IN THE COURT OF APPEALS OF IOWA

No. 1-31 / 90-883

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

MICHAEL HUGH SHERIDAN,

Appellant.

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Appeal from the Iowa District Court for Butler County, Carl D. Baker, Judge.

Defendant appeals his conviction, following a jury trial, for third-degree sexual abuse. **AFFIRMED.**

Gary R. Papenheim, Parkersburg, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, Gregory M. Lievens, County Attorney, and Brian Heyer, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

Michael Sheridan was charged with third-degree sexual abuse in violation of Iowa Code section 709.4(5)(1989). Section 709.4(5) provides that a person commits sexual abuse in the third-degree if the person performs a sex act with another person and "[t]he person is six or more years older than the other participant, and that other participant is fourteen or fifteen years of age." At the time of the alleged sex act, Sheridan was twenty-four years old and the victim was fifteen.

The trial information accused Sheridan of engaging in sexual intercourse with the victim on or about November 26, 1989. Sheridan presented an alibi defense that he had been in Wyoming from November 4, to December 3, 1989. Several witnesses supported Sheridan's alibi. Sheridan also denied ever engaging in intercourse with the girl. He sought to explain her allegations by showing she fabricated the claim out of jealousy.

A jury found Sheridan guilty of third-degree sexual abuse. He has appealed the resulting conviction.

First, Sheridan challenges the sufficiency of the evidence to support the conviction. He contends the trial court should have granted his motion for a directed verdict of acquittal because the State never rebutted his alibi.

Secondly, Sheridan contends the trial court erred, in light of his alibi defense, in instructing the jury the date

of the offense was not material to guilt. He argues that although the actual date of sexual abuse is generally not material, under the facts of his case the date was material because of his alibi defense.

Thirdly, Sheridan contends the trial court erred by allowing a witness to testify about out-of-court statements made by the victim concerning the incident. The State responds that the victim's statement was an excited utterance and a prior consistent statement, which was admissible after Sheridan attempted to impeach the victim's credibility by suggesting her accusation was a recent fabrication.

Lastly, Sheridan argues the trial court abused its discretion by allowing the State to cross-examine him about a statement he made to authorities while being held in custody. In the statement, Sheridan allegedly denied the incident described by the victim but admitted engaging in sexual intercourse with the victim at a different time and place and under different circumstances. The trial court allowed the State to use the statement to impeach Sheridan after he testified he had never engaged in any sex act with the victim.

We address Sheridan's first two challenges together. Sheridan argues that instruction 16, which instructed the jury that the date of the commission of the offense was not material to guilt, violated his due process right to

reasonable notice of the crime with which he was charged. Sheridan claims that absent proper notice he could not prepare a defense. Sheridan asserts he prepared his alibi defense in reliance on the trial information. He contends instruction 16 impermissibly allowed the jury to go beyond the time frame specified in the trial information when deciding whether a sex act ever occurred. Jury instruction 16 stated:

> The date fixed in the County Attorney's Trial Information for the commission of the offense is not material and a conviction can be returned upon any date within the statute of limitations. The statute of limitations requires the State to prove the offense was committed within three (3) years prior to the filing of the Information. The Information was filed on January 23, 1990. You must still consider the defendant's defense of alibi, which is defined in instruction 17.

Generally, under Iowa law the State does not have to elect or prove a date certain in order to prove incest or statutory rape since the exact time of the offense is not material. State v. Griffin, 386 N.W.2d 529, 532 (Iowa App. 1986)(citing State v. Rankin, 181 N.W.2d 169, 171 (Iowa 1970)). Sheridan concedes the instruction correctly instructed the jury on the general law about sex abuse, but he argues that the instruction was improper in the circumstances of his case.

Sheridan complains that since the State elected in the trial information to specify the abuse occurred "on or about November 26, 1989," the jury instructions could not expand the time frame out to three years prior to the

filing of the trial information. Sheridan argues that because the victim denies the abuse occurred before November 4, or after December 1, 1989, and because the State failed to rebut his alibi that he was in Wyoming during the period of time the victim alleges the offense occurred, he should have been acquitted. Sheridan claims the only way the jury could have convicted him was by using instruction 16 as a means of convicting him of engaging in intercourse with the victim at some other time and place.

