

IN THE COURT OF APPEALS OF IOWA

No. 6-536 / 95-1870

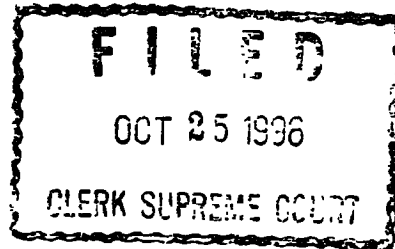
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEAN HERSCHEL COX,

Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Defendant appeals his sentence for simple assault. **AFFIRMED.**

Donna Lesyshen of Tyler & Lesyshen Law Firm, Waterloo, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Jeff Harris, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Habhab and Vogel, JJ.

SACKETT, C.J.

Defendant-appellant appeals his sentence following his conviction of simple assault, a misdemeanor. Defendant contends: (1) the district court abused its discretion in sentencing him to thirty days in jail; and (2) the imposition of \$5000 bail was excessive. We affirm.

Defendant was charged by trial information with third-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.1(1)(1995) stemming from an incident when he allegedly forced his victim to submit to a sex act against her will. Defendant filed a not guilty plea to the charge. Following trial, the jury returned with a verdict of guilty to the lesser-included offense of simple assault. The district court sentenced defendant to serve thirty days in jail. The court set his appeal bond at \$5000.

The first question is whether the trial court abused its discretion in the sentencing. Defendant advances the district court abused its discretion in sentencing him to serve thirty days in jail. Defendant contends the district court sentenced him to the maximum statutory term because the court believed him to be guilty of the third-degree sexual abuse charge and allowed this to influence its sentencing decision. Defendant further contends the district court was prejudiced against him because he did not show any remorse or admit guilt to the sexual abuse charge.

Our review on this issue is for an abuse of discretion. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994).

In sentencing defendant, the trial judge said in part:

THE COURT: Mr. Cox, as [your attorney] indicated a moment ago, I did sit through the trial and I am familiar with the accusations that were made against you. The jury chose to accept that what you did with [the victim] was a half-handed approach, but not sexual abuse. However, the biting of her by you and where you bit her¹ compelled me to say that the State's request is reasonable under the circumstances.

On those same facts, the jury might well have found you guilty of sexual abuse in the third degree. Instead of talking 30 days we would be talking 10 years. The jury chose to be charitable and chose to find, as I said before, that what you did was not sexual abuse, but was a crude come-on that did result in the assault of [the victim]. Biting her where you bit her, you had to know that was wrong and so 30 days is reasonable.

The State argues the trial court's comment was in response to and invited by defendant's counsel who commented she did not condone defendant's method of being amorous and did not believe the court did either.

The question is whether an impermissible sentencing factor was used, not the result it may have produced or the manner it may have motivated the trial court. *State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994).

Defendant contends the trial court's remarks indicate it thought defendant was guilty of the greater charge and considered the greater charge in sentencing. We agree with defendant it is error for a court to consider or rely on an unproven crime in sentencing. *State v. LeGrand*, 501 N.W.2d 59, 63 (Iowa App. 1993); *State v.*

¹ The victim's testimony was defendant bit her on the left side of her neck, her left arm, her left leg near her crotch, and on her breasts.

Bragg, 338 N.W.2d 187, 191 (Iowa App. 1986). Our reading of the trial court's remark causes us to conclude the trial court considered the nature of the crime of which defendant was convicted, not the unproven crime. The trial court did not abuse its discretion on this ground.

Defendant further contends the trial judge was prejudiced against him and he gave the sentence he did because defendant chose to go to trial and failed to show remorse.

Words may be made in sentencing which, with more thought, could be more artfully said. *See Thomas*, 520 N.W.2d at 31. Remarks in sentencing may be misconstrued. *See State v. Nicholas*, 247 N.W.2d 249, 255 (Iowa 1976). We do not find an abuse of discretion.

Defendant's last claim is the district court abused its discretion in setting his appeal bond at \$5000 since he had no prior criminal history. He maintains the district court set the bond so high in order to discourage him from filing an appeal.

We review for an abuse of discretion. *See State v. Harris*, 528 N.W.2d 133, 135 (Iowa App. 1994); *LeGrand*, 501 N.W.2d at 64. We find no abuse of discretion.

AFFIRMED.