IN THE COURT OF APPEALS OF IOWA

No. 1-052 / 89-1884

FILED
MAY 29 1991
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

354

JERRY AARON BEARDSLEY,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Philip J. Dandos and Dewie J. Gaul, Judges.

Defendant appeals his convictions, entered following a jury trial, for second-degree sexual abuse and third-degree sexual abuse. He challenges the sufficiency of the evidence to support the convictions. He also contends the conviction for third-degree sexual abuse must be vacated because it is a lesser-included offense of the conviction for second-degree sexual abuse. Additionally, defendant challenges an evidentiary ruling and a restitution order of the district court. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; Thomas S. Mullin, County Attorney; and Karrie J. Sierp and Clinton L. Spurrier, Assistant County Attorneys, for appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ., but decided en banc.

DONIELSON, P.J.

Jerry Beardsley was accused of sexually assaulting a woman. The alleged sex acts included both vaginal intercourse and digital penetration of the anus. Beardsley claimed his sexual contact with the woman was consensual.

On the basis of the two sex acts noted above, Beardsley was charged with both sexual abuse in the second degree and sexual abuse in the third degree. One charge was elevated to second degree because the vaginal intercourse was allegedly accompanied by threats of serious injury. A jury found Beardsley guilty of both charges. Beardsley has appealed the resulting convictions. We now affirm.

I. **Evidentiary Ruling.** First, Beardsley contends the district court erred by allowing evidence of a sexual assault he allegedly committed on a different woman in the State of Virginia some six months before the present crime. The victim in this case testified that during the sexual assault, Beardsley threatened to beat her head against the floor and wall which would seriously injure her, as he had done to a woman in Virginia. An officer called to the scene also repeated the victim's assertions of what was said by Beardsley during the assault. The State called the woman from Virginia to the stand and she testified that Beardsley had beaten her head against the floor and wall during a rape.

Determinations of relevance of evidence rest within the sound discretion of the trial court and will be

reversed only upon a showing that such discretion has been abused. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984).

The testimony by the victim of what Beardsley said to her during the commission of the sexual assaults was admissible. "It formed part of the whole transaction and was so closely related to the commission of the crime it was admissible to explain the circumstances under which the offense occurred." State v. Watson, 242 N.W.2d 702, 704 (Iowa 1976). A showing of what actually happened at the time of the offense may necessarily include recitation of the commission of another crime. This does not render the evidence inadmissible. State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974). The admission of this testimony was within the trial court's discretion.

The testimony by the officer was admitted under the excited utterance exception to the hearsay rule. See Iowa R. Evid. 803(2). We find no abuse of discretion in its admission.

Beardsley argues the woman from Virginia should not have been allowed to testify. He asserts the evidence was inadmissible under Iowa Rule of Evidence 404(b) because it was evidence of another crime or bad act, offered to prove his character. The State responds that this evidence was relevant under exceptions to rule 404(b) because it corroborated certain testimony of the victim in this case and went to her lack of consent.

The trial court determined the evidence relevant and, also, concluded that the probative value was not substantially outweighed by the danger of unfair prejudice. See State v. Knox. 464 N.W.2d 445, 449 (Iowa 1990) (quoting a two-part test in applying rule 404(b) from State v. Plaster, 424 N.W.2d 226, 229 (Iowa 1988)). The trial court found the evidence relevant to the victim's credibility and lack of consent. As to the potential prejudice to the defendant, the Virginia woman's testimony was severely circumscribed (being limited to 'yes' or 'no' responses to predetermined questions approved by the court); she was on the stand for approximately one minute; and immediately following her testimony, the trial court gave the following limiting instruction:

> Members of the jury, the evidence you have just heard is received for a limited purpose. The only purpose of it is to -- for you to determine whether or not certain things that mister -- that the defendant was alleged to have said were -- were said, and that's the only purpose for that evidence that you just heard. You will be given an instruction in regard to that when you get the instructions.

The jury was again instructed before its deliberations.

Application of rule 404(b) is largely a matter for the discretion of the trial court, and we will reverse it only when we find a clear abuse of that discretion. State v. Wade, No. 20/89-1765, slip op. at 3 (Iowa March 20, 1991). Under the circumstances of this case, we cannot say the trial court abused its discretion by allowing the testimony.

II. Sufficiency of the Evidence. Beardsley challenges the sufficiency of the evidence to support the convictions. He contends the evidence failed to establish beyond a reasonable doubt that any sexual contact between himself and the victim was non-consensual or was accompanied by threats.

