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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 26, 1986
vs.	)	280
MANTHA LEE HENDERSON,	)	6-333 85-1771
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County (No. 07X003969) - George L. Stigler, District Associate Judge.

Defendant appeals the judgment and sentence entered on a jury verdict finding him guilty of first-degree sexual abuse in violation of Iowa Code section 709.2. **AFFIRMED.**

John W. Ackerman of Ackerman Law Office, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; James W. Metcalf, County Attorney; and Jeffrey Goodman, Assistant County Attorney, for plaintiff-appellee.

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

SCHLEGEL, J. 281

Defendant appeals the judgment and sentence entered on a jury verdict finding him guilty of first-degree sexual abuse in violation of Iowa Code section 709.2. We affirm.

On May 10, 1985, the defendant, Mantha Lee Henderson, a 19-year-old male, was charged by trial information with first-degree sexual abuse in connection with the alleged rape of a 66-year-old woman, Madlyn O'Brien. The offense was alleged to have occurred in O'Brien's Waterloo apartment after midnight on May 1, 1985.

Prior to trial, Henderson filed motions to dismiss the trial information on the grounds that it failed to list the victim's current address in violation of Iowa Rule of Criminal Procedure 5(3). Following hearings on the matter, the trial court eventually granted Henderson's request for O'Brien's current address, but the address was not provided until during O'Brien's cross-examination at trial.

When trial commenced on August 13, 1985, O'Brien testified that Henderson forced his way into her apartment after identifying himself as a police officer. O'Brien claimed that Henderson carried a knife and that he shoved her around before having intercourse with her against her will. Henderson testified, however, that O'Brien had consented to the sex act and had offered to pay him $50 in exchange for sex.

O'Brien testified that she experienced great pain as a result of the alleged rape. Two treating physicians testified that O'Brien was seriously injured due to subsequent vaginal hemorrhaging. Defendant's medical expert, a physician who viewed O'Brien's injury in retrospect after examining her medical records, testified that O'Brien's injury created no risk of death.

On August 20, 1985, the jury returned a verdict finding Henderson guilty as charged. Henderson's motion for new trial or to vacate the first-degree conviction was overruled. On October 25, 1985, Henderson was sentenced to life imprisonment.

Defendant claims that there was insufficient evidence presented to support a guilty verdict, that the trial court erred in allowing the State to withhold the address of the victim until the time of trial, that the evidence did not support a finding that the type of injuries suffered by the victim constituted serious injury with the meaning of Iowa Code section 709.2, and that there was not sufficient evidence presented to support a finding that the victim's injuries constituted "serious injury."

Our scope of review is on assigned error only. Iowa R. App. P. 4.

Defendant first argues that there was insufficient evidence presented to support a verdict of guilty for sexual abuse in the first degree. Iowa Code section 709.1 (1985), in relevant part, defines sexual abuse:

> Any sex act between persons is sexual abuse by either of the participants when the act is performed with the other participant in any of the following circumstances:
>
> 1. The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.

Section 709.2 defines sexual abuse in the first degree:

> A person commits sexual abuse in the first degree when in the course of committing sexual abuse the person causes another serious injury.

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support

the charge. Substantial evidence means evidence which would convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). A jury is entitled to believe or disbelieve the testimony of witnesses as it chooses. State v. Wedelstedt, 265 N.W.2d 626, 629 (Iowa), cert. denied, 439 U.S. 954, 99 S. Ct. 352, 58 L. Ed. 2d 345 (1978). The jury was instructed in this case to determine the weight and credibility of the testimony of the witnesses, in view of all the evidence, and all the facts and circumstances of the case.

We have reviewed the testimony given in this case and we conclude that sufficient evidence exists in the record to allow a rational jury to find beyond a reasonable doubt that the defendant committed the crime of sexual abuse in the first degree. We will discuss the issue of first-degree sexual abuse below, but it is sufficient here to conclude that the jury found the testimony of Madlyn O'Brien and the witnesses for the State more credible than the testimony of Mantha Henderson and his witnesses. The jury is not bound to accept as true the evidence of any witness, but can reject or accept testimony and give weight to the testimony as in its judgment it is entitled to receive. State v. Blair at 416.

The defendant next contends that the State violated rule 5(3) of the Iowa Rules of Criminal Procedure and thereby directly interfered with the timely investigation and preparation of his case. Rule 5(3) provides:

> The prosecuting attorney shall, at the time of filing such information, also file the minutes of evidence of the witnesses which shall consist of a notice in writing stating the name, place of residence and occupation of each witness upon whose expected testimony the information is based, and a full and fair statement of the witness' expected testimony.

The minutes of testimony attached to the trial information dated May 10, 1985, listed the address of Madlyn O'Brien as 303 Courtland, Apartment #3, Waterloo,

Iowa. O'Brien was living at this address at the time of the attack. When defendant's attorney attempted to contact O'Brien at this address, he found the apartment vacant. The defendant then filed a motion to dismiss the trial information stating that the address given was a vacant apartment. The court ordered the State to refile the minutes of information. The amended minutes identified O'Brien's address as before. Following a second motion to dismiss the trial information, the court recognized the position of the State that the victim did not want her location known. The court instructed counsel for the State to set a hearing on this issue as soon as it could be arranged. At the pretrial hearing nearly a month after this directive, defense counsel again asked for the victim's address. The court, though recognizing the danger that might follow from providing the address to the defendant, did instruct the State to supply the address to the defense counsel. The defense counsel then learned the victim's address during cross-examination of the victim.

