

IN THE COURT OF APPEALS OF IOWA

No. 1-094 / 90-437

FILED

MAY 29 1991

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

GEORGE McMULLEN,

Appellant.

424

Appeal from the Iowa District Court for Black Hawk
County, Joseph C. Keefe, Judge.

Defendant appeals his conviction, following a jury
trial, for third-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S.
Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Roxann M. Ryan,
Assistant Attorney General, and Thomas J. Ferguson, County
Attorney, for appellee.

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

SCHLEGEL, J.

Defendant George McMullen appeals his jury conviction of sexual abuse in the third degree, a violation of Iowa Code section 709.4. McMullen contends that the subsection under which he was charged had been repealed prior to his alleged offense. He also claims he was denied effective assistance of counsel because his attorney failed to challenge the absence of minorities on his Black Hawk County jury panel. We affirm the conviction and preserve the ineffective assistance of counsel claim for postconviction proceedings.

I. McMullen was accused of sexually abusing his girlfriend's younger sister, M.C. The incident occurred on July 8, 1989, and M.C. was twelve years of age at the time. M.C. testified that she awoke that morning to find McMullen on top of her and that he penetrated her. Seminal fluid comparisons established that McMullen could have been the source of the fluid. McMullen denies the incident ever occurred.

On July 21, 1989, the the Black Hawk County Attorney by information charged McMullen as follows:

COMES NOW James M. Metcalf, as the County Attorney of Black Hawk County, State of Iowa, and in the name and by the authority of the State of Iowa, accuses George Dewayne McMullen of the crime of SEXUAL ABUSE IN THE THIRD DEGREE -- § 709.4 -- Class C Felony committed as follows:

The said George Dewayne McMullen, on or about the 8th day of July, A.D., 1989, in the County of Black Hawk and State of Iowa, did commit a sexual abuse upon [M.J.C.], a child: contrary to and in violation of § 709.4(3) of the Iowa Criminal Code.

McMullen was tried and convicted of third-degree sexual abuse based upon a violation of Iowa Code section 709.4(3). The incident occurred eight days after the effective date of a change in section 709.4, but prosecutors charged him under the old code section. He contends that the section under which he was charged had been repealed and that we must reverse his conviction. We review for errors of law. Iowa R. App. P. 4.

II. Prior to July 1, 1989, Iowa Code section 709.4 provided:

Any sex act between persons who are not at the time cohabiting as husband and wife is sexual abuse in the third degree by a person when the act is performed with the other participant in any of the following circumstances:

1. Such act is done by force or against the will of the other participant.

2. The other participant is suffering from a mental defect or incapacity which precludes giving consent, or lacks the mental capacity to know the right and wrong of conduct in sexual matters.

3. The other participant is a child.

4. The other participant is fourteen or fifteen years of age and the person is a member of the same household as the other participant, the person is related to the other participant by blood or affinity to the fourth degree, or the person is in a position of authority over the other participant and used this authority to coerce the other participant to submit.

5. The person is six or more years older than the other participant, and that other participant is fourteen or fifteen years of age.

Sexual abuse in the third degree is a class "C" felony.

Iowa Code § 709.4 (1989). The General Assembly modified this statute in 1989 by striking the section as it appears above and replacing it with a revamped statute. Act

Relating to Sexual Abuse, 1989 Iowa Acts ch. 138, § 3. The following modified section 709.4 became effective July 1, 1989:

A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances:

1. The act is done by force or against the will of the other participant, whether or not the other participant is the person's spouse or is cohabiting with the person.

2. The act is between persons who are not at the time cohabiting as husband and wife and if any of the following are true:

a. The other participant is suffering from a mental defect or incapacity which precludes giving consent.

b. The other participant is twelve or thirteen years of age.

c. The other participant is fourteen or fifteen years of age and any of the following are true:

(1) The person is a member of the same household as the other participant.

(2) The person is related to the other participant by blood or affinity to the fourth degree.

(3) The person is in a position of authority over the other participant and uses that authority to coerce the other participant to submit.

(4) The person is six or more years older than the other participant.

Sexual abuse in the third degree is a class "C" felony.

Iowa Code § 709.4 (Supp. 1989).

