

FILED

JAN 26 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**STATE OF IOWA,**

)

Plaintiff-Appellee,

)

Filed January 26, 1983

vs.

)

JUSTIN WAYNE MADISON,

)

2-25266793

Defendant-Appellant.

)

Appeal from Polk District Court - M. J. V. Hayden, Judge.

Defendant appeals his conviction of sexual abuse in the second degree in violation of Iowa Code §§ 709.1 and 709.3(2) (1981). REVERSED.

Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant, Justin Wayne Madison, appeals his conviction of sexual abuse in the second degree in violation of Iowa Code §§ 709.1 and 709.3(2) (1981). On appeal he asserts (1) that the evidence was insufficient to support the jury's verdict of guilty; (2) that evidence concerning certain statements made by the five-year-old victim constituted inadmissible hearsay; and (3) that the five-year-old victim should not have been found competent to testify at trial. We reverse.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4.

I.

Defendant contends that there is insufficient evidence from which a rational jury could find beyond a reasonable doubt that the defendant committed an act of sexual abuse upon the victim, a five-year-old boy. After carefully reviewing the record, we must agree with defendant. The facts of the underlying incident and of the proceedings below are long and involved but must be set forth with specificity for proper evaluation under our standard of review. The review governing this type of challenge was recently articulated in State v. Aldape, 307 N.W.2d 32, 29 (Iowa 1981), as follows:

In reviewing a motion for a directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. All of the evidence must be considered, State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980), and all legitimate inferences that may be deducted therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d at 339.

- 2 -

II.

On December 3, 1980, the victim, a five-year-old boy, was found crying on a street corner by a couple who attempted to help him find his home. The boy had balloons and candy in his possession. After their unsuccessful attempt to locate the child's home, the couple took him to the police station. His foster parent saw a televised news report about the child and immediately went to the police station to pick him up. The foster father was allowed to testify at trial, over hearsay objections, that the victim told him that he had been picked up to go home from school by a cab driver who took him to a store where he bought the candy and balloons, took him to a location under a bridge, and later dropped him off. The foster father also testified that the victim was complaining of a sore throat. When asked why, the victim responded that the man put a "squirrel" in his mouth and put soap in it. Believing the boy to have been sexually abused, the foster parents took the victim to the hospital to be examined. The foster father was given no report of the results of the examination and was not told whether there was any evidence of sexual abuse. However, a social worker informed the foster parents that the victim had been tied up and had talked about the "squirrel" that was put in his mouth.

An investigative officer was summoned to the victim's home to question him regarding the appearance of the cab driver and the alleged incident of sexual abuse. He returned the following day, December 4, and asked the victim some additional questions. The investigative officer then went to the Yellow Cab Company and spoke to the vice president of the company. The investigative officer described the nature of the investigation and gave the vice president a description of the cab driver, presumably as the description had been given him by the victim. The vice president gave the officer a name and a photograph. The investigative officer then returned to the police department and tried to put his

information together. He then returned to the victim's house and presented six police photographs to the victim to see if he could identify the man who allegedly sexually abused him. The investigative officer testified that the victim pointed to the defendant's picture three different times. The officer then went to the defendant's home and arrested him for sexual abuse in the second degree. The officer testified that, when informed that he was under arrest, the defendant stated, "I didn't have that little boy in my cab." The defendant denies making such statement.

The victim testified under oath at a deposition hearing that a wolf, a big fish and bears were present in the park when the cab driver tied him up. He also testified that the wolf fell in the water, that the fish then ate the wolf, and that the cab driver caught the fish and ate it. He also demonstrated some confusion concerning the sequence and location of events. Nevertheless, at a hearing to determine the victim's competency, the victim demonstrated an ability to distinguish between a truth and a lie. The court found the victim competent and permitted him to testify at trial. At trial, the victim said that the statements made at the deposition were pretend.

