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IN THE COURT OF APPEALS OF IOWA

280

STATE OF IOWA,)

Plaintiff-Appellee,) Filed September 6, 1984

vs.)

CLAY LOUIS BOWLES,) 4-190
83-733

Defendant-Appellant.)

Appeal from the Iowa District Court for Black Hawk County - Peter Van Metre, Judge.

Defendant appeals from his conviction on two counts of sexual abuse in the third degree in violation of Iowa Code section 709.4 (1981). AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

Defendant appeals from his conviction on two counts of sexual abuse in the third degree in violation of Iowa Code section 709.4 (1981). He asserts: (1) that he was denied his constitutional right to due process, confrontation of witnesses, and a fair trial when he was not permitted to present evidence that on a previous occasion the victim had taken off her clothes at a party; (2) that conviction on a second count of sexual abuse was improperly based on a count of the trial information that had been dismissed on the ground that it merged with a kidnapping charge; and (3) that the trial court should not have excluded as irrelevant a notebook with numerous pages missing when he had testified that he tore a page out in order to give the complaining witness his phone number at her request. We affirm.

In the early morning hours of Sunday, August 8, 1982, the complaining witness, Ms. Armstrong, met defendant at a party. Ms. Armstrong testified that she allowed defendant to drive her to his house to obtain some marijuana. Then defendant drove the car to a secluded area where he allegedly forcibly committed a number of sex acts with her. Defendant then took her back to his house and forced her to engage in sexual intercourse again. Ms. Armstrong fled while defendant was asleep. Defendant admitted having sexual intercourse with Ms. Armstrong, but claimed that it was consensual. He testitified that afterwards he wrote his telephone number on a notebook page, tore it out, and gave it to Ms. Armstrong at her request.

Defendant was charged with kidnapping in the first degree and sexual abuse in the third degree. On November 22, 1982, the trial court overruled defendant's motion to dismiss count I (kidnapping), but sustained his motion to dismiss count II (sexual abuse) on the grounds that it was a lesser included offense to the kidnapping charge. The State filed a motion to reconsider the order of November 22 stating that the incident of sexual abuse in the car relied upon in the

kidnapping charge was separate from the incident of sexual abuse at defendant's home. The trial court reserved ruling on the motion to reconsider until the conclusion of the State's case-in-chief. At that time defense counsel argued the point in his motion for judgment of acquittal. The trial court overruled that motion, and specifically referring to the State's earlier motion to reconsider the dismissal of count II, the court stated that since two separate incidents of sexual abuse were supported by the evidence, both counts could be submitted to the jury. At the close of all the evidence defense counsel again moved to dismiss the sexual abuse count and his motion was overruled.

Our review of criminal cases is on assigned error. We make an independent evaluation of the totality of the circumstances, however, on issues involving the violation of constitutional safeguards. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Prior Sexual Activity. Defendant made an offer of proof that if called to testify a witness would state that Ms. Armstrong removed all of her clothes at a private card party in 1982. Defendant claims the trial court erred in refusing to admit this evidence.

At the time of the hearing Iowa Rule of Criminal Procedure 20(5) was in effect[1] which stated:

> In prosecutions for the crime of sexual abuse, evidence of the prosecuting witness's previous sexual conduct shall not be admitted, nor reference made thereto in the presence of the jury, except as provided herein. Evidence of the prosecuting witness's previous sexual conduct shall be admissible upon appropriate order of the court if the defendant shall make application to the court not later than five days before trial.
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> The court shall conduct a hearing in camera as to the relevancy of such evidence of previous sexual conduct, and shall limit the questioning and control the admission and exclusion of evidence upon trial.

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[1] Rule 20(5) was replaced on July 1, 1983, by rule 412 of the Iowa Rules of Evidence. The two rules are "substantially similar" in effect. See State v. Clarke, 343 N.W.2d 158, 160 (Iowa 1984).

> In no event shall such evidence of previous sexual conduct of the prosecuting witness committed more than one year prior to the date of the alleged crime be admissible upon the trial, except previous sexual conduct with the defendant. Nothing in this rule shall limit the right of either the state or the accused to impeach credibility by the showing of prior felony convictions which are otherwise admissible.

Prior sexual conduct, offered to prove consent, has repeatedly been rejected by the supreme court as irrelevant. State v. Folck, 325 N.W.2d 368, 374 (Iowa 1982); State v. Davis, 269 N.W.2d 434, 439 (Iowa 1978); State v. Ball, 262 N.W.2d 278, 280 (Iowa 1978).

In State v. Zaehringer, 280 N.W.2d 416 (Iowa 1979), the supreme court held that the trial court abused its discretion in preventing defendant from putting on evidence that the complaining witness claimed to have posed for nude photographs for another person for a fee and had offered to do the same for defendant. The court reasoned that posing nude is not per se "sexual conduct" within the meaning of the prior rape shield law, Iowa Code section 782.4 (1977). Id. at 420. The court observed:

> We also note that the purpose behind the defendant's seeking the introduction of the evidence in question was to explain evidence already introduced by the State and not to imply consent on the part of the prosecutrix. If the evidence had been submitted for the latter purpose, with the accompanying inference of prior sexual conduct or activity, § 782.4 would in all likelihood have barred its admission.

