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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

155

STATE OF IOWA,)

Plaintiff-Appellee,) Filed January 30, 1981

vs.)

DEAN C. UNDERWOOD,) 0-324
64178

Defendant-Appellant.)

Appeal from Pottawattamie District Court - Leo Connolly, Judge.

Defendant appeals conviction of sexual abuse in the second degree in violation of section 709.3(2), The Code 1979, challenging the sufficiency of the evidence on the necessary elements of the crime charged, the propriety of certain instructions, the failure to give instructions on defenses of insanity and diminished responsibility, and the constitutionality of section 907.3, The Code 1979, under which defendant was given a mandatory sentence without the possibility of probation because a forcible felony was involved. AFFIRMED.

Lyle A. Rodenburg, Council Bluffs, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Jeanine Freeman, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Dean C. Underwood, appeals from his conviction of sexual abuse in the second degree in violation of section 709.3(2), The Code 1979. The numerous issues raised include challenges to the sufficiency of the evidence on the necessary elements of the crime charged, the propriety of certain instructions, the failure to give instructions on the defenses of insanity and diminished responsibility, and the constitutionality of section 907.3, The Code 1979, under which defendant was given a mandatory sentence without the possibility of probation because a forcible felony was involved. We affirm.

On July 23, 1979, defendant was charged by information with committing sexual abuse in the second degree upon his nine-year-old sister. Trial court subsequently granted defendant's motion for appointment of a psychiatrist at state expense to determine defendant's competency to stand trial. The resulting report, however, was not introduced or in any way referred to at trial, nor was defendant's competence raised as an issue at any other time. Following trial on October 10th, the jury convicted defendant of second-degree sexual abuse, the offense charged. Defendant's post-trial motions for new trial and judgment of acquittal were overruled. On October 18th the trial court imposed a sentence of imprisonment not to exceed twenty-five years. The court noted that the sentence was mandatory under section 907.3, The Code 1979, because defendant was convicted of a forcible felony and therefore was ineligible for probation or deferred judgment. This appeal followed.

I. Scope of Review. Since this is a proceeding at law, our review is for the correction of errors only. Iowa R. App. P. 4.

II. Sufficiency of the Evidence. Defendant first claims that the trial court erred in refusing to grant his motion for judgment of acquittal because there is insufficient evidence of the victim's age or of the occurrence of a sex act. Two of the elements that the state must prove to establish sexual abuse in the second degree are that a sex act occurred and that the victim was under the age of twelve years. The trial court so instructed the jury.

In reviewing the propriety of trial court's denial of a motion for judgment of acquittal, we consider all the evidence in the light most favorable to the State. State v. Holderness, 293 N.W.2d 226, 230 (Iowa 1980); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). If there is substantial evidence in the record, the jury's verdict is conclusive. Robinson, 288 N.W.2d at 338. "Substantial evidence . . . means such

evidence as could convice a rational trier of fact that defendant is guilty beyond a reasonable doubt." Id. at 339.

Applying these principles to this case, we find defendant's claims are without merit. The father of one of the victim's friends, the victim's aunt, the victim herself, and one of the arresting police officers all testified that the victim was nine years old at the time of the incident. Although defendant claims that such testimony was incompetent for various reasons, those objections were not raised at trial; we therefore do not consider them here for the first time. State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978).

We also find sufficient evidence that a sex act occurred. The victim's friend's father found defendant on top of the victim; neither was wearing clothes. Officer David Yapp testified that defendant admitted to having committed a sex act with his sister. This, along with other uncontroverted evidence, is sufficient to warrant submission of the question to the jury. The trial court correctly overruled defendant's motion for judgment of acquittal based upon insufficient evidence.

III. Submission of Both Second- and Third-Degree Sexual Abuse as Duplicitous. Defendant next claims that the trial court erred in submitting both second- and third-degree sexual abuse to the jury because the same general elements are present in both charges; hence, submission of both charges was confusing to the jury and unduly emphasized the sexually abusive character of the crime charged. He concludes that the State should be deemed to have elected to prosecute only the lower offense, i.e., third-degree sexual abuse, and that the jury should not have been instructed on the second-degree offense. We disagree.

Initially, we note that, since defendant cites no authority for his argument, we could deem this issue waived under Iowa R. App. P. 14(a)(3). But considering the merits, we conclude it is clear that second- and third-degree sexual abuse are not identical crimes; rather, the latter is a lesser-included offense of the former. One is guilty of second-degree sexual abuse if "[t]he other participant is under the age of twelve." § 709.3(2), The Code 1979. Whereas one commits the third-degree offense if "[t]he other participant is a child." § 709.4(3), The Code 1979. "Child" is defined for this purpose as a person under fourteen years of age in section 702.5, The Code. Thus, we conclude the two offenses are different, depending upon the age of the victim.

