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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)

Plaintiff-Appellee,) Filed February 24, 1982

vs.)

JOSEPH CLAYTON,) 1-440/66515

Defendant-Appellant.)

Appeal from Montgomery District Court - Paul H. Sulhoff, Judge.

Defendant appeals from his conviction for sexual abuse in the third degree in violation of section 709.4(1), The Code 1979. Defendant asserts that: (1) the trial court erred by denying him a change of venue; (2) there was insufficient evidence to support either his conviction or to support the trial court's use of an instruction on flight to avoid prosecution; (3) the trial court erred by rejecting his requested instruction on consent to sexual activity; and (4) the trial court erred by rejecting his contention that chapter 709 unconstitutionally imposed on him the burden of proving consent to sexual activity. AFFIRMED.

Richard G. Davidson of Davidson Law Office, Clarinda, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

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

Defendant appeals from his conviction for sexual abuse in the third degree in violation of section 709.4(1), The Code 1979. Defendant asserts that: (1) the trial court erred by denying him a change of venue; (2) there was insufficient evidence to support either his conviction or to support the trial court's use of an instruction on flight to avoid prosecution; (3) the trial court erred by rejecting his requested instruction on consent to sexual activity; and (4) the trial court erred by rejecting his contention that chapter 709 unconstitutionally imposed on him the burden of proving consent to sexual activity. We affirm.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

This appeal arises out of events which occurred on December 9, 1979, in downtown Red Oak, Iowa. The victim testified that as she was walking through a park on her way home from her boyfriend's house at about 10:30 p.m., defendant ran after her, pushed her against the fence near a lumberyard, pulled out a knife from his belt, took her into the alcove of a building in a nearby alley, and said, "If you yell or scream, I'll kill you . . . . I'll kill you if you make any noise." The victim said that she was frightened because defendant had a knife at her throat. She testified that defendant told her to disrobe and that he committed a sex act upon her without her consent. She further testified that upon hearing a noise in the alley the defendant "jumped up and he goes, 'Get your clothes on.'" When she could not find her shirt, he said, "Just zip up your coat and walk out of here like nothing happened." When the victim saw a flashlight, she ran toward it, yelling "Get him." The person with the flashlight was a police officer.

Officer Dennis Steffensen testified that at 10:45 p.m. on December 9, 1979, two young women informed him that they saw defendant "take a girl into the

alley." The officer went into the alley to investigate and saw the victim running toward him "screaming and in hysterics." He also saw the defendant running in the opposite direction. The officer called to the defendant to stop but defendant looked over his shoulder and continued running. The officer found a blouse, identified as the victim's, laying on the ground in the alley.

Defendant testified in his own defense that he was with the victim in the alley but that he did not have sexual intercourse with her. He stated that he had been "harassed" by police earlier in the evening about carrying a four-to-five-inch hunting knife, and that he had left his knife at home and replaced it with a paint brush and a pair of pliers in his knife sheath. Defendant asserted that he ran when he saw Officer Steffensen because "They [the police] was harassing me earlier that night." He further testified that he ran some distance and laid beneath some bushes until the officers were gone. When the police attempted to execute an arrest warrant for defendant on December 11, 1979, they were told by defendant's mother that he was not at home and that she had not seen him for a couple of days.

II.

We first deal with the state's contention that this appeal should be dismissed as untimely. The record indicates that the jury returned a verdict of guilty on April 23, 1980. On May 12, 1980, defendant filed a motion for a new trial raising most of the issues presented on appeal but not clearly alleging newly discovered evidence. On May 22, 1980, the trial court sentenced the defendant without ruling upon his motion for a new trial. On February 23, 1981, the trial court overruled the defendant's motion for a new trial. On March 16, 1981, defendant filed notice of appeal. This notice was not filed within 60 days of the entry of defendant's conviction and sentence. The state asserts the appeal should be dismissed because the pending motion for a new trial does not extend time for filing notice of appeal under State v. Anderson, 308 N.W.2d 42 (Iowa 1981).

