IN THE COURT OF APPEALS OF IOWA

No. 0-466 / 99-1155
Filed August 30, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GINA MARIE SAXTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard, II, District Associate Judge.

Defendant appeals from the judgment and sentence entered upon her conviction for aggravated child endangerment. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, J. Patrick White, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

HECHT, J.

On appeal from the judgment and sentence entered upon her conviction for aggravated child endangerment, Gina Saxton contends the sentencing court erred by considering unproven and unprosecuted charges. We affirm.

I. Factual Background and Proceedings. Saxton is the mother of three children, Crystal, age thirteen; Brandon, age nine, and Tyler, age five. Tyler is a special needs child and requires a feeding tube to receive nutrition. On March 5, 1999, the State filed a trial information charging Saxton with one count of child endangerment. The charge was based on allegations Saxton left Crystal unattended with a twenty-year-old male after being warned they were sexually involved and left her daughter responsible for the care of her nine and five-year old sons for two weeks while she vacationed in Florida. The minutes of testimony attached to the trial information also indicated Saxton had provided Crystal with alcohol, tobacco, and marijuana.

Saxton signed a written guilty plea[1] on June 3, 1999. The guilty plea contained the statement, "I have read the Minutes of Testimony filed with the Trial Information and do not contest the accuracy of those minutes." At sentencing on July 8, 1999, Saxton admitted she allowed Crystal to smoke marijuana and tobacco in her presence and had knowledge the child had consumed alcohol. She also admitted leaving her younger children in Crystal's care when she was on vacation, although she claimed she had requested three

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[1] This document was actually entitled "Written Arraignment and Plea of Not Guilty." However, it is clear from the body of the document it was merely a misnomer in the caption.

adults to look in on them. Saxton further testified a neighbor had expressed concern about Crystal's sexual activity with an older boy. Crystal's father, Thomas Miller, gave a victim impact statement at sentencing. He indicated in his testimony Saxton made alcohol and tobacco available to Crystal and allowed the child to be sexually active. Saxton testified at sentencing she was not aware of Crystal's sexual activity with an adult male until she was informed after the fact by a representative of the department of human services. The district court sentenced Saxton to 365 days in jail, all but sixty days suspended, and placed her on probation for two years.

II. Standard of Review. We review the district court's sentence for the correction of errors at law. Iowa R. App. P. 4; *State v. Sailer,* 587 N.W.2d 756, 758 (Iowa 1998). A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as consideration of impermissible facts. *State v. Loyd,* 530 N.W.2d 708, 713 (Iowa 1995). Sentencing decisions of the district court are cloaked with a strong presumption in their favor and an abuse of discretion will not be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

III. Merits. Saxton contends the district court impermissibly considered evidence she allowed her daughter to be sexually active when determining her sentence. She denied knowledge of Crystal's sexual activity during the sentencing hearing and contends on appeal that her awareness of such activity

was not proven and therefore could not be considered by the sentencing court. A sentence will be set aside and the case remanded to the district court for resentencing if the sentencing court relied upon charges of unprosecuted or unproven offenses. *See Sailer,* 587 N.W.2d at 762. A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it. *State v. Gonzalez,* 582 N.W.2d 515, 516 (Iowa 1998).

The sentencing court may rely upon evidence presented to it. *See State v. Mateer,* 383 N.W.2d 533, 538 (Iowa 1986). The district court may also rely in part on the minutes of testimony attached to the trial information. *State v. Fluhr,* 287 N.W.2d 857, 868 (Iowa 1980) *overruled in part on other grounds by State v. Kirchoff,* 452 N.W.2d 801, 805 (Iowa 1990); *State v. Marsan,* 221 N.W.2d 278, 280 (Iowa 1974). However, where portions of the minutes are not necessary to establish a factual basis for the guilty plea, they are denied by the defendant, and they are otherwise unproved, there is no basis to allow the sentencing court to consider and rely on such portions. *State v. Black,* 324 N.W.2d 313, 316 (Iowa 1982); *State v. Messer,* 306 N.W.2d 731, 733 (Iowa 1981).

The district court made the following statement at sentencing, which Saxton points to in support of her claim:

> In this particular case, the record is replete with failures on your part either by omission or commission to perform your responsibilities to your children. The period of effective abandonment of leaving them without supervision for extended periods of time, I understand that you dispute that as a fault on your part, it's clear to me that was a significant problem. Even more significantly with respect to Crystal, the record would indicate that Crystal was allowed to use or provided with tobacco, marijuana,

> and alcohol. She was allowed to be sexually active. All of these things were done with your knowledge, if not consent, if not encouragement.

The minutes of testimony attached to the trial information clearly establish Crystal was sexually active with a boy who was seventeen years of age and an adult male. Several witnesses listed in the minutes of testimony were prepared to testify Crystal was sexually active, including Crystal herself. The minutes of testimony also clearly establish Saxton knew of the sexual nature of the relationship between her daughter and the minor male. The record before the sentencing court also established Saxton knew her daughter had spent time with an adult male on several occasions behind a closed bedroom door; and the male did not leave the bedroom until the early hours of the morning.

The district court cannot rely solely on the minutes of testimony. *See Marsan*, 221 N.W.2d at 280. However, the victim impact statement of Thomas Miller at the sentencing hearing corroborated the minutes of testimony and established Saxton allowed her daughter to be sexually active. Saxton argues Miller's statements are not enough to support the district court's finding she knew of Crystal's sexual behavior. We need not decide, however, whether Miller's testimony is sufficient standing alone to establish the fact of Saxton's knowledge. In her written guilty plea, the defendant did not contest the accuracy of the minutes of testimony, which included evidence from which it could be reasonably inferred she knew of Crystal's sexual activity with both males. She admitted in her testimony at sentencing that her neighbor informed her Crystal was sexually active with the adult. She provided a prescription for birth control pills to Crystal

because she knew she had been sexually active with the minor. As noted above, the minutes of Crystal's testimony indicated Saxton was aware the child and the adult male were in a bedroom with the door shut until early in the morning on several occasions. This testimony creates a strong inference Saxton had knowledge Crystal was sexually active with an adult male and, by either her acts or omissions, consented and encouraged such behavior.

IV. Conclusion. There is sufficient evidence in the minutes of testimony and in the victim impact statement to support the district court's conclusion Saxton's knew of her daughter's sexual behavior. The district court did not err by sentencing her to 365 days of imprisonment, all but sixty days suspended, and two years of probation. The sentence of the district court is affirmed.

AFFIRMED.