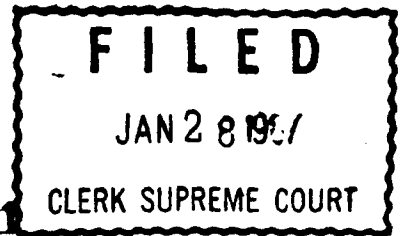


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

201

Plaintiff-Appellee,

)

Filed January 28, 1987

vs.

)

6-479
86-245

ROBERT M. NELSON,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Scott County (No. 120813-01) -
James R. Haverkamp, Judge.

Defendant appeals from conviction of sexual abuse. **AFFIRMED.**

Charles Harrington, Appellate Defender, and Raymond E. Rogers, Assistant
Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Christie J. Scase, Assistant Attorney
General; and Virginia Barchman, Assistant Scott County Attorney, for
plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

PER CURIUM

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Defendant Robert M. Nelson appeals from his conviction of sexual abuse in the second degree in violation of Iowa Code §709.3(2) (1985). Defendant was charged by trial information alleging he had on or about June 27 1985, committed a sexual act with a child under 12 years old. Following a jury trial defendant was convicted of the offense.

On appeal defendant solely contends the trial court erred in instructing the jury that they could convict if they determined that the offense occurred between July 24, 1982, and July 24, 1985, where such instruction had no basis in the record. The trial court instructed the jury as follows:

The exact date when said offense was committed, if you find the same was committed, is not material, provided it is shown to have been committed sometime within three years just preceding the 24th day of July, 1985, the date on which the County Attorney's Information was filed in court.

Defendant objected to the instruction on the grounds it was confusing and it would cause the jury to speculate regarding when the alleged act occurred.

In the instant case, the victim was five years old and was a neighbor of defendant. She had played with defendant's children during the spring and summer of 1985 and had been in defendant's house on more than one occasion. She was not able to relate a date the abuse took place.

In State v. Griffin, 386 N.W.2d 529, 532 (Iowa App. 1986), this court stated:

Iowa Code section 709.3 defines second-degree sexual abuse and does not make a particular time period a material element of the offense. Furthermore, under Iowa law the State does not have to elect or prove a date certain in order to prove sex crimes such as incest, or statutory rape since the exact time of the act is not material.

In addition to the instruction to which defendant complains, the court also gave the following marshalling instruction:

You must find the defendant not guilty of Sexual Abuse in the Second Degree, unless the State proves by evidence beyond a reasonable doubt, each of the following elements:

1. That on or about the 27th day of June, 1985, the defendant performed a sex act with [C.B.].
2. That the participant with whom the sex act was performed was under the age of twelve.

If you find the State has proved beyond a reasonable doubt each and all of the elements, then you will find the defendant guilty of Sexual Abuse in the Second Degree; but, if you find the State has failed to prove the above elements beyond a reasonable doubt, then you will find the defendant not guilty.

Viewed in conjunction with the marshalling instruction, the challenged instruction did no more than define the limits of "on or about the 27th day of June, 1985." Such instruction was appropriate given the fact that the victim was too young to remember the specific date of the abuse.

In State v. Rankin, 181 N.W.2d 169, 172 (Iowa 1970) the court stated:

Proof of the other incidents was so indefinite as to time, place and details that it was little more than evidence that this act had occurred more than once. There was very little possibility the jury in the instant case would have divided over which specific act defendant was guilty of committing. Some liberality must be permitted in this area because of the age of the prosecutrix. A person should not be able to escape punishment for such a disgusting crime because he has chosen to take carnal knowledge of an infant too young to testify clearly as to the time and details of such shocking activity.

We therefore find the trial court did not err in giving the challenged instruction. We affirm the trial court.

AFFIRMED.