IN THE COURT OF APPEALS OF IOWA

No. 3-171 / 92-446

FILED
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CLERK SUPREME COURT
000401

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LEE OLTROGGE,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, James C. Bauch, and Lawrence H. Fautsch, Judges.

David Lee Oltrogge appeals from his conviction, following a jury trial, of sexual abuse in the second degree in violation of Iowa Code section 709.3 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, and Thomas J. Ferguson, County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

OXBERGER, C.J. 000402

David Oltrogge and codefendant Scott Neuendorf were charged with sexual abuse in the second degree. A motion to sever the trials was filed and granted.

Prior to trial, the State filed a motion in limine seeking to exclude references to an allegation that the victim was a prostitute, based on Iowa Rule of Evidence 412. The court ruled only Oltrogge could make reference to the victim being a prostitute.

At trial, the victim testified she was approached by three men in a car. One of the men, Neuendorf, produced a gun and ordered her into the car. They later let the third man out. Oltrogge and Neuendorf then drove the victim to a field and ordered her out of the car. When she refused Neuendorf struck her on the head with a bottle and Oltrogge punched and kicked her. Oltrogge continued kicking her as she was pulled from the car, by the ankle, by Neuendorf. She grabbed Oltrogge's fist and bit him. He complained of bleeding as a result. The victim's clothes were pulled from her. Oltrogge and Neuendorf took turns sexually abusing the victim through rectal, vaginal and oral intercourse. She was kicked and hit repeatedly on the head with a bottle. Finally, she was told to insert a beer can into her vagina. When she refused, they attempted to kick the can into her.

Oltrogge left for half an hour to get cleaned up. When he returned, Neuendorf walked to meet him. The victim ran

and hid in a wooded area until the men left. She then located her clothes and crawled to the Warehouse Market where she was helped by a clerk.

A criminalist testified the victim's clothing was in disarray and stained with blood and feces. Medical testimony indicated she had broken facial bones, abrasions on her face, numerous bruises on her back and arms, a loosened tooth and tenderness in her chest, back, ankle, jaw, shoulder and rectal area.

Oltrogge claimed the victim was a prostitute and alleged the sexual acts were consensual. He was found guilty and sentenced to a term not to exceed twenty-five years. He subsequently filed a motion for new trial on the basis of, among other things, the discovery of new evidence. The motion was overruled.

Oltrogge appeals. He argues he was denied a fair trial since he could not produce evidence to show the victim was a prostitute. He argues new evidence had come to light which proves that the victim entered the car voluntarily. Lastly, he argues that the State failed, among other things, to prove the sexual activity was against her will.

The State argues, among other things, that the so-called new evidence was available before trial and that counsel did not preserve error on rule 412 since he did not file a written motion, before or during trial, offering instances of Spates' past sexual behavior.

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I. Applicability of Rape Shield Law

Oltrogge contends the trial court erred in failing to admit evidence indicating the victim was a prostitute. The State argues Oltrogge failed to preserve this issue for appeal, pursuant to Iowa Rule of Evidence 412(c)(1), which requires the accused to make a written motion to offer evidence of the victim's alleged prior sexual behavior. Pursuant to State v. Martin, 385 N.W.2d 549, 552 (Iowa 1986), we find this issue adequately preserved for appeal and turn to the merits of the question before us.

Iowa Rule of Evidence 412, in pertinent part, provides:

> (a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, reputation, or opinion evidence of the past sexual behavior of an alleged victim of such sexual abuse is not admissible.
> (b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual abuse, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:
>
> (1) admitted in accordance with subdivisions "c"(1) and "c"(2) and is constitutionally required to be admitted; or
>
> (2) admitted in accordance with subdivision "c" and is evidence:
> (A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
> (B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual abuse is alleged.

The two narrow exceptions of subsection (b)(2) are not

pertinent to the facts of this case. Oltrogge is not attempting to offer information regarding the victim's past sexual behavior to show the source of the semen or injury. He is also not attempting to offer any past sexual behavior between the victim and himself.

Our decision turns on our application of subsection (b)(1), which requires prior sexual conduct of the victim be admitted if the requirements of subsection (c) are satisfied and the Constitution so requires. As earlier noted, the requirements of subsection (c) were technically not satisfied in this case, but we address the constitutional question.

The constitutional requirements of admissibility were spelled out in State v. Clarke, 343 N.W.2d 158, 161 (Iowa 1984). In Clarke, the court noted:

> The constitutional provisions most often implicated in cases of this type are the sixth amendment right of confrontation and the fourteenth amendment due process right to a fair trial. The Constitution, however, ordinarily requires only the introduction of otherwise relevant and admissible evidence. Evidence that is irrelevant is not constitutionally required to be admitted. Further, the trial court has a duty to protect a witness from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate. Even relevant evidence is not constitutionally required to be admitted if the prejudicial effect outweighs the probative value. . . .

Id. (citations omitted).

Oltrogge essentially argues he was denied due process when he was not permitted to rebut the victim's testimony with what he claims was relevant evidence of consent. We

are not persuaded and find the requirements of the Sixth and Fourteenth Amendments have been fully satisfied in this case. Oltrogge was permitted to testify he believed the victim was a prostitute and consented to sexual acts on the night in question. The additional evidence he intended to enter was corroborative evidence that indicated the victim had been and may presently be a prostitute. It was not specific evidence she had engaged in prostitution that evening. We do not find evidence that the victim may have engaged in prostitution on a previous occasion or occasions relevant to the issue of consent on the night in question. In fact, we find this type of testimony falls squarely within the evidence the rape shield law was designed to prohibit. Consent to sexual acts on one, or many, occasions with someone other than the defendant is not relevant to, nor probative of, the issue of consent for sex relations with the defendant. We find no error in refusing the offered testimony and affirm the decision of the trial court.

II. Motion for New Trial

Oltrogge also contends the trial court erred in failing to grant his motion for new trial on the basis of newly-discovered evidence. To prevail on a motion for a new trial based upon newly-discovered evidence, a defendant must show: (1) that the evidence could not have been discovered earlier in the exercise of due diligence;

(2) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) that the evidence probably would have changed the result of the trial. State v. Whitsel, 339 N.W.2d 149, 156 (Iowa 1983). In passing on motions for new trial based on evidence newly discovered, the trial court is vested with wide discretion. State v. More, 382 N.W.2d 718, 723 (Iowa App. 1985). Motions for new trials based upon newly-discovered evidence are not favored and should be closely scrutinized and granted sparingly. State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).

We find adequate support in the record to indicate the proffered evidence was discovered by the investigator prior to trial. The investigator himself testified he had talked to the possible witness about the case "five to ten times" prior to trial. In addition, we agree with the trial court's conclusion that the proffered evidence would not have changed the outcome of the case. Accordingly, we affirm the decision of the trial court.

III. Sufficiency of the Evidence

Finally, Oltrogge contends there was insufficient evidence to sustain the jury's verdict. Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational

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trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

We find substantial evidence to support the jury's verdict. Although Oltrogge contends the victim consented, we find nothing about the victim's encounter with Oltrogge which would support a finding of consent. The evidence left on the scene was exactly as the victim described it. The victim was severely beaten; her injuries were not at all consistent with a theory of consent. Much of Oltrogge's own testimony corroborates the testimony of the victim. We find this sufficient to support the jury's verdict and affirm Oltrogge's conviction for sexual abuse in the second degree.

AFFIRMED.