We find that Anderson is distinguishable. Anderson filed a post judgment motion for a new trial but in the instant case defendant filed his motion for a new trial before entry of the judgment against him. Under these circumstances, we believe the time for appeal was effectively tolled until thirty days following the trial court's ruling on the motion. We proceed to the merits of defendant's appeal.

III.

Defendant first asserts that his motion for a change of venue was improperly denied. We disagree.

The trial court has discretion in ruling on a motion for change of venue. See Iowa R. Crim. P. 10(9). We must determine whether the trial court abused its discretion in denying the requested change of venue. State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980); State v. Cuevas, 288 N.W.2d 525, 527 (Iowa 1980). "The test is whether there is reasonable likelihood defendant could not receive a fair trial" in the county in which trial was set. State v. Dague, 206 N.W.2d 93, 95 (Iowa 1973). Affidavits supporting the motion for change of venue "must be stated with such definiteness and certainty that the court can determine their sufficiency; and, if facts are stated on information and belief, the source of information and the grounds of belief must be stated with particularity and certainty." Coleman v. State, 222 N.W.2d 497, 500 (Iowa 1974); State v. Dague, 206 N.W.2d at 95.

In the case at bar, the affidavits lacked the specificity required for supporting affidavits. Each affiant made general allegations of prejudice and failed to provide any supporting detail. The factual showing of potential prejudice was therefore inadequate. We find there was no abuse of discretion when the trial court denied defendant's motion and affirm the trial court's decision.

IV.

Defendant's second argument is that the trial court erred by failing to find

that sections 709.1-.5, The Code 1979, were unconstitutional because it shifts the burden to the defendant to prove consent on the part of the complaining witness in that the state need not prove the victim's physical resistance.

It is undisputed that the state bears the burden of proving each and every element of the crime beyond a reasonable doubt and that the defendant bears no burden of proving any element. See Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 281 (1977). For sexual abuse in the third degree the state was required to prove (1) the commission of a sex act; (2) by participants who are not cohabiting as husband and wife; (3) by force or against the will of the victim. Section 709.4, The Code 1979. The fact that section 709.5, The Code 1979, does not require the state to establish physical resistance by the victim to prove the act was done by force or against the victim's will does not in any way shift the burden of proving nonconsent to the defendant. Therefore, defendant's argument is without merit and we affirm the trial court.

V.

Defendant asserts that the trial court improperly included the uniform jury instruction on flight to avoid prosecution. We disagree. The evidence shows that defendant ran past Officer Steffensen in the alley immediately after the attack, that defendant hid in some bushes to evade the pursuit of the police officers, and that he left town before he could be arrested. We find that the instruction was germane to the evidence and properly given. State v. Thrasher, 175 N.W.2d 397, 402 (Iowa 1970), quoting State v. Bester, 167 N.W.2d 705, 710-11 (Iowa 1969). We affirm the trial court.

VI.

Defendant asserts that the evidence was insufficient for the jury to conclude that the sex act was committed by force or against the will of the victim. More specifically, defendant asserts that by finding him guilty of third degree sexual

abuse, the jury found that defendant did not use a knife, and that when this finding is combined with the state's failure to introduce any evidence of the victim's resistance to the attack, the evidence is insufficient to find him guilty beyond a reasonable doubt. We disagree.

When reviewing sufficiency of the evidence, we view the evidence in the light most favorable to the state. All the evidence must be considered, State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980), and all legitimate inferences that may be deducted therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d at 339.

The victim testified that defendant threatened to kill her, that she believed he had a knife at her throat, and that defendant committed the sex act without her consent. We find that this evidence was sufficient to prove the act was committed by force or against the will of the victim and sufficient to find defendant guilty of sexual assault in the third degree.

VII.

Defendant's final assertion of error is that the trial court erred by refusing to give defendant's requested instruction on consent to sexual activity. We disagree. The trial court gave uniform jury instructions regarding the use of force, lack of consent, the definition of a sex act, and the elements of second and third degree sexual abuse. See II Uniform Jury Instructions, Nos. 902, 905, 911 (1981). We believe the instructions as given correctly state the law and, therefore, we affirm the trial court.

AFFIRMED.