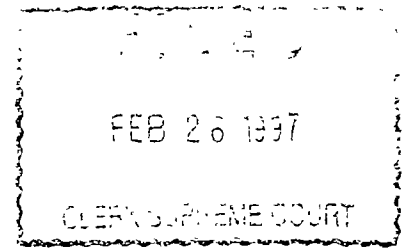


IN THE COURT OF APPEALS OF IOWA

No. 6-798 / 96-0683



IN THE INTEREST OF N.B., A Minor Child,

N.B.,

Appellant.

Appeal from the Iowa District Court for Polk County, Karla J. Fultz, Associate
Juvenile Judge.

Juvenile appeals from the court's order finding he committed a delinquent act
of sexual abuse in the third degree in violation of Iowa Code sections 709.1(1) and (3)
and 709.4(2)(b) (1995). **AFFIRMED.**

J. Michael Mayer, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney
General, Stephen C. Robinson, Assistant Attorney General, John Sarcone, County
Attorney, and Jaki Livingston, Assistant County Attorney, for appellee-State.

Considered by Habhab, C.J., and Streit and Vogel, JJ.

STREIT, J.

Juvenile appeals from the court's order finding he committed a delinquent act of sexual abuse in the third degree in violation of Iowa Code sections 709.1(1) and (3) and 709.4(2)(b) (1995). He contends there is insufficient evidence to support the court's finding he sexually assaulted his stepsister while in the home of their parents.

On June 2, 1995, the State filed a delinquency petition alleging twelve-year-old Nicholas B. sexually abused his stepsisters, Carrie L. and Malisa L., ages thirteen and fifteen years, respectively.

At trial, Malisa testified Nicholas repeatedly forced her to have sex in the room she shared with Carrie. She stated this occurred while her mother and stepfather were at home, and, although she yelled for help, they could not hear her. She stated Nicholas similarly assaulted Carrie. She said she did not tell anyone about the alleged assaults because Nicholas threatened to hurt them.

Carrie testified she was sexually assaulted several times by Nicholas around Christmas of 1994.

Dr. Rizwan Shah testified she examined the girls and found Malisa lacked hymenal membrane, and this indicated it had been repeatedly injured. She also noted there was a healed scar in her vaginal canal. She concluded Carrie's hymen was torn in its entirety, and she had a scar in her vaginal canal. The injuries were healed, and Dr. Shah could not estimate when the injuries occurred. She concluded it likely

occurred from a one-time trauma, not from repeated complete penial penetration. She stated repeated digital penetration would not cause injury.

The court dismissed the sexual abuse allegation involving Malisa because Malisa admitted she was sexually active, and her testimony lacked credibility since she had previously falsely accused her father of raping her so she could move to Des Moines to live with her mother. The court found Malisa could be lying about this sexual assault to leave her mother's home.

The court found Nicholas had sexually abused Carrie. It entered a dispositional order confirming Nicholas committed the delinquent act of third-degree sexual abuse and adjudicated him delinquent.

Nicholas appeals. He contends the state did not present sufficient evidence to establish beyond a reasonable doubt he sexually assaulted Carrie.

Review of juvenile delinquency proceedings is de novo. *In Interest of A.H.*, 549 N.W.2d 824 (Iowa 1996). Under the due process clause of the fourteenth amendment, juveniles have a constitutional right to the beyond-a-reasonable-doubt standard of proof in an adjudicatory hearing. *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). The State must show beyond a reasonable doubt Nicholas performed a delinquent act. *See* Iowa Code § 232.47(10) (1997); *In re Interest of J.D.S.*, 436 N.W.2d 342, 349 (Iowa 1989); *In Interest of C.T.F.*, 316 N.W.2d 865, 868 (Iowa 1982).

Much of Nicholas's argument centers around the credibility of Malisa, and that Carrie and Malisa would say anything to escape from their home environment. Malisa and Carrie had a very small room in the house where they slept. The room had no furniture and the girls were locked in their room for most of every day. The children were home-schooled with a teacher in the home twice a week. Nicholas never left when the teacher made her visits. The only time Malisa and Carrie left the house was on family outings. Neither of the girls attempted to escape or tell anyone about the alleged abuse.

These children endured a very harsh living environment. Malisa and Carrie were both severely malnourished and emaciated. Dr. Rizwan Shah was reminded "of some of the pictures of Holocaust victims. They were just skin and bone." Even though the girls had every incentive to lie in order to escape from such a grueling life style, the medical evidence of sexual assault cannot be disputed.

Nicholas argues Carrie invented the frequent assaults to corroborate Malisa's false claims. We agree with the trial court that Malisa's credibility is lacking. She accused her father of rape in order to be removed from her father's care and placed with her mother. She has also been sexually active and it is much more difficult to determine whether the injuries described by Dr. Shah occurred from acts of Nicholas.

It is quite certain, however, Nicholas injured Carrie while he committed sexual acts. Carrie testified Nicholas frequently assaulted her "front and back." Carrie's

hymen was torn in its entirety and she had a scar inside the vaginal canal. Dr. Shah stated her injury would be consistent with a one-time traumatic intercourse. Nicholas argues Carrie's testimony of frequent assaults is contrary to the physical evidence described by Dr. Shah. Dr. Shah, however, limited her opinion to a complete penal penetration. Finger penetration could have taken place without causing such injuries.¹

Carrie had little or no contact with anyone else other than the family. There is simply no other explanation for how or who tore her hymen in its entirety. Nicholas had access to the girls' room. We find beyond a reasonable doubt, Nicholas engaged in a delinquent act when he sexually abused Carrie.

We affirm the juvenile court.

AFFIRMED.

¹ Digital penetration of genitalia is within the purview of section 702.12, which defines "sex act." See Iowa Code § 702.17 (1997); *In Interest of J.D.S.*, 436 N.W.2d at 349; *State v. Whetstine*, 315 N.W.2d 758, 763 (Iowa 1982).