IN THE COURT OF APPEALS OF IOWA

No. 5-435 / 94-1438

STATE OF IOWA,

Plaintiff-Appellee,

vs.

BRUCE ROBERT NAPIER,

Defendant-Appellant.

FILED
SEP 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Hamilton County, Newt Draheim, Judge.

Defendant appeals from judgment and sentence, following jury trial, entered upon his conviction of third-degree sexual abuse, in violation of Iowa Code section 709.4 (1993). **AFFIRMED.**

Dan T. McGrevey, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Patrick Chambers, County Attorney, and Timothy Palmer, Assistant County Attorney, for appellee..

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

SACKETT, P.J.

Defendant-appellant Bruce Robert Napier appeals his conviction following a jury trial of sexual abuse in the third degree. He contends there is not substantial evidence to support the jury's verdict.

The State first contends the issue is not preserved for review in that the claim defendant now makes has been waived. Defendant made a motion to dismiss at the close of the State's case and again at the close of the trial testimony. He also filed a motion for judgment of acquittal or new trial prior to sentencing. He contended the only evidence was the perjured testimony of the complaining witness which was recanted at trial. He further contended the verdict was contrary to the evidence and the law, and the trial court erred in allowing the State to introduce evidence of an alleged past act of defendant with the alleged victim. The motion was subsequently amended to include a request for new trial based on a newly discovered witness who allegedly was approached by the alleged victim asking to support her false accusation.

The State moved to resist the motions and presented evidence defendant (1) had hired a post-trial witness to lie for him, (2) had lied during trial, and (3) since defendant's conviction, had tried to hire someone to put a gun to the alleged victim's head to get her to recant. Before the State finished with this evidence, defendant's attorney said defendant had decided to withdraw his motion for a new trial in light of the testimony being introduced because he knew the motion would not be successful. The State contends in doing this defendant waived and conceded all grounds in the

motion for new trial which also existed in the motion for directed verdict. Defendant disagrees, advancing he had filed both a motion for judgment of acquittal and a motion for new trial and all he withdrew was the motion for new trial. We agree with defendant, in withdrawing the motion for new trial, he did not also withdraw the motion for judgment of acquittal and the issue raised has been preserved for appellate review.

We review the evidence in the light most favorable to the State and all reasonable inferences flowing from it are accepted. *See State v. Blair*, 347 N.W.2d 416, 418-19 (Iowa 1984).

The evidence of the alleged criminal activity came from the testimony of the alleged victim, Kristina Pierce, defendant's stepdaughter. There was no other corroborating evidence. Defendant recognized corroborating evidence was not necessary.

Defendant claims, however, Kristina's testimony is replete with falsehoods and inconsistencies and Kristina made false statements under oath concerning allegations of rape. Defendant contends the evidence is so conflicting it does not make an issue of fact. He cites *State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993), in support of his position.

The State argues *Smith* is distinguishable because the discrepancies in this case do not approach the level of "absurdity" found in *Smith*. The State contends the

credibility issue was for the fact finder. Kristina's testimony, though contradicted in part, is sufficient to support the conviction.

AFFIRMED.