Id.

In this case defendant admits that the evidence sought to be introduced was for the purpose of showing prior sexual activity, and that it is offered on the issue of consent. Defendant claims that this evidence coupled with testimony that Ms. Armstrong stated on the day of the alleged rape that she wanted to "get laid," shows a history of indiscriminate sexual activity with strangers and is, therefore, relevant.

Defendant relies upon United States v. Kasto, 584 F.2d 268, 271-72 (8th Cir. 1978), cert. denied 440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486 (1979), which held that evidence of a rape victim's prior sexual activity was not sufficiently probative on the issue of consent or credibility as a witness to outweigh its prejudicial effect. However, the court stated: "Sexual history might also be relevant where the victim has engaged in a prior pattern of behavior clearly similar to the conduct immediately in issue." Id. at 271 n.2. We conclude that the Kasto exception is not applicable in this case. Although defendant's brief implies that the complaining witness frequently removed her clothing at parties and in public places, in his offer of proof only one such incident is outlined in the record. This incident, even when taken together with the statement expressing a desire to "get laid," does not constitute a pattern. Furthermore, undressing at a party is not conduct clearly similar to defendant's version of Ms. Armstrong's conduct on the night in question.

We do not believe that the evidence that the complaining witness, weeks or months prior to the alleged rape, removed all of her clothing at a private party is relevant on the issue of whether she consented to sexual intercourse with the defendant at a later time.

II. Dismissal of the Sexual Abuse Charge. Defendant claims that he could not be convicted of a second count of sexual abuse because count II of the trial information charging him with sexual abuse had been dismissed prior to trial. The record of this case does not support this contention. Although the trial court initially granted defendant's motion to dismiss count II, it reserved ruling on the State's motion to reconsider the dismissal stating before trial that its prior ruling was based on a misunderstanding of the information. At the close of the State's evidence, the trial court referred to the motion to reconsider and expressed its intention to submit the sexual abuse charge to the jury.

Defendant's reliance on McWilliams v. Walker, 209 Iowa 769, 771-72, 229 N.W. 183, 184(1930), is misplaced. In Walker defendant was sentenced to a higher crime than that charged in the indictment. In this case sexual abuse was charged in the information, argued to the jury, denied by the defendant, and submitted in the instructions. Defendant does not claim that he was surprised by the conviction on count II, or that he was denied the opportunity to prepare a defense. Therefore, the trial court did not err in submitting count II to the jury.

Defendant also argues that his conviction under count II was invalid because the alleged sexual abuse at his home was not charged separately from the underlying sexual abuse required to support the first degree kidnapping charge.

Iowa Code section 701.9 and Iowa Rule of Criminal Procedure 6(2) prohibit a person from being convicted of both the public offense charged and a lesser included offense arising from the same occurrence. In State v. Newman, 326 N.W.2d 796 (Iowa 1982), the supreme court held that a conviction for both sexual abuse and kidnapping was improper when several incidents of sexual abuse were treated as one occurrence by the prosecutor, trial court, and jury. The court stated:

> In the present case the prosecutor did not separately charge and try defendant, and the jury did not separately convict him, for sexual abuse based on the one of the sex incidents; and the prosecutor did not separately charge and try defendant, and the jury did not separately convict him, for kidnapping based on the other sex incident. If that had occurred we would be required to determine whether on this evidence defendant could legally be so tried and convicted under rule 6(1)—a question we do not now decide. Instead, the prosecutor, trial court, and jury viewed the ride in the vehicle and the incidents which occurred during the ride as one overall occurrence.

Id. at 803.

In the present case the State set forth two distinct incidents of sexual abuse and stated that the sexual abuse in the vehicle was the basis for the kidnapping charge in count I of the information and the sexual abuse at defendant's home was

the basis for the sexual abuse charge in count II. The evidence at trial supported a finding of two acts of sexual abuse. See State v. Holderness, 301 N.W.2d 733, 740 (Iowa 1981). The jury was instructed that it had to find two separate acts of sexual abuse in order to find defendant guilty under both counts. Therefore, the requirement of Newman was satisfied and defendant could property be convicted under both counts.

III. Demonstrative Evidence. A trial court has considerable discretion in determining the admissibility of demonstrative evidence. State v. Henderson, 268 N.W.2d 173, 178-79 (Iowa 1978). Defendant claims the trial court abused its discretion in refusing to admit into evidence a spiral notebook. Defendant alleged that he wrote his name and telephone number on a page, tore it out of the notebook, and gave it to Ms. Armstrong at her request. We cannot say the trial court abused its discretion in keeping out this evidence. It is impossible to corroborate defendant's version of the facts by examining this notebook. The presence of the notebook has no logical tendency to increase the probability that the complaining witness consented to sexual intercourse. Furthermore, we note, as did the trial court, that defendant held the notebook while testifying. The jury was able to observe the existence of a notebook at that time. It was not error to prevent the jury from examining the notebook more closely since an examination would not aid the jury and would expose them to other writings in the notebook not relevant to the case.

AFFIRMED.