IN THE COURT OF APPEALS OF IOWA

No. 9-590 / 89-13

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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

332

vs.

TAD GABRIELSON,

Appellant.

Appeal from the Iowa District Court for Wright County, Jon S. Scoles, Judge.

Defendant appeals a judgment and sentence entered by the trial court, following a nonjury trial, finding him guilty of third-degree sexual abuse. **AFFIRMED AND REMANDED.**

Lawrence F. Scalise and Ann Fitzgibbons of Scalise, Scism, Sandre & Uhl, Des Moines, for appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; and Lee E. Poppen, Wright County Attorney, for appellee.

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

OXBERGER, C.J.

Tad Gabrielson (Gabrielson) appeals from a judgment and sentence entered by the trial court, following a nonjury trial, finding him guilty of third-degree sexual abuse. Gabrielson asserts that the trial court erred in: (1) failing to grant his motion for a psychiatric examination of the victim; and (2) finding that there was sufficient evidence to prove he was guilty of third-degree sexual abuse. We affirm the conviction but remand for a hearing.

Gabrielson is a thirty-year-old man living in Belmond with his wife, Darla, and two small children. Gabrielson's family owned a business known as We '3' Markets. Gabrielson was a manager of one of the family's three stores. In April 1987, T.B., a fifteen-year-old high school student, began working at We '3' Markets. T.B. also did considerable work as a baby-sitter for the Gabrielsons.

According to T.B.'s testimony at trial, Gabrielson and she soon began developing a relationship. T.B. and Gabrielson soon developed a much closer relationship, to the extent that they were kissing, hugging, and fondling. One month before T.B.'s sixteenth birthday, she and Gabrielson had engaged in intercourse for the first time. This relationship continued until March 1988, at which time T.B.'s parents discovered a diary that she had kept, recounting numerous sexual encounters with Gabrielson.

T.B.'s parents took her to the Gabrielsons to confront Tad with the contents of the diary. Gabrielson denied the

accusations. T.B.'s parents subsequently reported the incident to the police. Gabrielson was arrested and subsequently charged with third-degree sexual abuse. Gabrielson pled not guilty to the charge.

Gabrielson's defense counsel filed a motion to compel discovery, in which Gabrielson requested the court to order T.B. to submit to an examination by a child psychiatrist. The State resisted, and the trial court subsequently denied the request for a psychiatric examination.

Trial was held in October 1988. At trial, T.B. testified about her relationship with Gabrielson and the contents of the diary. T.B. testified that she and Gabrielson would often have intercourse at his home while she was to be baby-sitting and had intercourse at numerous other locations. On cross-examination, however, T.B. testified that she also believed that her grandfather's ghost lived in her house and that she had never stolen any items from work. Defense counsel then introduced a videotape from the store's hidden camera showing T.B. stealing.

Gabrielson, his wife, and numerous friends introduced extensive evidence to dispute the alleged dates of intercourse contained in the diary. Gabrielson testified that he never had any relationship with T.B. Gabrielson stated that he and T.B. could not have done the things described in the diary at the store, since the store was heavily used in all areas, and they would have been seen.

The State introduced the testimony of Walt Mason, who testified that he saw Gabrielson and T.B. kissing near the time clock. Other evidence introduced at trial included a note written by T.B. to Gabrielson stating that she was sorry for all the trouble she had caused and that she had lied about everything.

The case ultimately was submitted to the trial court. The trial court, in finding Gabrielson guilty, relied heavily upon the diary. The trial court reasoned that many times the diary referred to pain, disappointment and questioning, feelings not generally characteristic of someone fantasizing. The court also noted that many of the items in the diary were grounded in fact. Because of the unusual circumstances of the case, the trial court noted that it seriously considered granting probation due to the past record of Gabrielson and the fact that had another thirty days elapsed, the act would not have been illegal. The trial court, however, sentenced Gabrielson to a term not to exceed ten years. Gabrielson has appealed.

I.

