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CLERK, SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 23, 1980

vs.

)

MICHAEL DAVID KULISH,

)

0-203

Defendant-Appellant.

)

63802

Appeal from Chickasaw District Court - Frank D. Elwood, Judge.

Defendant appeals conviction of assault while participating in a felony of sexual abuse in the third degree in violation of sections 708.3 and 709.4(1), The Code 1979. -
AFFIRMED.

Michael Kennedy, of Kennedy & Kennedy, New Hampton, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie Pottorff, Assistant Attorney General, for plaintiff-appellee.

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

Defendant appeals from his conviction of assault while participating in a felony of sexual abuse in the third degree in violation of sections 708.3 and 709.4(1), The Code 1979. Defendant contends the trial court erred in failing to grant his motion for a directed verdict on the ground that the prosecution failed to present the jury with sufficient evidence that defendant successfully committed the felony of sexual abuse in the third degree. Defendant also contends the trial court erred by denying his motion for mistrial after the prosecutor had made a statement in closing argument that defendant claims violated his fifth amendment right not to testify.

Evidence adduced at trial shows the following. Near midnight on December 14, 1978, Patricia Halbur was awakened from sleep by a loud banging at the door of her mobile home. She put on a robe over her nightgown and answered the door. Defendant, Michael Kulish, was at the door, claiming that he had run out of gas nearby and wanted to use Halbur's telephone. Halbur admitted defendant to her home, and shortly thereafter defendant grabbed Halbur and threw her on the floor. The two scuffled. With Halbur lying on the floor supine, defendant mounted her, chest-to-chest. Defendant clutched Halbur's neck with one hand and scooted his pants down with the other. Halbur testified that after more scuffling defendant rubbed his penis up and down her vaginal area. Halbur then picked up a heavy plastic child's toy and struck defendant twice, thereby stunning him and causing him to fall off Halbur. Shortly thereafter defendant left the Halbur home.

I. Defendant contends that the trial court erred in denying his motion for a directed verdict for lack of sufficient evidence of a violation of section 708.3, The Code 1979. In reviewing the denial of a motion for a directed verdict in a criminal case, we view all evidence on the record in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). If there is substantial support for the verdict in the record, the jury verdict is conclusive. Id. Substantial evidence is such evidence as could convince a rational trier of fact that defendant is guilty beyond a reasonable doubt. Id. at 339.

Defendant argues that one must be found to have successfully completed a felony in order to be convicted under section 708.3. The felony of which the defendant is accused is sexual abuse in the third degree, codified in section 709.4(1), The Code 1979. A violation of section 709.4(1) requires the occurrence of a "sex act." Section 702.17,

The Code 1979, defines "sex act" in part as "...contact between the genitalia of one person and the genitalia ... of another person. . . ." Defendant argues that since the prosecution failed to prove beyond a reasonable doubt that contact was made between the genitalia of Halbur and defendant, there was insufficient evidence that defendant committed a sex act, and hence, insufficient evidence that defendant committed a felony. According to defendant, since the prosecution failed to prove beyond a reasonable doubt that defendant successfully committed a felony, the trial court erred in denying defendant's motion for a directed verdict.

First, we think there is substantial evidence on the record, which, when viewed in a light most favorable to the prosecution, could convince a rational jury beyond a reasonable doubt that defendant touched Halbur's genitalia with his and thus that defendant committed a sex act and violated section 708.3. At trial Halbur four times testified that defendant's genitalia and her genitalia came into contact. Defendant produced no witnesses or non-testimonial evidence at trial. Viewing the record in a light most favorable to the State, we conclude that there is substantial evidence on the record from which a rational jury could conclude beyond a reasonable doubt that defendant successfully committed a sex act during his assault on Halbur in violation of section 708.3.

Second, assuming arguendo that evidence at trial did not show beyond a reasonable doubt defendant's completion of a sex act, the flaw in defendant's argument is that it presumes that a violation of section 708.3 requires the finding of the commission of an assault while successfully committing a felony. However, a person violates section 708.3 who commits an assault while "participating" in a felony. Section 708.3, The Code 1979. Section 702.13, The Code 1979, defines "participating in a public offense" as follows:

A person is "participating in a public offense," during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be. A person is "participating in a public offense" during this period whether the person is successful or unsuccessful in committing the offense.
(Emphasis added.)

