IN THE COURT OF APPEALS OF IOWA

No. 9-215 / 88-883

FILED
DEC 2 1 1989
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

406

JONATHAN KAY DAVIS,

Appellant.

Appeal from the Iowa District Court for Hardin County, M. D. Seiser, Judge.

Defendant appeals from his conviction, following a jury trial, of second-degree sexual abuse. He contends the trial court erred by submitting incorrect jury instructions; by permitting the use of a wooden structure to screen the victim from the defendant in contravention of Coy v. Iowa; and by admitting a videotaped interview with the victim. The defendant also raises a constitutional challenge to Iowa Code § 702.17 on vagueness grounds; alleges the verdict was not supported by sufficient evidence; contends there was a prejudicial variance between the crime charged and the proof at trial; and claims he was denied a fair trial. **REVERSED AND REMANDED.**

Jim R. Sween of Sween Law Office, Eldora, for defendant-appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General; and James L. Beres, County Attorney, for plaintiff-appellee.

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

SCHLEGEL, J.

A jury found defendant, Jonathan Kay Davis, guilty of second-degree sexual abuse following an incident involving a five-year-old girl, and after a trial at which expert medical testimony indicated there had been no sexual "penetration" of the victim. On appeal, defendant alleges several grounds for reversal, a number of them stemming from his contention that a sexual abuse conviction requires evidence of "penetration" as opposed to mere "contact." Davis asserts the trial court erred by instructing the jury otherwise. He argues under the facts of this case, section 702.17 of the Iowa Code is unconstitutionally vague. He also contends the State offered insufficient evidence to support his conviction. Davis also claims there was a prejudicial variance between the crime charged (sexual abuse by "penetration") and the proof presented at trial (mere sexual "contact").

Defendant challenges the use at trial of a three-sided plywood structure to isolate him during testimony by the victim. He insists use of such a device is unconstitutional under the recent U.S. Supreme Court opinion in Coy v. Iowa, 487 U.S. ____, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). Defendant also contends the trial court erred by admitting into evidence a videotaped interview with the victim, taken without prior court authorization and without notice to the defense, and an

opportunity to be present. Finally, based upon these issues the defendant contends he was denied a fair trial. We reverse and remand for a new trial.

I. **Jury Instructions.** Defendant contends the trial court erred in instructing the jury mere contact between the finger of one person and the genitalia or anus of another, could constitute a "sex act" as defined in Iowa Code section 702.17 (1987). Defendant also objects to the trial court's inclusion of a specific intent element in instruction number 21.

Second-degree sexual abuse is not a specific intent crime, but is, instead, a general intent crime. Lamphere v. State, 348 N.W.2d 212, 217 (Iowa 1984). The failure to instruct on general intent is erroneous, id., but defendant offers no argument to explain how requiring the State to meet the higher burden of proof of specific intent prejudiced him. Without a claim and proof of prejudice, this court need not address the adequacy of the intent element of instruction number 21.

In instructing the jury on the elements of sexual abuse in the second degree, the trial court gave this instruction to the jury:

INSTRUCTION NO. 22

> The term "sex act" as used in these instructions, means any sexual contact between two persons, by use of a substitute for a sex organ which is in contact with the genitalia or anus of the other person.

> The penetration of the genitalia or anus of one person by the finger of another person could constitute a sex act.

The term "sex act" means:

> [A]ny sexual contact between two or more persons, by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Iowa Code § 702.17 (1987).

Defendant argues the State was required to prove penetration by a finger, and not merely that a finger had contact with the genitalia of another. Iowa Code section 702.17 (1987) sets forth four separate actions which constitute "sexual acts." The only reference to "penetration" in this statute is with regard to the first type of conduct which the legislature has deemed is a "sex act" ("by penetration of the penis into the vagina or anus"). The other three types of conduct set out in section 702.17, refer to "contact" between certain body parts or artificial sex organs; no reference is made to "penetration" in these other definitions.

The polestar of statutory construction is legislative intent. State v. Whetstine, 315 N.W.2d 758, 760 (Iowa 1982). Ordinarily, words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary. Hedges v. Iowa Dept. of Job Service, 368 N.W.2d 862, 866 (Iowa App. 1985).