Gabrielson argues that the the trial court erred in finding sufficient evidence to convict him, since T.B.'s testimony was uncorroborated and all the other witnesses stated that they were unsure of any dates in question. We review this issue because if we agree with Gabrielson on this issue, we would not need to reach the issue in Division II.

The test of whether defendant's conviction is supported by sufficient evidence is whether after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980) (quoting Jackson v. Virginia, 443 U.S. 307, 318-319, S. Ct. 2781, 61 L. Ed.2d 560, 573 (1979)). We apply the test in view of all the evidence presented, not just that supportive of guilt. Id. at 340.

We review the record in the light most favorable to the State. State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987). We make any legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). The test is whether the evidence is sufficient to withstand appellate scrutiny and support a verdict involves an inquiry as to whether the evidence is "substantial". State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Evidence meets the threshold criteria of substantiality if it is evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). We find the evidence to be substantial.

Our review of the record in the light most favorable to the State convinces us that there was substantial evidence from which a rational fact finder could find Gabrielson was guilty of sexual abuse beyond a reasonable doubt.

The defendant is charged with a violation of Iowa Code section 709.4 (5)(1989). In order to sustain a conviction for that offense, the State has the burden of proving beyond a reasonable doubt each of the following elements:

> 1. That the defendant committed a sex act with T.B. on September 23, 1987;
>
> 2. That he was six or more years older than T.B.;
>
> 3. That T.B. was 14 or 15 years of age; and
>
> 4. That the defendant and T.B. were not cohabiting as husband and wife.

The last three elements are not in dispute. The only element in contention is whether the defendant committed a sex act with T.B. on September 23, 1987.

The first item of evidence which will be considered is the testimony of T.B. T.B. testified that she had sexual intercourse with the defendant on September 23, 1987. In other sexual abuse cases, similar testimony has been held sufficient by itself to prove the commission of the act. See State v. Farnum, 397 N.W.2d 744, 748 (Iowa 1986); State v. Ree, 331 N.W.2d 557, 561 (S.D. 1983). Consequently, we conclude that T.B.'s testimony is sufficient enough to establish the elements of the crime.

T.B.'s testimony was supported by the diary which she wrote during the time in question. The trial court concluded that the diary is more than a "fantasy". The trial court stated:

> At various times, the diary refers to pain, disappointment, and questioning. It also refers to arguments and disagreements between the parties. The diary is uncharacteristic, in the

> court's view, of someone who is merely writing fiction." In addition, the court notes that while there may be some question about some of the times contained in the diary, the great majority of the entries are grounded in fact. For example, on August 27, 1987, it is undisputed that the defendant went out of town with his cousins, the disagreement is in regard to the time he returned to Belmond. On September 5, 1987, the defendant did, in fact, borrow his brother's pickup truck, the dispute arises regarding when the truck was returned. In addition, the testimony of Angela Rarickman and Angela Walrod support T.B.'s version of the events of January 26, 1988, as opposed to the version testified to by the defendant and his mother.

The second item of evidence is the ten notes which were identified by T.B. as having been written by the defendant to her. A handwriting expert confirmed that the notes in question were written by the defendant. We agree with the opinion of the trial court that the defendant's explanation of those notes was not credible. We also find it is difficult to believe that the defendant would make four separate notes with the word "navel", two of which have hearts on them, for the purpose of making signs for the grocery store. T.B.'s explanation in this regard is more believable. In addition, the defendant did not have a satisfactory explanation for the notes which provided "I want to _____ you!!" and "smile if you want to!"

The third item of evidence is the testimony of Walt Mason, who was employed at the defendant's grocery store at the time in question. Mason testified that he saw the defendant and T.B. kissing in the back room at the We "3" grocery store. He further testified that the defendant was

buttoning his pants or belting his belt, while T.B. was buttoning the top button of her blouse. Mason's testimony supports T.B.'s allegations regarding a relationship between herself and the defendant and directly controverts the defendant's allegations that he at no time had any physical relationship with T.B. There was no explanation made by the defendant for Mason's testimony. Mason's testimony constitutes independent, eyewitness corroboration of T.B.'s testimony that there was a close physical relationship between the defendant and T.B.

