IN THE COURT OF APPEALS OF IOWA

No. 1-598 / 90-1606

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

CHIEN VAN TRAN,

Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak and Ray Hanrahan, Judges.

Chien Van Tran appeals his conviction by a jury of second-degree sexual abuse. **AFFIRMED.**

Patricia M. Hulting of Roehrick, Hulting & Moisan, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Melodee Hanes, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Thi Trihn Pham is Vietnamese. She came to the United States in September 1989. Pham lived in a house with other Vietnamese, two members of her family, and the defendant, Chien Van Tran.

On January 24, 1990, Tran asked Pham to go with him to visit a friend. After visiting the friend Pham asked Tran to take her back to school. Instead, Tran took Pham to a mobile home. Inside the mobile home, Tran obtained a gun, loaded it, and handed it to Pham. Tran told Pham she could shoot him, he could shoot her, or she had to sleep with him. Pham placed the gun on a table. While Pham was standing behind him, Tran fired the gun twice into the kitchen area. Pham left the mobile home and waited in the car for approximately thirty minutes. Pham did not run away because she did not know her way back to school.

Tran got into the car and stated he would take Pham back to school. Instead, he drove to Saylorville Lake. When they arrived at Saylorville Lake, Pham got out of the car and tried to walk away but Tran backed the car up and blocked her way. After Pham got back into the car, Tran sexually assaulted her. Pham believed Tran's gun was with his coat in the back seat.

At trial two interpreters were employed to translate Vietnamese to English and English to Vietnamese. The jury found defendant guilty of sexual abuse in the second degree. The district court sentenced Tran to a term not to exceed twenty-five years. Tran appeals, claiming the

translation of the Vietnamese and English languages at trial was inadequate, his attorney was ineffective, and the evidence was insufficient to sustain his conviction.

A. Adequacy of Translation.

Defendant claims his rights to due process of law and confrontation of witnesses were denied because of the inadequate translation at trial. Our de novo review of the record, however, does not indicate a single objection by defendant or his counsel relating to the adequacy of translation. "A reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation." United States v. Joshi, 896 F.2d 1303, 1308 (11th Cir. 1990). Moreover, we have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

B. Ineffective Assistance of Counsel.

Defendant claims his trial counsel rendered ineffective assistance by failing to ensure the translation of testimony against him was sufficiently accurate to permit him to confront the evidence against him. Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be developed.

State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). Our de novo review indicates an inadequate record for us to adjudicate Tran's claim. We preserve his ineffective assistance of counsel claim for a later proceeding.

C. Sufficiency of the Evidence.

Defendant also challenges the sufficiency of the evidence to sustain a conviction of sexual abuse in the second degree. Sexual abuse is in the second degree when there is a display of a dangerous weapon during the commission of sexual abuse. Iowa Code § 709.3(1) (1991). Defendant maintains there was insufficient evidence to prove he displayed a dangerous weapon during the commission of the sexual abuse. Defendant contends displaying the gun at the mobile home was a separate and distinct act from the sexual assault which occurred approximately one hour later.

Our review is for correction of errors at law. Iowa R. App. P. 4. The jury's verdict is binding upon a reviewing court 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).

Reviewing the record in the present case, we conclude the evidence presented at trial was sufficient to establish Tran's use of a gun during the commission of the sexual abuse. Although the gun was not displayed to the victim during the actual sex act, the victim testified she and Tran were in a mobile home when Tran got a gun, loaded it, handed it to her, and told her she could shoot him, he could shoot her, or he could rape her. Tran took the gun and fired two shots. When Tran subsequently took Pham to Saylorville Lake, he did nothing to dispel her fear and apprehension of the gun's presence. In fact, Pham believed the gun was with the defendant's jacket in the back seat of the car. Pham testified she unsuccessfully attempted to procure the gun during her struggle with defendant.

The trial court found, and we agree, the display of the gun at the mobile home was part of a continuing act of sexual abuse culminating in the assault at Saylorville Lake. We hold the evidence was sufficient to sustain the conviction of sexual abuse in the second degree.

AFFIRMED.