IN THE COURT OF APPEALS OF IOWA

No. 7-199 / 95-1948

JUN 26 1997

000625

STATE OF IOWA,
Plaintiff-Appellee,

vs.

IVY N. FOUNTAIN, JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Defendant appeals from judgment and sentence entered, following a jury trial, for sexual abuse in the third degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan Crawford, Assistant Attorney General, Fred H. McCaw, County Attorney, and Christine O. Corken, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

STREIT, J.

Defendant Ivy Fountain, Jr. appeals the judgment and sentence entered upon his conviction, following a jury trial, for sexual abuse in the third degree, in violation of Iowa Code section 709.4(1) (1995). We affirm.

In March 1995, Rachel, who was then sixteen years old, ran away from home and ended up at the apartment of Lindsy Lenihan. Lenihan and several other runaways at this apartment had access to alcohol and marijuana. On March 5, 1995, Rachel was sleeping in one of the bedrooms when Fountain came in and said, "Let's get this over with." He took Rachel's pants off and proceeded to have sexual intercourse with her. Rachel banged her head and arms on the wall. Afterwards, she noticed blood on her upper inner thigh and on the sheets. She took the sheets to the basement to be washed. Rachel claimed she was sexually assaulted by three other men while staying at the apartment.

A few days later, Fountain's girlfriend, Tonica Davis, threatened to hurt Rachel if she found out Fountain had sex with her. After Rachel returned home, she told her mother she had been sexually assaulted. Rachel was taken to the hospital, and the police were contacted. A physical examination did not reveal any vaginal injuries.

Rachel did not initially mention Fountain to her mother, a nurse, or police officers. She did mention the three other men she claimed had sexually assaulted her. During the investigation, other people told police that Fountain had sexual contact

with Rachel. An officer asked Rachel about these allegations, and she acknowledged Fountain had sexually assaulted her. Rachel stated she had been afraid of Davis.

Lenihan testified she had seen Rachel, Fountain, and Mario Owens in a bedroom. She stated it looked like the men were going to have sex with Rachel. She removed Rachel from the room. Lenihan testified she later asked Fountain if he had sex with Rachel, and he admitted it. Lenihan overheard Davis threaten Rachel if she found out Fountain had sex with her.

Jeremy, another runaway, testified Fountain had asked him if Rachel would have sex for money. Jeremy also testified he heard Rachel banging on the walls, and later saw her carrying sheets to the basement.

Walter Woodall testified he met Fountain while the two men were in jail. Woodall stated Fountain told him he had sex with Rachel.

Fountain denied having any sexual contact with Rachel. He admitted he had seen Rachel at Lenihan's apartment, but stated he had not been at the apartment on March 5, 1995. Fountain presented the testimony of Dr. Rudolph Galask, a gynecologist. Dr. Galask testified it was unusual that if Rachel was injured by Fountain, as she claimed, she did not have pain when she had sexual intercourse within a day or two after the incident.

A jury found Fountain guilty of third-degree sexual abuse. He filed a motion for new trial on the ground of jury misconduct. He claimed a juror had not answered

the juror questionnaire truthfully regarding whether the juror was a victim of prior sexual abuse. The district court denied the motion, finding there was no reason to believe the jury's verdict was impaired. Fountain was sentenced to a term of imprisonment not to exceed ten years. He now appeals.

I. Fountain contends there was insufficient evidence for a rational jury to find he committed the crime of sexual abuse in the third degree. He claims Rachel is not credible because of her attention deficit disorder, her borderline personality disorder, and her mental health problems.

When a criminal defendant challenges the sufficiency of evidence to support a conviction, we review all of the evidence in the record in a light most favorable to the State. *State v. Garr,* 461 N.W.2d 171, 173 (Iowa 1990). We must uphold the conviction if there is substantial evidence in the record to support it. *State v. Frake,* 450 N.W.2d 817, 819 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *State v. Robinson,* 288 N.W.2d 337, 339 (Iowa 1980).

We find there is sufficient evidence in the record to support Fountain's conviction. The jury was not required to accept defendant's version of the facts. *State v. Trammell,* 458 N.W.2d 862, 863 (Iowa App. 1990). The very function of the fact-finder is to sort out the evidence presented and place credibility where it belongs. *Id.* In the present case, the jury must have found Rachel's testimony to be credible,

and Fountain's testimony to be not credible. Rachel's testimony was corroborated by the testimony of Lenihan, Jeremy, and Woodall.