The express mention in a statute of one thing implies the exclusion of others. In re Wilson's Estate, 202 N.W.2d 41, 44 (Iowa 1972). Likewise, the express inclusion of a specific term in one part of a statutory definition, and its omission in other parts thereof, indicates a legislative intent not to include it in those latter parts. Had the Iowa legislature wished to make "penetration" a prerequisite for a "sex act" involving artificial sexual organs, or substitutes therefor, it had the ability to do so; but it specifically chose to limit this requirement to only the first of the four definitions of a "sex act" set out in Iowa Code section 702.17 (1987). The legislature chose only to require "contact" between an artificial sex organ (or substitute therefor) and the genitalia or anus of another for a "sex act" to occur. When a statute is plain and its meaning clear, we are not permitted to search for a meaning beyond its expressed terms. State v. Hunziker, 311 N.W.2d 692, 693 (Iowa App. 1981). While the Iowa Supreme Court has recognized the "inartful" drafting of this last provision of section 702.17, Whetstine, 315 N.W.2d at 761, it is clear any confusion in the statute relates to whether "substitutes therefor" refers to artificial or natural sexual organs. No confusion exists as to whether the legislature intended for "penetration" to apply to this last provision. We find jury instruction number 22 was consistent with section

702.17, and the trial court did not err in giving this instruction to the jury. See also Iowa v. Phipps, 442 N.W.2d 611, 613 (Iowa App. 1989) (in determining "skin-to-skin" contact was not necessary for a "sex act" to occur, court assumed contact between hand and genitals was a "sex act" pursuant to section 702.17).

Defendant argues the trial court's interpretation of section 702.17, requiring only mere contact and not penetration, causes the statute to overlap with other prohibited acts, i.e., section 709.8 (lascivious act with a child) and section 709.12 (indecent contact with a child). The mere fact defendant's conduct is or could be interpreted as falling within the confines of a different section, does not preclude us from finding defendant's conduct is within the prohibited conduct of section 709.3. Phipps, 442 N.W.2d at 612.

II. **Constitutionality of Section 702.17.** Defendant contends section 702.17 is unconstitutionally vague where the actus rea is something less than penetration and the contact is with a thumb or finger. A penal statute must satisfy two standards to survive a due process vagueness attack: it must give a person of ordinary intelligence fair notice of what is prohibited, and it must provide an explicit standard for those who apply it. State v. Pierce, 287 N.W.2d 570, 573 (Iowa 1980).

In Whetstine, the Iowa Supreme Court held section 702.17 was not unconstitutionally vague, and a person of ordinary intelligence would have notice insertion of a finger or hand into a vagina is a sex act under the statute. Whetstine, 315 N.W.2d at 764. It cannot be questioned defendant had notice a finger or thumb is a substitute for either a natural or artificial sexual organ. Id. at 761. However, defendant contends, absent penetration, a person cannot tell when a finger ceases to be a finger and becomes a substitute for a sexual organ.

Defendant's argument is defeated by the explicit language of the statute. The term "sex act" means "any sexual contact between two or more persons." Iowa Code § 702.17 (1987). Not only must there be contact between an artificial sexual organ and a victim's genitalia, but it must be sexual contact. Such a requirement prevents various innocuous activities, like a medical examination or the bathing of a child, from being subsumed into the statute. The requirement of "sexual contact" in section 702.17 eliminates any risk a defendant would not have notice of when contact between a finger and the genitals of another is a prohibited sex act. Defendant's argument of unconstitutional vagueness is rejected.

III. Variance Between the Crime Charged and the Proof. Defendant contends there was a prejudicial variance between the crime with which he was charged and the proof presented at trial.

When a crime may be committed in different ways, and the State specifies one way, the offense must be proven to have been committed in the way charged. State v. Willet, 305 N.W.2d 454, 457 (Iowa 1981). Where there is a variance between the crime charged and the proof at trial, we will require a new trial if a substantial right of the defendant is prejudiced. Id.

There was no prejudicial variance between the trial information and the proof. The trial information charged defendant with digital penetration, and the State presented evidence of penetration (i.e., the testimony of the victim, her mother, her baby-sitter, etc.), and this issue was submitted to the jury.

The purpose of a county attorney's information (or indictment) is to afford the person charged with an opportunity to prepare a defense. Sufficient notice of the charge pending must be given. State v. Davison, 245 N.W.2d 321, 324 (Iowa 1976), cert. denied, 430 U.S. 955 (1977). A variance between the information and proof is only prejudicial if a defendant "is not fully notified of the charges against him so that he may prepare to defend." Willet, 305 N.W.2d at 457. The variance in this case is not prejudicial because once the defendant knew he was being charged with a sex act involving an artificial sex organ or substitute therefor, he would have known from an examination of the statute, mere contact was all the

statute required, even if the State alleged it could prove a more severe form of contact like penetration.

