IN THE COURT OF APPEALS OF IOWA

No. 6-613 / 95-1935

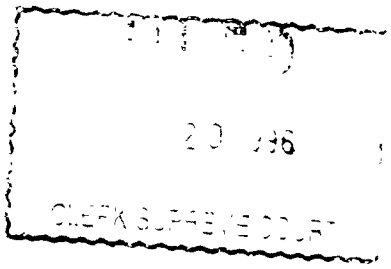
STATE OF IOWA,

Appellee,

vs.

TIMOTHY S. FREEMAN,

Appellant.



Appeal from the Iowa District Court for Pottawattamie County, Glen M. McGee, Judge.

Defendant appeals his conviction, following a jury trial, of third-degree sexual abuse in violation of Iowa Code section 709.4 (1993). **AFFIRMED**.

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

Thomas J. Miller, Attorney General, Roxann M. Ryan, Assistant Attorney General, Richard Crowl, County Attorney, and Christopher M. Wilson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Cady, and Huitink, JJ.

CADY, J.

Timothy Freeman appeals his conviction following a jury trial for third-degree sexual abuse in violation of Iowa Code section 709.4 (1993). We affirm the conviction on our review.

Timothy Freeman was arrested and charged with sexual abuse after he allegedly engaged in consensual sexual intercourse on two occasions with T.C., a fourteen-year-old girl who resided in his apartment complex. T.C. testified at trial the first incident occurred on August 19, 1994. She and Freeman had been drinking with several friends, including Ron Countee, in Jo Carrion's apartment. Carrion was Freeman's friend. Freeman and T.C. remained in the apartment after Carrion and the rest of the friends left. Freeman locked the door and went to an upstairs bedroom with T.C. where they engaged in sexual intercourse. The first incident ended when someone knocked on the door downstairs. T.C. went into the upstairs bathroom while Freeman went to answer the door.

The second incident occurred in late September or early October 1994. The circumstances were similar to the first incident; however, they occurred in a different apartment and there were two individuals in the apartment when Freeman and T.C. went upstairs.

T.C. eventually told her mother about the incidents. Her mother took her to the doctor. The doctor found T.C. had contracted gonorrhea and chlamydia.

T.C. further testified at trial she had not engaged in sexual intercourse with anyone except Freeman. T.C. stated her reference to sexual intercourse referred to penile-vaginal penetration. In further reference to the incidents during cross examination, the following exchange took place:

> Q. [by defense counsel] So you and Tim had sex three times in about 45 minutes to an hour; is that correct? A. [by victim] Yeah.
> Q. Did you touch him? A. What do you mean?
> Q. Well, did you touch him, any parts of his body, sexually? A. No.
> Q. Did he touch you, any parts of your body sexually? A. No.

Ron Countee testified he saw Freeman in Carrion's apartment with a young woman in August 1994. Countee left the apartment and returned some time later. When Countee returned he found the door locked and he had to knock on the door in order to enter the apartment. Freeman came to the door and unlocked it. Countee saw someone go into the upstairs bathroom. He later noticed a wet spot on the mattress in the upstairs bedroom.

Freeman testified Carrion moved out of the apartment where the incident allegedly occurred in July 1994, a month before the alleged abuse. Another witness corroborated Freeman's testimony on this issue. The official eviction notice to Carrion was not issued until September. Also, one of the individuals who remained downstairs during the second incident testified the incident did not occur.

Freeman's wife testified she was tested in March 1995 for sexually transmitted diseases. The test results were negative. Freeman testified he had never contracted a sexually transmitted disease.

Freeman was charged with third-degree sexual abuse under the theory he performed a sex act with T.C. while she was fourteen and he was six or more years older. Trial commenced on September 6, 1995. Freeman moved for judgment of acquittal at the close of the evidence. His motion was denied. He was convicted as charged and sentenced to a term of imprisonment not to exceed ten years.

On appeal, Freeman challenges the sufficiency of the evidence to prove he engaged in a sex act with T.C. He contends her testimony was so inconsistent, and contradictory to other evidence in the case, that her uncorroborated allegations cannot support the conviction. He contends T.C.'s testimony did not provide details about the alleged sex acts. He also points out she denied the parties touched during the acts. Freeman argues there was evidence the girl told two of her friends she had fabricated her testimony. He also contends the evidence established the alleged sex acts could not have occurred at the locations the girl described. Freeman asserts he and his wife had never had any sexually transmitted diseases and this supports his claim he never performed a sex act with the girl.

Freeman also argues his trial counsel was ineffective in failing to introduce the medical records of Freeman and his wife to support their claims they had never

contracted any sexually transmitted diseases. He argues such evidence would have bolstered his credibility. He further argues expert medical evidence should have been introduced concerning the likelihood that a sexually transmitted disease would have been transmitted to his wife if he and T.C. had sexual intercourse. Freeman requests his claim of ineffective assistance be preserved for postconviction proceedings so he can further develop the record on this matter. The State argues this issue should be rejected on direct appeal.

I. Sufficiency of Evidence

Our standard of review is well settled. A verdict of guilty will be reversed only when it is not supported by substantial evidence. *State v. McGrew*, 515 N.W.2d 36, 37-38 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact Freeman is guilty of the crime charged beyond a reasonable doubt. *See State v. LeGeari*, 346 N.W.2d 21, 23 (Iowa 1989). We view 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. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

We find substantial evidence supports Freeman's verdict. T.C. testified at the trial about the incidents of sexual abuse. Her testimony concerning the sex acts was sufficiently detailed and age-appropriate. There is absolutely no requirement for corroboration of a victim's testimony. *State v. Knox*, 536 N.W.2d 735 (Iowa 1995);

Iowa R. Crim. P. 20(3). Nevertheless, her description of events was corroborated by other testimony. Although conflicting testimony appears in the record to question T.C.'s credibility, the jury was in the best position to judge whom and what to believe. *Knox*, 536 N.W.2d at 742 (citing *State v. Hulbert*, 481 N.W.2d 329, 332 (Iowa 1992). It was for the jury to assign the evidence the weight it deemed proper. *State v. Simpson*, 528 N.W.2d 627, 632 (Iowa 1995).

The evidence supported the verdict. The district court properly denied Freeman's motion for a directed verdict.

II. Ineffective Assistance of Counsel

Our ultimate concern in claims of ineffective assistance of trial counsel is the "'fundamental fairness of the proceeding whose result is being challenged.'" *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984)). We review de novo the totality of the circumstances relating to counsel's conduct, keeping in mind the presumption that counsel performed competently. *Risdal*, 404 N.W.2d at 131. The burden is on Freeman to prove by a preponderance of the evidence that (1) counsel failed to perform and essential duty and (2) prejudice resulted. *Id.* at 131-32. While ineffective assistance claims normally require preservation for postconviction proceedings to allow trial counsel to defend his or her actions, disposition on direct appeal is appropriate if further explanation is unwarranted. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994).

We conclude the claim should be preserved for postconviction proceedings. This will allow Freeman to develop the proposed testimony and provide defense counsel an opportunity to explain the lack of medical evidence.

We preserve Freeman's claim of ineffective assistance of trial counsel. We affirm his conviction.

AFFIRMED.