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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	Filed August 27, 1986
Plaintiff-Appellee,	)	5-660 / 85-592
vs.	)	
FRANK PHILLIP SPROULE,	)	
Defendant-Appellant.	)	

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Appeal from the Iowa District Court for Cerro Gordo County (No. 16722), Gilbert K. Bovard, Judge.

Defendant appeals from his conviction for indecent contact with a child. **AFFIRMED.**

Herman P. Folkers and John S. Mackey of Nelson & Folkers, Mason City, for defendant-appellant.

Thomas J. Miller, Attorney General; Elizabeth E. Ciebell, Assistant Attorney General; and William S. Vanderpool, Cerro Gordo County Attorney and Carlynn D. Grupp, Assistant County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J. 421

Defendant (Sproule) appeals from his conviction for indecent contact with a child. We affirm.

Sproule first contends that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence to establish that Sproule acted with the requisite intent for the purpose of sexual arousal.

In reviewing Sproule's first contention, we are bound by State v.. Price, 365 N.W.2d 632 (Iowa App.. 1985), and must view the evidence in a light most favorable to the verdict. Id. at 633. The trial court, acting as a jury, found Sproule guilty. We can overturn this finding only if it is found to be without substantial support in the record, or clearly against the weight of the evidence. See State v. Hall, 287 N.W.2d 564, 565 (Iowa 1980).

It is the province of the fact finder to resolve fact questions and to assess the credibility of witnesses. State v. Hall, 287 N.W.2d 565 (Iowa 1980); State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976); State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980).

A substantial portion of the State's evidence against the defendant (Sproule) came from the testimony of a child. The inferences to be drawn and the credibility given to her testimony are also questions for the fact finder. State v. Jenkins, 326 N.W.2d 67, 72 (N.D. 1982).

Defendant was convicted of indecent contact with a child, a crime requiring a showing of specific intent. The intent to be proved under the statute is that the contact be "for the purpose of arousing or satisfying the sexual desires of either" party. See Iowa Code §§ 709.8, 709.12.

As Sproule concedes specific intent of a defendant can rarely be established by direct evidence. That intent generally can only be established by circumstantial evidence and reasonable inferences drawn from the conduct in question. See

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II Iowa Uniform Jury Instructions Ann. No. 215 (1982); State v. Luter, 346 N.W.2d 802, 809 (Iowa 1984); State v. Serr, 322 N.W.2d 96, 101 (Iowa App. 1982).

The evidence reveals that Amy (11), Christine (11), and Carrie (13) decided to ride their bikes to a local swimming pool. Sproule was going out to walk his god in the woods of a state park. Amy's mother gave her permission for the girls to walk the dog with Sproule with the understanding that Sproule would leave the girls at the swimming pool after the walk. At the request of Amy's mother, Sproule allowed Amy's little brother to go along with the group.

After the walk was over, Sproule drove by Amy's home to leave the younger brother with his mother, but the mother was not home yet. Sproule then dropped Christy and Carrie off at the swimming pool. Amy and her brother went with Sproule to his home to continue trying to reach the children's mother. Once at Sproule's home they attempted to call Amy's mother unsuccessfully. Sproule asked Amy what types of music she liked and turned on some music. He arranged for Amy's brother to leave the apartment to find a neighbor child. Sproule then suggested that Amy lie down while he rubbed suntan lotion on portions of her body which were not covered by her one-piece swimming suit. Amy testified that Sproule put his fingers under the bathing suit and in contact with her breast area.

The evidence shows us a 47-year-old man who brought an eleven-year-old girl he had known for only one hour to his apartment. The girl laid down on the floor as he suggested and allowed him to apply suntan lotion to her body. In the course of the events, his hand came in contact with her breast area.

Such evidence is sufficient to support a verdict of guilty. We find it unnecessary to determine whether we should adopt a technical rule requiring additional evidence beyond the evidence of the act itself as advocated by the defendant. In this case, the additional evidence is sufficient to support the verdict.

Sproule incorrectly asserts that a complaining witness's testimony must be supported by corroborating evidence. The supreme court has held that the crime of lascivious acts with a child, the forerunner to indecent contact with a child, does not require corroboration. "The testimony of the prosecuting witness alone, if believed, is sufficient to warrant a conviction." State v. Doss, 246 Iowa 651, 652, 67 N.W.2d 451 (1954).

