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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed March 9, 1988 424
vs.	)	
ROOSEVELT HARDY, SR.,	)	7-538 87-30
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County (No. D7X 007931), Roger F. Peterson and George L. Stigler, Judges.

Defendant appeals from his conviction of sexual abuse in the second degree in violation of Iowa Code section 709.3(2). **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, and James R. Huff, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney General; and James Metcalf, Black Hawk County Attorney, for plaintiff-appellee.

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

HABHAB, J.

Defendant appeals from his conviction of sexual abuse in the second degree in violation of Iowa Code section 709.3(2). Defendant contends that: (1) testimony regarding an alleged previous incident of sexual contact between the defendant and the victim was inadmissible; (2) the defendant's confession was not voluntary; and (3) the defendant's confession was not corroborated.

At all times material to this controversy, defendant Roosevelt Hardy, Sr., and Lenora Spates Hardy lived together in a common-law marriage relationship at 225 Sumner Street in Waterloo. Also included as residents in the household were Lenora's two daughters, eleven-year-old Bianca and seven-year-old V.C. (the victim), the couple's infant son, Jeffrey, and defendant's sixteen-year-old son, Roosevelt Hardy, Jr.

On June 5, 1986, V.C. was the victim of sexual abuse. Her vagina was torn and she lost a considerable amount of blood. She is mentally retarded and possesses only the limited mental abilities of a twelve to fifteen-month-old infant. She can form understandable simple words and phrases, but cannot express herself in a coherent group of words. She was not competent to testify in court. The only question for the trial court was by whom was this sexual abuse act committed.

Part of the evidence pointing to the defendant as the perpetrator of this crime was in the form of testimony by defendant's common-law wife, Lenora Hardy, mother of the victim. She testified that sometime during the year before this incident, she had seen the defendant touching V.C. in a sexual manner (feeling the victim's breasts). The defendant contends that the trial court committed reversible error by admitting this testimony.

Iowa courts do not admit other crimes and prior bad acts of a defendant into evidence when such evidence has "no relevancy except to show the defendant

is a bad person and thus likely committed the crime in question." State v. Munz, 355 N.W.2d 576, 581 (Iowa 1984) (quoting State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979)); see Iowa R. Evid. 404(5). However, "evidence of prior sexual acts with the victim in order to show a passion or propensity for illicit sexual relations with the particular person concerned" is admissible. State v. Munz, 355 N.W.2d at 581 (quoting McCormick's Handbook on the Law of Evidence, § 190 at 449 (2d ed. E. Cleary 1972)).

Defendant concedes that Lenora Hardy's testimony that she witnessed the defendant feeling V.C.'s breasts is an exception to the above-mentioned exclusionary rule, but argues that it is more prejudicial than probative and, pursuant to Iowa Rule of Evidence 403, should not have been admitted. We disagree. Evidence that defendant was previously observed fondling V.C.'s breasts is highly probative to show his passion or propensity for illicit sexual relations with V.C. Its probative value far exceeds any prejudicial effect it may have.

Our holding in this regard is not without precedent. In State v. Tharp, where even though defendant's prior sexual contact with the victim (fondling her breasts) occurred some four to five years prior to the incident charged, it was held that the probative value of that prior act was found to exceed any prejudice that might result therefrom. State v. Tharp, 372 N.W.2d 280, 281-82 (Iowa App. 1985). In State v. Munz, the court held that prejudice resulting from admission of photographs depicting defendant and victim engaging in various sex acts did not override the probative value of the evidence. State v. Munz, 355 N.W.2d 576, 580 (Iowa 1984).

Defendant cites the Spaulding case where the court stated: "Without question the level of prejudice inherent in this type of evidence is high." State v. Spaulding, 313 N.W.2d 878, 881 (Iowa 1981). Defendant fails to mention the rest of the court's holding where it states that evidence of this type is "never-

theless admissible if its value in searching out the truth of the charges becomes or remains relatively higher." Id. at 881. We hold that Lenora Hardy's testimony that defendant had previously touched V.C. in a sexual way was of higher value in searching out the truth of the charges than its prejudicial effect. Therefore, the trial court's decision to admit this evidence is upheld.

Defendant next contends that the trial court erred by admitting into evidence the statement made by the defendant on June 12, 1986. The defendant gave several statements to Officer Nemmers, who investigated the case. With the exception of the statement given on June 12, 1986, they were all consistent in denying any involvement in the sexual abuse and in denying that the defendant was even home at the time of that crime. The June 12 statement, on the other hand, was very incriminating.