IV. Admissibility of the Videotape. During the trial a videotaped interview of the alleged victim was submitted into evidence. Defendant alleges admission of this videotape violated his due process rights, the reliability of the videotaped interview was questionable, and the videotape was extremely prejudicial to defendant. We reverse on other grounds, however it is necessary for us to discuss the admissibility of the videotape for purposes of the new trial.

There is no question the videotaped interview in this case is hearsay. In order for it to be admissible it must fall within one of the exceptions to the hearsay rule. Iowa Code section 910A.14(3) provides that recorded statements of a child witness describing sexual contact not otherwise admissible may be admitted provided the court determines that the statements comply with Iowa Rule of Evidence 803(24). Rule 803(24) is the exception to the hearsay rule the court used to allow the statement. The requirements for admissibility under rule 803(24) include guarantees of trustworthiness. We do not think that sufficient guarantees of trustworthiness exist. Even the trial judge noted that the procedure for interviewing a child witness was improper and that the interviewer seemed to be hounding the witness. The State admits that this

video was not a deposition. In State v. Hamilton, 309 N.W.2d 471, 478 (Iowa 1981), the court stated that purely investigative interviews were not intended to be used as a means of perpetuating testimony. There is no need for the State to perpetuate the testimony in this manner. The child was able to testify at trial and therefore the need for the video was minimal. We hold the tape to be inadmissible at any future trial.

V. Constitutional Right to Confront Witnesses. Defendant contends his constitutional rights to confront the witnesses against him, due process of law, and effective assistance of counsel, were violated by enclosing him in a three-sided plywood structure during the testimony of the victim. As this aspect of defendant's appeal turns on a constitutional issue, we review the record de novo and evaluate the totality of the circumstances. State v. Hoverstein, 437 N.W.2d 240, 241 (Iowa 1989).

The United States Supreme Court in Coy v. Iowa, 487 U.S. ____, ____, 108 S. Ct. 2798, 2802, 101 L. Ed 2d 857, 866 (1988), while stating, "It would be difficult to imagine a more obvious or damaging violation to the defendant's right to a face-to-face encounter," recognized that rights conferred by the confrontation clause are not absolute and may give way to other important interests. Id. at ____, 108 S. Ct. at 2802, 101 L. Ed. 2d at 866. The Court did not determine what exceptions might exist which

would qualify or limit a defendant's rights under the confrontation clause, but it did indicate any such exceptions would only be allowed when "necessary to further an important public policy." Id. at _____, 108 S. Ct. at 2803, 101 L. Ed. 2d at 867. The United States Supreme Court stated since no individualized findings had been made that the particular witnesses involved needed special protection from a screen, the Court could not determine whether any conceivable exception might have been derived which would have sustained the decision of the Iowa Supreme Court. Id. at _____, 108 S. Ct. at 2803, 101 L. Ed. 2d at 867.

Guided by the United States Supreme Court's decision in Coy, our supreme court has recognized a child witness exception to the confrontation clause. State v. Hoverstein, 437 N.W.2d 240, 241 (Iowa 1989).

> By enacting chapter 910A, the Victim and Witness Protection Act, the legislature evinced its belief that protection of child witnesses is an important public policy.

In Interest of J.D.S., 436 N.W.2d 342, 347 (Iowa 1989) (emphasis added). If, in our de novo review of the record, we find that a child needed the protection of a screen, then the decision of the trial court to that effect is correct. Hoversten, 437 N.W.2d at 241-42.

The record in this case reveals the State made a case-specific finding of the necessity of a screen. Prior to the victim's testimony, the State presented evidence

with regard to the need for a screen in this matter. Dr. Carroll Roland, a psychologist who had been treating the victim, testified the victim was suffering from a posttraumatic stress disorder. He stated the victim had experienced some trauma as a result of the alleged sexual abuse. This trauma manifested itself in various physical and emotional problems. The victim was having sleep disturbances, recurring dreams about the abuse, and would become extremely upset if she saw the alleged perpetrator or an automobile which was similar to that driven by the alleged perpetrator. The victim was uncomfortable around other people, she tried to avoid activities which reminded her of the alleged abuse, and she had voiced a fear for the safety of her mother and herself. Dr. Roland also specifically stated that face-to-face contact between the victim and defendant was not advisable.

Upon completion of the presentation of evidence in support of the protection of the witness, the trial court concluded the State had clearly shown the need for it and granted the State's protective order in this regard. Upon our review of the totality of the circumstances, we find case-specific individualized findings were made with regard to protection which was needed for this witness. Statutory restrictions placed upon defendant's right to confront this particular witness were justified by the compelling state interest of protecting child witnesses.

