IN THE COURT OF APPEALS OF IOWA

No. 0-48 / 89-796

STATE OF IOWA,

Appellee,

vs.

EDDIE JEROME WILSON,

Appellant.

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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Winnebago County, Mark S. Cady, Judge.

The defendant appeals his conviction, following a jury trial, for second-degree sexual abuse. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Andi S. Lipman, Assistant Appellate Defender, for the appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan and Virginia Barchman, Assistant Attorneys General; Richard L. Petersen, County Attorney; for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J. 387

The defendant, Eddie Jerome Wilson, was accused of sexually abusing his two daughters, who were aged six and three, respectively, when the charges were filed. Wilson was charged with two counts of sexual abuse in the second degree (one count relating to each daughter). After a jury trial, he was acquitted of abusing the younger child but was found guilty of abusing the older child. He was convicted of one count of second-degree sexual abuse and was sentenced to incarceration for up to twenty-five years. He has appealed.

Wilson challenges the sufficiency of the evidence to prove that he had sexually abused the older daughter.

Wilson also contends the district court abused its discretion by ruling that the older daughter was competent to testify.

Finally, Wilson challenges an instruction which told the jury it could find Wilson guilty without finding a specific date for the offense if it found that the offense had been committed sometime within four years preceding the filing of the trial information. Due to the children's tender ages and confusion about time, it was impossible to specify exactly when the alleged offenses occurred. Wilson acknowledges that a precise time specification is not an element of sexual abuse, and that courts have been particularly liberal about time specification where young

children are involved. However, in the present case he contends the instruction confused the jury and allowed it to find him guilty on the basis of possible prior crimes.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

There is sufficient evidence to convince a rational trier of fact that Jerome Wilson committed second-degree sexual abuse. There was evidence from the oldest daughter that Wilson had at least "touched" her genitalia with his fingers. In addition, the physician who examined her testified that she had suffered sexual abuse. The defense points out the doctor testified the evidence of abuse suggested penile penetration rather than digital, and that the State did not even claim penile penetration had occurred. The doctor did not rule out digital penetration

however, and the jury could certainly have inferred that digital penetration took place. The doctor also stated the damage to her genital area could have been caused by an accident and there was evidence presented of a roller skating accident which injured the child "between her legs." The doctor also pointed out that such an accident would manifest itself outside the genital area and would possibly involve hospitalization, of which there was no evidence. Given this testimony, the jury was entitled to reject the roller skating accident theory. The record shows that the daughter testified quite clearly as to who touched her and where that person touched her. The jury could certainly accept her testimony over evidence presented by the defense, which it apparently did. All of the evidence presented at trial was sufficient to warrant a guilty verdict and we will not disturb such a verdict on appeal.

The appellant also challenges the trial court's ruling finding the six-year-old daughter competent to testify. This witness was seven years old at the time of trial. Iowa Rule of Evidence 601 reads in pertinent part:

> [A] child, as defined in Iowa Code section 702.5, is presumed to be competent. If the child's competency is questioned the court shall determine whether the child is mentally capable of understanding the nature of the questions put the child, whether the child is able to formulate intelligent answers and communicate impressions and recollections regarding the incident about which the child is to testify, and whether the child can understand the responsibility to tell the truth.

The age of a child makes little difference under Iowa law, as long as that child is able to satisfy the requirements of rule 601 to the satisfaction of the trial judge. A trial court ruling on a competency question is discretionary and will be reversed only if an abuse of discretion is shown. State v. Whitfield, 315 N.W. 2d 753, 755 (Iowa 1982).

The trial judge questioned the child as to what it means to tell the truth. A review of this questioning makes it apparent the child knew the difference between the truth and a lie, and that she was prepared to tell the truth. The questioning of the child, direct and cross, involved certain medical terms and issues about which most children are only vaguely aware. This child responded admirably to the questions. She did use simple terms, such as: he touched me on my "bottom," when referring to her anus, and "where I go to the bathroom," when referring to her vagina. However, it was clear from the record that she knew what was asked of her and answered accordingly.

There was some question as to whether she possessed sufficient memory of the incident. It was claimed that she could only remember "half" of what happened, and could place no exact dates or times on the incidents. Half of what happened was enough in this instance. The exact time of day was not important to the case. Even an adult will often have difficulty remembering the exact time something

happens. The child was able to tell if it was dark or light outside and that it happened at her father's home. The witness clearly understood the questions asked of her, told the truth in response to those questions, and possessed sufficient memory and descriptive capabilities to admit her testimony. The trial court did not abuse its discretion in allowing the witness to testify.

Finally, the appellant challenges the trial court's submission of the following instruction:

> The exact date when an offense is committed is not material, provided the State has proved that it was committed some time within four years preceding the date on which the Trial Information was filed in court. The Trial Informations in this case were filed on August 19, 1988.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). However, the trial court's ruling regarding this decision will not be disturbed absent an abuse of the trial court's discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 796, 798 (Iowa App. 1986). We will not find an abuse of discretion unless "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. The burden of proving abuse of discretion lies with the defendant. Id.

The defendant's charges were limited to two possible counts of sexual abuse. This instruction made it clear

that the exact times of the abuse were not important unless the abuse occurred more than four years prior to August 19, 1988. In State v. Washington, 356 N.W.2d 192, 196 (Iowa 1984), the supreme court held that "the date or dates fixed for the commission of a crime are not material, and a conviction can be returned upon any date within the limitations statute." See also State v. Griffin, 386 N.W.2d 529, 532-33 (Iowa App. 1986). The exact date was not material in this case. The time frame was sufficiently limited by the evidence so the jury would not convict for any other bad acts the defendant may have committed. The trial court did not abuse its discretion in submitting instruction 16 to the jury. We affirm the trial court.

AFFIRMED.