758, 761 (Iowa 1982). 000847

Monk argues that the "sexual contact" provision requires the State to prove that the defendant had an actual sexual purpose or motive in committing the act. The State need not show that Monk was sexually aroused or that he derived any sexual gratification from the act he committed. State v. Pilcher, 158 N.W.2d 631, 637 (Iowa 1968). Second-degree sexual abuse is a general intent crime, not a specific intent crime. Lamphere v. State, 348 N.W.2d 212, 217 (Iowa 1984); State v. York, 293 N.W.2d 13, 14 (Iowa 1980). The only intent required is a general intent which is supplied by the unauthorized sexual act. Pilcher, 158 N.W.2d at 637. We find there is substantial evidence in the record to support Monk's conviction of second-degree sexual abuse.

Monk also argues that the trial court erred in precluding the jury from considering his theory of defense by limiting trial counsel's closing argument and denying his requested jury instructions.

Monk objected to the court's definition of a "sex act". Instruction No. 17 stated the following:

"Sex act" means a person's use of artificial sex organ or a substitute for a sexual organ in contact with the anus of another.

Monk requested the instruction be changed to contain the statutory term "sexual contact." The court explained its ruling on Instruction No. 17, and the effect of that ruling on closing arguments, as follows:

And with all due respect to [defense counsel], I'm denying his requested instruction because, in effect, I'm precluding him from arguing to the jury that this would not have been a Sexual Abuse in the Second Degree because there was no sexual gratification.

* * *

And hopefully no one misunderstands what I'm saying as far as closing arguments. All I'm doing is limiting the defense from making the same argument that it made in its motion for judgment of acquittal to the jury as part of its closing argument because I've basically ruled that the law does not require the State to prove a motive of sexual gratification in order to establish an offense of Sexual Abuse in the Second Degree.

* * *

Also, based on my ruling with respect to Defendant's Requested Instruction No. 2 and at the request of the State, I also do not feel it would be appropriate for the defense to argue that the State has to prove specific intent to prove up a charge of Sexual Abuse in the Second Degree or Third Degree.

The trial court's decision on jury instructions will not be disturbed absent an abuse of the trial court's discretion. State v. Cunningham, 463 N.W.2d 887, 889 (Iowa App. 1990). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)).

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Regarding the language of the jury instructions, "a party cannot posit error on the fact that the instructions do not present a concept in exactly the same language in which the party wishes to have it presented." State v. Florie, 411 N.W.2d 639, 697 (Iowa 1987). A defendant is not entitled to a particularly worded instruction where the instructions given, when viewed as a whole, adequately and correctly cover the substance of the requested instruction. State v. Hatter, 342 N.W.2d 851, 857-858 (Iowa 1983).

While it certainly would not have been error for the trial court to have used the statutory term "sexual contact" as requested by Monk, under the circumstances it was not an abuse of discretion not to do so. We approved a similar jury instruction in State v. Hy, 458 N.W.2d 609, 611-12 (Iowa App. 1990). In addition, the Iowa Uniform Criminal Jury Instruction 900.8 does not contain the statutory term "sexual contact".

We also find the district court did not err in prohibiting Monk's lawyer from arguing to the jury that Monk should be acquitted "because there was no sexual gratification." This argument goes to the "specific intent" issue. The absence of specific intent of sexual gratification is not a defense to second-degree sexual abuse. State v. Pilcher, 158 N.W.2d at 637; York, 293 N.W.2d at 14; Lamphere, 348 N.W.2d at 217. Therefore it was not error for the court to refuse to instruct the jury

or to preclude Monk from arguing it. See State v. Stewart, 445 N.W.2d 418, 421-22 (Iowa App. 1989). (ordinarily defendant is entitled to instructions relating to any theory of defense, but only if defendant's request sets out a correct declaration of law).

AFFIRMED.