FILED
OCT 29 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

454

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

RONALD DEAN SIMMONS,)

Defendant-Appellant.)

Filed October 29, 1985

5-447
84-1250

Appeal from the Iowa District Court for Polk County, Louis A. Lavorato, Judge.

Defendant appeals his conviction of sexual abuse in the third degree. **AFFIRMED.**

Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, Lona Hansen, Assistant Attorney General, and A. Patricia Houlihan, Assistant County Attorney, for plaintiff-appellee.

Heard by Snell, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant, Ronald Dean Simmons, was convicted of the crime of sexual abuse in the third degree. The trial information charged him with that crime, alleging that he committed sexual abuse with the victim, a child under fourteen years of age. Defendant claims that the evidence was insufficient to support the trial court's verdict of guilty and further claims that he was denied effective assistance of counsel. We affirm the conviction, and deny his claim of ineffective assistance of counsel.

When reviewing the sufficiency of 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 from the evidence in the record. It is necessary to consider all of the evidence and not just the evidence supporting the verdict. The verdict of the trier of fact is binding upon us 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. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984).

From the evidence at trial, the trier of fact would be justified in finding the following facts.

On or about the 14th day of August, 1983, in the early morning hours, defendant, in an intoxicated condition, arrived home, went to the bedroom of the victim, awakened her, and told her to go downstairs. The evidence showed that when she got downstairs, defendant took off his pants, removed the victim's underpants, and lay on top of her. The victim, the 14-year-old daughter of the woman with whom defendant was living, testified that defendant inserted his penis into her vagina. The evidence further showed that the victim's mother

came into the room where this activity took place, observed the defendant lying upon her daughter, pulled him off her, and sent her daughter to her room.

There was testimony by the victim's mother and by the defendant, that defendant was drunk, and defendant denied that he was on top of the victim, or that any sexual intercourse occurred.

On the basis of the record, there is substantial evidence of defendant's guilt beyond a reasonable doubt. There was ample evidence to support the finding that defendant committed sexual abuse in the third degree.

Defendant argues that there is insufficient evidence to support a finding that penetration of the victim's vagina by his penis occurred. It is argued that in his intoxicated condition, he was impotent, and that he could not have an erection. He points to the testimony of the victim, where she states the defendant's was ". . . kind of droopy, right kind of down.", as indicating his inability to perform sexual intercourse, or to achieve penetration. The victim's mother also testified that defendant drank a lot, and that when he was drunk, he didn't perform sexually. She also testified that she knew he was drunk on the occasion of the occurrence involved here.

1. **Sufficiency of the Evidence.**

The victim in this case was, at the time of the occurrence, thirteen years of age. Sexual abuse in the third degree, as alleged in this case, is committed as follows:

> Any sex act between persons who are not at the time cohabiting as husband and wife is sexual abuse in the third degree by a person when the act is performed with the other participant in any of the following circumstances:
> 1. . . .
> 2. . . .
> 3. The other participant is a child.

Section 709.4, Code of Iowa, 1983.

A "child" is any person under the age of fourteen. Section 702.5, Code of Iowa 1983.

A "sex act" is defined as follows:

> The term, "sex act" or "sexual activity" means 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 therefore in contact with the genitalia or anus.

Section 702.17, Code of Iowa, 1983.

The jury, or in this case, the court, as the trier of fact, is not required to accept the defendant's version of the facts. State v. Wilkins,, 346 N.W.2d 16, 20 (Iowa 1984).

There was substantial evidence to support the finding that defendant committed a sex act upon the victim. His supposed inability to perform sexually, by reason of his intoxication, does not rule out the performance of a sex act, since a sex act may occur by genital contact without penetration. State v. Howard, 284 N.W.2d 201, 203-04 (Iowa 1979). As in that case, the trial court was permitted to infer that considering the positions in which defendant and the victim were found, a contact of their genitalia occurred. Such an inference, even disbelieving the evidence of penetration, would be sufficient to constitute a sex act, and therefore, sexual abuse of the 13-year-old victim. There was sufficient evidence to support the conviction.

II. **Ineffective Assistance of Counsel**

Defendant argues that he was denied effective assistance of counsel in that his attorney: (1) failed to interview witnesses prior to trial at his request; (2) those witnesses had testimony material to his defense; and (3) failed to call certain witnesses at trial material to his defense. Specifically, he claims that

his sister, brother-in-law, and mother could have testified as to his alcoholism and the fact that he was drunk on the morning in question, thus presenting a defense as to his lack of ability to perform sexually because he was intoxicated. He also asserts that his attorney should have discussed the defense of diminished capacity prior to trial, and that failure to do so was ineffective assistance of counsel. The gist of his argument is that additional testimony of his history of alcohol abuse, his intoxication on the morning in question, and his consequential inability to perform sexually was material to his defense and that excluded witnesses could have provided this crucial testimony.

The duty is on the defendant to cite to and to demonstrate those particular instances in which trial counsel failed to perform an essential duty. See State v. White, 337 N.W.2d 517, 518-20 (Iowa 1983). There is a presumption that counsel is competent. Sims v. State, 295 N.W.2d 420, 423 (Iowa 1980). Defendant must establish by a preponderance of the evidence that counsel rendered ineffective assistance. State v. Aldape, 307 N.W.2d 32, 42 (Iowa 1981).

Before it will be found that a defendant was rendered ineffective assistance the defendant must show: (1) that counsel failed to perform an essential duty, and (2) that prejudice resulted, to the extent that, "There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, ____ U.S. ____, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). Under the second prong the defendant must demonstrate not only "a possibility of prejudice, but that it worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (emphasis in original). State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984), quoting United State v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982).

The offense defendant is charged with, sexual abuse in the third degree, in violation of Iowa Code section 709.4(3), does not include an intent element. State v. Tague, 310 N.W.2d 209, 211 (Iowa 1981). Nor does the sex act necessarily require penetration. See State v. Howard, 284 N.W.2d 201, 203-04 (Iowa 1979); Iowa Code § 702.17 (1983). In light of these critical and fundamental facts, we shall examine whether the alleged additional testimony is material to defendant's case, and whether its exclusion "worked to his actual and substantial disadvantage. . . ." State v. Miles, at 234.

As stated previously, the gist of the lacking testimony was that defendant suffered from a history of alcohol abuse, that he was drunk the morning of the alleged abuse, and that because of his intoxication he could not have an erection. At the outset, it is readily apparent that the evidence of his alcohol abuse and drunkenness is material only to defendant's state of mind or intent. We have already established that this crime does not depend on the accused's intent or state of mind. Secondly, the evidence that his inability to achieve an erection is not essential for the occurrence of a sex act for sexual abuse in the third degree. Finally, the defendant has failed to demonstrate any testimony from these additional witnesses that has not already been revealed at trial. Both the defendant and the victim's mother testified as to his inebriated state that morning and his usual sexual manifestations from alcohol. The additional witnesses add nothing new to this issue.

We conclude therefore that the missing testimony is not material to defendant's case and therefore could not have worked to his actual and substantial disadvantage.

We affirm the judgment of the trial court and deny defendant's claim of ineffective assistance of counsel.

AFFIRMED.