A child's testimony concerning improper contact with an adult is often viewed as inherently trustworthy. See State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983); State v. Myers, 382 N.W.2d 91 (Iowa 1986). In cases such as this, a child's testimony tends to hold an air of authenticity. Also it is believed that children are incapable of fabrication concerning the mysteries of sexual experience. Brown, 341 N.W.2d at 14. Case law dating to 1933, directs that the fact finder in a trial of a specific intent offense such as this, may draw a permissive inference that the intent was present in the defendant's act and proof of separate and distinct acts of a similar nature is unnecessary. State v. Kincade, 241 Iowa 1259, 45 N.W.2d 736, 738 (1950); State v. Rounds, 216 Iowa 131, 248 (N.W. 500 (1933).

Sproule says the fighting issue in this case is whether there is sufficient evidence in the record to support a finding that defendant acted with an intent or purpose of sexual arousal. The State claims that an inference of the requisite intent can be inferred from the nature of the act itself.

Sproule contends that the crucial threat running through all the reported cases in which the element of intent or purpose is supplied solely through inference to be drawn from the nature of the contact itself is that there is no other possible inference that could be drawn from the nature of that contact.

Sproule urges that viewing all the facts in the light most favorable to the State and giving full credibility to the testimony of the child they do not support an inference of guilt because the act itself here does not unequivocally indicate sexual activity.

He says where a plausible explanation of the conduct of the defendant exists other than improper sexual motive that something more is required than reliance solely on the inference from the act itself.

He denies the State's contention that he is advocating a corroboration requirement. He says he is not advocating a technical requirement of independent corroboration evidence. He says the issue is one of sufficiency of the evidence. The evidence must do more than raise the inference of guilt beyond mere suspicion, speculation or conjecture.

Sproule says "no one could honestly claim that an incidental contact with the breast area of a ten-year-old child that occurs during the act of applying suntan lotion to her chest is so unmistakenly sexual in nature as to permit no other inference. He claims there was no other evidence, circumstantial or direct, to support a finding that the defendant acted with improper purpose or intent.

We find the totality of the circumstances support the trial court's finding of guilt.

AFFIRMED.

All judges concur except Schlege, J., who dissents.

I respectfully dissent. I cannot agree that the State has proven, beyond a reasonable doubt, that defendant acted with an intent or purpose of sexual arousal.

The majority has accepted the State's argument on two issues that consequently has resulted in the affirmation of defendant's guilt of the charges against him. First, they conclude that the testimony of the eleven-year-old victim (ten at the time of the alleged act) need not be corroborated. Second, they conclude that the element of intent may be "inferred from the nature of the act itself." I am compelled to argue that (1) the testimony of the victim, in this case, is not so inherently trustworthy that it does not need corroboration; and (2) the "nature of the act itself", without additional evidence, does not allow an inference of specific intent necessary to find defendant guilty of this offense, beyond a reasonable doubt.

I begin this analysis with the concession that the findings of fact by the trial court, if supported by substantial evidence, are binding upon the appellate court. See Iowa R. App. P. 14. I intend to show, however, that the trial court's findings that defendant acted with the required specific intent, and, in fact, even touched the victim's breast, are not supported by substantial evidence.

I. The Child's Testimony. Contrary to what the majority has stated, defendant does not insist that a complaining witness' testimony must be supported by corroborating evidence. This characterization allows the reader to conclude that the defendant argues corroboration is always needed. He does not make such an argument. He does argue, however, in this case, corroboration of the victim's testimony should have been required.

The majority states, in effect, that the supreme court does not require corroboration for the crime of lascivious acts with a child. They then cite State

v. Doss, 246 Iowa 651, 652, 67 N.W. 2d 451 (1954). I do not believe that the supreme court intended to lay down such a rule that the crime of lascivious acts with a child never needs corroboration. And yet, a fair reading of the majority's statement would have one believing that is the case. In fact, the quotation from Doss is, at worst, taken out of context, and at best, inapplicable to the facts of this case.

In Doss, the 15-year-old victim, and prosecuting witness, testified that the defendant made numerous trips with her to his home at which time he had intercourse with her. She became pregnant and gave birth to a child.

The supreme court stated:

> While there is no testimony as to the acts in question, other than that of the girl, there is considerable [sic] to the attention shown to her by the defendant and as to various times they were together. Many discrepancies as to the time and place when and where these acts took place appear in her cross-examination. The defendant denies all wrongdoing and asserts a mere friendly interest in the girl. . . .
>
> All crimes are statutory. Some require corroboration, some do not. This specific one does not. The testimony of the prosecuting witness alone, if believed, is sufficient to warrant a conviction. It is true, as claimed by the appellant, that a witness may be so discredited upon cross-examination as to entirely destroy his direct testimony as a matter of law. But such is not this case. Whatever discrepancies appear in her testimony merely tend to weaken her statements as to the time and place but not as to the acts having been committed. As to that feature, she did not waiver. It was for the jury to judge, not the court, and the case was properly left to the jury to decide." (Emphasis added.)