The unmistakable language of section 702.13 makes it clear that successful completion of a felony is not necessary to participation in a felony under section 708.3. State v.

Johnson, 291 N.W.2d 6, 8 (Iowa 1980). Hence, the prosecution had no burden of proving beyond a reasonable doubt that defendant had successfully committed a felony in order to withstand a motion for a directed verdict. The trial court did not err in denying defendant's motion for a directed verdict.

II. Defendant contends that because in an unreported closing argument the prosecutor stated, "The evidence of the state is unrefuted," the State impermissibly referred to defendant's failure to testify in contravention of defendant's right not to testify under the fifth amendment to the United States Constitution. The fifth amendment prohibits the prosecution from commenting on a criminal defendant's failure to testify in his own behalf. Griffin v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 1233, 14 L.Ed.2d 106, 110 (1965). The fifth amendment has been held applicable to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 6, 84 S. Ct. 1489, 1492, 12 L.Ed.2d 653, 658 (1964). The issue before this court is whether the prosecutor's statement constituted an impermissible comment on defendant's failure to take the stand. In addressing this issue we ask whether a reasonable juror would consider the prosecutor's statement a comment on defendant's silence. See United States v. Corral-Martinez, 592 F.2d 263, 269 (5th Cir. 1979). Since defendant raises a constitutional issue, we make an independent evaluation of the totality of circumstances surrounding the alleged violation of defendant's constitutional rights, State v. Fisher, 279 N.W.2d 265, 266 (Iowa 1979), State v. Snethen, 245 N.W.2d 308, 311 (Iowa 1976), and we apply federal law instead of state law, Chapman v. California, 386 U.S. 18, 21, 87 S. Ct. 824, 826-27, 17 L.Ed.2d 705, 709 (1967).

We believe that the gap in meaning between the statement made by the prosecutor, that the State's evidence was unrefuted, and the statement's alleged implication, that the defendant failed to testify, is so wide that a reasonable juror would not draw the alleged implication from the prosecutor's statement. The plain meaning of the prosecutor's statement is that the defense failed through any means - production of witnesses, non-testimonial evidence, or cross-examination - to refute the State's case. When in a criminal trial a jury considers whether the State has proved its case beyond a reasonable doubt, it is entitled to consider the strength of the State's case in relation to the defense's unsuccessful efforts to undermine the State's case. It is not inappropriate for the State to comment that its demonstration of guilt beyond a

reasonable doubt withstands the defendant's efforts to show there is a reasonable doubt. See United States v. Rodriguez, 556 F.2d 638, 641-42 (2d Cir. 1977). We therefore conclude that the prosecutor's statement in the case at bar constituted no error amounting to a comment on the fact that defendant failed to testify in his own behalf.

Moreover, even if the prosecutor's statement constituted error, it constituted harmless error. A defendant is not entitled to reversal of his conviction on the basis of constitutional error if the error is shown to be harmless. Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 827, 17 L.Ed.2d 705, 709 (1967); State v. Nelson, 234 N.W.2d 368, 372 (Iowa 1975). In evaluating error the test is "whether it appears beyond a reasonable doubt that the error did not affect the accused's right to a fair trial." State v. Porter, 283 N.W.2d 351, 353 (Iowa 1979).

The case against Kulish was very strong. The allegedly improper remark was made only once. If the prosecutor's isolated statement reasonably could be thought to imply defendant's silence, then it is an implication obliquely made. Defendant requested and was granted a jury instruction stating that no inference of guilt was to be drawn from the fact that defendant did not take the stand. We do not believe that the impression made on the jury by the jury instruction concerning defendant's silence could have been augmented by the prosecutor's statement. We agree with the trial court's observation that "... it would take a great stretching of construction to envision any prejudice that could result" from the prosecutor's statement. Therefore, the trial court did not err in denying defendant's motion for mistrial.

AFFIRMED.