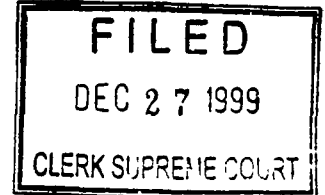


IN THE COURT OF APPEALS OF IOWA

No. 1999-414 (9-667) / 99-239
Filed December 27, 1999



IN THE INTEREST OF D.K.W., Minor Child,

D.K.W., Minor Child,
Appellant.

Appeal from the Iowa District Court for Tama County, Michael J. Newmeister,
District Associate Judge.

Juvenile appeals the juvenile court finding and disposition adjudicating him
delinquent for third-degree sexual abuse. **REVERSED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown.
for appellant.

Thomas J. Miller, Attorney General, Janet Hoffman and Chris Odell, Assistant
Attorneys General, Nikki Aden, Legal Intern, and Brent Heeren, Assistant County
Attorney, for appellee-State.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HUTTINK, P.J.***I. Background Facts and Proceedings.***

In a delinquency petition filed April 28, 1998, the State alleged fifteen-year-old D.K.W. committed a delinquent act of sexual abuse in the third degree. This petition followed A.T.'s complaint accusing D.K.W. of assaulting and forcing her to submit to sexual intercourse.

The State's case included A.T.'s testimonial version of events occurring in a school library on March 3, 1998. According to A.T., she was alone in the library after school when D.K.W. approached her and began making sexual advances. When she rejected these advances, A.T. testified D.K.W. grabbed her and began choking her by placing his forearm around her neck. In the resulting struggle, A.T. claims she bit D.K.W. on the arm before he wrestled her to the floor, removed her clothing, and forced her to have sexual intercourse. A.T. also testified she suffered an abrasion on her back, her jeans were ripped, and her shirt was stained by D.K.W.'s semen.

A.T.'s friend, J.P., testified that she saw and talked to A.T. immediately after these events. A.T. told her she had "fucked" D.K.W. but didn't know whether she was raped or not. When A.T. told J.P. she had told D.K.W. no, they concluded A.T. had in fact been raped. J.P. also testified she saw a wet spot on A.T.'s shirt and described the abrasion on A.T.'s back.

On cross-examination both A.T. and J.P. were impeached with prior versions of their conversation indicating A.T. stated she wanted to have sex with D.K.W. but

changed her mind and told him no. Both testified A.T. initially said the abrasion on her back happened when D.K.W. snapped her with a rubber band.

A.T. was also cross examined about prior sexual behavior with D.K.W. and others.¹ A.T. acknowledged a prior consensual sex act with D.K.W. in the school library several years before this incident. She also acknowledged making prior unsubstantiated rape allegations against others who had groped and otherwise assaulted her.

The State's case also included testimony from police and school officials concerning their investigation of A.T.'s complaints. A police officer testified concerning D.K.W.'s initial statements and A.T.'s initial statements to him. A high school principal testified that ten days after the incident he observed a small bruise on D.K.W.'s arm located approximately where A.T. said she bit D.K.W. The principal also testified D.K.W. said he bruised his arm playing basketball.

D.K.W. initially denied any sexual activity with A.T. when confronted with A.T.'s allegations. He later conceded to having consensual intercourse with A.T.

At trial D.K.W. testified he was in the library serving an after school detention and initiated a conversation with A.T. about a test. According to D.K.W., A.T. "started saying stuff like, 'You want blue balls' and comments like that." He also claims A.T. said, "Come here. I want to show you something," and when he

¹ Prior to trial D.K.W. filed a "Motion Pursuant to Iowa Rule of Evidence 412" stating his intention to offer evidence of A.T.'s past sexual behavior including a consensual sex act with D.K.W. and accusations of rape and sexual harassment made against others.

responded, A.T. began unbuttoning her shirt and grabbing his crotch. According to D.K.W., the two then undressed and A.T. sat on him, grabbed his penis, and placed it in her vagina. D.K.W. denied ejaculation because intercourse lasted less than thirty seconds and he was afraid they would be detected.

D.K.W. also testified he initially denied any sex acts with A.T. because his aunt was present when he was confronted with A.T.'s allegations and he was too embarrassed to admit sexual intercourse with A.T. in the presence of his aunt. D.K.W. further denied having any prior sexual experiences with A.T.

Several witnesses acquainted with both A.T. and D.K.W. testified A.T. openly boasted that she "fucked" D.K.W. and allegations of sexual abuse were not included in the initial versions A.T. expressed to them. Evidence of A.T.'s prior rape allegations included testimony from a school administrator indicating A.T. had been specifically instructed on sexual abuse and sexual harassment issues before this incident.

