FILED
AUG 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed August 26, 1982

vs.)

419

CLARENCE RICHARD SMITH,) 2-235 / 67507

Defendant-Appellant.)

Appeal from Marion District Court - Richard D. Mohr, Judge.

Defendant appeals his conviction of sexual abuse in the third degree in violation of Iowa Code § 709.4(1). AFFIRMED.

Philip F. Miller, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Assistant Attorney General, and Theresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell and Johnson, JJ.

Defendant appeals his conviction of sexual abuse in the third degree in violation of Iowa Code § 709.4(1). He claims the trial court erred in excluding certain evidence of the complainant's past sexual conduct and that the evidence was insufficient to support the jury's verdict. We affirm.

Defendant was charged by information with the crime of sexual abuse in the third degree; specifically, a sex act "done by force or against the will of the other participant." Iowa Code § 709.4(1). The complainant was Robin Louise Smith, defendant's stepdaughter, who was living with him and his wife at the time. She alleged that during the evening of May 1, and the early morning hours of May 2, 1981, she, defendant and various acquaintances went to two different taverns and then back to defendant's residence to play cards. They were all drinking beer during this time. After everyone else left at about 6:00 a.m., complainant went to bed. According to her testimony, defendant then came into her room and had sexual intercourse with her against her will. When she got away, she tried to get out of the house but defendant grabbed her and again committed a similar act of sexual abuse against her.

Defendant filed a pretrial motion to admit certain evidence allegedly showing complainant's prior sexual activity. The trial court held an in-camera hearing pursuant to Iowa R. Crim. P. 20(5) and ultimately overruled defendant's motion on the ground that the proffered evidence was not material or relevant to the case at hand. After trial to the jury, defendant was found guilty of the offense as charged. After the court denied his motions for a new trial and in arrest of judgment, it sentenced defendant to a prison term not to exceed ten years and a $5,000 fine. This appeal followed.

I. Defendant first contends that he should have been allowed to introduce evidence of complainant's prior accusation against someone else of rape and her sexual activities which took place in January, 1981.

Regarding the prior accusation of rape, defendant apparently claims that such evidence should be admissible as an attack on complainant's credibility. The record, however, shows that the trial court did not make a final ruling on this issue to foreclose the possibility of defendant introducing the desired evidence. At the hearing on the motion to admit evidence, the following exchange occurred:

> THE COURT: * * *
>
> The Court has in mind that paragraph B of the Motion to Admit Evidence wherein it is stated or alleged in the motion that the prosecutrix stated that her stepfather, Joe Hatfield, attempted to rape her, in the context of the evidence at the trial, this could be proper cross-examination to inquire into this, depending upon the trial record.
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> * * *
>
> MR. HICKS: And the possible statements made by Robin Louise Smith as shown in B and D of that motion could, under proper circumstances, be brought up in cross-examination of her, is that correct?
>
> THE COURT: That is the ruling of the Court.

At trial, defendant made no attempt to link the evidence of prior accusation with the direct examination of complainant, nor did he seek a ruling from the trial court as to its admissiblity at that time.

We agree with the State that this situation is analogous to that presented by a motion in limine. In State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979), the court said:

> It is well established that a ruling on the motion, which only grants or denies protection from prejudicial references to challenged evidence, does not preserve the inadmissibility issue for review. [authorities] It is only where the ruling reaches the ultimate issue, and declares the evidence admissible or inadmissible, that it is a final ruling, which need not again be raised at trial.

In this case, the court did not make a final ruling on defendant's motion to admit the prior accusation; it was therefore incumbent on him to raise the issue at trial and obtain such a ruling in order to preserve any possible resulting error for our review. Because defendant failed to do so, we have nothing to review.

II. The court did decide at the pretrial hearing that defendant's proposed evidence regarding complainant's sexual activities of January, 1981, would be inadmissible in any event. Defendant wanted to admit evidence pertaining to the fact that complainant had engaged in sexual intercourse at that time with her boyfriend at the home of the Shepherds, some family friends. The next day, the Shepherds noticed that the sheets on the bed where complainant and her boyfriend slept were bloodstained. Complainant testified that she was not menstruating at that time, but that she was at the time of the alleged rapes in this case. Her stepmother's sister and her husband, however, found no signs of fresh blood when they went to defendant's house on the afternoon of May 2, 1981 (the day of the incidents in this case). This chain of circumstances is alleged by defendant to rebut the charge that he committed the acts of sexual abuse against complainant.

In determining the admissibility of evidence of past sexual conduct in sexual abuse cases, Iowa R. Crim. P. 20(5) states in part: "The court shall conduct a hearing in camera as to the relevancy of such evidence of previous sexual conduct, and shall limit the questioning and control the admission and exclusion of evidence upon trial." Here the court concluded that the proffered evidence "is wholly immaterial and irrelevant to any of the issues in this case."

We agree. "The test of relevancy is whether the evidence offered would render the desired inference more probable than it would be without such evidence." State v. Ball, 262 N.W.2d 278, 279 (Iowa 1978). We cannot see how the fact of complainant's sexual activities four months preceding has any impact on the question whether an act of sexual abuse occurred on May 2, 1981. Whether or not the Shepherds found bloodstains on the bedding in the afternoon has little, if anything, to say about its condition at 7:00 that morning, which is when the alleged abuses occurred. The trial court correctly overruled defendant's motion to admit this evidence.

III. Defendant's remaining issues involving his motions to direct a verdict of acquittal, for a new trial and in arrest of judgment are all based on his contention

that the evidence was insufficient to support his conviction. We examine all of the evidence in the light most favorable to the prosecution. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). We conclude there was sufficient evidence to justify the jury's decision. Complainant testified in detail regarding defendant's acts of sexual abuse. Medical testimony indicated that complainant's genital area was swollen, bruised and reddened and that these conditions were consistent with recent and forceful intercourse. Defendant's argument appears to focus on the alleged lack of credibility of complainant's testimony. It is up to the finder of fact, however, to make determinations of witness credibility. Here, the jury decided the question in the State's favor.

We have considered all of defendant's arguments and find merit in none of them. We therefore affirm his conviction.

AFFIRMED.