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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed June 26, 1984
vs.	)	4-136 83-534
BRUCE LEE ARNOT,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Davis County—Philip R. Collett, Judge.

The defendant appeals from his conviction following a jury trial, for sexual abuse in the second degree. AFFIRMED.

Thomas M. Walter of Johnson, Bauerle, Hester & Walter, Ottumwa, for the defendant-appellant.

Thomas J. Miller, Attorney General, and Mary Jane Blink, Assistant Attorney General, for the plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, and Hayden, JJ.

Defendant appeals from his conviction, following a jury trial, for sexual abuse in the second degree. We affirm.

I. Scope of Review

Our scope of review is at law and for correction of errors only. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982). However, if basic constitutional safeguards are asserted, we make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

II. Competency

Arnot declares the trial court erred in finding him mentally competent to stand trial. It is well settled that a defendant may not be tried or convicted while he is incompetent to stand trial. State v. Lyon, 292 N.W.28, 12 (Iowa 1980). A defendant is initially presumed competent and the burden to establish the contrary is upon him. State v. Pedersen, 309 N.W.2d 490, 496 (Iowa 1981). If the evidence is in equipose, the presumption should prevail. Id. at 496.

At the time of the competency hearing, the trial court had before it two psychiatrists, both indicating that presently defendant was competent and the likelihood of a recurrence of his mental illness was limited if Arnot stayed on his medication.

Defendant's witness, Dr. Lacy, testified that at that point in time, Arnot understood the legal process and the charges, was able to assist his counsel in terms of the preparation of the case, and was rational and coherent. He also testified, however, that at any time Arnot may, as a result of his mental disorder, become unable to assist his attorney in the defense of his case. Arnot's position of incompetency appears to be premised on that possibility, i.e., that his mental disorder would recur.

Arnot asserts that Iowa Code section 812.3 and 812.4 require defendant's competency to be permanent. However, we do not agree. Section 812.3 provides

that if a question arises concerning defendant's competency at any stage of the criminal proceeding, a hearing upon that issue is proper. See State v. Jackson, 305 N.W.2d 420, 425 (Iowa 1981).

Our review on this issue is not de novo. Id. Our inquiry is limited to whether there is support in the record for the competency finding. Id. The foregoing indicates that there is. Therefore, we affirm the trial court's ruling.

II. Opening Statement

Arnot claims that the trial court erred in overruling its motion for mistrial based upon the county attorney's misconduct during his opening statement. Trial courts have considerable discretion in ruling on such motions and reviewing courts will not interfere absent a showing that the trial court abused its discretion. State v. Love, 302 N.W. 115, 119 (Iowa 1981).

In order to afford relief on such a claim, the improper matter must appear somewhere in the record so that we may review it. State v. Horsey, 180 N.W.2d 459, 460 (Iowa 1970). Here, the challenged statement was not reported. As such, we will not speculate as to what was said or in what context the objectionable statements were made. Accordingly, we have nothing to review; the denial of the motion for mistrial must be affirmed.

III. Sufficiency of the Evidence

Arnot asserts that the evidence was insufficient to overcome his insanity defense, insufficient to prove that the act of sexual abuse was accompanied by threats of force creating a substantial risk of death or serious injury as is required by Iowa Code section 709.3, and if the evidence of second-degree sexual abuse was sufficient, section 709.3 denies equal protection.

The principles governing challenges upon the sufficiency of the evidence are as follows:

> In reviewing a motion for a directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. All of the evidence must be considered and all legitimate inferences that may be deducted therefrom will be

> accepted. A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt.

State v. Peck, 329 N.W.2d 680, 686-87 (Iowa Ct. App. 1982)(citations omitted).

A. Sanity

Defendant pleaded insanity as a defense. At the close of all the evidence defendant moved for a directed verdict on the ground that the evidence showed beyond a reasonable doubt that Arnot was not sane at the time of the offense. The court overruled the motion.

