IN THE COURT OF APPEALS OF IOWA

No. 5-214 94-701

FILED
JUN 27 1995
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MANUEL KEVIN MCKUNE,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Defendant appeals from judgment and sentence entered upon his conviction of third-degree sexual abuse, in violation of Iowa Code section 709.4(2)(b) (1993).

AFFIRMED.

Mary K. Hoefer of Mears Law Office, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, J. Patrick White, County Attorney, and Janet Lyness, Assistant County Attorney, for Appellee.

Heard by Hayden, P.J., and Sackett, and Cady, JJ.

CADY, J.

This appeal requires us to review the sufficiency of the evidence to support a conviction, as well as a claim of ineffective assistance of trial counsel. Upon our review, we affirm.

Following a jury trial Manuel McKune was convicted of sexual abuse of a twelve year-old girl, identified as J.W. The young girl is burdened with an attention deficit disorder and is developmentally slow.

At trial, J.W. testified that she was at McKune's apartment with her mother and other adults on the evening of July 31, 1993. J.W. fell asleep on the couch and the adults, except for McKune, left to go to a convenience store. During this time, J.W. was awakened when McKune laid on top of her and rubbed against her. J.W. further testified that McKune took off her shorts, lifted her legs to near her chest, and then placed his penis in both her vagina and "poopy hole." She felt "white stuff" come out of McKune's penis and later saw something watery on the couch. When the adults returned, J.W. ran out into the hall and told her mother "he raped me." On cross-examination, McKune asked J.W. about several alleged inconsistencies between her testimony and earlier deposition testimony. He also suggested J.W. did not have a grasp of reality and had falsely accused another man of rape on a prior occasion. J.W.'s mother testified that she examined J.W. after the incident and noted redness around her anus and wetness in the crotch of her underwear.

McKune was convicted of third-degree sexual abuse and appeals. He contends

there is insufficient evidence to support the conviction because J.W.'s testimony is so contradictory that it is incredible. He also contends his trial counsel was ineffective for failing to preserve an adequate record for review and failing to object to hearsay testimony.

I. Sufficiency of Evidence

We overturn a guilty verdict in a criminal case based on the insufficiency of evidence only when there is no substantial evidence in the record to support the charge. *State v. McGrew*, 515 N.W.2d 36, 37-38 (Iowa 1994). Substantial evidence is evidence which could convince a rational jury of the defendant's guilt beyond a reasonable doubt. *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993). In determining the sufficiency of the evidence, we view the evidence in a light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deducted from the record. *State v. Smith*, 508 N.W.2d 101, 102 (Iowa App. 1993).

It is generally the function of the jury to determine the credibility of witnesses. Id. at 102. An exception to this rule has been recognized, however, when the testimony supporting controlling facts is so impossible, absurd, and self-contradictory that the fact finding process is transformed into guesswork. *Id.*

McKune attacks J.W.'s trial testimony as self-contradictory and inconsistent with her previous deposition testimony. While we agree that some inconsistencies and contradictions are apparent from the record, the central aspects of J.W.'s account

of the incident were not. To the contrary, J.W. provided a fairly consistent and detailed account of the sex act. The contradictions raised by McKune pertained to less controlling or ancillary matters, such as what McKune was wearing at the time, the place where J.W.'s mother conducted her examination, and whether the discharge J.W. observed on the couch was white or clear. Similarly, the inconsistencies between her trial testimony and the testimony of other witnesses was not significant. They concerned such matters as a five minute discrepancy in the length of time J.W. and McKune were alone in the apartment, and who opened the door to the apartment after the other adults returned from the convenience store. The type of contradictions and inconsistencies raised by McKune do not render J.W.'s central testimony absurd or impossible.

Furthermore, J.W.'s account of the incident was supported by the testimony of her mother, who observed possible objective signs of sexual abuse. It was also uncontradicted that the apartment door was locked when the adults returned. There was also testimony that McKune was perspiring when the adults returned.

Upon review of all the evidence presented, we find substantial evidence to support the verdict. A rational jury, in considering all the evidence, could conclude beyond a reasonable doubt that McKune was guilty.

II. Ineffective Assistance of Counsel

The defendant has the burden to prove ineffective assistance of counsel. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). Two elements must be established. *Id.*

at 131-32. First, it must be shown that counsel failed to perform an essential duty. *Id.* Secondly, defendant must show that prejudice resulted. *Id.*

McKune presents two grounds in support of his claim that his trial counsel failed to perform an essential duty. The first is that his trial counsel failed to make a specific record of his actual physical appearance to verify the discrepancy in the description of him given by J.W. Secondly, he claims his trial counsel failed to object to hearsay testimony of an investigating police officer. The officer testified that J.W. told a child abuse investigator at the hospital that McKune was wearing black brief style underwear, prior to his further testimony that he determined McKune wears colored brief style underwear. We find from our de novo review of the record that McKune is not entitled to relief.

Trial counsel did not fail to perform an essential duty by failing to make a record of his physical appearance. The identity of the accused was not an issue in this case. *See Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). The discrepancy in J.W.'s description of McKune was relevant only to challenge the sufficiency of the evidence by attacking J.W.'s credibility. The record was adequate for this purpose. We therefore, turn to the second ground for relief.

An investigating officer is generally permitted to explain the reasons for his or her actions by testifying to background information obtained about the crime under investigation. *State v. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977). Under these circumstances, out-of-court statements that are a part of such background information

are not offered to prove the truth of the statement, but are permitted to explain relevant subsequent conduct of the investigating officer. *Id.*; *State v. Coburn*, 315 N.W.2d 742, (Iowa 1982). Statements offered solely to explain relevant subsequent conduct are not hearsay.

In this case, the officer's determination of the type of underwear worn by McKune is not relevant without some independent evidence connecting it to the crime, such as the victim's observation of the type of underwear worn by McKune. If the statement by J.W. as testified to by the officer was not offered for its truth, then it cannot be used to explain the relevancy of the officers' testimony about the type of underwear worn by McKune. Our review of the record fails to disclose any independent evidence to connect the color of McKune's underwear to the crime. Accordingly, we believe the officer's testimony was inadmissible hearsay.

Notwithstanding if hearsay testimony is not outcome determinative, the failure to object can be within the range of competency. *See State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993). We look to see whether the performance of counsel under the circumstances fell below the normal range in evaluating claims of ineffective assistance of counsel. *Id.*

We believe the hearsay testimony in this case was not outcome determinative under all the evidence presented at trial. Thus, we are unable to find a lack of normal

competency. Furthermore, McKune has failed to explain how a timely objection would have changed the result of the case. *See Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

AFFIRMED.