

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 29 1988

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed June 29, 1988

vs.

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258

DOUGLAS KURTZ,

)

8-124

87-499

Defendant-Appellant.

)

Appeal from the Iowa District Court for Woodbury County (42271), Michael S. Walsh, Judge.

Defendant appeals his conviction and sentence for the crime of sexual abuse in the second degree in violation of Iowa Code section 709.3. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Defendant, Douglas Kurtz, appeals his conviction and sentence for the crime of sexual abuse in the second degree, in violation of Iowa Code section 709.3. Kurtz asserts the evidence was insufficient to support his conviction of sexually abusing his stepdaughter, K.B. He also contends the trial court erred by 1) admitting testimony regarding evidence of his commission of another crime, and 2) not requiring K.B. to testify in open court, rather than on videotape, at his trial. We affirm.

I. Sufficiency of Evidence. As we stated in State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987), the legal principles applicable to cases of this nature are as follows:

Our scope of review is on assigned error only. Iowa R. App. P. 4. The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1984); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

Id.

In this case, K.B. testified Kurtz had touched her on her "private parts" and had licked her "private parts." Kurtz asserts these references to "private parts" were insufficient to show he made oral contact with K.B.'s genitalia.

He contends K.B. never indicated specifically which private parts of her body she was referring to. We are not persuaded, however, K.B.'s references were as vague as Kurtz suggests. It is quite clear "private parts" refers to genital organs. See State v. Dennison, 435 P.2d 526, 529 (Wash. 1967); State v. Moore, 241 P.2d 455, 459 (Or. 1952). Moreover, even Kurtz's counsel characterized K.B.'s gesture indicating her private parts as pointing toward her thighs, stomach, and groin area.

We find the evidence adduced at trial would convince a rational factfinder Kurtz was guilty beyond a reasonable doubt. We conclude there was substantial evidence to support Kurtz's conviction.

II. Prior Bad Acts. Kurtz also contends the trial court erred by admitting evidence the Sioux City police had previously seized twenty-three small bags of marijuana as a result of a search of his residence. This evidence was introduced during cross-examination of one of Kurtz's witnesses. Kurtz himself had earlier testified the drug charges brought because of the search had been dismissed because the search warrant was invalid. He also testified his wife, K.B.'s mother, was the source of the information for the search warrant and knew the drug charges had been dismissed. She was also the initial source of the information for the current charge. The obvious inference Kurtz invited the jury to draw was that since one set of charges based on information from his wife had been dismissed, the current charge based on information from the same source was unfounded.

The general rule is that evidence to show the commission of crimes other than that for which the defendant is presently on trial is inadmissible. State v. Finchum, 364 N.W.2d 222, 225 (Iowa 1985); State v. Wright, 191 N.W.2d 638, 639 (Iowa 1971). Exclusion of this evidence is based on the view it is ordinarily not relevant and its probative value does not outweigh its prejudicial effect.

State v. Mendiola, 360 N.W.2d 780, 782 (Iowa 1985); see also State v. Connor, 314 N.W.2d 427, 429 (Iowa 1982).

However, we are convinced this general rule of exclusion does not apply where, as here, Kurtz has raised the issue of 1) his good character by implying he did not commit the alleged prior criminal act, and 2) the bad character of the source of the information upon which the prior and current charges were based by stating the warrant for the marijuana search was bad. Cf. United States v. Wilford, 710 F.2d 439, 449 (8th Cir. 1983), cert. denied, 464 U.S. 1039, 105 S. Ct. 701, 79 L. Ed. 2d 166 (1984) (defendants raised as a material issue their intent in committing the acts charged, thereby allowing the government to introduce evidence of prior similar acts to show that defendants were aware their acts were unlawful and they intended to commit such unlawful acts); State v. Scalf, 254 Iowa 983, 990, 119 N.W.2d 868, 872 (1963) (testimony by defendant's witnesses that defendant's reputation was very good opened the door for controverting testimony in rebuttal). Certainly the state could challenge Kurtz's veracity by the presentation of evidence revealing material facts are other than as he stated, so long as the subject of the allegedly inaccurate statement was material and not collateral to the facts of the case. See State v. Fowler, 248 N.W.2d 511, 520 (Iowa 1976).

We conclude Kurtz made the subject of the prior drug charges material to the case. The trial court did not abuse its discretion by admitting evidence impeaching Kurtz's testimony.

III. Right to Confront. Kurtz's final assertion is the trial court erred by failing to require K.B. to testify in open court, instead of on videotape. Kurtz's trial counsel initially objected to the videotaped deposition at a pretrial hearing on the ground the tape would not show the interaction between K.B. and the other persons in the room. Kurtz's counsel also objected to the tape

in his motion for new trial and motion in arrest of judgment. However, Kurtz's counsel did not raise these objections at trial.

Although counsel need not keep making the same objection in order to preserve error regarding the same type of evidence, he can, by his later consent, waive that objection. State v. Schmidt, 312 N.W.2d 517, 518 (Iowa 1981).

In this case, counsel for Kurtz and the State were questioned by the trial court, "Whatever's on the tape, the two of you have agreed that that should be shown to the jury?" Kurtz's counsel responded, "That's correct, Your Honor." Moreover, the content of the trial court's introduction of the tape to the jury was stipulated to by the parties. Under these circumstances, we conclude Kurtz waived his objection to the introduction of the tape.

AFFIRMED.