IN THE COURT OF APPEALS OF IOWA

No. 6-076 / 95-0145

FILED
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000405

STATE OF IOWA,

Appellee,

vs.

VALENTINO WHITAKER,

Appellant.

Appeal from the Iowa District Court for Dallas County, David L. Christensen, Judge.

Valentino Whitaker appeals his conviction and sentence on one count each of second-degree sexual abuse, third-degree sexual abuse, and assault with intent to commit sexual abuse. **AFFIRMED.**

John P. Messina, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, William Byers, County Attorney, and James Ballard, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the second judicial district serving on this court by order of the Iowa Supreme Court.

HUITINK, J.

Valentino Whitaker appeals his conviction and sentence on one count each of second-degree sexual abuse, third-degree sexual abuse, and assault with intent to commit sexual abuse. We affirm.

Valentino Whitaker was charged with second-degree sexual abuse, third-degree sexual abuse and assault with intent to commit sexual abuse following allegations he had sexually abused his girlfriend's two minor daughters, Brandi and Andrea. At the bench trial, Brandi testified regarding an incident where Whitaker allegedly slid his hand up her leg and pushed his hand against her genitals. She further testified that later that same day Whitaker asked her to put lotion on the inside of his thighs and on his penis. Brandi testified she "swatted" at Whitaker's penis and then told him to put the lotion on himself.

Andrea testified that when she was between the ages of eleven and thirteen Whitaker forced her to put lotion on his penis and masturbate him several times. She also testified that on one occasion, Whitaker assaulted her as she was getting out of the shower and ran his finger up her crotch.

Whitaker denied the sex abuse allegations. He admitted to a joking confrontation with Andrea in the shower but denied touching her genitals. Following the district court's denial of Whitaker's motion for judgment of acquittal, the district court found him guilty as charged and sentenced him to an indeterminate

twenty-five-year prison term on the second-degree sexual abuse charge, ten years on the third-degree sexual abuse charge, and two years on the assault charge. Whitaker appeals.

Whitaker contends on direct appeal that he was denied the effective assistance of counsel. Generally, such claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We will, however, resolve an ineffective assistance of counsel claim on direct appeal where the record is sufficient to adjudicate a defendant's claim on the merits. *State v. Scholerman*, 315 N.W.2d 67, 71 (Iowa 1982). Here, we find the record sufficient to evaluate Whitaker's claim and will accordingly consider it on direct appeal. Because this claim implicates Whitaker's constitutional rights, we make our own evaluation based on the totality of the circumstances. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). This is the equivalent of de novo review. *Id.*

In order to prevail on his ineffective assistance of counsel claim, Whitaker must show by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *See State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987); *Edman v. State*, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume counsel acted competently. *See Risdal*, 404 N.W.2d at 131.

Whitaker first maintains his trial counsel was ineffective in failing to argue the hand-to-genitalia contact involving Brandi was not a sex act as defined by Iowa Code section 702.17 (1993). He claims because the State was unable to show that either his touching of Brandi's crotch or Brandi's "swat" of his penis involved the use of the hand as a sex organ. his conduct did not constitute a sex act and counsel should therefore have moved for judgment of acquittal on these grounds. We disagree.

Iowa Code section 702.17 (1993) defines "sex act" as:

> [A]ny sexual contact between two or more persons by: . . . contact between the finger or hand of one person and the genitalia or anus of another person . . . or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Whitaker contends this provision requires the hand be used as a sex organ substitute for hand-to-genitalia contact to qualify as a sex act. We, however, find nothing in the plain language of the statute to indicate such an additional requirement was intended by the legislature. Instead, we find the plain meaning of the word "contact" requires nothing more than "the coming together or touching of two objects or surfaces." *See The American Heritage Dictionary*, 315 (2d ed. 1985). Had the legislature intended hand-genitalia contact under section 702.17 to require more than a touching of the hand and genitalia, it could have done so. Absent a contrary legislative directive, we decline to impose additional conditions for finding a sex act under Iowa Code section 702.17.