VI. Due Process of Law. Defendant contends the use of the screen in this case was in violation of his due process rights under the fourteenth amendment. Specifically, he claims the screen erected in this case was inherently prejudicial because it impinged on his presumption of innocence, and it impaired his ability to communicate with counsel.

Pursuant to Iowa Code section 910A.14(1) (1987), the trial court required the construction of a screen between the defendant and the victim during the victim's testimony. The screen used in this case consisted of a three-sided plywood structure. The front panel was approximately four feet wide and six feet high. The front contained a two-foot square one-way mirror through which the defendant could see the victim, but she could not see him. The side panels were approximately six feet high and were attached by hinges to the front panel. The courtroom was noticeably darkened throughout the victim's testimony.

Certain actions may be so inherently prejudicial they will only be permitted if justified by an essential state interest. State v. Coy, 397 N.W.2d 730, 734, rev'd on other grounds, 487 U.S. ____, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

> A practice is inherently prejudicial if in a particular case it is likely to compromise a defendant's constitutional right to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

Id. at 735.

The United States Supreme Court has recognized "that certain practices pose such a threat to the fairness of the fact-finding process that they must be subjected to close judicial scrutiny." Holbrook v. Flynn, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 1347, 89 L. Ed. 2d 525, 535-36 (1986). The Supreme Court also recognized that the right to a fair trial is a fundamental liberty, and the presumption of innocence is an important part of that fairness. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 1692, 48 L. Ed. 2d 126, 130 (1976). "Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle and common human experience." Id. at 425 U.S. 504, 96 S. Ct. 1962, 48 L. Ed. 2d 130. Based on reason, principle, and common human experience, the screen in this instance was inherently prejudicial because it impinged on defendant's presumption of innocence. In any event, a label of guilt will certainly be placed on any defendant sitting in such a structure just as the prison garb did in Estelle. Borrowing language from Coy, "It would be difficult to imagine a more obvious or damaging violation of the defendant's . . ." right to a fair trial. In addition to the prejudicial appearance of the screen, the defendant was prejudiced because he was not able to hear the witness's answers. The State claims this was not prejudicial because

the court ordered the reporter to repeat the witness's answers. Nothing could be more prejudicial than to have all the testimony of the complaining witness repeated verbatim. While enabling the defendant to hear the answers, it unduly emphasized her testimony. The repetition was undoubtedly even more effective since it was made by an officer of the court--the court reporter--with the authority she is perceived by the jury to possess. The repetition of the answers clearly prejudiced the defendant as much as the failure to hear the questions did.

There is no question that the use of the "cage" prevented the defendant from receiving a fair and impartial trial. We reverse and remand for a new trial.

REVERSED AND REMANDED.

All judges concur except Donielson, J., dissents, and Habhab, J., who specially concurs with the dissent.

DONIELSON, J. (dissenting)

I respectfully dissent. The screen used in Coy consisted of a "large screen," Coy v. Iowa, 487 U.S. ____, _____, 108 S. Ct. 2798, 2799, 101 L. Ed. 2d 857, 863 (1988), which contained a one-way screening device, Id. at _____, 108 S. Ct. at 2806, 101 L. Ed. 2d at 870 (Blackmun, J., dissenting), and in order for it to function properly,

> it was necessary to dim the normal courtroom lights and focus a panel of bright lights on the screen, creating in the trial judge's words, "sort of a dramatic emphasis" and a potentially "eerie" effect.

Id. at _____, 108 S. Ct. at 2810, 101 L. Ed. 2d at 875 (Blackmun, J., dissenting).

Our supreme court specifically addressed the issue of inherent prejudice in State v. Coy, 397 N.W.2d 730, 734-35 (1986), rev'd on other grounds, 487 U.S. _____, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988), and it specifically found the screen used in Coy not to have been inherently prejudicial, Id. at 735. If the screen utilized in Coy, and the circumstances surrounding its use, are not egregious enough to have been inherently prejudicial, then I am puzzled as to how today's majority can conclude the screen used in this case is.

The majority objects to the box-like structure of the screen used in this case. The type of screen a trial court will choose to use will depend upon the structural and

lighting requirements of the individual courtroom. It may not be possible to simply place a screen or mirror between the defendant and the witness; some type of reinforcement may be necessary to keep the screen or mirror in place. I would not find the limited use of the screening device used in this case was inherently prejudicial in the circumstances of this trial.

