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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-144 / 89-794

346

STATE OF IOWA,

Appellee,

vs.

RAFAEL ARMOND ROBINSON,

Appellant.

Appeal from the Iowa District Court for Polk County, Luther T. Glanton, Senior Judge.

Defendant appeals from his conviction, following a jury trial, for third-degree sexual abuse. He contends the district court should have granted a mistrial because a police officer testified he had fled when approached by the officer. He also contends the sentencing court failed to state its reasons for making his prison sentence consecutive to an earlier sentence on another charge. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender; and Andi S. Lipman, Assistant Appellate Defender, for the appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; James Smith, County Attorney; and Catherine Thune, Assistant County Attorney, for the appellee.

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

DONIELSON, P.J.

Rafael Robinson was accused of sexually assaulting the mother of his fifteen-year-old girlfriend. In his defense, he alleged the mother disapproved of his relationship with her daughter and had fabricated this charge in order to break up the relationship.

Robinson was charged with sexual abuse in the third degree. At his jury trial, a police officer testified that when he sought to stop Robinson in order to question him about this incident, Robinson "bolted from the area." The district court sustained Robinson's motion to strike this testimony about flight, and the district court admonished the jury not to consider the testimony. The district court declined to grant Robinson a mistrial due to the evidence about flight.

The jury found Robinson guilty of sexual abuse in the third degree. The court then sentenced Robinson to a term of imprisonment not to exceed ten years. The court also revoked Robinson's probation on a prior aggravated misdemeanor conviction and directed the sentence for the present sexual abuse charge run consecutively to the sentence on the prior conviction.

Robinson has appealed from his conviction and sentence. He contends the district court abused its discretion by refusing to grant him a mistrial due to the police officer's testimony concerning flight. Robinson argues this testimony was so prejudicial that merely

striking the testimony and admonishing the jury not to consider it were inadequate remedies.

Robinson also contends the district court abused its sentencing discretion by directing that the sentence on the present charge be consecutive to the sentence on the earlier charge. He complains the sentencing court stated no reasons for its choice of consecutive sentences.

I. **Mistrial.** A trial court has broad discretion in ruling on motions for mistrial. State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986). We will not interfere with a trial court's decision absent an abuse of discretion. See State v. Lewis, 391 N.W.2d 726, 730 (Iowa App. 1986). Generally, a trial court's quick action in striking improper evidence and cautioning the jury to disregard it will prevent any prejudice. Brown, 397 N.W.2d at 699. A defendant who asserts such actions are insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of the trial court. Id.

At issue is a single statement made at trial by Officer Roth. When asked if he had been able to contact defendant during his investigation of the crime, Officer Roth stated:

> I observed him on the 4th of November, 1988. He was at the intersection of 12th and College. He was walking in that particular area there, and then he jumped into a motor vehicle. I had that vehicle stopped. As soon as I approached that vehicle, this defendant bolted from the area there.

Defendant objected to the response and moved for a mistrial.

The trial court sustained defendant's motion to strike the testimony but declined to grant a mistrial. In upholding defendant's motion to strike, the trial court had the contested testimony read back twice to the jury; after each reading the court admonished the jury to pay no attention to the testimony.

In arguing the trial court abused its discretion in declining to grant a mistrial, defendant appears to make two arguments. First, the evidence of flight was so prejudicial that the court's admonition to the jury to ignore the evidence could not have cured the error and a mistrial should have been granted. Defendant's second argument is that the prejudice caused by the flight testimony was exacerbated when the jury heard it repeated twice when the court was granting the motion to strike. Defendant claims that given the weakness of the State's case as a whole, the mere evidence of flight (and later repetition of that evidence) was so significant and prejudicial that it could not be cured by the court's admonition "to pay no attention at all to the evidence."

We reject defendant's arguments. Our appellate courts have recognized flight instructions are rarely advisable. State v. Bone, 429 N.W.2d 123, 126 (Iowa 1988); State v. Mayberry, 411 N.W.2d 677, 684 (Iowa 1987); State v. Marsh, 392 N.W.2d 132, 134 (Iowa 1986); State v. Caldwell, 423 N.W.2d 564, 566 (Iowa App. 1988). However, those decisions have not necessarily foreclosed the admission of flight

evidence. See State v. Mitchell, 450 N.W.2d 828, 831 n.1 (Iowa 1990) (Bone involved the propriety of instructing on the issue of flight, not the admissibility of flight evidence generally).

