IN THE COURT OF APPEALS OF IOWA

FILED
DEC 17 1987
CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee)
vs.)
RICHARD VARNEY,)
Defendant-Appellant.)

Filed December 17, 1987

7-469
86-1549

424

Appeal from the Iowa District Court for Wayne County (No. 20921) - Michael Streit, Judge.

Defendant appeals from his conviction of six counts of second-degree sexual abuse. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Pamela Greenman Dahl, Assistant Attorney General; Thomas H. Miller, Assistant Attorney General; and Alan M. Wilson, County Attorney, for plaintiff-appellee.

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

SACKETT, J.

Defendant was charged with several other defendants, including his wife Naomi, with sexual abuse of his two minor daughters. He was tried to a jury, convicted on six counts of sexual abuse, and sentenced to six consecutive twenty-five year terms. Defendant appeals contending the trial court erred in striking the testimony of defense witness Naomi Varney, in denying his motion for mistrial and in failing to explain why defendant received a more severe sentence than his wife received from the same judge in her trial.

The State contended defendant participated in, or aided and abetted, three separate orgy sessions involving his two daughters. Each of these sessions allegedly took place at defendant's residence. Each allegedly involved Rex Devore, Bobby Clark and Jon Smith. Rex Devore testified on behalf of the State and admitted his involvement in the three episodes of sexual abuse. His story generally corroborated the testimony of the two victims. Defendant testified in his own behalf and denied any involvement in the incidents of sexual abuse.

The defendant subpoenaed Naomi Varney as a witness. Naomi, who was awaiting trial, filed a motion to quash her subpoena contending she felt if she took the fifth amendment it would be used against her later. The motion was denied.

Naomi was called by defendant as his witness. After some brief introductory questions were answered, the court interrupted Mrs. Varney's testimony.

> THE COURT: Excuse me, counsel. Mrs. Varney, it is my duty to inform you that you have a right to remain silent, that anything you say can and will be used against you in a court of law. You are under a trial information charged with similar crimes as your husband and I must advise you of those rights. You have an attorney and if you wish to talk to him you can at any time. Do you understand your right to remain silent?
>
> THE WITNESS: Yes, I do.

***

THE COURT: You may ask another question. Just a moment. Ma'am, have you had a chance to talk with your attorney?

THE WITNESS: Yes.

THE COURT: You may ask another question.

Q. (By Mr. Clogg) Naomi, was Bobby Clark, Jon Smith and Rex Devore ever all three present at your residence in Seymour, Iowa, in the summer of 1985? A. Would you repeat that question?

MR. CLOGG: Would you read it back, Mr. Reporter.

(Record read.)

THE WITNESS: No.

Q. (By Mr. Clogg) They were never all three there at the same time? A. No.

Q. Do you remember the summer of 1985 how often Rex Devore was at your residence in 1985?

THE COURT: Counsel, approach the bench, please.

***

Q. (By Mr. Clogg) Mrs. Varney, around the 4th of July of 1985 did you have any altercations or problems with Jon Smith? A. I take the Fifth.

A JUROR: I didn't hear what she said.

THE COURT: Say that again, ma'am.

THE WITNESS: I take the Fifth.

Q. (By Mr. Clogg) Mrs. Varney, are you telling me that you are refusing to answer any further questions that I might ask you about this? A. Yes.

Q. So any more questions I ask you you are going to assert your Fifth Amendment rights? A. Yes, I will.

MR. CLOGG: I guess I'm done, Your Honor.

The State then moved to strike Naomi's testimony on the ground that the witness had made a "complete denial" of the charges, and the State was now without the right to cross-examine the denial. Defendant resisted contending

the witness had waived her privilege of self-incrimination as to the subject matter covered in her direct testimony. The defendant contended the witness should be directed to answer questions on cross-examination. The trial court granted the State's motion to strike the testimony. Defendant moved for mistrial. The motion for mistrial was denied.

Defendant submits that it was error to strike Naomi's testimony, and error to deny the motion for mistrial after sustaining the State's motion to strike.