Noticeably absent from the majority's decision is recognition of the factors existing in Coy which persuaded our supreme court the screen used in that case was not inherently prejudicial. The screen used in Coy was used only during the testimony of the child witnesses, and the jury was instructed the screen is merely a procedure utilized during the testimony of children. Limited use of the screen and a cautionary jury instruction were similarly utilized in the case at bar. Id. at 735. The United States Supreme Court did not reach the issue of inherent prejudice when ruling on Coy, 487 U.S. at ____, 108 S. Ct. at 2803, 101 L. Ed. 2d at 867; therefore, the analysis provided by our own supreme court is instructive and should guide this court in this matter.[1]

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1. Contrary to the implication which arises from the language "borrowed" by the majority from the U.S. Supreme Court, ("'It would be difficult to imagine a more obvious or damaging violation of the defendant's . . .' right to a fair trial."), the U.S. Supreme Court never reached the issue of inherent prejudice caused by the use of a screen. The Supreme Court carefully restricted its decision to the effect on a defendant's confrontation clause rights when no specialized findings are made to warrant the use of a screening device.

The majority contends the screen used in this case impinged on the defendant's presumption of innocence, and it compares the screen to the wearing of prison garb. However, unlike the wearing of prison garb, Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 1691 (1976), or shackles, State v. Wilson, 406 N.W.2d 442 (Iowa 1987), a screen is not a continuing influence which is present before the jury throughout the whole trial. See Estelle, 425 U.S. at 505, 96 S. Ct. at 1693, 48 L. Ed. 2d at 126. A screen is used only for that period of time in which a child witness testifies. Furthermore, a screen serves an essential state interest, see State v. Hoversten, 437 N.W.2d 240, 241 (Iowa 1989) (protection of child witnesses is an important public policy); prison garb serves no such interest. Estelle, 425 U.S. at 505, 96 S. Ct. at 1693, 48 L. Ed. at 131.

Arguably, the use of any type of screen sets a defendant apart from others in a courtroom. The United States Supreme Court has recognized:

> This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct.

Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340,

1345, 89 L. Ed. 2d 525, 533-34 (1986). Just as the presence of armed police officers in a courtroom may be noticed by jurors, that in and of itself is not prejudicial to a defendant. State v. Williams, 217 N.W.2d 573, 574 (Iowa 1974); Holbrook, 475 U.S. at 571, 106 S. Ct. at 1347, 89 L. Ed. 2d at 534-35 (1986). The jury was instructed the law provided for the use of such a device during a child witness's testimony and it was not to draw any conclusions with regard to the defendant's guilt or innocence from the use of the screen. I doubt that the jury--which we must assume to have been intelligent and capable of following instructions--drew an improper inference from the screen, and I do not see that its use was inherently prejudicial. See Coy, 487 U.S. at ____, 108 S. Ct. at 2810, 101 L. Ed. 2d at 876 (Blackmun, J. dissenting).

The majority further argues the repetition of the child witness's answers was prejudicial. I fail to see how this is any more prejudicial than the need to repeat the answers of a soft-spoken witness. Our legislature and supreme court have recognized the propriety of using screens when child witnesses testify. Relying on the analysis set forth by our supreme court in Coy and the description we have available of the circumstances surrounding the use of the screen in Coy, i.e., a darkened and "eerie" courtroom setting, I am not prepared to find the screen used in this case to have been inherently prejudicial.

I must also dissent with regard to the admissibility of the video tape. Defendant challenges the videotape as "unreliable" and therefore not admissible pursuant to Iowa Code section 910A.14(3) (1987) and Iowa Rule of Evidence 803(24). Defendant challenged the reliability of the videotape before the trial court, and the trial court judge determined sufficient safeguards had existed during the interview to ensure its reliability. The trial court specifically noted the victim's mother had not been present during the interview, and it concluded the lack of breaks during the interview did not affect its admissibility. With regard to this latter point, the trial court ordered the victim's trial testimony to be limited to twenty-minute intervals with intervening breaks. The videotaped interview had no such restriction, and in fact only two separate four-minute breaks occurred during that two-hour interview. The trial court may have found the lack of breaks in the interview to be less important because of the difference in the atmosphere which existed between the interview (informally conducted in a room which contained children's toys) and the formal setting of the courtroom in which the victim testified.

I would concur with the trial court's assessment of the reliability of the video and would not restrict its admission in a new trial.

HABHAB, J. (specially concurring with dissent)

I specially concur with the dissent.