A convenience store employee testified at trial that between 3:15 and 3:30 on the afternoon in question a small boy purchased balloons and candy while a yellow cab was in the parking lot. Other evidence showed that defendant was the driver of an orange cab on the day in question. The vice president of the cab company described the cab, numbered 440, which was leased by the defendant:

It is orange and black. When we purchased the company all of the vehicles were that color. It was called Yellow Cab Company, but they are orange, the hood, the top and the deck lid are orange. The four fenders are black. That was the company colors for many years.

We also have cabs that are entirely in lemon yellow, which in most cases indicates that that's an owned cab being driven by the owner-operators, as opposed to a lessor.

Defendant's trip sheet showed that he had taken fares between 2:55 and 3:15 p.m. and between 3:10 and 3:25 p.m. Defendant testified that at 3:25 he dropped off an elderly woman customer at a bank and waited some time for her to withdraw some money with which to pay the fare. He testified that he then ran a few errands and stopped at home to get a sandwich and his badge before picking up his next fare at 4:05.

Much of the State's evidence introduced at trial was conflicting. The investigating officer testified over hearsay objection that the victim told him that the cab was yellow. The victim's foster father testified that the victim told him the cab was orange. The victim himself, however, testified that the cab was white. His foster father also testified that the victim usually took a white cab home from school. A different cab company owns and operates white cabs in the area.

Testifying at trial, the victim described the cab driver as white, skinny and without any identifying marks on his arms or hands:

Q. Okay. How about—I'm going to say the way his body looked. Did his body look funny to you at all?
A. Yeah.

Q. How come?

MR. BARRETT: I am going to object to that as leading and suggestive.

THE COURT: It will be overruled.

Q. How come his body looked funny? A. Because he was skinny.

Q. Okay. What does this skinny mean? A. You're fat.

Q. It means you're fat? A. Yeah.

Q. Is there a difference between being skinny and being fat? A. No.

Q. Well, do you remember the color of his eyes?
A. No.

Q. Was there anything funny about his eyes?

A. No.

Q. How about his skin, Jesse? A. No.

Q. How about his arms? A. No.

Q. Jesse, do you know what a scar is? A. No.

Q. Okay. Were there any marks on this man that you remember? A. No.

* * *

Q. Jesse, do you know what a stomach is? A. No.

Q. Point to your stomach. A. Right here (indicating).

Q. So you might now know what it is, but you know where it is; don't you? A. Yeah.

Q. Tell them about the cab driver's stomach.

A. He was skinny.

Q. Was he skinny like you? A. Yeah.

Prior to trial, when the victim had described the incident, he said that the cab driver had put a "squirrel" in his mouth. At trial, however, he testified that the cab driver put his penis in his mouth. While he testified that he didn't know what a penis was, he was able to point between his legs to show that he knew where it was located on his body.

The victim then testified that the investigating officer had shown him some pictures and asked him to point out "the bad guy." The victim testified that he pointed to a picture of the cab driver; that this was not the man that had put his penis in the victim's mouth; and that, when the pictures were mixed up a second time, he pointed to a different picture. The exact testimony was as follows:

Q. Okay. Were you able to show him — A. Yeah.

Q. —somebody? What did you say when you showed him the picture? Q. That's him.

Q. And who are you talking about? A. About the bad guy.

Q. And is this the man who put his penis in your mouth? A. No.

Q. Well, why was this the bad guy? A. He was in the picture.

Q. The picture that you showed to [the officer] was that a picture of the cab driver? A. Yeah.

Q. After you showed [the officer] the picture, what did [he] do with all the pictures? A. He—

Q. He did what? A. Striking them out.

Q. What did he do next? A. He bring me—show where the birds run. He took them.

Q. Did he mix the pictures up a second time? A. Yeah.

Q. And did you pick out the picture again? A. Yeah.

* * *

Q. Okay. Did you pick the same picture both times, Jesse? A. No.

Q. You picked a different picture? A. Yeah.

The photograph which was shown to the victim in the photo display was not introduced into evidence. The victim was then asked to look at all of the people in the courtroom and say whether the cab driver was in the room. The victim testified that he had looked at all of the people in the room and that the cab driver was not present.

