IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

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**STATE OF IOWA,** )

Plaintiff-Appellee, )

vs. )

**OSCAR HERMAN STENDER,** ) 9-156
88-558

Defendant-Appellant. )

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Appeal from the Iowa District Court for Linn County (No. CRF 10431-0687), Lynne E. Brady, Judge.

Defendant appeals conviction, following a jury trial, of second-degree sexual abuse. **AFFIRMED.**

William L. Wegman, State Public Defender, and Linda Del Gallo, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Amy M. Anderson, Assistant Attorney General; and Harold W. Denton, Assistant County Attorney, for plaintiff-appellee.

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

**DONIELSON, P.J.**

Defendant appeals from his conviction, following a jury trial, for the crime of sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3 (1987). He challenges the sufficiency of the evidence to establish his guilt. We affirm defendant's conviction.

**I. Standard of Review.** The standard of review in a case involving a challenge to the sufficiency of the evidence is well settled:

> When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. It is necessary to consider all of the evidence and not just the evidence supporting the verdict. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt.

State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16).

Defendant was convicted of second-degree sexual abuse by performing a sex act with a child under the age of twelve in violation of Iowa Code sections 709.3(2) and 709.1(3) (1987). Sex act is defined by the Code as

> any sexual contact between two or more persons, by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia 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.

Iowa Code § 702.17 (1987). Defendant contends there is insufficient evidence he sexually abused a child.

**II. Sufficiency of the Evidence.** The trial information filed in this case alleged that defendant, Oscar Stender, had sexually abused B.B., a five-year-old boy, during the month of May 1987. Stender moved into an upstairs apartment next door to B.B.'s house on May 16, 1987. B.B.'s mother reported the alleged sexual abuse to the authorities on May 29, 1987.

B.B. testified that when he was at Stender's apartment "he sucked my [B.B.'s] dick." He also testified he saw Stender's penis when it "was like it was hard." B.B. said he saw Stender "pee" and described it as "it was white in a straight line" and it went on the floor and on Stender. B.B. stated he was at Stender's apartment four times and watched the Care Bear movie on one of those occasions. He said something happened every time he was in Stender's apartment and that Stender offered him $20 not to tell anyone.

B.B.'s mother testified that on Friday, May 29, 1987, she observed B.B., while he was getting ready for kindergarten, squeezing his testicles and penis together. She asked B.B. who taught him that, and he responded, "really, Oscar showed me." She also testified that on Tuesday of that week she saw Stender and B.B. in the window of Stender's apartment and Stender was brushing glass off

B.B.'s pants. The mother also stated that on Wednesday 25th she yelled several times for B.B. to come home, and when he didn't answer she went over to the apartment. She saw B.B. and Stender walking down the stairs and when she asked B.B. why he didn't answer, Stender interrupted with, "Oh, he thought he'd wait until you yelled one more time."

B.B.'s father testified he was baby-sitting B.B. the previous weekend and on one occasion yelled for B.B. to find out where he was playing. B.B. looked out Stender's window and said he was watching a Care Bear movie. The victim's father also testified he met Stender later that evening when Stender came over to make sure B.B. made it home safely.

A social worker from the child protection agency testified she interviewed B.B. She stated that B.B. identified the penis as a "dick."

A detective investigating the allegation of sexual abuse testified he went to Stender's apartment on June 1, 1987. He stated that when he knocked on Stender's door Stender asked, "Is that you, [B.B.]? When the detective identified himself, Stender said, "Just a minute. I have to get my pants on." Stender admitted to the detective he owned a Care Bear movie.

Stender provided detailed testimony to the jury concerning his whereabouts and activities between May 16, 1987, and May 31, 1987. He testified he saw B.B. on two

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occasions. The first time he saw B.B., Stender testified, he did not even know B.B.'s name. On May 19, 1987, B.B. came to his apartment and asked to use Stender's bathroom. After using Stender's bathroom, B.B. went to Stender's kitchen window and lifted the window. The window fell and broke a kerosene lamp shade, splattering glass on B.B. Stender took B.B. home and had his mother check for glass on his clothing. Stender testified the only other time B.B. had been to his apartment was on May 20, 1987. B.B. came to Stender's door and asked for a drink of water. Stender said he gave B.B. a drink on the stairwell landing and then B.B. left. B.B. testified that he had never been to Stender's apartment to use the bathroom or for a glass of water. Stender denied B.B. had watched the Care Bear movie at his house.

Stender offered the testimony of several family members and friends to substantiate his alibi defense. Stender asserts the testimony provided by the State so conflicted with that provided by defendant and his witnesses that a rational juror could not have reasonably concluded beyond a reasonable doubt defendant performed a sex act with B.B. It is the province of the jury to evaluate conflicting evidence. The jury is at liberty to believe or disbelieve the testimony of witnesses and to give such weight to the evidence as in its judgment the evidence is entitled to receive. State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984).

The jury is in a superior position to judge the credibility of witnesses, and we grant considerable deference to the trial court's findings of fact. State v. Hatter, 342 N.W.2d 851, 854 (Iowa 1983). Viewing the evidence in the light most favorable to the State, we find ample evidence that Stender committed a sex act (oral to genital contact) with B.B. Accordingly, we affirm defendant's conviction for second-degree sexual abuse.

**AFFIRMED.**