

IN THE COURT OF APPEALS OF IOWA

FILED

DEC 27 1983

CLERK SUPREME COURT

STATE OF IOWA,

) Filed December 27, 1983

Plaintiff-Appellee,

)

vs.

)

3-338
69488**JAY ALAN COLLINS,**

)

Defendant-Appellant.

)

Appeal from Jasper District Court, Thomas S. Bown and M.C. Herrick,
Judges.

Defendant appeals his conviction of second-degree sexual abuse in violation
of Iowa Code sections 709.1 and 709.3(2). AFFIRMED.

James W. Cleverley, Jr., of Diehl, Clayton, Cleverley, Knopf & Williams,
Newton, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney
General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

OXBERGER, C.J.

On July 7, 1982, defendant was arrested by Newton police on a complaint alleging second-degree sexual abuse. A subsequently filed trial information and minutes of testimony alleged that defendant engaged in oral and anal sexual acts with his seven-year-old nephew. Following the denial of defendant's motion to suppress certain incriminating statements, the case was tried to a jury which found defendant guilty as charged. He was subsequently sentenced to an indeterminate twenty-five year term of imprisonment. We affirm.

L Insanity

Collins contends that the issue of his sanity at the time of the alleged acts should have been submitted to the jury. The issue of insanity will not arise unless substantial evidence from some source appears in the record of the accused's incapacity to commit the crime under the M'Naughton rule. State v. Donelson, 302 N.W.2d 125, 135 (Iowa 1981). Insanity is an affirmative defense and instructions on such should not be submitted unless the evidence would sustain an affirmative finding on that issue. State v. Booth, 169 N.W.2d 869, 871 (Iowa 1969).

Collins alleges that at the time the acts were committed he was suffering a psychomotor seizure and was unable to comprehend the nature and quality of his acts. Dr. Jerry Lewis testified for the defendant. Lewis indicated that he believed it was highly unlikely that Collins suffered from psychomotor seizures. He further testified that there were no reports in world literature where anyone was found sexually molesting someone while having a psychomotor seizure; nor was there any evidence of such a condition when Collins was given an electroencephalogram; neither had any one observed Collins having behavior that was consistent with a psychomotor seizure. Dr. Lewis indicated that Collins has a history consistent with antisocial behavior and suggests that it is more likely that Collins is using this symptom to avoid punishment. Furthermore, psychomotor seizures occur randomly. The alleged acts occurred on a regular basis on Friday and Saturday nights at about 8 or 9 o'clock.

We find the evidence to be clear that the trial court's decision in not submitting defendant's proposed instructions on insanity to the jury was correct.

II. Constitutional Rights

When issues of violations of basic constitutional rights are raised, we make our own evaluation of the totality of the circumstances under which the ruling on those constitutional rights was made. State v. Cullison, 227 N.W.2d 121, 126 (Iowa 1975).

Collins argues that his right to remain silent was violated. He maintains that he showed his desire to remain silent in the police car en route to the police station. However, he was not asked any questions during this time. Therefore, his silence cannot be interpreted as an expression of his desire to exercise his constitutional right to remain silent.

Collins also maintains that when he arrived at the police station he refused to cooperate with Detective Foreman by answering his questions. There is a dispute in this evidence, and we accept the trial court's determination that Foreman's testimony was more credible. We find that Collins voluntarily, knowingly, and intelligently waived his right to remain silent by answering Foreman's questions. None of the answers were incriminating. When Collins asked for right to call an attorney, Foreman started to make the call. However, Collins spontaneously asked Foreman to speak to him alone. Collins then, without questioning, confessed to the charge. We agree with the trial court's finding that Foreman did not tell Collins that numerous charges would be filed if he did not confess to one charge. Collins signed a statement which recited he had been accorded his Miranda rights and he waived those rights.

We find no error in the trial of this matter.

AFFIRMED.