We recognize that a plain meaning approach to "contact" would in many cases allow for a defendant's single act to be charged as either sex abuse under Iowa Code

section 709.2- 4 or lascivious acts under section 709.8(1). The fact that two statutes provide different criminal penalties for essentially the same conduct, however, is no justification for taking liberties with unequivocal statutory language. *State v. Caskey*, 539 N.W.2d 176, 177 (Iowa 1995). As a result, we are not required to depart from the plain meaning of the word "contact" under section 702.17 based solely on the fact that Whitaker's conduct could be charged as a lesser offense.

Finally, even if hand-genitalia contact should be defined as requiring the hand to be used as a sex organ, counsel was under no duty to move for judgment of acquittal on these grounds. *See Jasper v. State*, 477 N.W.2d 852, 858 (Iowa 1991) (counsel does not have a duty to anticipate a point of law upon which the Iowa appellate courts have never ruled). Counsel's failure to challenge Whitaker's conviction based on the definition of "contact" under section 702.17 does not constitute ineffective assistance of counsel.

Whitaker next contends counsel was ineffective in failing to raise a statute of limitations defense in reference to the third-degree sexual abuse offense involving Andrea. He claims the applicable limitations period was three years and that it expired on December 31, 1993. We disagree.

At trial Andrea, born January 25, 1977, testified Whitaker sexually abused her from the time she was about eleven or twelve years old until she was about thirteen. The State charged that this offense occurred "on or about January 1988 through

December 1990." The trial court made a finding of fact that the crime occurred between those dates listed in the trial information.

When an offense is based on a series of acts, the period of limitations commences upon the commission of the last of those acts. Iowa Code § 802.7 (1993). As a result, the limitations period would have commenced on December 31, 1990. When the abuse started in 1988, the applicable limitation period would have been three years. *See* Iowa Code § 802.3 (1987). In 1990, however, the Iowa Legislature amended section 802.2 to allow the limitations period for sex abuse cases committed on a child under the age of twelve to extend up to six months after that child attains the age of eighteen. *See* Iowa Code § 802.2 (1991) (effective July 1, 1990).

The general rule regarding statute of limitations changes is that if a case is once barred by a statute of limitations, it cannot be resurrected by extending a limitation period. *State v. Schultzen*, 522 N.W.2d 833, 834-35 (Iowa 1994). This rule, however, is inapplicable where the statute of limitations has not run on a defendant's alleged acts at the time the statute is amended. *Id.* Because the period of limitations on Whitaker's acts did not expire until December 31, 1993, the 1990 amendment applies.

The trial court determined that Whitaker began sexually abusing Andrea in January 1988. Andrea did not turn twelve until January 1989. Therefore, the facts of the offense fit within the language of the 1990 amendment and the limitations period for the offenses involving Andrea did not expire until July 25, 1995, six months after

Andrea's eighteenth birthday.[1] Because the statute of limitations had not run on the third-degree sexual abuse charge involving Andrea, counsel was under no duty to raise a statute of limitations defense.

Finally, Whitaker contends trial counsel erred in making improper assurances of acquittal throughout the course of plea bargain negotiations. He asks us to preserve his claim for postconviction proceedings. We find, however, that even after postconviction proceedings Whitaker would be unable to show he was prejudiced by any "guarantees" of acquittal counsel may have made.

The decision of how to plead is one for the defendant. *State v. Walton*, 228 N.W.2d 21, 23 (Iowa 1975). While Whitaker may have relied on counsel's advice in weighing his options throughout the course of plea negotiations and may even have construed this advice as a guarantee of acquittal, the ultimate decision to reject the State's plea offer was Whitaker's responsibility alone. Accordingly, we find Whitaker has failed to show he was prejudiced by any alleged guarantees counsel made prior to trial.

In summary, we find counsel breached no essential duty in failing to make a motion for judgment of acquittal on grounds Whitaker's conduct did not constitute

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[1]Given the time frame of the offense, the State could have charged Whitaker with the higher offense of second-degree sexual abuse using the under twelve alternative. We find, however, that the prosecutor's decision to charge Whitaker with the less onerous offense of third-degree sexual abuse should not preclude extension of the limitations period under the 1990 amendment.

sexual abuse under Iowa Code section 702.17. We further find counsel did not have a duty to raise a statute of limitations defense in regard to the third-degree sexual abuse charge. Finally, we conclude Whitaker was not prejudiced by any apparent guarantees by counsel he would be acquitted. Whitaker was not denied effective assistance of counsel. We affirm.

AFFIRMED.