

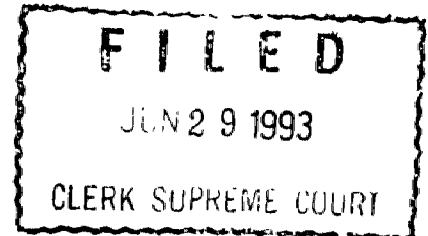
IN THE COURT OF APPEALS OF IOWA

No. 3-221 / 91-1893

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GEORGE JAMES BRITT,
Defendant-Appellant.



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Appeal from the Iowa District Court for Madison County,
James W. Brown, Judge.

George James Britt appeals from his conviction,
following a jury trial, of sexual abuse in the third
degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia
Reynolds Lapointe, Assistant State Appellate Defender, for
appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich,
Assistant Attorney General, and A. Zane Blessum, County
Attorney, for appellee.

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

OXBERGER, C.J.

Eudora Sole, a ninety-two-year-old resident of the Care Center North, was sexually abused by a man whom she thought was a doctor examining or "poking" her. She suffers from organic brain syndrome which is similar to Alzheimers and senile dementia. It was determined she had been sexually abused after blood was observed on her underwear, bed, the floor and chair, and a medical examination revealed that her vagina was lacerated.

George James Britt, a nurse's aide, was charged with sexual abuse in the third degree.

At trial, Janet Wilson, the nurse on duty the night of the incident, testified Britt was the only male employee working that night. He was in charge of the west wing where Mrs. Sole resided. Ms. Wilson testified that although she usually saw Britt every half hour to an hour while they were both making their rounds, on the night of the incident she could not account for his whereabouts for over an hour. She said during this time she passed Ms. Sole's room and the door was shut, which was very unusual. The prosecutor then asked her where she thought Mr. Britt was. At this point, defense counsel objected on speculation grounds but was overruled. Ms. Wilson replied, "I believe he was in the room when the door was closed."

The next day the judge told both parties he had changed his mind on the ruling and would tell the jury he should have sustained the objection and admonish them to disregard

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it when deliberating. Britt's motion for mistrial was denied. The court then cautioned the jury accordingly.

DCI criminalist Paul Bush testified he examined seminal fluid from Mrs. Sole's vagina, bed pad, and undergarments. He learned the semen was from an "A" secretor which is consistent with Britt's blood type. Further, taking account of PGM factors, he concluded Britt is one of 10.25% of the Caucasian male population who the semen could have come from. This testimony eliminated an earlier suspect, Terry Strain, who had come to work at 5:45 a.m.

Other witnesses testified the doors were always locked at night and no residents were seen wandering about in the hallways. Furthermore, it was established that only eight of twenty-five male residents were at all ambulatory, two of which were capable of getting the side rails of their beds down without assistance.

The court denied Britt's motions for judgment of acquittal based on lack of evidence. Britt was found guilty by the jury and his motion for judgment notwithstanding the verdict was denied. He was sentenced to an indeterminate term not to exceed ten years.

Britt appeals.

I. Curative Instruction Regarding Improper Lay Opinion

Testimony

Britt first contends the district court erred by overruling his motion for mistrial based on the improper

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lay opinion testimony of Janet Wilson. Specifically, he claims her testimony that she believed Britt was in the victim's bedroom with the door closed warranted granting his motion for mistrial. He claims the curative instruction given to the jury was not sufficient to override the prejudice the statement created.

Cautionary instructions are presumed to cure error in all but the most "extreme cases". State v. Newman, 326 N.W.2d 788, 792 (Iowa 1982); State v. Belieu, 288 N.W.2d 895, 901 (Iowa 1980). We do not find this to be an extreme case and conclude the trial court's prompt, precise cautionary remarks cured any error. We further conclude Britt has failed to show he was prejudiced and affirm the trial court's denial of Britt's motion for mistrial.

II. Sufficiency of the Evidence

Britt also challenges the sufficiency of the evidence supporting his conviction. He contends the possibility of other perpetrators was not sufficiently ruled out. He also contends the victim's failure to identify him as the perpetrator causes the conviction to be seriously questioned.

Our scope of review is on assigned error only. Iowa R. App. P. 4 The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will 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. Bass, 349 N.W.2d 498, 500 (Iowa 1984); State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985). 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. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

Ample evidence supports the jury's verdict finding Britt guilty of third-degree sexual abuse. He was the only male employee on duty the night the incident occurred. Testing from semen samples found on and around the victim, coupled with other testing, indicates Britt was one of 10.25% of the male Caucasian male population who may have

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contributed the semen. The charge nurse on duty that night testified she was unable to account for Britt's whereabouts for over an hour. She also testified she locked the doors shortly after arrival, making it unlikely that someone else broke in and committed the abuse. Few male residents in the facility had the physical capacity to perform the act. Another witness testified there were no male residents roaming the halls on the night in question. Finally, the victim's inability to identify her attacker is of little consequence in this case. The victim had a condition like Alzheimers disease accompanied with senile dementia. She was unable to identify anything significant about the abuse, except that a doctor had examined or "poked" her.

Based on this evidence, we conclude the jury had sufficient evidence from which to find Britt committed sexual abuse in the third degree. We affirm the conviction.

AFFIRMED.