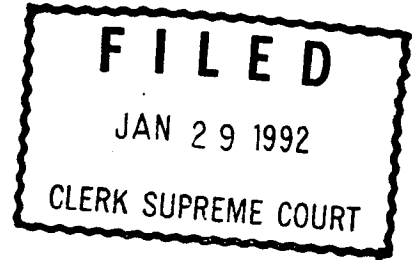


IN THE COURT OF APPEALS OF IOWA

No. 1-477 / 90-1157



STATE OF IOWA,

Appellee,

vs.

MELVIN J. LOVETINSKY,

Appellant.

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Appeal from the Iowa District Court for Johnson County,
Paul J. Kilburg, Judge.

Lovetinsky appeals from his convictions, following a jury trial, for two counts of lascivious acts with a child. **AFFIRMED.**

Sally H. Peck, Iowa City, for appellant.

Bonnie J. Campbell, Attorney General; Julie Ann Halligan, Assistant Attorney General; J. Patrick White, County Attorney; and Anne Lahey, Assistant County Attorney, for appellee.

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

DONIELSON, P.J.

Melvin Lovetinsky was accused of engaging in non-penetrative sexual contact, on multiple occasions, with an eleven-year-old girl. The girl and her mother were residing with Lovetinsky when the acts occurred. The State charged Lovetinsky with two counts of lascivious acts with a child, in violation of Iowa Code section 709.8(1), and a jury found him guilty on both counts. He has appealed the resulting conviction.

On our review, we affirm the judgment of the district court. We find no merit in any of Lovetinsky's numerous assignments of error.¹

I. Lesser-Included Offense. Lovetinsky first contends the district court erred in refusing to submit simple assault as a lesser-included offense of lascivious acts with a child. The State responds that assault is not a lesser-included offense of lascivious acts because assault includes an element (the painful, injurious, insulting, or offensive nature of the contact to the victim) which is not an element of lascivious acts. The

1. We raise the issue of appendix designation sua sponte. The appendix filed in this case, all five volumes and 1280 pages, contains an excess of irrelevant material. See Iowa R. App. P. 15(a). This court has access to the record and, therefore, does not need it reproduced in toto in the appendix. "Failure to limit the appendix to relevant portions of the record results in two problems. One is unwarranted printing expense and the other is an unwarranted reading burden on the members of the appellate courts." State v. Oppelt, 329 N.W.2d 17, 21 (Iowa 1983). We strongly encourage counsel to comply with the rules of appellate procedure in the future.

State notes that the crime of lascivious acts can occur even if the child consents and thus does not find the contact to be painful, injurious, insulting or offensive.

The test to be employed is the legal or "impossibility test," which provides that "[a] lesser offense is necessarily included in the greater offense if the greater offense cannot be committed without also committing the lesser." State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990). We agree with the State. It is possible to commit the greater offense, lascivious acts with a child, without committing the lesser offense, simple assault. Therefore, simple assault is not a lesser-included offense of lascivious act with a child and need not have been submitted to the jury.

II. Suppression of Evidence. Lovetinsky contends the district court should have suppressed certain testimony from a doctor and a social worker concerning the child's reports of sexual contact. It appears Lovetinsky believes the evidence is objectionable based on the manner in which it was gathered, the alleged unreliability of the evidence, and the competence of the evidence. The only discernible argument, however, is Lovetinsky's contention that this testimony was flawed because the doctor and the social worker were inadequately informed about the child's disease and its symptoms. The girl suffers from a disease called tuberous sclerosis which produces both physical and mental symptoms. These symptoms include impaired motor skills,

impaired verbal communication abilities, borderline intelligence, and an attention deficit disorder. Lovetinsky claims the testimony was so unreliable that it was illegal and, therefore, should have been suppressed. The trial court's failure to do so, he argues, denied him his right to due process guaranteed by the fourteenth amendment to the United States Constitution.

We do not believe Lovetinsky's constitutional rights are implicated in this assignment of error. Nevertheless, we find no deprivation of Lovetinsky's constitutional rights. Nor do we believe the trial court abused its discretion in admitting the testimony.

III. Limitation of Testimony. Lovetinsky contends the district court erred by restricting the testimony of his experts concerning tuberous sclerosis and its effects on the child. The district court did allow certain expert testimony about the disease but restricted the testimony when it seemed to be addressing the child's credibility.

Decisions regarding the admissibility of expert testimony rest in the discretion of the trial court. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). We will reverse the trial court's ruling only upon a clear showing that the trial court abused its discretion. Id. "This is a difficult standard to meet." Id. To show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v.

Blackwell, 238 N.W.2d 131, 138 (Iowa 1976). We are unable to find an abuse of the trial court's discretion.

IV. Prosecutorial Misconduct. Lovetinsky contends he should have been granted a new trial due to several instances of prosecutorial misconduct.

A. Conduct Toward Complainant. He argues that the prosecutor showed an improper and prejudicial degree of friendliness to the young complaining witness. He contends this action implicated his fourteenth amendment due process rights by denying him a fair trial.