A. The Fifth Amendment Privilege

Defendant argues he was correct in his assertion Naomi Varney was subject to cross-examination by the State. Defendant points out it was not clear when the court struck Naomi's testimony that any further testimony would have been incriminating. The privilege of one not an accused is a privilege to be free from legal coercion imposed to compel an incriminating response which may be put to the individual and extends to a witness in a criminal proceeding. State v. Parham, 220 N.W.2d 623, 626 (Iowa 1974). The standard applicable in determining if the privilege is properly asserted is set out in Hoffman v. United States, 341 U.S. 479, 486-87, 71 S.Ct. 814, 818, 95 L.Ed. 1118, 1124 (1951):

> The privilege afforded not only extends to answers that would in themselves support a conviction * * * but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant * * * .[citing authorities] But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. * * * [citing authority] The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, * * * [citing authority], and to require him to answer if it clearly appears to the court that he is mistaken. * * * [citing authority] However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege,

> it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Id. Applying this standard, we find no error in the trial court's ruling.

B. Motion For Mistrial

Defendant claims once the trial court had sustained the privilege and struck the testimony in the presence of the jury, fairness required the granting of a mistrial. Defendant claims the court, in waiting until after Naomi began to testify in the jury's presence before admonishing her about the fifth amendment, created the impression the witness believed she had something to hide and that the court believed she had something to hide. Defendant cites State v. Allen, 224 N.W.2d 237, 241 (Iowa 1974), to support his contention. This case is clearly distinguishable from Allen, a case in which the State called a witness the prosecutor knew or had reason to anticipate would claim the fifth amendment privilege. Allen recognizes it is improper for a prosecutor to require a witness to claim his or her privilege against self-incrimination in the presence of the jury when the prosecutor knows or has reason to anticipate the witness will assert it. Allen, 224 N.W.2d at 240.

Defendant subpoenaed Naomi as a witness. She was a codefendant. Defendant had reason to believe she would assert the fifth amendment privilege. Additionally, she raised the fifth amendment privilege in her motion to quash. Naomi made defendant aware she would exercise the privilege; defendant elected to call her as his witness anyway.

The trial court has broad discretion in granting or denying a motion for mistrial. State v. Trudo, 253 N.W.2d 101, 106 (Iowa 1977), cert. denied, 434 U.S. 903. When evidence is improperly before the jury and is later withdrawn with a cautionary instruction to the jury, there is no error in refusing to grant

a mistrial except in extreme instances where the prejudicial effect would probably remain to influence the jury regardless of the exclusion of the evidence. State v. Peterson, 189 N.W.2d 891, 896 (Iowa 1971); State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970). We find no abuse of the trial court's discretion in denying the motion for mistrial.

C. Sentence

Defendant claims the trial court erred in failing to explain why defendant received a more severe sentence than the one imposed by the trial court in Naomi Varney's case. Defendant was sentenced to consecutive twenty-five year terms of imprisonment on the six counts of sexual abuse in the second degree upon which he was convicted. Naomi Varney was convicted on four counts of sexual abuse in the second degree. She received concurrent sentences on two counts and consecutive sentences on two counts. She was sentenced by the same judge who sentenced defendant. The reasons stated for defendant's sentences were (1) the seriousness of the offenses, (2) the fact defendant was an active participant and if anything the originator of the problem, and (3) the crimes were calculated and intentional victimizations of his daughters and they resulted in serious and emotional harm to them.

Defendant contends the statement of reasons for sentence should have included an explanation for the disparate treatment of him and his codefendant spouse, who he claims was similarly situated. The defendant recognizes codefendants need not receive identical sentences and each participant in criminal activity must be judged on an individual basis. But the defendant contends the possibility of the involvement of improper sentencing factors is raised wherever similarly situated codefendants receive significantly different sentences from the same sentencing judge. Defendant argues any wide disparity in the

treatment of codefendants should be justified on the record by the trial court and because the trial court did not show why defendant was treated more harshly than his codefendant the case should be remanded for resentencing. Defendant provides no supporting authority for this position. However, we find it unnecessary to address this issue. Defendant was charged and convicted of six offenses; his wife was charged and convicted of four. The trial court found the defendant, if anything, was the originator of the problem and intentionally victimized his daughters. The defendant and his wife were clearly not similarly situated defendants. A sentencing court will not be reversed unless found to have abused its discretion. State v. Wright, 340 N.W.2d 590, 593 (Iowa 1983).

We find no abuse of discretion. The sentence is affirmed.

AFFIRMED.