Our scope of review is on assigned error only. Iowa R. App. P. 4. The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Hall, 371

N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

Several witnesses testified that they heard screams on the night the sexual assaults were alleged to have taken place. At least one of these witnesses testified that he heard words to the effect of 'help me, Jerry's raping me.' Neighbors of the victim testified that she came to their door in a traumatized state, wearing nothing but a bed sheet, and asserted she had been raped.

The victim testified that Beardsley insisted on engaging in sex acts against her will. She also testified that the vaginal intercourse was accompanied by Beardsley's threats to beat her head against the floor if she did not cooperate.

Emergency room medical personnel discovered a three-quarters of an inch laceration in the victim's vagina and a blister inside the victim's mouth (consistent with the defendant's attempts to muffle the victim's screams). The victim's personal physician examined her a few days after the assault and found that the victim suffered from a bruise on her shoulder and tenderness in her neck.

The defendant admitted at trial that he did have vaginal intercourse with the victim. He also admitted he penetrated the victim's anus with his finger. Furthermore,

he testified that he had indeed related the Virginia incident to the victim on the night of the offenses. Beardsley claims, however, that the sex acts were consensual and that the Virginia story was told subsequent to the sex acts; he testified that he related the story when he and the victim were arguing. The jury was not required to believe the defendant's version of the incident.

We find substantial evidence supports Beardsley's two convictions.

III. <u>One Crime or Two?</u> Beardsley also contends that his conviction for third-degree sexual abuse must be vacated because it is a lesser-included offense of his conviction for second-degree sexual abuse. In this argument Beardsley claims that the State's theory of the case described a single sexual transaction which may not give rise to two separate convictions.[1] The State responds that two separate incidents of sexual abuse occurred: the vaginal intercourse, accompanied by threats elevating it to second degree, and the digital penetration of the anus.

Beardsley is correct in noting that his trial counsel did not preserve this contention for appeal. Furthermore, defendant's contention is more properly addressed as a question of multiplicity. However, even had the issue been

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1. Beardsley argues that in the event this issue was not adequately preserved, any such failure resulted from ineffective assistance of counsel.

properly preserved, we would find the contention without merit.

> It is generally accurate to say that there may be a conviction for more than one offense only where (a) each is based upon different conduct, or (b) if based on the same conduct, each offense requires proof of a fact not required by the other. F. Remington and A. Joseph, Charging, Convicting and Sentencing the Multiple Criminal Offender, 1961 Wis. L. Rev. 528, 545.

Harrell v. State, 277 N.W.2d 462, 465 (Wis. App. 1979). Defendant was charged and convicted of separate and distinct offenses. Cf. State v. Criswell, 242 N.W.2d 259, 261 (Iowa 1976). Although both charges of sexual abuse here arose out of the same general transaction, the offenses were defined as separate and distinct sex acts, consisting of different conduct. Defendant was not entitled to have the two convictions merged into one.

> Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder,--an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.

Harrell, 277 N.W.2d at 469.

IV. Victim Restitution. Finally, Beardsley contends the district court abused its discretion by requiring him to pay victim restitution of $1,794.70. He argues there was insufficient evidence that the victim had actually suffered pecuniary damages in this amount. We disagree.

Nothing in Iowa Code section 910.3 (1989) requires, as defendant suggests, that the victim provide sworn information about her pecuniary damages. The trial court ordered restitution in the amount of $1,794.70, as represented in the presentence investigator's report. That investigator reported that the amount was based on contact with the victim's attorney and was broken down into various categories. We conclude the trial court was well within its discretion in relying upon this information for its restitution order.

For all the foregoing reasons, defendant's convictions are affirmed.

AFFIRMED.

All judges concur except Oxberger, C.J., and Schlegel, Hayden and Sackett, JJ., who specially concur.

OXBERGER, C. J. (specially concurring)

I concur in the result only.

SCHLEGEL, J. (specially concurring)

I concur in the result. I write separately to express my views on division III of the majority opinion finding that the defendant's conviction of third-degree sexual abuse should be upheld. The majority concedes that the problem is one of multiplicity. More accurately, the issue is whether the defendant's rights against double jeopardy are being infringed by multiple punishments for the same offense.

The testimony showed that defendant pinned the victim on the bed and put his finger in her anus. He threatened to stick his whole hand in her anus if she did not allow him to have vaginal intercourse. (Apparently, he eventually removed his finger.) He overpowered her and had vaginal intercourse.

The question that has to be resolved is whether digital penetration of the victim's anus followed by penal penetration of the victim's vagina was "the same act or transaction" under Blockburger v. United States, 248 U.S. 299, 304 (1932). There are two facets to this: (1) whether this is truly the same act (thus, whether the double jeopardy analysis even applies), and (2) if one concludes that double jeopardy applies, whether the prosecution survives the Blockburger test of "whether each provision requires proof of a fact which the other does not." The majority decision has failed to separate these two facets of the problem and to provide the necessary facts for a cogent analysis.