After reviewing these and all other facts and circumstances introduced into evidence in this case, we conclude that the State has produced sufficient evidence so a trier of facts could find beyond a reasonable doubt that the defendant engaged in a sex act, as defined in Iowa Code section 702.17, with T.B. on September 23, 1987.

II.

Gabrielson asserts that the trial court should have granted his request to order that a psychiatric evaluation be done on T.B. since her belief that a ghost lives in her house evidences a propensity to fantasize. Gabrielson contends the evaluation is especially important since her accusations are unsupported by any reliable evidence.

"Discovery rulings are within trial court's sound discretion and we review them only for abuse of that discretion." State v. Wagner, 410 N.W.2d 207, 213 (Iowa 1987). An abuse of discretion occurs when the trial

court's ruling is based on untenable grounds. State v. Myers, 382 N.W.2d 91, 93 (Iowa 1986). The trial court's decision to order a psychiatric or psychological examination of a sex abuse victim falls within the trial court's discretion. State v. Tharp, 372 N.W.2d 280, 284 (Iowa App. 1985). The burden is on the defendant to demonstrate the necessity of such evaluation. Id.

In his brief before this court, Gabrielson states the purpose for the mental examinations is "to determine whether or not [T.B.] . . . was capable of fantasizing a relationship with Tad Gabrielson and believing it as strongly as she believed in her grandfather's ghost."

In Myers, the Iowa Supreme Court held that an expert's opinion as to the truthfulness of a witness is not admissible pursuant to rule 702. The Myers court stated that the ultimate determination of the credibility or truthfulness of a witness is not "a fact in issue," but a matter to be generally determined solely by the jury. Myers, 382 N.W.2d at 97. The court further stated that in such cases "it seems experts will be allowed to express opinions on matters that explain relevant mental and psychological symptoms present in sexually abused children," but experts will not be allowed to opinion matters "that either directly or indirectly renders an opinion on the credibility or truthfulness of a witness." Id. See also Sallis v. Lamansky, 420 N.W.2d 795, 797 (Iowa 1988); State v. Woodyard, 414 N.W.2d 654, 658 (Iowa 1987).

T.B. testified at trial as follows:

> Q. The fact is you do believe in fantasies don't you? A. Like what?
> Q. Like ghosts in your home? A. Yeah.
> Q. You do believe that, don't you? A. Yes.
> Q. You believe, in fact, and you've told people at the store, in fact, that there is a ghost in your home.
> Q. Scratched your hand--excuse me--is that true? A. Yes, I have said that.
> Q. You've said that it's scratched the hand of your mother and, I understand your sister. A. Yes.
> Q. You said that? A. Yes.
> Q. You believe that? A. Yes.
> Q. And, in fact, you've said that you've heard that ghost walking around your house, right? A. Yes.
> Q. . . . And ate some Oreos cookies, the ghost did? A. I didn't see that, no.
> Q. You said that though, didn't you? A. Yes.
> Q. And believe to be the case, don't you? A. Yes.
> Q. And you said that the ghost came with you folks from Michigan? A. Yes.
> Q. The ghost is your dead grandfather. A. Yes.
> Q. And it's, [T.B.], as true as the material in your diary, is that true? A. Yes.

We hold that Gabrielson has established the need for a psychiatric examination of T.B. The purpose of the examination is not to enable the psychiatrist to testify as to his or her opinion of T.B.'s credibility or truthfulness as a witness. The purpose of the examination shall be to determine those issues approved by the supreme court in Myers, 382 N.W.2d at 97, and to determine the extent T.B.'s belief in ghosts has affected her ability to separate fact from fantasy in her everyday experiences.

We remand this matter to the trial court to order an examination by a psychiatrist and that the trial court make

a copy of his or her report available to counsel for both parties. The trial court shall conduct a hearing to determine whether such evidence requires a new trial. The parties may file an expedited appeal of the trial court's ruling.

AFFIRMED AND REMANDED.