IN THE COURT OF APPEALS OF IOWA

No. 5-204 / 94-261

FILED
MAY 30 1995
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

KENNETH HACK,

Appellant.

Appeal from the Iowa District Court for Grundy County, Jon Fister, Judge.

Kenneth Hack appeals the judgment and sentence entered upon his conviction, following a jury trial, of assault with intent to commit sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Don Kliebenstein, County Attorney, and Todd A. Greer, Assistant County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

HUITINK, J.

Kenneth Hack appeals his conviction of assault with intent to commit sexual abuse. We affirm.

Hack and his fiancee, C.D., were involved in an altercation at a Grundy Center bar on January 10, 1993. The altercation turned violent when Hack grabbed C.D. and slammed her head into a lottery machine. Hack also struck C.D. with his fist and poked her in the crotch with a broken broom handle. C.D. testified Hack pulled her jeans down and placed his hand in her vagina. She also testified Hack told her he was going to rape her.

Hack admitted assaulting C.D. He, however, denies threatening to rape her and did not recall placing his hand in her vagina. There is also undisputed evidence Hack had been drinking heavily prior to the assault.

C.D. was taken to the hospital for treatment approximately three hours after the assault. C.D., the investigating police officer, and attending medical staff all testified regarding C.D.'s emotional state following this incident. She was described as physically shaking, crying, and experiencing "emotional liability" consistent with a "psychological trauma state."

C.D.'s injuries included swelling on the back of her head, bruises on her arms, scuff abrasions and contusions on her chest, bruises on her collar bones and neck, abrasions on her shoulders, contusions on her back, contusions around her pubic area

and labial fold, bruises on her legs, and abrasions on her buttocks. Her attending physician was permitted, over Hack's hearsay objection, to read the following transcript of a tape-recorded conversation he had with C.D. before he examined her:

> I said to [C.D.], "In your own words; what happened?" [C.D.] responded, "He got really mad at me." I said, "Who -- who's he?" Her response was, "My fiance -- my ex-fiance. He decided to slam me around and just take it all out on me." I then said to [C.D.], "Okay. Is there anything more?" [C.D.] said, "He said he was going to rape me and ripped my pants off." And I said to her, "I know this is difficult." [C.D.] said, "I know, I know. And he put his hand inside me, you know. And I just begged him to leave me alone and, you know, not to do that. And it ended up that he didn't, you know, so he just proceeded to slam me around some more." I responded, "Okay. And was that here in Grundy?" [C.D.] said, "Yes, it was at work." My response was, "At work? And that's at Joe's?" She responded, "Yeah." I then said, "What time was that?" She responded, "At 2:10 so everybody was gone." I then said, "Okay. What we're going to do here is called -- And did he rape you?" [C.D.] said, "No." And my response was, "So he just -- he touched you with his hands?" "Yeah," was her response. I then said, "Was there anything else? Did he have his clothes on the whole time?" [C.D.], "Yeah, he did." My response was, "Okay, fine. And did he hit you?" [C.D.], "Yeah. And he pushed me down and he slammed me into things, you know, he threw me down." And my response was, "Okay. The reason I'm asking this is because the kit that they provide is called euphemistically a rape kit, and if no rape took place then that will change the way some of things we do." [C.D.] responded, "Right." And I said, "Okay, right." All right, I'll go ahead and do the exam now."

Hack's motion for a judgment of acquittal challenging the sufficiency of the evidence were denied. The district court instructed the jury on the elements of assault with intent to commit sexual abuse causing bodily injury, assault causing bodily injury and assault. The alternative of assault with intent to commit sexual abuse without

injury was not submitted. Hack's trial counsel did not object to this omission nor did he request an instruction on Hack's timely asserted defense of intoxication.

On appeal Hack contends (1) the district court abused its discretion by admitting hearsay evidence, (2) his trial counsel was ineffective for failing to request an instruction on his intoxication defense and for failing to request a proper marshaling instruction, and (3) the evidence was insufficient to support his conviction.

