IN THE COURT OF APPEALS OF IOWA

FILED
DEC 17 1987
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

NAOMI VARNEY,

Defendant-Appellant.

Filed December 17, 1987

7-473
86-1617

418

Appeal from the Iowa District Court for Wayne County (No. 20921) - Michael J. Streit, Judge.

Defendant appeals her conviction and sentence on four counts of sexual abuse. **AFFIRMED.**

Deborah S. Krauth of the Krauth Law Firm, Chariton, for defendant-appellant.

Thomas J. Miller, Attorney General; Richard J. Bennett and Thomas H. Miller, Assistant Attorneys General; and Monty Franklin, County Attorney, for plaintiff-appellee.

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

SACKETT, J.

Defendant was charged with and convicted of sexual abuse resulting from two alleged incidents in which her two daughters, then ages ten and eleven, were both sexually abused.

Defendant appeals from her conviction contending (1) the trial court erred in overruling an objection to a leading question, (2) there is insufficient evidence to support the verdict, (3) the trial court abused its discretion in the admission of certain medical testimony, and (4) the trial abused its discretion in imposing consecutive sentences.

I.

Defendant contends the trial court erred in overruling an objection to a leading question. One of defendant's daughters testified as a witness. During her testimony she was asked if her mother had touched her. She said "yes." When asked what her mother did she did not respond. There was some other testimony and then the daughter's testimony continued as follows:

> Q. She licked you between the legs, didn't she, Shannon? A. (Witness nods head.)[1]
>
> MR. WILSON: Your Honor, I'm going to object to that question as being a leading question. It is particularly leading in this circumstance with this witness and under these — under this environment.
>
> THE COURT: Overruled. Did you answer his question? A. (Witness nods head.)
>
> THE COURT: She nodded.
>
> MR. MILLER: I believe she nodded yes, Your Honor.
>
> Q. (by the Court) You nodded, didn't you? A. (Witness nods head.)

We agree with the defendant the question was leading. The question is did the trial court abuse its discretion in overruling the objection. State v.

[1] Prior to the taking of testimony, the parties agreed that when the children testified a "head nod" would be acceptable as a "yes" response to a question and a "head shake" would be acceptable as a "no" response.

Mueller, 344 N.W.2d 262, 266 (Iowa App. 1983). Iowa Rule of Evidence 611(c) provides in part that "leading questions should not be used on the direct examination of a witness except as may be necessary to develop that witness' testimony." A trial court has considerable discretion in admitting or excluding answers to leading questions, and there must be a clear abuse of discretion to justify a reversal. Giltner v. Stark, 219 N.W.2d 700, 706 (Iowa 1974). The trial court is in a better position than we to observe the circumstances that may justify the asking of leading questions. State v. Bradford, 175 N.W.2d 381, 383 (Iowa 1970). Leading questions may be proper and necessary where the witness is of tender age, State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978); State v. Shultz, 177 Iowa 321, 328, 158 N.W. 539 (1916); Mueller, 344 N.W.2d at 267, as well as where the witness is testifying as to some form of sexual abuse. State v. Torrence, 257 Iowa 182, 131 N.W.2d 808, 812-13 (1964); Mueller, 344 N.W.2d at 267.

The witness was less than twelve years of age. She was testifying as to acts of her mother. Mueller, 344 N.W.2d at 267. An attempt was made to elicit the information through the use of nonleading questions. The trial court did not abuse its discretion in allowing the leading question.

II.

Defendant next contends there was insufficient evidence to support her conviction of four counts of sexual abuse in the second degree. She claims the court should have granted her motions for acquittal because there was insufficient evidence she aided and abetted.

> When sufficiency of the evidence is challenged . . . we review the evidence in the light most favorable to the state. The evidence must be such that, when considered as a whole, a reasonable person could find guilt beyond a reasonable doubt. [citations] All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict. [citation] A jury verdict is binding

> on us if there is substantial evidence to support it. By "substantial evidence" we mean evidence which could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.

State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981), cert. denied, 451 U.S. 841 (1982). See also State v. Doss, 355 N.W.2d 874, 877 (Iowa 1984). Circumstantial evidence is as probative and convincing as direct evidence. Mulder, 313 N.W.2d at 888.

A defendant may be convicted upon a theory of aiding and abetting if there is sufficient evidence that "he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977). Aiding and abetting requires that the accessory "in some way 'associate himself with the venture, that he or she participate in it as something that he or she wishes to bring about, that he or she seek by his or her action to make it succeed.'" Id. at 108 (quoting United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938)). It is not required that the defendant "actively" encouraged or assisted the commission of another's crime, only that he in some fashion, even passively, assented to it or lent countenance or approval to the crime. State v. Cunha, 193 N.W.2d 106, 111 (Iowa 1971). Guilt as an aider and abettor is often only proven through circumstantial evidence, and it may be inferred from the circumstances surrounding the crime; such guilt may be demonstrated by defendant's presence, companionship, and conduct before and after commission of the crime. State v. Buttolph, 204 N.W.2d 824, 825 (Iowa 1973).

Defendant's two daughters and a male witness all testified that, on two separate occasions, defendant was present in the farm home she occupied with her husband when four men had sexual intercourse with her two daughters.

The testimony was on the first occasion defendant invited everyone upstairs where they took off their clothes. She then had sexual intercourse with her husband; the other three men had sexual intercourse with her two daughters and then with her. The testimony showed substantially the same thing happened in the second instance in which defendant was involved. On both occasions she was present in the same room where the sexual activity with her daughters took place, and she could see what was happening. There is substantial evidence to support the verdict.

III.

Defendant further contends the trial court abused its discretion in allowing the pediatrician who examined her daughters to testify the girls suffered physical damage which would create problems for them when later engaging in normal sexual activity or in childbirth. We find no abuse of discretion in the admission of the testimony. See State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984); State v. Gartin, 271 N.W.2d 902, 912 (Iowa 1978).

IV.

Defendant's last contention is the trial court abused its discretion in giving her consecutive sentences. The sentencing court cannot be held to have abused its discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. State v. Parsons, 401 N.W.2d 205, 210-11 (Iowa App. 1986). When a court imposes two or more mandatory sentences, it may specify that they will be served concurrently or consecutively. There is no general requirement that mandatory sentences be served consecutively. State v. Harrington, 349 N.W.2d 758, 763 (Iowa 1984).

Sexual abuse in the second degree is a forcible felony, see Iowa Code §702.11, and, therefore, a mandatory term of incarceration is required. Iowa

Code §907.3. Though this defendant was subject to mandatory imprisonment, the court had discretion to make the terms on the four counts concurrent or consecutive.

The court cited as one of its reasons for imposing the sentence the nature of the offense. The nature of the offense alone cannot be determinative of a discretionary sentence. State v. Dvorsky, 322 N.W.2d 62, 67 (Iowa 1982).

As a second reason for the sentence, the court cited defendant's "calculated and intentional victimization" of her daughters. Defendant contends the record fails to support these findings by the court. We disagree. The record reflects defendant encouraged the sexual abuse of her daughters and then stood by and watched it happen.

We find no abuse of discretion on the part of the sentencing court. We affirm.

AFFIRMED.