Because Lovetinsky alleges error involving a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975). Our standard of review is de novo. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

Lovetinsky cites several instances of conduct which he claims prejudiced him. He contends the prosecutor told the complaining witness that she could go home if she told the truth. He alleges that on the day of trial some of the members of the County Attorney's office purposely wore clothing which was the complaining witness's favorite color. He alleges the prosecutor loaned the witness a dollar, and that the prosecutor took the witness to dinner. We do not believe that Lovetinsky was prejudiced by any of these instances.

B. Failure to Correct Statement. Lovetinsky next argues the prosecutor failed to correct a witness's statement. Lovetinsky claims the witness's statement, therefore, misled him concerning the quality of the complainant's testimony and prejudiced him at trial. Lovetinsky asserts this failure of the prosecutor denied him his due process rights.

Because Lovetinsky asserts his due process rights were violated, we make an independent evaluation of the totality of the circumstances to determine if such error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975). Our review is de novo. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

We need not decide whether or not the prosecutor improperly failed to correct an incorrect witness statement. We find that, even if Lovetinsky's account is correct, he cannot have suffered prejudice as a result. In essence, Lovetinsky claims that Sharon Mahota, a caseworker at Tanager Place Sex Abuse Treatment Program, met with defense counsel the night before the complaining witness testified. At that meeting, Mahota inaccurately stated that the complaining witness "does not verbalize" when she gives her account. In fact, the complaining witness had verbalized her account, and she did so again at trial. Lovetinsky claims to have relied upon Mahota's inaccurate statement to his detriment, being unprepared for the complaining witness's verbal testimony at trial.

We are not persuaded that Mahota's misrepresentation as to the quality of the complaining witness's prior accounts could reasonably be relied upon by Lovetinsky in preparing his case. First, Mahota's misrepresentation, and the prosecutor's failure to correct this misrepresentation, occurred the night before trial. Surely, Lovetinsky's case had been prepared by that time. Furthermore, Lovetinsky would not have been justified in believing that the quality of the complaining witness's testimony would not improve at trial. Accordingly, we are not persuaded that Lovetinsky's due process rights were violated. We believe Lovetinsky received a fair if not a perfect trial.

C. **Script.** In Lovetinsky's motion for new trial he complained that the prosecutor had failed to disclose and produce certain lists of questions and answers allegedly prepared as a "script" for the complaining witness to use during her testimony. Lovetinsky claims this constituted misconduct which violated his due process rights.

During the hearing on this matter, the prosecutor testified that she had prepared this list of questions and expected answers in anticipation of trial as is her usual practice. The complaining witness stated that she was never aware of any list of questions prepared by the prosecutor at any time prior to trial. The district court found that the list of questions was consistent with standard trial practice and was not improper. The court

did not believe that the list was a script used to influence the witness's testimony.

Lovetinsky also assigns as error the trial court's ruling that the list of questions was not discoverable because it was attorney work product. We find no merit in Lovetinsky's argument. Being nothing more than a guide to trial preparation, the list contained no discoverable substantive information which had not already been made available to the defense. The list was pure attorney work product.

V. Recantation by Complainant. On June 15, 1990, approximately four months after his conviction, Lovetinsky filed a motion for new trial in which he claimed that the complaining witness and her sister were recanting the allegations that Lovetinsky had committed an offense against the complaining witness. The trial court denied the motion.

The trial court has broad discretion in ruling on a motion for new trial based on a witness's recantation of allegedly false testimony. State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). We will not interfere unless we find a clear abuse of discretion. Id.

Recantation should be viewed with the utmost suspicion, and the trial court is not required to believe the recantation. Id. Unless satisfied that the trial testimony was false, and that a jury might reach a different result without it, a new trial should not be

granted. Id. On the record before us, we are unable to find an abuse of the trial court's discretion.

VI. Improper Suppression of Exculpatory Evidence.

Lovetinsky contends his due process rights were violated by the State's alleged concealment of potentially exculpatory evidence. Lovetinsky claims the State failed to disclose that the complaining witness had, before trial, stated that Lovetinsky "hadn't done it." He also claims the State failed to disclose that the complaining witness had been promised that she could go home if she told the truth.

We are unable to find, and Lovetinsky has failed to demonstrate, that this issue was properly preserved for our review. We find this argument was not made to the trial court, and we will not address it for the first time on appeal. State ex rel. Iowa Department of Human Services v. Duckert, 465 N.W.2d 871, 873 (Iowa 1991).

VII. Additional Jury Panelists. Lovetinsky also contends the district court should have called additional jury panelists for voir dire. He complains that the panelists called had already been through several voir dire experiences and actual trials with the same prosecutor; he suggests that the panelists, therefore, had an unduly close relationship with the prosecutor. This relationship, he asserts, denied him his right to an impartial jury. We find no abuse of the trial court's discretion.

VIII. Juror Challenge. Finally, Lovetinsky contends the district court should have sustained his challenge for

cause to a certain juror. The juror had expressed distaste for the sexual references and sexual terminology necessary in a trial of this type. A trial court has broad discretion in ruling on a challenge for cause. State v. Winfrey, 221 N.W.2d 269, 273 (Iowa 1974). The witness stated that although he was uncomfortable with the case, he could be fair. We are unable to find an abuse of the trial court's discretion.

The costs of this appeal are taxed to Lovetinsky.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.