IN THE COURT OF APPEALS OF IOWA

FILED
JUN 25 1985
CLERK SUPREME COURT

STATE OF IOWA,	)	468
Plaintiff-Appellee,	)	Filed June 25, 1985
vs.	)	
JAMES DONALD LANE,	)	5-217 / 84-1145
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Marshall County - Carl D. Baker, Judge.

Defendant appeals from his conviction of sexual abuse in the third degree in violation of Iowa Code section 709.4. AFFIRMED.

Lylea Dodson, William L. Kutmus, and Mark S. Pennington, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson and Hayden, JJ.

HAYDEN, J.

Defendant appeals from his conviction of sexual abuse in the third degree in violation of Iowa Code section 709.4. He challenges the sufficiency of the evidence and also argues that his trial attorneys rendered ineffective assistance by failing to object to testimony attacking his character and alleging prior acts of sexual abuse on the victim's sister.

Our review of this action is on assigned error. Iowa R. App. P. 4. However, on issues involving the violation of basic constitutional safeguards we make an independent evaluation of the totality of the circumstances which is the equivalent of a de novo review. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982). The sixth amendment right to effective assistance of counsel is a basic constitutional safeguard triggering a de novo review. Sims v. State, 295 N.W.2d 420, 422-23 (Iowa 1980).

I. Defendant claims that there was insufficient evidence to find him guilty of sexually abusing his adopted daughter, Shawn, age 17 at time of trial. In reviewing a challenge to the sufficiency of the evidence all the evidence is viewed in the light most favorable to the State to determine whether there was substantial evidence to support the verdict. State v. Kupp, 310 N.W.2d 179, 182 (Iowa 1981). In a trial to the court the findings of fact have the effect of a jury's special verdict. Id. at 181. Evaluation of the credibility of witnesses is for the factfinder. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980).

Shawn Lane testified that defendant had sexually abused her on four occasions. Her sister and her mother testified that they knew nothing about the sexual abuse and believed that Shawn hated defendant enough to fabricate the story in order to get out of the house. The trial court found Shawn's testimony to be more credible. After reviewing all of the testimony we cannot disturb the trial court's findings.

II. Defendant maintains that his trial attorneys rendered ineffective assistance by not objecting to testimony concerning defendant's violent temper. In order to show that an act or omission of counsel constituted ineffective assistance, defendant must show that counsel failed to perform an essential duty and prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Defendant must overcome a presumption that counsel is competent. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). The prejudice component of the claim may be addressed without deciding whether counsel's performance was deficient. Id. The prejudice must be such that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); Taylor, 352 N.W.2d at 685.

The State introduced evidence that defendant had an uncontrollable temper, that he had struck his wife in the past, and that he held his wife and two daughters at gunpoint on one occasion. Defendant claims this evidence was only introduced in order to show that he was a bad person and, therefore, it was impermissible character evidence. See Iowa R. Evid. 404(a). The evidence was relevant, however, to the issue of lack of consent of the victim to the acts of sexual intercourse. The record shows that on August 28, 1984, Shawn was alone in her bedroom with the door locked. Defendant pounded on the door and insisted that he be allowed to enter. Shawn unlocked the door and defendant then had sexual intercourse with her. She testified that she unlocked the door because she was afraid of him and she believed he would break down the door if she refused. Evidence of defendant's temper and violent nature substantiated the reasonableness of her fear and explained her actions. All of the circumstances surrounding the act of abuse, subjective as well as objective, should be considered in determining whether the act was consensual. State v. Bauer, 324 N.W.2d 320, 322 (Iowa 1982). Fear has been recognized as a substitute for physical resistance. Id.

We find that defense counsel did not fail to perform an essential duty by not objecting to this evidence nor was the defendant prejudiced by the failure to object.

III. Defendant also argues that counsel was ineffective for not objecting to evidence that defendant had sexually abused Shawn's sister, Jody. Defendant cites five instances in which this evidence was referred to indirectly. Contrary to defendant's allegations, we find that defense counsel did object to several of these references. Furthermore, we hold that defendant has not shown that he was sufficiently prejudiced by these references. Defendant filed a motion in limine seeking to exclude evidence of defendant's sexual abuse of Jody. The trial court reserved ruling on the motion until trial. At trial the court sustained several objections and refused to allow the evidence into the record. Defendant waived his right to a jury and trial was to the court. We find that the references which slipped into the record were not likely to have swayed the court so that the result of defendant's trial would have been different if counsel had objected to each and every oblique reference to the prior acts.

AFFIRMED.