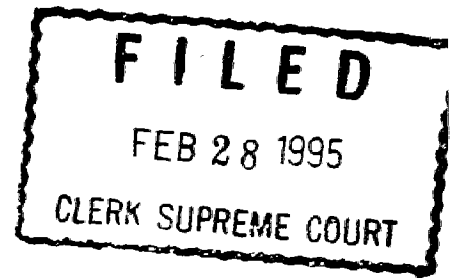


IN THE COURT OF APPEALS OF IOWA

No. 5-022 / 94-93



STATE OF IOWA,

Appellee,

vs.

BRUCE R. WATSON,

Appellant.

Appeal from the Iowa District Court for Madison County,
Peter A. Keller, Judge.

Bruce Watson appeals the judgment and sentence entered upon his conviction, following a jury trial, of second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, and A. Zane Blessum, County Attorney, for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

HAYDEN, P.J.

On March 21, 1994, the State filed an amended trial information charging Bruce Watson with second-degree sexual abuse, third-degree sexual abuse, and indecent contact with a minor.

At Watson's October 1994 jury trial the parties apparently understood all witnesses would be sequestered from the courtroom when they were not on the stand; however, no formal sequestration motion was made.

Watson's minor stepdaughter, B.B., testified about various incidents of sexual abuse perpetrated by Watson against her. B.B. stated she was first abused by Watson when she was six or seven years of age and the family was living in Indianola. B.B. remembered three incidents of sexual abuse which occurred when she was in the fourth grade and the family was living in a trailer home in Bevington. When B.B. was ten her family moved to St. Charles and she recalled Watson sexually abused her twice in the basement of their home, once when she had been showering. B.B. estimated Watson had intercourse with her about every two to three weeks from the time she was seven until she was twelve.

B.B.'s brother testified when the family was living in Bevington he had walked in on Watson and B.B. Watson was undressed and was making B.B. touch his penis. The victim's brother also testified he once heard B.B. shout "rape." B.B.'s brother recalled on yet another occasion,

he saw defendant coming up from the basement naked and B.B. was behind him.

Dr. Rizwan Shah explained based on her observations of scarring on the opening of B.B.'s vagina and a defect in her hymen she concluded penile penetration had occurred. However, Shah estimated penetration occurred sometime within the last two years. She further concluded there could not have been more than two episodes of sexual intercourse within the last two years.

Watson called his stepfather, Duane Fisher, as a witness. He testified there was not an operational shower in the basement of the St. Charles home when the abuse allegedly occurred. Additionally, Fisher stated the St. Charles house was green, not yellow as B.B. had testified.

In rebuttal the State called Jerry Bassanmus, the father of Mrs. Watson. Watson requested the court not allow this witness to testify because he had been present throughout the trial; however, the court allowed Bassanmus to testify about Watson's reputation, the shower, and house color. Bassanmus testified the shower was operational during the relevant time period and the house was yellow.

At the close of the State's evidence and again after all evidence had been presented Watson moved for a directed verdict. The motions were denied.

The jury found Watson guilty of second-degree sexual abuse and acquitted him of the other charges. The court sentenced Watson to a term not to exceed twenty-five years.

Watson appeals. He argues two issues on appeal. He first argues there was insufficient evidence to support his conviction. Second, he argues the trial court abused its discretion by allowing a witness who had not been sequestered to testify on rebuttal. We will consider each issue in turn.

I. Insufficient Evidence.

Our scope of review is on assigned error only. Iowa R. App. P. 4. We view the evidence in the light most favorable to the State. State v. Rojas-Cardona, 503 N.W.2d 591, 594 (Iowa 1993). We draw all fair and reasonable inferences from the evidence, taking all of the evidence into consideration. Id. We uphold a jury verdict against a posttrial motion for new trial based on sufficiency of the evidence if there is substantial record evidence to support the verdict. Id. Evidence is substantial if it could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id. (citing State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981)).