In that statement, the defendant allegedly said that after he came home on June 5, he fell asleep on the couch. He awoke to find V.C. on top of him performing the sexual act. When he saw what was happening, he immediately stopped her. The trial court accepted this statement as an admission that the alleged sexual contact had taken place, but refused to believe that V.C. had been the aggressor. Defendant signed this statement, but claims he involuntarily did so. He asserts that given his inability to read and the conflicting testimony as to whether he knew what he was signing at the time he signed the June 12 statement, it cannot be said that the State carried its burden of demonstrating that the statement was voluntary.

"The burden is on the State to show by a preponderance of the evidence that an accused's inculpatory statement or confession was voluntary." State v. Nolan, 390 N.W.2d 137, 142 (Iowa App. 1986). In reviewing defendant's claim that his confession was involuntary, this court must "make an independent, de novo review of the totality of the circumstances surrounding the confession."

State v. Hodges, 326 N.W.2d 345, 347 (Iowa 1982).

> There is no talismanic definition of voluntariness. The "totality of the circumstances" encompasses the characteristics of the accused and the details of the interrogation process. The court determines the facts surrounding the inculpatory statement, assesses their psychological impact on defendant, and evaluates the legal significance of defendant's reactions.
>
> Defendant's choice to confess must be essentially free and unconstrained with his will not overborne and his capacity for self-determination not critically impaired. State v. Cullison, 227 N.W.2d 121, 127 (Iowa 1975) (citations omitted).

State v. Nolan, 390 N.W.2d 137, 142 (Iowa 1986) (quoting State v. Hodges, 326 N.W.2d at 347-48).

> Many factors bear on the issue of voluntariness. These include the defendant's knowledge and waiver of his Miranda rights; the defendant's age, experience, prior record, level of education and intelligence; the length of time defendant is detained and interrogated; whether physical punishment was used, including the deprivation of food or sleep; defendant's ability to understand the questions; the defendant's physical and emotional condition and his reaction to the interrogation; whether any deceit or improper promises were used in gaining the admissions; [and] any mental weakness the defendant may possess.

State v. Hodges, 326 N.W.2d at 348 (citations omitted); see State v. Davidson, 340 N.W.2d 770, 771-73 (Iowa 1983); State v. Jump, 269 N.W.2d 417, 424-28 (Iowa 1978).

Defendant's testimony conflicts with that of Investigator Nemmers, Officer Lake, and Agent McCleary with regard to the voluntariness of defendant's statements. Where there is contradictory testimony, the finder of fact must assess the credibility of the witnesses. In this case, the trial court made findings consistent with the officers' testimony. Since trial courts are in a better position to judge the credibility of witnesses by observing them while testifying, we will in this case (although we are not bound to do so) grant the trial court's findings regarding witnesses' credibility considerable deference. State v. Hatter, 342 N.W.2d 851, 854 (Iowa 1983); see also State v. Farris, 359 N.W.2d 190, 192

(Iowa 1984). With this in mind, we concur with the trial court in its findings that the State has proven that the defendant's statements of June 12, 1986, were voluntarily given by him after he had been informed of his rights under Miranda.

The final issue raised by the defendant is a challenge to the sufficiency of the evidence presented to corroborate his confession. Iowa Rule of Criminal Procedure 20(4) provides: "The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense." While the State was unable to present concrete physical evidence to establish that the defendant was the individual who abused his stepdaughter on June 5, ample circumstantial evidence was presented to corroborate the defendant's confession. "Corroboration need not be strong nor need it go to the whole case so long as it confirms some material fact connecting the defendant with the crime." State v. White, 319 N.W.2d 213, 214 (Iowa 1982) (citing State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976)).

The defendant admitted that he was present in his home during the time period when the abuse most likely occurred. Witnesses who saw the defendant that afternoon testified that he was nervous, shaky, and acting unusually. Testimony also indicated that the defendant had been wearing tan pants on the day of the 5th and that these pants were not found after that day. The defendant very strongly denied owning tan pants and said he was wearing black corduroys on June 5th. Evidence also revealed that on the day following V.C.'s injury the defendant was speaking of suicide and the possibility of leaving the state.

The trial court held and we agree that these pieces of circumstantial evidence serve as ample corroboration for the defendant's confession. State v. Hobson, 284 N.W.2d 239, 242-43 (Iowa 1979). Therefore, the corroboration requirement of rule 20(4) was met.

In summary, the trial court held that presentation of evidence regarding a prior incident of sexual contact between the defendant and the victim was more probative than prejudicial, defendant's June 12 statement was voluntary, and there was sufficient evidence to corroborate defendant's confession. We agree with the trial court.

AFFIRMED.