It is true that a court may decline to order the State to disclose a witness's address to protect the witness from embarrassment, harassment, or threats to safety. State v. Cuevas, 282 N.W.2d 74, 81 (Iowa 1979). The State must make a sufficient showing that disclosure of the address would cause such embarrassment, harassment, or threats to safety. Id. We do not find any such showing in the record. The State did not make a sufficient showing at any time before the trial date detailing the specific reasons for withholding the address of the victim. When ordered on June 16, 1985, to amend the minutes or request a hearing on the address issue, the State did not comply. On July 17, 1985, the State was ordered to set a hearing on the issue; the State did not comply until the day of trial. It may very well have been that the provision of the address would have resulted in embarrassment, harassment, or threats to the safety of the victim. However, the burden is on the State to show this. We do not

condone dilatory tactics such as these even if done for allegedly good cause. We expect officers of the court to respect both the spirit and the letter of the law.

We conclude, however, that reversal is not required on this issue since the record does not show that the defendant was prejudiced by non-access to O'Brien before the trial date. We will not reverse on the ground of technical defects in procedure unless it appears in some way that these defects have prejudiced the complaining party or deprived him or her of the full opportunity to make defense of the charge. State v. Smith, 282 N.W.2d 138, 141 (Iowa 1979). On appeal, the defendant suggests he needed the address of the victim to trace the evolution of O'Brien's story. He apparently would have received no help from O'Brien herself since the State revealed at the pretrial hearing that O'Brien was vocal about not talking to the defense counsel before trial. We doubt that much would have been gained by talking directly to O'Brien, other than the information acquired when she was deposed. The other reasons to have the address before trial, according to the defendant's assertion at the pretrial conference, was to investigate physical evidence at the scene of the crime and to obtain statements from the victim's new neighbors as to possible statements made by the victim concerning the crime. The first goal could not be directly achieved by acquiring the victim's new address. The second goal was extremely speculative and no continuance was asked for in order to examine O'Brien's new acquaintances after the defense attorney discovered the victim's address. In light of this failure to make a motion for a continuance, we must conclude that at that time the defendant's counsel did not think that the failure to secure such testimony would prejudice the defendant or deprive the defendant of a full and fair opportunity to make defense to the charge. See State v. Smith, 282 N.W.2d at 141. We conclude that neither prejudice was caused nor a full

opportunity was denied defendant to make a defense to the charge by the State's failure to comply with rule 5(3) of the Iowa Rules of Criminal Procedure and therefore we do not reverse on this issue. We must reemphasize, however, that we strongly disapprove of the manner in which the prosecuting attorneys cavalierly disregarded the required procedure in this matter.

Defendant next contends that the evidence did not support a finding that the type of injuries suffered by the victim constituted serious injury within the meaning of Iowa Code section 709.2. Defendant contends that since the evidence did not show a brutal or violent attack other than the sex act itself, the insertion of the penis into the vagina alone cannot be first-degree sexual abuse. Defendant contends that he must have known or have had reason to know that such penetration could conceivably result in life-threatening injury.

Under section 709.2, as stated above, a person commits sexual abuse in the first degree when in the course of committing sexual abuse the person causes another serious injury. We do not agree with defendant's contention that penetration of the vagina by the penis without additional brutal and violent acts cannot constitute first-degree sexual abuse. The language of 709.2 specifies "in the course of" which does not suggest a collateral brutality. We recognize that forcible sexual abuse will frequently cause pain or other injury. State v. McKee, 312 N.W.2d 907, 914 (Iowa 1981). If forcible sexual abuse results in serious injury, the offense is enhanced to sexual abuse in the first degree. Id. Our courts have not required collateral brutality to find sexual abuse in the first degree. See State v. Coburn, 315 N.W.2d 742, 748 (Iowa 1982). There is no merit in defendant's claim that a brutal and violent attack apart from the rape is necessary to enhance the crime to first-degree sexual abuse.

The defendant finally contends that there was not sufficient evidence presented to support a finding that the victim's injuries constituted "serious injury." Iowa Code section 702.18 (1985) states:

> Serious injury means disabling mental illness, or bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

The serious injury at issue in the present case is bodily injury which creates a substantial risk of death. Each case must be judged on its own facts when deciding if there was a serious injury. State v. Coburn, 315 N.W.2d at 748. Substantial risk of death is more than just any risk of death but does not mean that death is likely. State v. Anderson, 308 N.W.2d 42, 47 (Iowa 1981). In the present case we find sufficient evidence to enable a jury to find serious injury within the meaning of section 702.18. Dr. Abbot, the physician who treated the victim in the emergency room after the assault, testified that O'Brien was in great pain and lost a great deal of blood. He testified that O'Brien's injuries were very serious and in his opinion there was a possible risk of death. Dr. Jeffries, O'Brien's regular physician, later examined the victim. He testified that her injuries were very serious and if unchecked the hemorrhaging could have led to a heart attack and brain damage. The jury also heard testimony from Dr. Pettit, who examined the medical records of the victim. He concluded that the injuries suffered by the victim were not life threatening and did not present the possibility of death. In Anderson, the supreme court said that when a doctor testified that death to an elderly victim of rape was "certainly possible," a rational trier of fact could use that evidence to conclude that a substantial risk of death existed. State v. Anderson, 308 N.W.2d at 47. Evidence is sufficient if a rational trier of fact could find guilt beyond a reasonable doubt. State v. Jones, 289 N.W.2d 597, 600 (Iowa 1980). In the present case, we find, as

the court did in Anderson, that a rational trier of fact could conclude from such testimony from a doctor that a substantial risk of death existed for the elderly victim.

For the foregoing reasons, we find that the conviction of the defendant for first-degree sexual abuse should be affirmed.

AFFIRMED.