On cross-examination, the victim acknowledged the prosecuting Polk County Attorney and indicated that he understood his name to be Channing. The following questions and answers were then given:

Q. Have you talked to him quite a bit about this case? A. Yeah.

Q. Do you know how many times you talked to him? A. No.

Q. Would it be quite a few? A. Yeah.

Q. Can you give us any idea how many times you talked—he talked to you? A. No.

Q. Did he tell you what to say? A. Yeah.

Q. What did he tell you? A. I forgot.

Q. You forgot what he told you to say? A. Yeah.

Q. But he did tell you some things to say?
A. Yeah.

Q. You are sure of that? A. Yeah.

Q. That's not a story? A. No.

Q. How many different times did he tell you what to say? A. I don't know.

Q. Did he tell you what to say every time you talked to him? A. No.

Q. Just some of the time? A. Yeah.

The defendant testified and demonstrated to the jury that he had very little hair on his stomach. He also demonstrated that his hands had been badly scarred in a car accident in 1973. The record also indicates that at the time of the alleged incident the defendant was approximately 26 years old, weighed about 265 pounds, and had a beard and a mustache. When he was 20 years old, however, he was 90 pounds lighter and clean shaven.

At the close of all the evidence, the defendant moved for a directed verdict. The motion was overruled by the court and the jury returned a verdict of guilty. Judgment was entered on the verdict and defendant appealed.

III.

Based on our review of the evidence in the light most favorable to the state, we do not believe it to be sufficiently substantial such that a rational trier of fact could find beyond a reasonable doubt that defendant committed the act of sexual abuse upon the victim. See Aldape, 307 N.W.2d at 39. We find there is insufficient evidence of the identity of defendant as the cab driver who allegedly committed the act of sexual abuse.

While an out-of-court identification made from a photographic line-up is not inherently unreliable, its reliability must be judged by examining the totality of circumstances under which it was made. Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977); State v. Mack, 286 N.W.2d 396, 403-04 (1979). Convictions have been reversed where the circumstances suggest that the reliability of the out-of-court identification was doubtful and where the identifying witness could not then make an in-court identification of the defendant. See Crawley v. United States, 320 A.2d 309, 312 (C.A. D.C. 1974); People v. Gardner, 221 N.E.2d 232, 236 (Ill. 1966) (conviction of defendant resting on doubtful, vague and uncertain identification which does not produce an abiding conviction of guilt will be reversed).

We believe the out-of-court identification of defendant in the instant case was unreliable. The picture of defendant which was presented to the victim for identification in the photographic line-up was never introduced into evidence. The investigative officer testified that the photograph was a police photo. The record suggests that the photo was somewhat dated and taken at a time when defendant was much thinner and clean-shaven. The victim's identification from this type of photo comports with his testimony that the cab driver was skinny. He also described the defendant as having a hairy stomach, which the defendant does not have, but failed to describe the defendant as having a hairy beard or mustache, which he does have. This fact comports with the defendant's argument that the photo portrayed the defendant without a beard. Moreover, the victim testified that the man he pointed to in the photograph was not the person who allegedly put his penis in the victim's mouth. These facts, and the fact that the victim could not make an in-court identification but said that the cab driver was not present in the courtroom, casts doubt on the reliability of the out-of-court identification of defendant.

Moreover, the victim's testimony was often confused and conflicting. The record reveals that he has trouble identifying colors. While he testified at trial that the cab was white, the investigative officer testified that the victim told him the cab was yellow and the foster father testified that the victim told him the cab was orange. This evidence casts further doubt on the identification of defendant with the crime charged.

The case of State of Williams, 121 Ariz. 213, 589 P.2d 456 (1978), cited in State's brief, is distinguishable. There the five-year-old victim's identification of defendant was not conflicting, vague or confused, and was bolstered by other evidence. Also, unlike People v. Gardner, there was no exculpatory evidence in Williams which countered the identification. Id at 215, 389 P.2d at 458.

Based on the record as a whole, we find there is not substantial evidence to support the charge. Accordingly, the defendant's conviction must be reversed and the charges against him dismissed.

REVERSED.