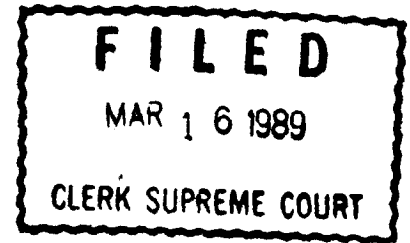


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DEE JAY RADEKE,)
Defendant-Appellant.)

314

8-614
88-84

Appeal from the Iowa District Court for Cedar County
(No. CR 29720), Max R. Werling, Judge.

The defendant appeals his conviction by a jury of
assault with intent to commit sexual abuse. **AFFIRMED.**

Katie J. Wolfe, West Branch, for defendant-appellant.

Thomas J. Miller, Attorney General; Julie Ann Halligan,
Assistant Attorney General; and Sterling L. Benz, Assistant
County Attorney, for plaintiff- appellee.

Heard by Oxberger, C.J., and Donielson and Sackett,
JJ., but considered en banc.

DONIELSON, J.

315

Defendant appeals from his conviction by a jury of assault with intent to commit sexual abuse. He contends there was insufficient evidence to support the verdict and that the trial court abused its discretion by allowing testimony of an earlier unrelated incident and by refusing to grant a mistrial based on the prosecutor's prejudicial misconduct during closing arguments.

In August 1987 Dee Jay Radeke, using a false name, set up an appointment with a female real estate agent to see a secluded rural property near West Branch. In making arrangements, defendant misrepresented his marital and employment status as well as his financial ability to purchase the real estate. Defendant and the victim were alone viewing the house. As they were about to leave the house, defendant got behind the woman, put his hand over her mouth, and grabbed her around the waist. Defendant told the woman that if she did as he said, he would not hurt her. He then told her to unbutton her blouse.

The woman testified that she had on a blouse that buttoned from the shoulder up to the collar. She unbuttoned the blouse, but then she moved away from Radeke. She told the defendant that others knew where she was and that the owner would be returning soon. Radeke apologized and left. The victim locked the door and immediately called for help.

I. As a result of this incident, defendant was charged under Iowa Code section 709.11 (1987), which provides:

Assault with intent to commit sexual abuse. Any person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse is guilty of a class "C" felony if the person thereby causes serious injury to any person and guilty of a class "D" felony if the person thereby causes any person a bodily injury other than a serious injury. The person is guilty of an aggravated misdemeanor if no injury results.

To define sexual abuse we must look to two other statutes. Sexual abuse is defined under section 709.1 as:

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.

A sex act is defined under section 702.17 as:

The term "sex act" or "sexual activity" means any sexual contact between two or more persons, by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalis or anus of another person or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Defendant contends because there is no evidence he intended to commit a sex act as defined by section 702.17 there was not substantial evidence of guilt.

We disagree. We find there is substantial evidence in the record to generate a jury question on the issue of whether defendant had the specific intent to commit the sex act as those words are defined in the Iowa Code.

The evidence shows the defendant was acting under false pretenses when he asked the woman to show him the house. He told her he would not harm her if she did as she was told after he had grabbed her. In a strong voice, he told her to unbutton her blouse. Fortunately the woman got away before anything else happened. However, in a statement to the police, defendant said, "I would have had sex with her at this point if she had agreed, but I did not intend to force her to have sex with me."

It is the role of the jury to decide whether Radeke had the specific intent to commit the sex act. The standard to be applied was outlined by us in State v. Maynard, 379 N.W.2d 382, 383 (Iowa App. 1985).

The overt act must reach far enough towards the accomplishment, toward the desired result, to amount to the commencement of the consummation, not merely preparatory. It need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but it must approach sufficiently near it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

Id. quoting State v. Roby, 194 Iowa 1032, 1043, 188 N.W. 709, 714 (1922).

In Maynard, we were able to infer that defendant was intending to have sexual contact with the victim from his

act of getting into bed with her while he was naked. 379 N.W.2d at 384. Similarly, in Radeke's case, we can infer that defendant was intending to commit a sex act from his actions, his words, and the surrounding circumstances.

We review the evidence in the light most favorable to the State and allow every legitimate inference which reasonably and fairly may be deduced therefrom. We find substantial evidence to support the trial court's findings.