II. Fountain sought to introduce evidence that Rachel had two sexually transmitted diseases (STDs). He claimed he did not have any STDs, and this showed he did not have sexual contact with Rachel. The district court ruled the evidence was inadmissible under Iowa Rule of Evidence 412, the rape shield law. This rule prohibits the introduction in a criminal case of evidence of the past sexual behavior of the alleged victim. Iowa R. Evid. 412(a). Fountain made an offer of proof on this issue. He now claims the district court should have allowed him to introduce this evidence.

A ruling excluding evidence is reviewed for the abuse of discretion. *State v. Knox,* 536 N.W.2d 735, 738 (Iowa 1995). The rape shield law and the general rules of relevancy require a balancing test. *Id.* at 739. The evidence may have some relevancy, yet it may not be admissible if the probative value of such evidence is substantially outweighed by the danger of unfair prejudice. *Id.*

We find no abuse of discretion in the district court's decision to exclude the evidence. The evidence in question was of limited relevance. Dr. Galask testified there was a twenty to twenty-five percent chance a male would become infected with a STD during unprotected sex with a woman. Thus, even if Fountain did have sexual contact with Rachel, there was a good chance he would not contract a disease.

Furthermore, there was no evidence as to when Rachel became infected. She claimed she had been sexually assaulted at least two more times at the Lenihan apartment after her contact with Fountain. The presence of a STD is highly inflammatory. *Id.* Based on all of these factors, we conclude the evidence was more prejudicial than probative, and was properly not admitted.

Fountain also argues the district court's decision to exclude the evidence denied him of his constitutional right to cross-examination. The Constitution requires only the admission of otherwise relevant and admissible evidence. *State v. Clarke,* 343 N.W.2d 158, 161 (Iowa 1984). Even relevant evidence is not constitutionally required to be admitted if the prejudicial effect outweighs the probative value. *Id.* We have already found the prejudicial effect of this evidence outweighed its probative value. We do not find Fountain was denied his constitutional right to cross-examination.

III. Fountain contends the district court abused its discretion in overruling his motion for new trial based on juror bias and misconduct. Fountain claimed one of the jurors, Veronica, had failed to reveal on the juror questionnaire that she had been a victim of sexual abuse. At the hearing on defendant's motion for new trial, Veronica admitted a former boyfriend had forced his way into her car, drove her to a remote area, and threatened to rape her. The boyfriend pled guilty to a charge of false imprisonment.

The district court found Fountain had produced no evidence sufficient to justify an inquiry concerning juror misconduct, and the court had no reason to believe the jury's verdict was impaired. Fountain believes Veronica's failure to give truthful answers on her juror questionnaire warranted the granting of a new trial.

The district court has broad discretion in ruling on motions for new trial based on jury misconduct. *State v. Tinius,* 527 N.W.2d 414, 417 (Iowa App. 1994). We will find an abuse of discretion only if the district court's ruling is clearly unreasonable under the attendant circumstances. *Id.*

Jury misconduct justifies a new trial only if the defendant establishes the misconduct was calculated to, and with reasonable probability did, influence the verdict. *State v. Arnold,* 543 N.W.2d 600, 605 (Iowa 1996). A common sense approach is followed in considering whether jury misconduct was designed to influence the verdict and likely did influence the verdict. *Tinius,* 527 N.W.2d at 417. The impact of the misconduct is judged objectively to determine whether the misconduct would prejudice a typical juror. *State v. Henning,* 545 N.W.2d 322, 325 (Iowa 1996).

We find no abuse of discretion in the district court's decision to deny Fountain's motion for new trial. We do not believe there is sufficient evidence to show Veronica engaged in juror misconduct. Veronica stated she did not consider the incident with her former boyfriend to be sexual in nature. Also, a police officer

testified the boyfriend's conduct did not meet the elements to charge him with sexual abuse. Veronica testified she had put the whole incident out of her mind. Furthermore, even if Veronica had engaged in juror misconduct, we do not find Fountain has shown it was reasonably probable her actions influenced the verdict.

We affirm Fountain's conviction for sexual abuse in the third degree. Costs of this appeal are assessed to Fountain.

AFFIRMED.

Huitink, J., concurs; Sackett, P.J., specially concurs without opinion.