I. Hearsay Objection.

Our scope of review on this issue is for errors of law. Iowa R. App. P. 4. We review for an abuse of discretion. *State v. Halstead*, 362 N.W.2d 504, 506 (Iowa 1985).

At trial the State conceded the transcript read by C.D.'s physician was hearsay, but urged its admission under recognized hearsay exceptions permitting admission of excited utterances and statements made for purposes of medical treatment. *See* Iowa R. Evid. 803(2) and 803(4). The district court rejected the latter argument but nonetheless found the statements found in the transcript were admissible as present sense impressions and excited utterances. *See* Iowa R. Evid. 803(1) and 803(2).

Hearsay is a statement other than one made by the declarant while testifying offered to prove the truth of the matter asserted. Iowa R. Evid. 801(c). Hearsay evidence is not admissible unless it falls within a recognized exception to the general rule excluding hearsay evidence. Iowa R. Evid. 802.

The general rule is that error in the admission of hearsay is presumed prejudicial unless the contrary is affirmatively established. *State v. Farris*, 359 N.W.2d 190, 193 (Iowa 1984); *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). We have stated, however, that prejudice will not be found where substantially the same evidence is in the record without objection. *Farris*, 359 N.W.2d at 193.

Hack's objection concerned C.D.'s statement to her physician that Hack said he was going to rape her. The trial transcript indicates C.D. testified in detail about the assault including Hack's threat to rape her. She also testified, without objection, that she informed the police and her physician of Hack's threat. Her testimony is substantially the same as the statements which were the subject of Hack's hearsay objection. Even if we were to find the challenged statement does not fall within any recognized hearsay exceptions, we do not believe Hack was prejudiced by its admission. We find no abuse of discretion and affirm on this issue.

II. Substantial Evidence.

When reviewing a conviction for sufficient evidence, we must uphold the district court's verdict unless the record lacks substantial evidence to support the charge. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence is evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The reviewing court must view the evidence in a light most favorable to the

State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the evidence in the record. *Id.* The court must, however, review all the evidence and not just the evidence supporting the verdict. *Torres*, 495 N.W.2d at 681.

The State was required to prove Hack assaulted C.D. with the specific intent to commit a sex act causing bodily injury. Iowa Code § 709.11 (1993). Hack admitted assaulting C.D. and concedes C.D. suffered bodily injuries as a result. He, however, argues the record does not contain sufficient evidence to establish specific intent to commit sexual abuse.

Intent may be established by circumstantial evidence and by inferences drawn from the conduct of the defendant in the light of human behavior and experience. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Intent to commit sexual abuse may be inferred from the defendant's words and actions. *State v. Radeke*, 444 N.W.2d 476, 478 (Iowa 1989) (citations omitted).

C.D. testified Hack said he was going to rape her. Her testimony included a description of Hack's sexually explicit language and behavior during the assault. There is also evidence C.D.'s jeans were ripped off and that she suffered bruising on and near her genitalia.

The jury heard both C.D.'s and Hack's version of the events resulting in these charges. As the factfinder, the jury was at liberty to accept or reject Hack's denials and

evidence contradicting the State's evidence. *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984); *State v. Trammel*, 458 N.W.2d 862, 863 (Iowa App. 1990) (citing *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984)). We conclude the State's evidence was sufficient to convince a rational trier of fact Hack intended to sexually abuse C.D. at the time he assaulted her.

III. Ineffective Assistance of Counsel.

Hack claims he was denied effective assistance of counsel. We generally will not decide these claims on direct appeal as we prefer to reserve them for postconviction proceedings where counsel has the opportunity to respond. *State v. Taylor*, 310 N.W.2d 174, 179 (Iowa 1981). We depart from this preference if the record is adequate to evaluate appellant's claims. *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982).

Hack's claims implicate counsel's practical and strategic considerations regarding the merits of Hack's intoxication defense and the desirability of submitting alternative theories of the charged offense. We are unable, based on this record, to fairly evaluate Hack's claims, and they are accordingly preserved for postconviction proceedings.

Hack's conviction is affirmed.

AFFIRMED.