During its deliberation, the jury sent a note to the trial court requesting clarification of the instructions. The note stated: "We need clarification on the term 'sex act.' Are we to consider only the one sex act occurring in the bathtub or any sexual intercourse that may have occurred with Micheal [sic] Sheridan (any other incident)?" The court responded: "You can consider all the evidence presented at trial, but you must base your verdict on the allegation of the sex act occurring in the bathtub and the definition of 'sex act' found in the jury instructions."

Because Sheridan alleges that jury instruction 16 deprived him of his constitutional right to due process, we make an independent evaluation of the totality of the relevant circumstances surrounding that challenge to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

We find that regardless of whether instruction 16 impermissibly allowed the jury to consider a crime other than the one Sheridan was charged with, the court's response to the jury's question during deliberation cured any potential problem.

Our scope of review for Sheridan's challenge to the sufficiency of evidence is on assigned error only. Iowa R. App. P. 4. We uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational

fact finder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

Sheridan deposed the victim in February of 1990 and even at that time she was vague about the actual date when the incident occurred. The victim, as well as the defendant and at least some of the witnesses, led chaotic lifestyles during the period of time when the incident is claimed to have occurred. At least once during the trial, the victim conceded that although she was "pretty sure" the incident occurred in November, it was possible it might have occurred in December. This response came immediately after the victim had responded affirmatively to the question "[a]re you certain that it occurred in November?" Additionally, although the victim was vague about the date the incident occurred, she was quite specific about the details of the abuse. Furthermore, other than the "paper-work" signed and dated by employees of the State of Wyoming on November 27, 1989, the defendant relied on the testimony of his family and friends to verify he remained in Wyoming until December 3, 1989.

The jury is the appropriate party to evaluate the truth and veracity of Sheridan's explanation of his whereabouts. State v. Horrell, 260 Iowa 945, 956-57, 151 N.W.2d 526, 529 (1967). In addition, the jury is not required to accept a defendant's version of the facts. State v. Wilkens, 346

N.W.2d 16, 20 (Iowa 1984). With these principles in mind, we find the jury could reasonably have concluded that "on or about" November 26, 1989, Sheridan engaged in sexual intercourse with the victim in a bathtub.

Next, we address whether the trial court improperly allowed a witness to testify as to statements about the incident made by the victim. The trial court found the statement admissible as an excited utterance. The alleged incident occurred in the witness's apartment, while the witness was shopping. The witness testified the victim told her about the incident when she arrived home from shopping and the victim was visibly upset when she told the witness about the incident.

To be admissible as an excited utterance, the declarant's statement must be made under the influence of the excitement caused by the event. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986). The lapse of time between the event and the statement may be lengthy, including up to several hours, so long as the declarant was still in a state of excitement resulting from the event. Id. (authorities omitted). The admission of evidence on this ground is largely within the discretion of the trial court. Id.

The State also argues the statement was admissible as a prior consistent statement following impeachment of the victim's veracity. Iowa Rule of Evidence 801(d) provides in pertinent part:

> A statement is not hearsay if -- (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

We find the testimony was admissible as either an excited utterance or as a prior consistent statement to rehabilitate the declarant's testimony.

Lastly, we address Sheridan's contention that the trial court erred in allowing the prosecutor to question him about statements he made while in the custody of the Butler County Sheriff's department concerning another incident of sexual intercourse with the victim. Prior to the trial, a hearing was held on Sheridan's motion to suppress "any and all evidence" obtained from the interrogation by the Butler County Sheriff. The court concluded Sheridan's statements "were made voluntarily and free from coercion and were not made in violation of constitutionally protected rights." We find the state properly used the statement for impeachment purposes after Sheridan testified he had never engaged in any sex act with the victim.

We affirm Sheridan's conviction for third degree sexual abuse in all respects.

AFFIRMED.