

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 28 1982

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

EDWARD FRANKLIN VAUGHAN,

Defendant-Appellant.

Filed October 28, 1982

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2-333

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Appeal from Johnson District Court - Ansel J. Chapman, Judge.

Defendant appeals from his conviction and sentence on a charge of second degree sexual abuse in violation of Iowa Code § 709.3(1) (1979), asserting: (1) that trial court abused its discretion in excluding certain evidence concerning the victim's past sexual conduct; (2) that defendant was denied the equal protection of the laws because the legislature prescribed a longer sentence for forcible sexual abuse committed by a person acting in concert with others than for forcible sexual abuse committed by a person acting alone; and (3) that a sentence of imprisonment for up to 25 years is cruel and unusual punishment for the crime of second degree sexual abuse. AFFIRMED.

Dennis S. Clark, Iowa City, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven M. Foritano, Assistant Attorney General, and plaintiff-appellee.

Considered en banc.

Defendant, Edward Franklin Vaugh, appeals from his conviction and sentence on a charge of second degree sexual abuse in violation of Iowa Code section 709.3(1) (1979). Defendant asserts: (1) that the trial court abused its discretion in excluding certain evidence concerning the victim's past sexual conduct; (2) that defendant was denied the equal protection of the laws because the legislature prescribed a longer sentence for forcible sexual abuse committed by a person acting in concert with others than for forcible sexual abuse committed by a person acting alone; and (3) that a sentence of imprisonment for up to 25 years is cruel and unusual punishment for the crime of second degree sexual abuse. We affirm.

The evidence shows that on May 3, 1981, the fourteen-year-old victim ran away from Sioux City and hitchhiked to Iowa City. Upon arriving in Iowa City, she had an opportunity to converse with two men, one of whom was defendant. The alleged rape occurred a short time later in a woods near the University of Iowa campus.

During trial, an in-camera hearing was held on admissibility of certain evidence of the victim's previous sexual conduct. At the hearing, the victim testified that she had told her boyfriend she was pregnant three times when she was not. The State brought out the fact that, at those times, the victim honestly believed she was pregnant. The victim also testified that she had developed an ovarian cyst as a result of her use of birth control pills and that, although the cyst had been surgically removed, she still felt some pain during certain activities. Defendant argued that the victim's alleged lie to her boyfriend about being pregnant was relevant to the victim's credibility. He also asserted that the testimony regarding the operation was relevant to explain the victim's screams during the incident. Trial court excluded the victim's testimony about her statements to her boyfriend and her use of birth control pills, stating that such testimony was not relevant and, even if it were, its probative value would be outweighed by its prejudicial effect. The trial court also noted in excluding the

testimony that defendant had failed to apply for its admission not later than five days before trial as required by Iowa Rule of Criminal Procedure 20(5). Defendant, however, was allowed to question the victim about the nature of the operation and the pain it caused.

The jury found defendant guilty of second degree sexual abuse. Second degree sexual abuse, a class B felony punishable by a prison term of up to 25 years, includes forcible sexual abuse committed by a person acting in concert with others. From this verdict and sentence defendant appeals.

I. Scope of Review. When violations of basic constitutional safeguards are alleged, this court makes an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). Other issues are reviewed on assignment of error only. Iowa R. App. P. 4.

II. Evidence of the Victim's Past Sexual Conduct. Defendant urges that trial court's ruling denied him his constitutional right to every available defense, including the opportunity to pursue certain issues regarding the truth and veracity of the victim. The trial court excluded such testimony on the basis of: (1) noncompliance with Iowa Rule of Criminal Procedure 20(5); (2) prejudicial value outweighed by probative value; and (3) irrelevancy. We affirm the trial court's exclusion on the basis of Iowa Rule of Criminal Procedure 20(5).

Iowa Rule 20(5) provides in part: "Evidence of the prosecuting witness's previous sexual conduct shall be admissible upon appropriate order of the court if the defendant shall make application to the court not later than five days before trial." At the time of trial defendant urged extenuating circumstances as reasons for his noncompliance with rule 20(5). These reasons, however, do not appear in the record.

We find that the rationale and reasoning in State v. Ogilvie, 310 N.W.2d 192 (Iowa 1981), is applicable to the case at bar.

One purpose of rape shield laws is to protect the privacy of victims. Another is to encourage the reporting and prosecuting of sex offenses. [citation] A third reason is to prevent time-consuming and distracting inquiry into collateral matters. [citations] A victim's privacy will be invaded as much when the inquiry is motivated by desire to confront real evidence as when it is motivated by desire to impugn her character. The result does not depend on the motive for the inquiry.

Id. at 195. The policy of this law will not be furthered by anything less than rigid application. Defendant's failure to comply with rule 20(5), without establishing attendant extenuating circumstances, is fatal to his assignment of error. We thus do not reach the relevancy issue.

III. Equal Protection. Defendant argues that defining one person's commission of sexual abuse against the will of another as only a class "C" felony, while categorizing sexual abuse as a class "B" felony when committed by two or more people acting in concert is a denial of equal protection since the only distinguishing criterion is the number of participants. He further submits that the number of individuals involved in a crime is, in fact, a suspect classification and not sufficient to require different classifications of punishment. We disagree.

Generally, a claim of denial of equal protection involves an assertion that the government has subjected someone to disparate treatment as compared to other persons similarly situated . . .

The legislature has vast authority and wide discretion in determining the classifications of persons to which its legislation shall apply. A statute does not violate equal protection unless there is no rational basis for the classification made by the legislature. The test is whether a rational relationship exists between the classification made and the governmental interest sought to be accomplished. In making this determination, a strong presumption of constitutionality is afforded the statute. When the constitutionality of the statute is only doubtful or debatable, we will not set it aside; every reasonable basis of support for the provision must be negated by the challenger.

We find no merit in defendant's argument that the number of perpetrators is a suspect classification requiring our application of the "strict scrutiny" test for equal protection analysis. See State v. Fagen, 323 N.W.2d 242, 243 (Iowa 1982). Accordingly, our test is whether there is a "rational relationship between the classification made and the legitimate governmental interest sought to be accomplished." State v. Kramer, 235 N.W.2d 114, 116 (Iowa 1975). Defendant "has the burden to negate every reasonable basis upon which the statute may be sustained." Fagen, 373 N.W.2d at 243.

The Missouri Court of Appeals in State v. Bear, 593 S.W.2d 254, 255 (Mo. App. 1980), stated that it is " 'obvious that a woman confronted with threatened or actual sexual abuse by a group of men is less likely to resist each member of the group. A victim in fear of physical violence or emotionally overcome by the prospect of repeated unwanted invasions of her body may well not resist, may consent or even invite, further invasions simply to terminate the ordeal.' " We believe such reasoning provides a rational basis for the legislative distinction at issue. Any classification made by the legislature is subject to a difference of opinion, but we will not declare a statute unconstitutional unless it is patently arbitrary. In the present case we are unable to say that the classification is palpably unreasonable and bears no relationship to a legitimate governmental interest.

IV. Cruel and Unusual Punishment. Defendant also claims that imposition of a term of imprisonment not to exceed 25 years constitutes cruel and unusual punishment for the crime of second degree sexual abuse. We disagree. The United States Supreme Court has recently made it clear " 'that for crimes conceivably classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislature prerogative.' " Hutto v. Davis, ___ U.S. ___, ___, 102 S. Ct. ___, ___, 70 L. Ed. 2d 556, 560 (1982) (citing Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980)). There is no

dispute that the sentence here is within the statutorily prescribed limits. We find no merit in defendant's arguments.

We affirm the trial court on all issues.

AFFIRMED.