The first issue which we should address is whether the crime charged no longer existed. The trial court did have subject matter jurisdiction because it is empowered to hear the general class of criminal cases. State v. Taggart, 430 N.W.2d 423, 426 (Iowa 1988). The crime of sexual abuse in the third degree existed both before and after the change effective July 1, 1989. Compare Iowa Code § 709.4 (1989) with Iowa Code § 709.4 (Supp. 1989).

The principle changes to section 709.4 were (1) rewording of the introductory paragraph, (2) adding an action for spousal abuse, and (3) internally recodifying the statute. As it relates to section 709.4(3) (1989), the legislature did not change the definition of "child." The language was merely changed to the more definite "twelve or thirteen years of age." The courts of this State have consistently held that a statutory revision is not "construed as altering the law unless the legislature's intent to accomplish a change in its meaning is clear and unmistakable." State v. Peterson, 327 N.W.2d 735, 738 (Iowa 1982) (quoting Emery v. Fenton, 266 N.W.2d 6, 10 (Iowa 1978)). "To constitute an implicit repeal, the new statute must cover the same subject matter as the old statute and the provisions of the statutes must be irreconcilably repugnant." State v. Rauhauser, 272 N.W.2d 432, 434 (Iowa 1978) (citing Dan Dugan Transp. Co. v. Worth County, 243 N.W.2d 655, 657 (Iowa 1976)).

The victim in this case was twelve years old. In comparing statutes it is evident that a sex act against a twelve-year-old was punishable under section 709.4 both before and after July 1, 1989. Given that we are bound to construe our statutes in harmony, Peterson, 327 N.W.2d at 738 (citing Iowa Code § 4.11), we should examine section 709.4 in light of the other sex abuse statutes. Sex acts against children under the age of twelve was punishable

under the second-degree sexual abuse statute in section 709.3 both before and after July 1, 1989. Sex acts against fourteen- and fifteen-year-olds were punishable under the third-degree sexual abuse statute as section 709.4(4)-(5) (1989) and section 709.4(2)(c) (Supp. 1989). Given this, it is clear that the term "child" in Iowa Code section 709.4(3) (1989) meant "a participant [who] is twelve or thirteen years of age." Thus, the only violation with which the defendant could have been properly charged is a sex act against a child who was twelve or thirteen years of age under section 709.4. We cannot say that the legislature unmistakably intended to redefine the term "child," nor can we find the statutes irreconcilably repugnant. Consequently, we cannot find that the violation with which the defendant was charged was nonexistent.

The question that remains, then, is whether the county attorney's error in charging a violation of Iowa Code section 709.4(3) (1989) instead of Iowa Code section 709.4(2)(c) (Supp. 1989) must defeat the conviction. The Iowa Supreme Court has held that an information is designed to give the defendant sufficient notice and an opportunity to defend. State v. Thomas, 262 N.W.2d 607, 609 (Iowa 1978); State v. Davison, 245 N.W.2d 321, 324 (Iowa 1976). Moreover, it has stated, "Where adequate notice is given a defendant by a valid information, as in this case, the conviction for a crime charged will stand even though a

variance is found in a reference to a statute." Davison, 245 N.W.2d at 324 (citing State v. Davis, 41 Iowa 311 (1875)). Finally, the Iowa Rules of Criminal Procedure state that no information "is invalid or insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in a matter of form which does not prejudice a substantial right of the defendant." Iowa R. Crim. P. 4(7) (contents of indictment); Iowa R. Crim. P. 5(5) (indictment rules applicable to information). Based upon these principles, we hold that the information adequately informed the defendant of the crime charged and that he could not have been prejudiced by the error alleged. Thus, we must affirm the judgment and conviction.

III. We find that the record is inadequate to determine the issue of ineffective assistance of counsel. Generally, ineffective assistance of counsel claims are preserved to allow for further evidence. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987). We therefore preserve the issue for postconviction proceedings. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984).

IV. We hold that defendant George McMullen was properly convicted on charges of third-degree sexual abuse. A modification of Iowa Code section 709.4 was technical in nature, and defendant could not have been prejudiced by the

error in charging. We further hold that the record is inadequate to consider defendant's ineffective assistance of counsel claim and preserve that issue for postconviction proceedings.

AFFIRMED.