IN THE COURT OF APPEALS OF IOWA

No. 2-466 / 91-547

FILED
DEC 29 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

GARY DEAN SNOW,

Appellant.

Appeal from the Iowa District Court for Winneshiek County, James C. Bauch, Judge.

Defendant appeals from judgment and sentence entered following his conviction by a jury of four counts of sexual abuse in the second degree, one count of sexual abuse in the third degree, and a habitual offender violation. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Sheryl A. Soich and Thomas H. Miller, Assistant Attorneys General; and Karl G. Knudson, County Attorney, for appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ. Schlegel, J., takes no part.

HABHAB, J.

This is an appeal by the defendant from judgment and sentence entered following his conviction by a jury of four counts of sexual abuse in the second degree, one count of sexual abuse in the third degree, and a habitual offender violation. We affirm.

The charges stem from allegations the defendant was having intercourse with his stepdaughter while she was ten, eleven, and twelve years old. As part of his defense, the defendant asserted he was suffering from genital warts and genital herpes and the victim was not. During the course of the trial, the defendant called as a witness the jail administrator, Deputy Sheriff Clifford Carey, who testified on direct examination that the defendant had been segregated for several months prior to trial from the other prisoners. Presumably, the defense was attempting to show the jury that because of segregation he could not have contacted herpes while in jail.

The State argued to the court after an offer of proof that since the defense had brought up the issue of the defendant's segregation while in prison the jury was entitled to know the reason. The court, over a defense objection of relevancy, agreed and stated that it would permit the testimony, not for the purpose of proving the truth of the matter asserted, but on the contrary for the limited purpose of showing why the sheriff's department segregated the defendant. Deputy Carey then testified the

reason the defendant was segregated from the other prisoners was because of written statements and complaints of other inmates about the defendant peeking or watching them while they were showering and going to the bathroom. Immediately after that testimony, the court admonished the jury that the answer to that question was given "not for the truth of the matters asserted therein but rather to show why the sheriff's department took the actions they took in segregating Mr. Snow from the other inmates."

We conclude this evidence was not offered for its truth, but rather was offered to help explain relevant conduct taken in response to them. As such it is not hearsay and is relevant. See State v. Williams, 360 N.W.2d 782, 787 (Iowa 1985) ("Third party statements that are offered only to explain responsive conduct are not hearsay."); State v. Hollins, 397 N.W.2d 701, 705 (Iowa 1986) ("Statements that otherwise would be considered hearsay offered not for the purpose of proving the truth of the statements but rather offered to help explain relevant conduct taken in response to them, are not hearsay and are not excludable as such."); State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978). In addition, we believe the cautionary instruction the court gave to the jury immediately after the testimony was received assisted the jury as to the purpose for which the testimony was offered. Like in State v. Hollins, we believe this cautionary statement forecloses any claim of prejudice. Hollins, 397 N.W.2d at 706. The

court clearly explained the purpose for which it was offered and the limitations on the jury's consideration of it. We do not find the court abused its discretion in receiving the testimony for that limited purpose. We affirm on this issue.

Later, during cross examination by the State, Carey testified, after a question as to whether he had any other complaints about the defendant making any suggestive comments, one inmate stated that while another inmate was lying on his stomach Snow had made some sexual comments about jumping in bed with him. The defendant did not object to this testimony. However, on redirect examination, the defense showed the following: the defendant did not jump into bed with the inmate; oftentimes people make jokes when they are in jail; and the defendant has a sense of humor. The defense on appeal claims ineffective assistance of counsel for failure to object to this testimony along with failure to object to testimony by the victim's mother, jury instruction, fifth amendment violation, and prosecutorial misconduct.

Resolution of claims of ineffective assistance of counsel is generally reserved for postconviction review by appellate courts because of the seriousness of the claim to counsel whose performance is being challenged as well as the fairness of the proceedings in which the effective assistance is alleged to have occurred. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). We believe the claims

that the defendant asserts on the grounds of ineffective assistance of counsel should be decided in postconviction proceedings if the defendant elects to proceed under those rules.

We have reviewed the defendant's final claim that the trial court erred in allowing Dr. Opdebeeck to testify the victim identified the defendant as her abuser. We do not believe the trial court abused its discretion in admitting this testimony. We adopt as our own the rationale of the supreme court used in State v. Tracy, 482 N.W.2d 675, 681-82 (Iowa 1991). We find no error here.

Costs of this appeal are taxed to the appellant.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur specially.

I find the trial court abused its discretion in admitting testimony defendant was segregated in jail because of complaints defendant was watching other inmates showering and going to the bathroom.

Why defendant was segregated in jail is in no way relevant to his innocence or guilt on the charge before the court.

I concur because I do not find on this record that, but for the admission, the result of this trial would be different.

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