The trial court, recognizing the questionable nature of flight evidence, consciously chose to strike the contested testimony. It then admonished the jury twice to disregard the evidence. While it may not have been necessary to have the flight evidence repeated twice to the jury during the admonition, we cannot find that the circumstances in this case were such that any prejudicial effect against defendant could not reasonably be cured by the court's admonition. No abuse of discretion occurred in declining to grant a mistrial.

II. Sentencing. Defendant contends the sentencing court abused its discretion in ordering his sentences to run consecutively and it failed to state adequate reasons for its decision. The decision to impose either concurrent or consecutive sentences is a discretionary one. See State v. Fink, 320 N.W.2d 632, 633 (Iowa App. 1982); Iowa Code § 901.8 (1987). A trial court's sentencing decision will be set aside only for an abusive exercise of discretion. Fink, 320 N.W.2d at 633. The Iowa Rules of Criminal Procedure require a trial court to state its reasons for selecting a particular sentence. Iowa R. Crim. P. 22(3)(d).

At the sentencing, the State recounted defendant's criminal record and his history of probation violations. Defendant's caseworker, Ms. Kiefer, testified regarding defendant's failure to abide by the terms of his probation. Following Ms. Kiefer's testimony, the trial court told defendant he was a "bad fellow" who had abused all of the chances he had been given. The court then revoked his probation for a prior aggravated misdemeanor and sentenced him for two years for the prior offense. The court then clarified to defendant that he was being sent to prison because of his past criminal record.

Defendant was then asked by the court whether he had anything to say. Defendant inquired if his sentences would run concurrently or consecutively. The court told defendant his prior jail time would be accounted for in his sentence. It then informed defendant that, "when you get out of this, you might be old enough to know how to behave . . . . You'll be 32 years old when you get out. You would be old enough then to know how to behave like a man." After making these statements to defendant, the court sentenced him to ten years for the offense of third-degree sexual abuse.

After sentencing defendant for ten years, the court denied him probation and explained its reasons for doing so:

> [Y]ou are denied probation because you are a bad citizen, you know. You have got a bad criminal record for just 20 years of age. You've got a criminal record back in June of '86. You were

> arrested for terrorism. They were kind enough to you because of your youth and turned you loose, and on the 18th of September you were held in Meyer Hall for sexual abuse again. And you finally got a deferred judgment, which meant the Judge was kind to you, and if you would have made it, after so many months he would have dismissed that case and you would have had no record against you at all. But you didn't care anything about that.
>
> And on the 14th of March you escaped -- on the 14th of March -- I can't see -- on the 10th of December you were charged again with sexual abuse, and you were finally tried on that one, and that is what you were convicted of.
>
> So this sentence of 10 years will run concurrently . . . . [The court subsequently corrected itself and said the sentences would run consecutively.]

From our review of the entire sentencing hearing, we conclude the trial court sufficiently stated its reasons for its sentencing decisions. The court had before it several issues: 1) whether defendant's probation on a prior conviction would be revoked; 2) what his sentence for his current offense would be; 3) whether the sentences would run concurrently or consecutively; and 4) whether defendant would receive probation on his current sentence. The court's comments with regard to each of these issues are illustrative as to why defendant was sentenced to consecutive sentences.

We may review the entire sentencing procedure to determine if the district court stated sufficient reasons for its sentencing decisions. See State v. Johnson, 445 N.W.2d 337, 343 (Iowa 1989) (Appellate court may review sentencing colloquy, sentencing order, and presentence

investigation report to determine if sentencing court had an overall sentencing plan.). The court alluded to defendant's past criminal record and parole violations, his failure to take advantage of a prior deferred judgment, and the length of incarceration necessary for rehabilitation. It is clear from the trial court's statements what reasons motivated and prompted its sentencing decisions. We find no abuse of discretion with regard to defendant's sentencing.

AFFIRMED.