The juvenile court, noting A.T.'s greater credibility, evidence of injury, and A.T.'s conduct following these events determined D.K.W. committed a delinquent act of sex abuse in the third degree. D.K.W. was adjudicated a delinquent child. In a subsequently entered dispositional order, D.K.W. was placed in a residential facility for juvenile sex offenders.

On appeal D.K.W. challenges the sufficiency of the evidence supporting his adjudication as a delinquent child. He argues the State has failed to prove he

~~committed a sex act~~ by force or against A.T.'s will. D.K.W. also contends the juvenile court's failure to rule on the admissibility of evidence of A.T.'s prior sexual behavior necessitates a reversal and remand for a new trial.

II. Scope of Review.

Our review of a delinquency adjudication is de novo. *In re J.D.S.*, 436 N.W.2d 342, 344 (Iowa 1989). Though we are not bound by the juvenile court's findings, we give weight to those findings and the credibility the court gives witnesses. Iowa R. App. P. 14 (f)(7).

III. Admissibility of A.T.'s Past Sexual Behavior.

As noted earlier, D.K.W. filed a pretrial motion concerning his intention to offer evidence of A.T.'s past sexual behavior and prior allegations of rape and sexual harassment made against others. This motion was first addressed by the court at the commencement of the adjudicatory hearing. The court instructed counsel as follows:

The Court: The court is also aware of the pendency of a motion under rule 412 of the Iowa Rules of Evidence.

After conferring with counsel, and in light of the fact there is no jury being finders of facts in this case, the court intends to receive evidence as part of the case in chief and rule on the applicability of the rape shield statute to the proffered testimony by the Defendant and request. Mr. Hereen [the county attorney], you make your objection known as to what portions of any evidence you wish to be considered by the rape shield statute.

The court independently will then rule on the admissibility of that evidence in the Court's consideration of those factors and in making its conclusions.

The State in conformity with the court's instructions objected to questions posed to A.T. on cross-examination concerning a prior consensual sex act with

D.K.W. The court noted the objection, reserved ruling, and the evidence was admitted as an offer of proof. Rulings on the State's objections to inquiries of A.T. and other witnesses concerning prior allegations of rape and sexual harassment against others were similarly reserved.

Our review of the record and the district court's "Findings of Fact, Conclusions of Law, and Judgment" fails to disclose the court's rulings on the State's objections. There is, however, no indication either the State or D.K.W. made any posttrial motions requesting the court's rulings on these objections. By failing to seek a ruling on his Iowa Rule of Evidence 412 motion or the State's objections, D.K.W. failed to preserve any evidentiary issue for appeal. *In re S.J.M.*, 539 N.W.2d 496, 499 (Iowa App. 1995).

IV. Sufficiency of the Evidence.

An adjudication of D.K.W.'s delinquency requires proof he committed the crime of sexual abuse in the third degree. Iowa Code § 232.20(2)(a). A person commits sexual abuse in the third degree when the person performs a sex act and the act was done by force or against the will of the other participant. Iowa Code § 709.4(1). The State has the burden to prove the elements of this offense beyond a reasonable doubt. Iowa Code § 232.47(4). If, in our de novo review, admissible evidence satisfies this standard, we need not reverse an adjudication of delinquency. *In re Thompson*, 241 N.W.2d 2, 4 (Iowa 1976).

Because the occurrence of a sex act is not disputed, the dispositive issue is whether it was performed by force or against A.T.'s will. The testimony of the immediate parties on this issue is irreconcilably conflicting. As finders of fact, we are accordingly required to accept the testimony we find more believable. The difficulty of this task is substantially increased because A.T. has made prior statements that conflict with her trial testimony. A.T.'s statements to others immediately after the incident concerning the cause of her back injury, her desire to have sex with D.K.W., and that she "fucked" D.K.W. are inconsistent with her testimonial claims of forced intercourse. The credibility of A.T.'s testimony is further diminished because it was substantially influenced by third-party interpretations of relevant events and clearly tailored to suit the needs of the prosecution.

Our reservations concerning A.T.'s complete truthfulness are not resolved by the State's physical evidence. A.T.'s torn jeans, abrasion on her back, the bruise on D.K.W.'s arm, and semen on her shirt lend themselves to plausible and innocent explanation. Any resulting inference of guilt necessarily requires a predicate assessment of A.T.'s truthfulness contrary to that which we have already made.

As noted earlier, the State bears the burden to prove D.K.W.'s guilt beyond a reasonable doubt. It is not D.K.W.'s burden to prove his innocence. After a full and fair consideration of the State's evidence, we are not convinced of D.K.W.'s guilt. Our conclusion that the State has not met its burden of proof should not be interpreted as an endorsement of D.K.W.'s complete truthfulness or version of these events. Our

findings are based on the State's failure to meet its heavy burden of proof. The juvenile court erred in concluding otherwise and its order adjudicating D.K.W. a delinquent child is reversed.

REVERSED.