In the instant case, the jury was required to find the following elements beyond a reasonable doubt:

(1) In or about 1990, defendant performed a sex act with B.B.

(2) Defendant performed the sex act while B.B. was under the age of twelve years. See Iowa Code § 709.3(2) (1993).

Watson's specific contention here is Dr. Shah's testimony belies most of B.B.'s claims regarding the time period in which the abuse took place and the frequency of the abuse; therefore, B.B. is not a credible witness. Contrary to defendant's assertions, any apparent discrepancy between Dr. Shah's and B.B.'s testimony is readily explained.

First, Dr. Shah explained young children may think intercourse occurred when, in fact, actual vaginal penetration did not occur. Thus it is possible during the early years of abuse contact between the genitals of defendant and B.B. was occurring but actual vaginal penetration was not. Incidentally, we note such contact is a proscribed sex act. See Iowa Code §§ 702.17, 709.1, and 709.3 (1993).

Second, Dr. Shah testified injuries which occurred before the onset of puberty may not be recognizable after the child has gone through puberty. Specifically, Dr. Shah stated tears and cuts may heal completely and not be visible under these circumstances. Dr. Shah testified at the time of her examination, B.B. exhibited a mid-puberty development. Thus evidence of any minor injuries B.B. may have received from this contact may no longer have been visible at the time of her examination.

Third, Dr. Shah testified she cannot accurately determine how many acts of intercourse a child has experienced after the onset of regular menstruation. Dr.

Shah explained when menstruation begins, the vaginal opening is large enough to allow penetration of the penis without further trauma. Any postmenstruation sex acts, therefore, would not leave evidence of trauma. At the time of her examination, B.B. had been having her period anywhere from six months to one year.

Fourth, clinical psychologist Dr. Barbara Cavallin testified when children are repeatedly abused, they often get confused as to the number of times it happened. She agreed when a child states abuse occurred a certain number of times and specifies a large number of incidents, that this is just the child's way of saying the abuse happened many times.

The jury is free to believe or disbelieve the testimony of the witnesses as it sees fit. State v. Garr, 461 N.W.2d 171, 174 (Iowa 1990) (citation omitted). "The very function of the jury is to sort out the evidence presented and place credibility where it belongs." State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984) (citations omitted). Specifically, a jury is not required to believe defendant. State v. Erving, 346 N.W.2d 833, 835 (Iowa 1984). This may be especially true when there is independent corroboration of a party's story, as in this case. The victim's brother provided independent corroboration of incidents of sexual abuse.

Under this record, the evidence as a whole was more than adequate to support the jury's guilty verdict. We affirm on this issue.

II. Sequestered Witness.

Iowa Rule of Evidence 615 authorizes a court, either at a party's request or on its own motion, to exclude potential witnesses in a case from being in the courtroom during the questioning of all other witnesses. Although no formal order of sequestration appears in the record, the parties and the court reached a pretrial understanding all witnesses would be sequestered. The decision whether to permit defendant to testify, despite violation of a sequestration order or agreement, rests in the sound discretion of the trial court and will not be overturned absent an abuse of discretion. State v. Pierce, 287 N.W.2d 570, 574 (Iowa 1980).

At the close of defendant's case, the State announced its intention to call a rebuttal witness. Defendant objected because the witness had been present in the courtroom during the trial. Following an offer of proof, the trial court permitted limited use of the rebuttal witness. Defendant claims this was an abuse of discretion. We disagree.

Until the State heard defendant's defense, it had no way of knowing who might be needed as a rebuttal witness. Indeed, the State clearly stated it did not decide to call Bassanmus "until this very last minute." There is no showing Bussanmus's presence in the courtroom was anything but inadvertent, and not an effort by the State to tailor his testimony. The trial court was assured of this

following its opportunity to hear Bussanmus's testimony and observe his demeanor during the State's offer of proof. Under these circumstances, there was no abuse of discretion.

Judgment of the trial court affirmed.

AFFIRMED.