In any event, there was sufficient evidence by which the jury could (and did) find defendant guilty of the second-degree offense. Thus, even if trial court erred in instructing the jury on both offenses, the error was not prejudicial to defendant.

IV. Trial Court's Instructions. Defendant further argues that trial court made numerous errors in instructing the jury. Specifically, defendant challenges the instructions given on the lesser included offense of lascivious acts with a child and contends that the trial court should have instructed the jury on the defenses of insanity and diminished responsibility. Defendant raised none of these objections at trial and we will not consider his contentions here for the first time on appeal. State v. Rouse, 290 N.W.2d 911, 915 (Iowa 1980). We also note that defendant failed to file a pretrial notice of intent to rely upon the defenses of either insanity or diminished responsibility as required by Iowa R. Crim. P. 10(10)(b)(1).

Defendant also argues that the trial court erred in instructing the jury that it was neither to give consideration to nor draw any adverse inferences from the fact that defendant refused to testify on his own behalf. This instruction allegedly violated defendant's privilege against self-incrimination guaranteed by the fifth amendment.

We agree that reversible error occurs if such an instruction is given unless it is requested by defendant. State v. Pierce, 240 N.W.2d 678, 680 (Iowa 1976). In this case, however, defendant's counsel requested and defendant himself consented to trial court's giving that instruction. Since the Pierce exception applies in this case, trial court did not err in giving the challenged instruction.

V. Constitutionality of Section 907.3, The Code. Defendant also attacks the constitutionality of section 907.3, The Code 1979, the statute under which trial court imposed a mandatory sentence on defendant as a forcible felon. He raises issues of separation of powers, due process, equal protection and cruel and unusual punishment. None of these constitutional objections were raised at trial, however. Again, defendant has failed to preserve error because even constitutional issues not raised in the trial court may not be presented for the first time on appeal. State v. Holmes, 276 N.W.2d 823, 828 (Iowa 1979). We therefore have nothing to review.

VI. Hearing to Determine Defendant's Competency. Before trial, the court granted defendant's motion to have a psychiatrist appointed at state expense to examine defendant for any possible mental problems and to determine his competency to stand trial. This examination was made but the results were not introduced or even referred to at trial. Defendant now claims on appeal that trial court erred in not holding a hearing or making any ruling on his mental condition or competence to stand trial.

We begin our analysis with section 812.3, The Code 1979, which provides as follows:

> If at any stage of a criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents him or her from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question. (emphasis added).

The statute clearly requires trial court to hold such a hearing if defendant has a mental disorder that is reasonably apparent, that is, "when the record contains information from which a reasonable person would believe a substantial question of the defendant's competency exists." State v. Lyon, 293 N.W.2d 8, 9 (Iowa 1980) quoting State v. Kempf, 282 N.W.2d 704, 706 (Iowa 1979).

We do not think the record in this case contains sufficient evidence to raise a substantial question of defendant's competence. It is significant to note, especially since a psychiatric examination was conducted before trial, that defendant at no time during the trial requested a competency hearing or in any way raised the issue of his competency to stand trial. Defendant points to the facts that he was scared and crying at the time of his arrest and that he was continually saying that he needed help. Officer Yapp testified that defendant told him that he "[has] an overpowering urge for sex and that he doesn't have anyone else to have sex with, so he picks on his sister." While this evidence suggests that defendant may have had problems dealing with his sexuality and that he wanted help in resolving these problems, we conclude the information before the court was insufficient to generate an independent responsibility to hold a competency hearing.

VII. Other Assignments of Error. We have considered all of defendant's numerous assignments of error, including those not fully discussed in this opinion, and find each to be without merit. We therefore affirm the conviction and sentence.

AFFIRMED.

All judges concur except Oxberger, C.J., and Snell, J., who dissent.

OXBERGER, C.J. (dissenting)

I dissent.

There are indications in the record Dean was unable to control his behavior for sometime prior to the incident. Several witnesses for the state testified that Dean was deeply disturbed following the incident. The neighbor, aunt and police officers stated that Dean pleaded for help and that he did not know why he commited the act. Dean's aunt testified Dean could not respond to her questioning following the incident, but could only stare. When the police questioned Dean as to what he was going to do with the knife following the incident, Dean responded he wanted to harm himself.

This mental disturbance seems to have continued beyond the time immediately following the incident. Prior to trial, Dean's attorney raised the question of competency based on the nature of the crime, Dean's mental history and his own observations and interviews with Dean. His motion for psychiatric evaluation was sustained which indicates trial court's recognition of the issue at that time. Whether such evaluation was made is not clear as no report as ordered appears in the record. I would remand to the lower court for the limited purpose of completing the aforementioned evaluation and submitting a report thereof.

Snell, J. joins in dissent.