I believe a proper application of the majority's quotation is to facts similar to those found in Doss. That is, corroboration is not required if the witness is competent, trustworthy, and believable. Therefore, the quotation from Doss would be applicable to the case at bar if the facts here are sufficiently analogous to those in Doss. The only similarity I can find in the two cases is that the

essential incriminating evidence is derived from only one similar source, the victim. Thus the reliability and trustworthiness of the victim's testimony is crucial to this case, just as it was in Doss.

What about the trustworthiness of this witness? The majority cites State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983), when it asserts that a child's testimony is "often viewed as inherently trustworthy" and that "children are incapable of fabrication concerning the mysteries of sexual experience." I again advocate that the holdings of Brown are misapplied to this case. In Brown, a five-year-old victim's identification of the defendant at the police station provided the factual foundation for the quotation used here by the majority. Despite what one might assume from the selected quotations used by the majority, the child's identification was not allowed as evidence by the supreme court. The court reasoned:

> Furthermore, the "guarantees of trustworthiness" that foundation admission under the rule are lacking here. Although there is substantial authority for the proposition that children are by nature innocent and inherently trustworthy, almost all of these cases are based on the excited utterance exception. In the overwhelming majority of these cases, a distressed child has blurted out to his or her parent a garbled story of sexual abuse. The undoubted reliability of these statements comes not only from the child's evident distress but also from the childlike nature of the narrative, see United States v. Nick, 604 F.2d 1199, 1201 (9th Cir.1979) ("The child's terminology has the ring of verity and is entirely appropriate for a child of tender years."); . . . .
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> * * *
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> It is, in fact, exactly this rationale which permits the introduction of this victim's statements to his mother and her friend, placing the assault in defendant's apartment. However, the boy's later identification of the photograph contained no such indicia of reliability. In making it, he was not showing a forced awareness of a realm of experience ordinarily hidden from young children; he was merely responding with a single gesture to a very ordinary and narrowly focused question. Indeed, the identification, made at the behest of a foreign authority figure and in response to a very specific question, partakes far more of the character of testimony at trial than it does of the character of an excited utterance.

> And, although a finding of incompetence to testify relates primarily to a potential witness's understanding of the oath, it also suggests a lack of either the maturity or the mental capacity required to answer questions truthfully. Where there is nothing else to indicate a propensity either for truth telling or for the truthfulness of a particular statement, that statement cannot be admitted.

Id. at 14, 15.

We have no excited utterance here. The record shows that when the victim arrived at her mother's house there was no excited accusation that defendant had sexually or in any other way improperly made contact with her. Upon arriving home, the victim and her mother first discussed the fact that defendant had rubbed some lotion on her arms and legs. They also discussed a game or toy that defendant had at his house that she and her brother observed or played with. The mother's testimony then went as follows:

> Q. And she didn't say anything at that time about any other areas of her body other than her arms and her legs?
>
> A. No.
>
> Q. When was the first time that you were aware that Amy said anything about lotion having been rubbed on her breast area?
>
> A. Well, she had said at a later time that lotion had been rubbed underneath her swimming suit, front of her swimming suit. She never really used the word breast until we had gone in for a meeting at the county attorney's office."

Clearly, if the reasoning of Brown were to be appropriately applied to this case, it would provide authority to seriously question the trustworthiness if not the admissibility of the victim's testimony in this case. Even if this testimony is admissible, I believe the holding of Doss would require at least some corroboration.

I also part with the majority's acceptance of the State's argument that the required specific intent can be inferred from the nature of the act itself,

in this case. I certainly do not disagree with State v. Kinkade, 241 Iowa 1259, 1261, 43 N.W.2d 736, 738 (1950), where the supreme court said, "In cases involving the offense charged here, it is ordinarily held the intent may be inferred from the nature of the act itself and the proof of separate and distinct acts of a similar nature is unneccessary." In Kinkade, the defendant admitted that "if the act was done at all it was not accidental, unintentional or inadvertent." Id. It was defendant's strategy in Kinkade to take advantage of earlier supreme court holdings and prevent evidence of other similar acts from being admitted into evidence, thus contesting only the commission of the act itself. However, the victim's testimony was substantially corroborated so that there was a clear commission of the act upon which the necessary intent could be inferred.

