IN THE COURT OF APPEALS OF IOWA

No. 4-515 / 93-1945

FILED
JAN 23 1995
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DEON ARNOLD REDMON,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Redmon appeals his conviction for the crime of second-degree sexual abuse. **AFFIRMED.**

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

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Karen Romano, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Habhab and Huitink, JJ.

HABHAB, J.

On June 10, 1993, Deon Redmon was charged by trial information with second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.2 (1993). The charges arose from allegations Redmon had sexually abused V.W., a six-year old child.

From December 1991 through March 1992, Redmon baby-sat V.W. and her brother Ronald on days when their mother, Veronica, was working and they were not in school. V.W. was then in kindergarten and only attended school three days a week. V.W. testified[1] Redmon took her into his bedroom to watch television while Ronald watched television in the living room. She stated Redmon told her to take off her clothes and he then stuck his finger in her private parts between her legs. She also stated he touched her with his penis on her private parts. According to V.W., Redmon told her not to tell anyone.

In March 1993, V.W. told Ronald about the touching. Ronald told an older sister, who in turn told Veronica. Veronica informed authorities and an investigation commenced.

V.W. was examined by Dr. Rizwan Shah, a medical doctor who is the director of the Family Ecology Center at Blank Children's Hospital. Dr. Shah testified V.W.'s genitalia showed signs of healed injuries and stated, with a reasonable degree of medical certainty, the injuries were

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1. V.W. was eight years old at trial time.

caused by digital penetration. Dr. Shah could not say when these injuries occurred. Dr. Shah found no evidence of repeated digital penetration and no evidence of penetration of the vagina with a penis.

Defendant's defense was that someone else had committed the sexual abuse. Prior to trial, the State filed a motion in limine seeking to limit defendant's presentation of evidence concerning Veronica's paramours. The district court ruled defendant could only present evidence to show who else had access to the child during the relevant period of time, which was the 1991-1992 school year.

Defendant presented the testimony of Veronica in an offer of proof. Veronica testified her former boyfriend, Jim Snell, was like a father to V.W. She also testified Jim had an alcohol problem and was a violent person. She testified she had ended her relationship with another boyfriend, Russell, after he pinched the bosom of V.W.'s older sister.

On cross-examination, defendant elicited testimony from Dr. Shah that there is usually a history of chemical dependency in families of children who are sexually abused. She also testified the sexual offender was generally someone who was in a close relationship with the child.

Defendant's wife, Nancy Redmon, testified defendant was not a drinking man or a violent man. She stated she had been a close friend of Veronica for several years and the

two families had a very good relationship until the present accusations were raised. Nancy testified Veronica left V.W. and Ronald in the care of Jim for a short period of time in 1991 while she was in the process of moving to Des Moines. Also, Russell had baby-sat for the children.

The case was tried without a jury to the court. The court found V.W. was a very credible witness. V.W. stated defendant, and no other person, had touched her improperly on her private parts. The court noted V.W. was very specific as to when and where the sexual abuse occurred. The court found defendant guilty of the crime of sexual abuse in the second degree. Defendant was sentenced to a term of imprisonment not to exceed twenty-five years. Defendant appealed. We affirm.

I.

Defendant contends there is insufficient evidence in the record to support his conviction.

In sufficiency of the evidence challenges, we review the evidence 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. Phanhsouvanh, 494 N.W.2d 219, 223 (Iowa 1992). A verdict will be upheld where there is substantial evidence to support the charge. State v. Smith, 508 N.W.2d 101, 102 (Iowa App. 1993). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id.

Normally, it is for the fact-finder to determine the credibility of witnesses. Id. However, the testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court. Id. at 103 (citing Graham v. Chicago & Northwestern Ry. Co., 143 Iowa 604, 615, 119 N.W. 708, 711 (1909)).

Defendant claims V.W.'s testimony was so self-contradictory it should be considered a nullity. He points out V.W. testified defendant never took his clothes off, but also stated he touched her privates with his penis. We find no contradiction here. It is certainly possible defendant took his penis out of his clothes, but did not fully remove his clothes.

V.W. also testified defendant had touched her "a lot." Dr. Shah testified she saw no evidence of repeated digital penetration. However, the fact there was no evidence of a great number of incidents of sexual abuse does not mean there could have been only one incident. It is possible any number more than once may have been considered "a lot" by V.W.

At one point prior to the trial, V.W. had stated defendant had placed his penis in her vagina and anus. Dr. Shah found no evidence of penile penetration of the anus or vagina. We determine V.W.'s testimony should not be discounted on this issue. V.W. could well have meant defendant had touched his penis to her vagina and anus, without actual penetration occurring.

Furthermore, defendant believes V.W.'s testimony should be discredited because she testified the digital penetration did not hurt, but felt funny. Dr. Shah testified the injuries to V.W.'s genital area would have hurt when they occurred. However, we note Dr. Shah testified an injury to the hymenal area causes a different type of pain than that caused by an injury to the skin. Dr. Shah stated an injury to the hymenal area causes a sensation of burning and irritation as opposed to a stabbing pain.

We determine V.W.'s testimony is not so self-contradictory it should be considered a nullity. V.W. testified defendant had touched her private parts. The medical evidence showed there had been digital penetration of V.W.'s genitals. We conclude there is substantial evidence in the record to support defendant's conviction.

II.

Defendant contends the court abused its discretion by limiting his ability to present evidence to show Jim and Russell fit a sex offender profile.

Defendant argued that in order to present his defense that someone else had committed the sexual abuse, he should be able to show sexual offenders tend to have certain characteristics. Because the case was tried to the court, the court stated it would allow the evidence to be presented, and would decide in ruling on the case whether the evidence should be considered. Defendant presented the

evidence we have outlined earlier in an effort to show Jim and Russell had certain characteristics of sexual offenders.

In its written findings of fact and conclusions of law, the district court stated:

> The court did not consider any of Dr. Shah's testimony related to the credibility of victims in sexual abuse cases. This is not a matter for expert testimony.

On appeal, defendant argues this is actually a ruling that the court would not consider the evidence he presented in an attempt to show others who had access to V.W. fit a sexual offender profile.

We believe the court's ruling addresses another issue altogether. During the trial, defendant asked Dr. Shah whether it was true twenty percent of alleged victims of sexual abuse made up their allegations. The State objected and the court allowed Dr. Shah to answer subject to the objection. On redirect, Dr. Shah testified two percent of false accusations come from children under ten and eighteen percent from children over ten.

We determine this is the evidence the court decided it should not consider because it related to the credibility of victims in sexual abuse cases. Expert psychological evidence should not be used to comment on a witness's credibility. State v. Hulbert, 481 N.W.2d 329, 332 (Iowa 1992). This is because veracity is not a fact in issue subject to expert opinion. Id. We conclude the district

court properly determined it should not consider evidence of the percentage of children who make up allegations of sexual abuse.

As to defendant's argument that the court did not consider the evidence he presented in an attempt to show others may have committed the sexual abuse, the court specifically stated it considered all of the evidence presented by the defendant as to the mother's boyfriends and the opportunity they might have to cause the sexual abuse. The court in its findings of fact stated:

> The court considered all of the evidence presented by the defendant as to the mother's boyfriends and the opportunity that they might have had to cause the digital penetration found by Dr. Shah.

The court's findings of fact and conclusions of law do not support defendant's argument that the district court did not fully consider his defense.

We affirm defendant's conviction for the crime of sexual abuse in the second degree. Costs of this appeal are assessed to defendant.

AFFIRMED.