The established rule is that if defendant's sanity is drawn in issue and substantial evidence appears in the record raising a fact question under the M'Naghten test—regardless of the source of that evidence—then the burden is on the State to prove defendant's sanity beyond a reasonable doubt by all the evidence in the case including the presumption of sanity. State v. Watts, 244 N.W.2d 586, 589 (Iowa 1976).

The evidence indicated that the victim thought Arnot to be "weird." Testimony established that Arnot had previously been in mental institutions and that he was regularly seeing a psychiatrist. Defendant's expert witness, Dr. Lacey, testified that although Arnot may have known right from wrong, he may not have believed these standards applied to him.

The State, on the other hand, introduced evidence from its expert, Dr. Fredrickson. He testified that in spite of defendant's mental disorder, at the time of the alleged illegal activity Arnot was still capable of knowing right from wrong and capable of understanding and knowing what he was doing. In further explanation, Dr. Fredrickson stated that he believed the act spoke for the fact that Arnot knew what he was doing, i.e., he was capable of carrying on rational and coherent conversation with the victim to the extent that the victim understood what he wanted.

Other evidence indicated that shortly after the alleged crime was committed, Arnot went to a friend's house and stated that he had "really done it now" and that he was in a lot of trouble. This statement indicates Arnot knew he had done something wrong. Similarly, defendant's statement that he did it to get even with the town, conveys the idea that Arnot knew he was doing something wrong.

We further note that Arnot's own expert, Dr. Lacey, testified that there was a good possibility that Arnot could distinguish right from wrong in the legal sense.

In considering this evidence as a whole, along with the presumption of sanity, we find that a reasonable person could find Arnot to be sane beyond a reasonable doubt. As such the evidence was sufficient to warrant the court's denial of a directed verdict on that issue.

B. Sexual Abuse

Iowa Code section 709.3 defines sexual abuse in the second degree as follows:

> A person commits sexual abuse in the second degree when the person commits sexual abuse under any of the following circumstances:
>
> 1. During the commission of sexual abuse the person displays in a threatening manner a deadly weapon, or uses or threatens to use force creating a substantial risk of death or serious injury to any person.

(emphasis added). Defendant submits that there was no evidence of a threat to use force creating a substantial risk of death or serious injury.

The victim testified that after the bar where the victim worked closed, defendant went into the kitchen, grabbed the victim, pulled her into the storage room, held her down on the floor, put a hand around her throat and said she had better cooperate because "he didn't give a damn about his life and he didn't give a

damn about [hers]. . . . Just said—said he would kill [her] and nobody would know out there." The victim testified that defendant then pulled down her pants and underwear and forced her to have oral sex and intercourse. She further testified that she was "petrified" and thought that he might kill her.

We find this conduct clearly rises to the level of a threat to use force creating a risk of death or serious injury. Defendant relies upon the fact that defendant did not in fact cause an injury or death. However, the plain language of the statute clearly prohibits a threat and the proscription is not limited to conduct resulting in actual injury or death.

We find the evidence was sufficient to support a jury finding that Arnot threatened to use force creating a substantial risk of death or serious injury. We affirm the denial of the directed verdict on this issue.

C. Constitutionality of Section 709.3

We find no merit in defendant's claim that section 709.3 violates the equal protection clause because there is no difference between the class of conduct proscribed by section 709.3, a class B felony, and section 709.4, a class C felony. His reasoning is as follows: A rational distinction does exist as to a higher degree of punishment for a person who displays a deadly weapon and for a person who actually uses force creating a substantial risk of death or serious injury; however, no rational distinction exists with regard to threats. We disagree.

We believe the rational basis for the difference in classification is obvious. Section 709.3 involves a greater risk of harm to the victim. Furthermore, a fear of death may render sexual abuse more easily accomplished.

Defendant claims that the act of forceable intercourse is <u>not</u> more heinous nor is the perpetrator more culpable when he says he will kill the victim as opposed to hurt the victim. We believe it is obvious why we reject this argument.

IV. Instructions

Defendant contends that instructions on insanity and second-degree sexual abuse should not have been submitted to the jury. We need not consider this issue since we have affirmed the denial of the directed verdict on both issues and found the submission of such issues to the jury to be proper.

AFFIRMED.