IN THE COURT OF APPEALS OF IOWA

No. 5-397 / 94-1504

STATE OF IOWA,

Plaintiff-Appellee.

vs.

GABRIEL CAUDILLO,

Defendant-Appellant.

FILED
OCT 31 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Woodbury County, Dewey J. Gaul, Judge.

Gabriel Caudillo appeals from his conviction, following a jury trial, of second-degree sexual abuse in violation of Iowa Code section 709.3(3) (1993). **AFFIRMED.**

Kimberly L. Heidinger of Brewer & Sinclair, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Paul K. Kittredge, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Gabriel Caudillo was convicted of the crime of sexual abuse in the second degree in violation of Iowa Code section 709.3(3) (1993). Defendant appeals contending (1) there was insufficient evidence to support his conviction; (2) he received ineffective assistance of counsel; (3) the district court abused its discretion in denying his request for a deferred judgment; and (4) the district court should have granted his motion for new trial. We affirm.

Under Iowa Code section 709.3(3), a person commits sexual abuse in the second degree when the person commits sexual abuse and the person is aided or abetted by one or more persons and the sex act is committed by force or against the will of the other participant.

Defendant was charged with abusing a sixteen-year-old girl, D.S. D.S. has a learning disability and is in special education classes.

On February 16, 1993, D.S. and Heriberto Carbajal, Rene Hernandez, Fernando Rico, Raul Galindo, and Jesus Alvarez, all students at North High School, boarded a city bus at the school. When D.S. got off the bus, the young men also got off the bus, surrounded her, and pulled her across the street. D.S. recognized them from school but said she went with them because she was afraid of them. After the group walked for a few blocks, defendant drove up in his car. Some of the young men asked defendant for a ride. Defendant took the group to Carbajal's house, but left and agreed to come back later.

At Carbajal's, Galindo took D.S. into a bedroom and attempted to take her clothes off. D.S. struggled. Two of the young men held her down and the others removed her clothes. Galindo then had sexual intercourse with D.S. while the others held her down. When Galindo had finished, Carbajal took D.S. into a different bedroom and had sexual intercourse with her. Alvarez and Hernandez then had intercourse with D.S.

When defendant returned, Alvarez was with D.S. According to defendant, one of the young men told him D.S. wanted to have sex with everyone in the house. Defendant obtained a condom. While defendant was waiting, Rico went into the bedroom, but came back out and told defendant D.S. had not wanted to have sex with Rico.

Defendant went into the bedroom. He admitted he did not say anything to D.S. Defendant testified he kissed her and then had sexual intercourse with her. D.S. testified defendant shoved her onto the bed and had sex with her. She said she kept trying to sit up, but defendant would not let her. After he had sex with D.S., defendant left the house.

The young men kept D.S. at the house for about five hours. They made her available to three other men whom D.S. could not identify. Galindo and Carbajal had sexual intercourse with D.S. again. Eventually, Galindo and Rico walked D.S. home.

Defendant was charged with sexual abuse in the second degree. He was seventeen years old at the time of the incident. His case was removed from juvenile

court. Defendant was tried as an adult jointly with Carbajal and Galindo. The jury found defendant guilty of the crime charged. He filed a motion in arrest of judgment and a motion for new trial. The motions were denied by the district court. The court sentenced him to a term of imprisonment not to exceed twenty-five years. Defendant appeals.

Defendant first contends there was insufficient evidence in the record to support his conviction. Defendant states there is insufficient evidence to show he performed a sex act by force or against the will of D.S. Defendant claims there was insufficient evidence to show during the commission of the sex act he was aided or abetted by one or more persons.

When a criminal defendant challenges the sufficiency of evidence to support a conviction, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We must uphold the conviction if there is substantial evidence in the record to support it. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *State v. Robinson*, 288 N.W.2d 337, 338 (Iowa 1980).

We find there is substantial evidence in the record to show defendant performed a sex act against the will of D.S. Defendant claimed he thought D.S. consented because someone told him D.S. wanted to have sex with all the men. However, defendant admitted Rico told him D.S. refused to have sex with him (Rico).

Defendant also admitted he never asked D.S. if she wanted to have sex. In fact, defendant admitted he did not say anything to D.S. D.S. testified defendant shoved her onto the bed and engaged in sex with her, even though she repeatedly tried to sit up. This is sufficient evidence to support the jury's conclusion the sex act was against the will of D.S.

We also find there was substantial evidence in the record to show defendant was aided and abetted by others in committing sexual abuse. A person aids or abets another in a criminal act when he or she assents to or lends countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission. *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977). D.S. was held at Carbajal's house by Carbajal and others for the purpose of making her available for sex with other men, including defendant. We find this is sufficient evidence to show others aided or abetted defendant in committing sexual abuse.

Defendant claims he received ineffective assistance of counsel because his trial attorney failed to call witnesses who could refute D.S.'s statement the sex act was committed against her will. Defendant asks to have this issue preserved for post-conviction relief proceedings.

When complaining about the adequacy of an attorney's representation, it is not enough to simply claim counsel should have done a better job. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Defendant must state the specific ways in which

counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Id.* Where claims are too general, they should not be preserved for later postconviction proceedings. *Id.*

We find defendant's claims here are too general to be preserved for postconviction proceedings. Defendant does not identify the potential witnesses he believes his attorney should have called, or reveal the substance of their proposed testimony. We deny defendant's claim of ineffective assistance on this ground.

Defendant contends the district court abused its discretion in denying his request for a deferred judgment. Under Iowa Code section 232.8(3), because defendant was not an adult at the time of the criminal incident, the court had the ability to defer judgment and place him on probation for a period not less than one year. Defendant claims because of his young age he could be rehabilitated through probation.

A sentence will be disturbed by a reviewing court only upon a showing the trial court abused its discretion. *See State v. Dicks*, 473 N.W.2d 210, 215 (Iowa App. 1991). No abuse of discretion will be found unless defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* Defendant has the burden of showing an abuse of discretion. *State v. LeGrand*, 501 N.W.2d 59, 64 (Iowa App. 1993).

Under Iowa Code section 901.5, when considering authorized sentencing options, a court should consider:

> which of them or which combination of them, in the discretion of the court, will provide maximum opportunity for the rehabilitation of the defendant, and for the protection of the community from further offenses by the defendant and others.

Iowa Code § 901.5 (1993). In addition, when determining a proper sentence, a court should consider the nature of the offense, the attending circumstances, and the defendant's age, character, and propensities or chances for reform. *State v. Johnson*, 476 N.W.2d 330, 335 (Iowa 1991).

We find no abuse of discretion in the sentence the district court entered in this case. The court considered deferring defendant's sentence pursuant to Iowa Code section 232.8(3), and rejected this option. The court stated:

> There are many crimes of sexual abuse in the second degree much more heinous, much more horrendous than this, but this is horrendous enough.

The court also considered the recommendation for incarceration given in the presentence investigation report. The court concluded defendant should receive the same sentence he would have received if he had been an adult at the time the crime was committed.

Finally, defendant contends the district court should have granted his motion for new trial because there was insufficient evidence in the record to support his conviction. We have already found there was sufficient evidence in the record to support defendant's conviction; therefore, we need not address this issue further.

We affirm defendant's conviction and sentence for the crime of sexual abuse in the second degree. Costs of this appeal are assessed to defendant.

AFFIRMED.