There is some case law on double jeopardy which borrows from Criminal Rule 6, which uses time, place, and circumstance tests for determining whether severance is in order. State v. Parker, 342 N.W.2d 459, 461 (Iowa 1983). To the extent the majority finds that defendant committed two acts separated by time and circumstance into separate offenses which do not implicate the protection against double jeopardy, I concur. By conceding that this is the same "general transaction," however, the majority implies that there may be a multiplicity problem. Although I am not persuaded that such a problem exists, if it does exist, we must meet it directly through analysis under Blockburger rather than reliance on decisions of foreign jurisdictions and secondary authority.

Sackett, J., joins this special concurrence.

HAYDEN, J. (specially concurring)

I concur in the result.

I write specially to address division III of the majority's opinion.

The majority acknowledges, and I agree, defendant's trial counsel failed to preserve for appeal the issue of lesser included offense. It is uncommon for this court to decide an issue not preserved for appeal. The majority is attempting to establish Iowa common law precedent in endeavoring to address such an issue here.

The majority relies solely upon Wisconsin law, notably the Wisconsin Court of Appeals' case of Harrell v. State, 277 N.W.2d 462, 465 (Wisc. App. 1979). That case is not factually in point with the instant case. In Harrell, the defendant committed two separate acts of sexual intercourse without the victims' consent. These acts were twenty to twenty-five minutes apart in time span. I have no problem with that Wisconsin court determining those two acts separated by such a time span constitutes two separate crimes of rape.

Also the majority cites, and apparently relies upon, an obscure 1961 Wisconsin Law Review article entitled Charging, Convicting and Sentencing the Multiple Criminal Offender. I note law review articles are not recognized as primary or secondary authority within the realm of jurisprudence.

The majority states the defendant was charged and convicted of separate and distinct offenses. It refers to State v. Criswell, 242 N.W.2d 259 (Iowa 1976). My reading of that case tells us the crimes of robbery with aggravation and assault with intent to commit murder are separate offenses. Neither is included within the other. Also, there was no error in imposing consecutive sentences. Id. at 261. It is apparent Criswell is of no legal import or assistance to us here.

In the Iowa case of State v. Jefferies, 430 N.W.2d 728, 741 (Iowa 1988), our supreme court abandoned the factual test in determining whether a given offense was included in another offense, but it retained the legal test.

> Under the legal test the lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater. This is because it would be possible in that situation to commit the greater without also having committed the lesser. In using this test, we look to the statutory elements rather than to the charge or the evidence.
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> If the lesser offense is defined alternatively, the offense is included if any of the alternatives are included. Because an offense is necessarily included in another if it is a component part of the greater, an offense is necessarily included if one of its statutory definitions makes it a component part of a greater offense. When so included, the greater offense cannot be committed without also committing the lesser offense.

Id. at 740-41 (citations omitted).

In the case of State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990), our supreme court again addressed the issue of "lesser included offense."

I quote from that case as follows:

> The paramount consideration in determining submissibility of lesser-included offenses remains whether the greater offense cannot be committed without also committing all elements of the lesser offense. State v. McNitt, 451 N.W.2d 824 (Iowa 1990). The comparison of the elements of the greater and lesser crimes, sometimes referred to as the "elements test," is only resorted to as an aid in applying the impossibility test and is fully subsumed therein.
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> When a case is tried to a jury, the determination of whether a particular lesser crime must be submitted as a lesser-included offense of the crime charged may logically begin with the court's marshaling instruction on the greater offense. The trial court must determine whether if the elements of the greater offense are established, in the manner in which the State has sought to prove those elements, then the elements of any lesser offense have also necessarily been established. It is not essential that the elements of the lesser offense be described in the statutes in the same manner as the elements of the greater offense. See State v. Waller, 450 N.W.2d 864, 866 (Iowa 1990) (equating elements statutorily described differently in greater and lesser offenses).

Id.

In attempting to decide whether the defendant committed one or more crimes we should not rely upon an obscure, foreign jurisdiction decision. To do so in this instance places this court at risk in circumventing or altering the holdings, principles and concepts of Jefferies, McNitt and Turecek. I suggest if two or more acts, or types of conduct, are not determined to be greater and lesser

included offenses of the other or others then and only then should they be considered for constituting separate crimes. We should not cavalierly graft the Harrell decision into Iowa's common law.

For these reasons I respectfully disagree with division III of the majority's opinion.

Sackett, J., joins this special concurrence.