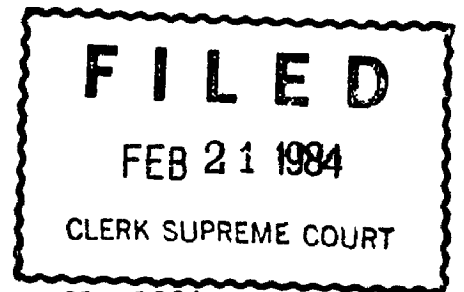


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

Filed February 21, 1984

vs.)

4-11
83-274

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ROBERT SWANSON,)

Defendant-Appellant.)

Appeal from the Iowa District Court for Black Hawk County - Peter Van
Metre, Judge.

Defendant appeals his conviction of third degree sexual abuse in violation of
Iowa Code section 709.4. AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.

Thomas J. Miller, Attorney General, and Sherie Barnett, Assistant Attorney
General, for plaintiff-appellee.

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Heard by Schlegel, P.J., Hayden, and Sackett, JJ.

SACKETT, J.

Defendant, Robert Swanson, appeals his conviction for third degree sexual abuse in violation of Iowa Code section 709.4.

Defendant was charged by information with third degree sexual abuse, arising out of an alleged rape in defendant's apartment. Defendant was initially found guilty as charged following a trial to the court, and was sentenced to an indeterminate ten-year term of imprisonment. Following a postconviction relief action, however, defendant was granted a new trial. The case was retried to a jury, which also found defendant guilty as charged. Trial court sentenced defendant to an indeterminate ten-year term of imprisonment and imposed a \$5,000 fine. As reasons for the sentence imposed, trial court stated:

... it's required by the statute.... you are a very dangerous person.... for the protection of society and just to keep you out of circulation as long as possible.... to ensure that other women don't have to go through what Lord knows how many have gone through at your hands.

On appeal defendant asserts that trial court's stated reasons for the sentence: (1) indicate that the court mistakenly thought a fine was mandatory; (2) failed to provide sufficient support for imposition of a fine in addition to a sentence of incarceration; and (3) failed to show that the more severe sentence imposed following defendant's retrial was "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," as required by North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

The state asserts that imposition of the fine following defendant's retrial is supported by trial court's conclusions that defendant "committed bare-faced perjury" at the trial.

At trial the prosecutrix testified that after she voluntarily went to defendant's apartment he forced himself on her and briefly engaged in intercourse, although he did not ejaculate. Defendant acknowledged that he and the

prosecutrix were in bed partially clothed, but that the blankets were between them and no sex act occurred. Trial court instructed the jury on the definition of "sex act" as follows:

The term "sex act" or "sexual activity" as used in these instructions means any sexual contact between two or more persons by penetration of the penis into the vagina. It does not require a completed act of intercourse with ejaculation to constitute a "sex act."

Defendant unsuccessfully objected that the last sentence of this instruction "unduly highlights the evidence in this case."

I. Instruction

The trial court is required to instruct on all material issues so that the jury understands the matters which they are to decide. State v. Van Rees, 246 N.W. 2d 339, 343 (Iowa 1976). Furthermore, instructions must state applicable legal principles in the light of the evidence. Id. Terms used in instructions should be defined when they may confuse the jury, but when the terms have common usage and are readily understandable by persons of ordinary intelligence they need not be defined. Henderson v. Scurr, 313 N.W. 2d 522, 525 (Iowa 1981). The jury instructions should not, however, place undue emphasis on any evidence or on any particular theory of the case. State v. Milliken, 204 N.W. 2d 594, 595-97 (Iowa 1973).

When examined in the context of the evidence produced at trial and the legal theories at issue, we cannot say that the instruction defining "sex act" unduly highlighted the state's theory of the case. The definition was tailored to the specific case because of the evidence produced regarding the specific nature of the sex act alleged to have taken place. We note that there were no additional instructions given concerning the same subject and, hence, no cumulative adverse effect. See State v. Hepburn, 270 N.W. 2d 629, 630 (Iowa 1978). The defendant does not challenge the legal accuracy of the definition as given. Because we find that the instructions, viewed as a whole, did not unfairly emphasize the state's version of the case, we find no error.

II. Sentencing

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In North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), the United States Supreme Court outlined the federal constitutional limits on the power of a state judge to impose a more severe sentence after reconviction than was ordinarily ordered. The Supreme Court described those limits as follows:

In order to assure the absence of such a motivation [retaliation on part of sentencing judge], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. [emphasis added]

Id. at 726, 89 S. Ct. at 2081, 23 L.Ed. 2d at 670. The state argues that the trial court's statement on the record that it believes defendant had committed perjury is enough to meet the Pearce requirements. We disagree. While objective evidence of defendant's alleged perjury may well be enough to satisfy Pearce, the conclusory statement that the judge is "satisfied that at this trial [defendant] committed barefaced perjury" is not enough. The factual data upon which the increased sentence is based, defendant's alleged perjury in this case, is not sufficiently developed in the record so as to enable this court to fully review the legitimacy of the increased sentence on appeal. Because the trial court impermissibly increased the defendant's punishment without satisfying the requirements established by the United States Supreme Court in North Carolina v. Pearce, that portion of the sentence imposing a \$5,000 fine is hereby vacated. The case is remanded for resentencing in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.