II. Defendant claims the trial court erred in denying the defendant's motions in limine to exclude the testimony of Corrine Burkett. One week prior, she showed defendant a property under similar circumstances. Corrine, however, brought her mother to the second arranged meeting and no incident took place. The defendant did not show up for the third scheduled meeting.

We do not need to decide whether it was error to commit this testimony over relevancy objections. Any error which might have occurred was harmless to the defendant. Since the prior act did not reach beyond the point of preparation, it was not a criminal act. This conduct was not such as to inflame the prejudice of the jury. Therefore, we find if the evidence was erroneously admitted, it constituted harmless error.

III. The defendant contends the trial court abused its discretion when it denied the defendant's motion for a new trial. Defendant based his motion on two grounds: first,

that the verdict was contrary to law and evidence; second, the prosecutor engaged in misconduct during closing arguments.

The trial court has a good deal of discretion in deciding whether the jury relied upon a misconception of the law, State v. Brown, 253 Iowa 658, 671, 113 N.W.2d 286, 294 (1962), and whether the verdict is supported by the evidence. State v. Sanders, 260 Iowa 327, 329, 149 N.W.2d 159, 160 (1967). Having already decided that substantial evidence supports the verdict, we need not address this question further.

Finally, we find that defendant failed to preserve error on the issue of prosecutorial misconduct. After an objection is sustained and the prosecutor is admonished by the court, failure to move for a mistrial for prosecutorial misconduct before the case is submitted to the jury waives error. State v. Dahlstrom, 224 N.W.2d 443, 449 (Iowa 1974). No such motion was made; therefore this issue is waived.

Therefore the decision of the trial court is affirmed.

AFFIRMED.

All judges concur except Sackett and Schlegel, JJ., who dissent.

SACKETT, J. (dissenting)

320

I respectfully dissent.

The issue is whether there is substantial evidence defendant intended to commit a sex act as defined by Iowa Code section 702.17 as:

The term "sex act" or "sexual activity" means any sexual contact between two or more persons, by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalis or anus of another person or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

There is evidence defendant misrepresented his marital, financial, and employment status to encourage the victim, a female realtor, to show him a home. Upon leaving the home he put his hand over her mouth and grabbed her around the waist. He told her to unbutton her blouse, which she did before she convinced him the owner would be returning. There is no evidence her breasts were ever exposed.

In State v. Baldwin, 291 N.W.2d 337 (Iowa 1980), the Iowa court interpreted section 702.17 in a case factually very similar to the case at bar. In Baldwin, the defendant lead a twelve-year-old girl named Angela to a remote corner of a public library where he grasped her by the arm, pushed her against the wall, with his hand on her shoulder kissed her on the forehead and put his hand down the front of her shirt.

In Baldwin, 291 N.W.2d 339-40, in interpreting section 702.17 the Iowa court said defendant was on solid ground in arguing:

"[I]n the case at hand the totality of the evidence may authorize a finding that the defendant solicited Angela for some sex-oriented purpose. There is no evidence to support a finding that this purpose was to engage in a sex act. . . ." Significantly, the human breast has no part in the foregoing statutory definition of a sex act. The term "genitalia" pertains only to the reproductive organs. Dollar's Medical Dictionary (25th ed. 1975)).

The court also said in Baldwin, 291 N.W.2d at 340:

. . . The jury could have deduced, as Baldwin concedes, that his conduct was for some sex-oriented purpose. But there is nothing to indicate that sex-oriented purpose was to achieve a sex act specifically described in section 702.17. Rather, the sex-oriented purpose might very well have been limited to the fondling of the little girl's breast.

The defendant contends the dictates of Baldwin require dismissal. The State seeks to distinguish Baldwin because the defendant made the statement, "I would have had sex with her at this point if she had agreed, but I did not intend to force her to have sex with me." The State recognizes the statement was defendant would only have had sex if it were consensual, but the State says there was sufficient evidence because part of the defendant's statement could have been believed and part could have been disbelieved.

The defendant and the State both recognize Baldwin deals with the sufficiency of evidence to show an intent to commit a sex act. The majority, however, has elected not to cite or distinguish Baldwin in their opinion. I find Baldwin controlling and reject the State's argument

defendant's statement distinguishes this case from Baldwin. While I find the defendant's conduct to be outrageous, what he has done does not meet the requirements for guilt under the statute with which he is charged.

I would reverse the conviction.

Schlegel, J., joins this dissent.