IN THE COURT OF APPEALS OF IOWA

FILED
APR 25 1989
CLERK SUPREME COURT

388

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
BOBBY RAY BATES,) 8-681 / 87-1701
Defendant-Appellant.)

Appeal from the Iowa District Court for Woodbury County (CR42414), Phillip S. Dandos, Judge.

Defendant appeals his conviction by a jury of third-degree sexual abuse. **AFFIRMED.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Sheryl A. Soich, Assistant Attorney General, for plaintiff-appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

HAYDEN, J. 389

Defendant, Bobby Ray Bates, appeals from his conviction by a jury of third-degree sexual abuse. He contends the trial court erred by limiting its intoxication instruction to the lesser-included offense of assault with intent to commit sexual abuse when the instruction should also have been applied to the sexual abuse charge. We affirm.

Bobby Bates was charged with sexual abuse in the third degree for an incident involving a fifteen-year-old girl which occurred after Bates had been out all night "partying." In addition to the sexual abuse charge, the trial court submitted the lesser-included offense of assault with intent to commit sexual abuse and applied an intoxication instruction to this offense. Bates requested the intoxication instruction also be applied to the sexual abuse charge but the trial court denied his request. The jury then found Bates guilty of sexual abuse.

On appeal, Bates contends the trial court erred by refusing to apply the intoxication instruction to the sexual abuse charge. He argues since specific intent is an element of the lesser-included offense, specific intent is also necessarily an element of sexual abuse. Therefore, Bates reasons, the intoxication instruction dealing with the defendant's ability to form the requisite specific intent should have been applied to both charges.

Our scope of review is for errors at law. Iowa R. App. P. 4.

The defendant and the State spent considerable effort attempting to reconcile the trial court's decision to give the intoxication instruction only regarding the lesser-included offense of assault with intent to commit sexual abuse, and not in regard to the crime of third-degree sexual abuse. The defendant's argument, he asserts, is one of logic--how can a lesser-included offense require specific intent (for which the intoxication instruction is available), while the primary offense is considered a general intent crime (one which does not lend itself to an intoxication instruction).

It is not incumbent upon us here to decipher the lesser-included offense relationship between assault with intent to commit sexual abuse and third-degree sexual abuse. The only issue to be resolved here is whether third-degree sexual abuse is a specific intent crime, thereby lending itself to an intoxication instruction, or instead a general intent crime which would not lend itself to the intoxication instruction. The defendant was not convicted of the lesser-included offense and further, the lesser-included defense instruction has no effect on our determinations here. Thus, we limit our review to the aforementioned issue.

"It has long been a general rule in Iowa that, although voluntary intoxication cannot constitute a defense to a crime, it may negate criminal intent if such intent is an

element of the crime charged." State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986). The Caldwell court further noted "voluntary intoxication may not . . . reduce a charge when the crime does not require specific intent." Id. In addition, Iowa Code section 701.5 provides as follows:

> The fact that a person is under the influence of intoxicants or drugs neither excuses the person's act nor aggravates the person's guilt but may be shown where it is relevant in proving the person's specific intent or recklessness at the time of the person's alleged criminal act or improving any element of the public offense which the person is charged.

The Iowa Supreme Court has determined sexual abuse is a general intent crime. Lamphere v. State, 348 N.W.2d 212, 217 (Iowa 1984); State v. Johnson, 291 N.W.2d 6, 9 (Iowa 1980). Defendant asks us to ignore this well-founded principle arguing Johnson stands for the proposition third-degree sexual abuse is a specific intent crime. We reject this interpretation. In Johnson the supreme court unequivocally held third-degree sexual abuse is a general intent crime. Id. Therefore, the trial court was correct in not applying the intoxication instruction to the charge of third-degree sexual abuse.

AFFIRMED.