Such is not the case before us today. The only evidence of the commission of an act is the uncorroborated testimony of an eleven-year-old witness. She testified in part, as follows:

> Q. Now, can you describe to me what part of your legs he put the lotion on?
>
> A. Just up to my thighs.
>
> Q. Did he put the lotion on almost up to where your suit began?
>
> A. No.
>
> Q. Did heA. Well, yes. He did, but he didn't put it under my swimming suit.
>
> * * *
>
> Q. Then where did he put the lotion?
>
> A. My arms.
>
> Q. Okay. And after he put it on your arms, where did he put it?
>
> A. My chest.
>
> Q. Okay. Now, could you stand up again for me.

(Witness stands.)

I know it's kind of difficult for you to talk about this, I believe, Amy. I could use a doll to have you describe where he put the lotion, but you think you need that?

A. No.

Q. Okay. Now, you mentioned that he started putting some lotion on your chest. Describe to me — you've got a high neck sweater on right now. You didn't have that on then. You had your suit on, is that right?

A. Uh-huh.

Q. Tell me about the top of this suit that you had on. What kind of suit is it?

A. It came down to here (indicating), or right up here, you know.

Q. I'm looking at your sweater right now, and you've got some animals on your sweater.

A. Yes.

Q. What are those? Dogs?

A. Yeah.

Q. Is that about where your suit ended?

A. About right here, where the first stuff of white —

Q. Okay. Where that design is across A. Yeah.

Q. And your suit has some straps on it too, is that right?

A. Yes.

Q. What kind of straps?

A. They were thin straps.

Q. Okay. And how about the sides of your suit, under your arms? I assume you have to have a hole to let your arm out. Where does that go?

A. Like that (indicating).

Q. Pretty much right under your armpit there?

A. Yeah.

Q. Now, when he started putting the lotion on the front of you there — stand just a bit longer if you could. Can you describe to me both in words and by — with your hands where he put that lotion?

A. Right here on my chest, and that's when I started getting kind of restless.

Q. Okay. Did his fingers or did his hand go underneath your suit?

A. Yes.

Q. And what are you describing to me, down towards your — underneath your suit, under the armpits and down towards your stomach?

A. Just straight down.

Q. Okay. Did he have his hands underneath your suit during this time?

A. No.

Q. Did he have his fingers underneath your suit?

A. Yes — He didn't exactly

Q. Okay.

A. —underQ. Let me ask you again: Did he have his hands under your suit?

A. Yes.

* * *

Q. Now, we talked earlier with a little girl about the language she uses for different parts of the body. You're old enough. What do you call this part of a woman's body?

A. Private spot.

Q. Okay. Is there a word — would you call it breast too? Do you know what that word is?

A. Yes

Q. Did Frank put lotion on your breasts? I know you're not a fully developed woman yet, but did he put lotion on your breasts?

A. I — well, my opinion, yes.

The witness could not find the swimming suit that she wore that day at defendant's home. Therefore she had to narratively describe where defendant did or did not touch her. However, despite her testimony, it is still unclear exactly where the top of her suit was located on her chest. It is also unclear whether defendant's hand was underneath her suit or just his fingers or even the tips of his fingers. It is apparent, however, that the hand or finger did not remain under her suit for anything more than an instant, and was not repeated. This is entirely consistent with the intent and thought process of someone merely applying lotion to someone else's body.

Furthermore, it is not clear at all what encompasses this ten- or eleven-year-old's definition of breast. All that we have is her "opinion" that defendant touched her breast. A term that she did not use until visiting with the county attorney, and a term that was used by the county attorney at trial in a very leading and suggestive manner. I cannot conclude that this is substantial evidence upon which the trial court's findings can be supported. I certainly cannot conclude that this testimony establishes beyond a reasonable doubt that defendant either touched her breast or, at the very least, did so with the requisite intent.

For this court to allow the intent to be "inferred from the nature of the act itself", we must have a concise reliable portrayal of the act allegedly committed by the defendant. Such was the case in Kinkade, supra. But clearly such is not the case here. Using the legal reasoning of the majority, the facts and the evidence apply to the law in the following manner.

The intent is derived from the act itself. The act itself depends upon solely the witness' testimony; the witness only says that in her opinion defendant touched her breast; the witness was ten when the act allegedly occurred and

eleven when she tesified; the witness' testimony does not amount to an excited utterance and is not corroborated.

Unlike the majority, I cannot conclude that all of the dominoes in the State's case have fallen to prove defendant is guilty beyond a reasonable doubt. Therefore, I would reverse the trial court.