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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

413

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

HENRY HAROLD HAINES,)

Defendant-Appellant.)

Filed February 23, 1983

2-380
67820

Appeal from Scott District Court, Jack L. Burns, Judge.

Defendant appeals from his conviction by jury of three counts of lascivious acts with a child, a violation of Iowa Code section 709.8 (1981). AFFIRMED.

Kent Simmons of Raben, Liebbe, Shinkle & Bremer, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant Henry Harold Haines was charged by trial information with three counts of lascivious acts with a child, all in violation of Iowa Code Section 709.8 (1981). The alleged acts were committed upon three Haines sisters, nieces of the defendant, who were then ages 11, 8, and 6.

Each of the Haines girls testified at trial. The eldest, LaDonna, testified that defendant took all three of the girls to an upstairs bedroom in defendant's mother's house and pulled down LaDonna's pants and his own and lay on the bed with LaDonna on top of him. She then testified that he "spermed" on her, and described the emission. On cross-examination, defense counsel attempted to inquire into two previous occasions upon which LaDonna had been the complainant in charges of sexual abuse by perpetrators other than the defendant. The State objected to the cross-examination on the grounds that it was irrelevant and immaterial and beyond the scope of direct examination. The defendant responded that he was eliciting the evidence in an attempt to show that the witness could have obtained the unusual vocabulary and physiological knowledge displayed in her earlier answers even if she had not been molested by the defendant.

The court adjourned to chambers where the issue was discussed at some length. Defendant reiterated his purpose for the particular question, the court asked the State to restate its objection, and the State then objected on the grounds that the areas of inquiry—the witness's sexual history and prior complaints—were protected by statute. The objection was sustained and the jury was instructed to disregard any response the witness made to the question.

When the court submitted its proposed instructions to the jury, defendant requested that the proposed alibi instruction be modified to include "clarifying" language that the burden of proof was on the State to prove that the accused was present at the time and place of the alleged offense. Defendant's proposed instruction was denied.

The jury returned a verdict finding the defendant guilty of three counts of lascivious acts with a child. Defendant was sentenced to a period of confinement not to exceed five years on each count, each sentence to run consecutively. This appeal followed.

Defendant contends that the trial court erred in precluding cross-examination inquiry into the witness's prior experiences of sexual abuse, and in denying defendant's proposed modification of the alibi instruction. Our scope of review on appeal is on assigned error, except with regard to allegations of constitutional violations, which we review de novo, making an independent evaluation of tne totality of circumstances. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Evidence of Prosecuting Witness's Prior Sexual Experiences

A. Applicability of Iowa Rule of Criminal Procedure 20(5).

On appeal the State argues that the trial court properly prohibited the defendant from questioning LaDonna, the prosecuting witness, about her prior experiences of sexual abuse because he waived the right when he failed to make a timely application to the court as required by rule 20(5). That rule provides, in pertinent part:

> Evidence of past sexual conduct in trials of sexual abuse. In prosecutions for the crime of sexual abuse, evidence of the prosecuting witness' previous sexual conduct shall not be admitted, nor reference made thereto in the presence of the jury, except as provided herein. Evidence of the prosecuting witness' previous sexual conduct shall be admissible upon appropriate order of the court if the defendant shall make application to the court not later than five days before trial.

This statute refers to "prosecutions for the crime of sexual abuse," however, and is therefore inapplicable to the case before us. "Sexual abuse" is defined as:

> Any sex act between persons is sexual abuse by either of the participants when the act is performed with the other participant in any of tne following circumstances:

> 1. Such act is done by force or against the will of the other. In any case where the consent or acquiescence of the other is procured by threats of violence toward any person, the act is done against the will of the other.
>
> 2. Such other participant is suffering from a mental defect or incapacity which precludes giving consent, or lacks the m tal capacity to know the right and wrong of conduct in sexual matters.
>
> 3. Such other participant is a child.

Iowa Code § 709.1. Section 702.17 further defines "sex act" as:

> . . . any sexual contact between two or more persons by penetration of the penis into the vagina or anus, by contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

The defendant, however, was charged with, and tried on, three counts of lascivious acts with a child, which is defined in § 709.8:

> It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without his or her consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:
>
> 1. Fondle or touch the pubes or genitals of a child.
>
> 2. Permit a child to fondle or touch his or her genitals or pubes.
>
> 3. Solicit a child to engage in a sex act.
>
> 4. Inflict pain or discomfort upon a child or permit a child to inflict pain or discomfort on him or her.

There may be some overlap between the two sections, but each governs separate activities and it is possible to commit either offense without also committing the other. Although § 709.8 is contained within the general Chapter 709, entitled "Sexual Abuse," it is obvious from an examination of these definitions and the chapter as a whole that the legislature intended the section entitled "lascivious acts with a child" to constitute a separate and distinct offense from the offense of sexual abuse, which encompasses first, second, and third degree sexual abuse. See

Iowa Code §§ 709.2, 709.3, 709.4. We therefore conclude that rule 20(5) does not provide a basis for the trial court's exclusion of the evidence in question.

B. Relevancy of the Evidence and Proper Scope of Cross-Examination

Although we hold that rule 20(5) is inapplicable to this prosecution for lascivious acts, we do not think that the trial court erred in prohibiting defense counsel from questioning the prosecuting witness with regard to her prior experiences of sexual abuse. In addition to its objection based on rule 20(5), the prosecution also objected to the line of cross-examination on the grounds that it was "irrelevant and immaterial and beyond the scope of direct examination." The trial court has considerable discretion in its determinations of the relevance, materiality, and admissibility of evidence. State v. Webb, 309 N.W.2d 404, 411 (Iowa 1981); State v. Zaehringer, 280 N.W.2d 416, 419 (Iowa 1979). Similarly, the scope of cross-examination is within the discretion of the trial court. State v. Cornell, 266 N.W.2d 15, 21 (Iowa 1978). The court's rulings on these matters will not be disturbed on appeal except upon a showing of a clear abuse of discretion. Webb, 309 N.W.2d at 411; State v. Sheffey, 250 N.W.2d 51, 55 (Iowa 1977).

Abuse of discretion has been defined as:

> an erroneous conclusion and judgment, one clearly against the logic and effect of facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.

State v. Morrison, 325 N.W.2d 254, 256 (Iowa 1982)(quoting Best v. Yerkes, 247 Iowa 800, 816, 77 N.W.2d 23, 32 (1956)). Applying this standard, we do not think that the trial court erred in refusing to permit defense counsel to pursue a line of questioning which might have brought out the fact that LaDonna had previously been sexually abused. See Cornell, 266 N.W.2d at 21. The trial court stated, as its reason for excluding the evidence and in response to defendant's argument that

the evidence was relevant to show other possible sources of LaDonna's physiological knowledge:

> I don't believe the Court is in a position to assume what you are saying could be assumed. And I do not see it as a valid argument for that purpose. Like I said, if you can show that she has made similar complaints that were not founded, I think that would be relevant and probably admissible. Just the fact that she may have testified on one or two occasions before where something did in fact happen, I certainly don't think that is something that can be used at this time to make it look like she may in fact be making it up by giving this description from something prior.

We conclude that the court acted well within the scope of its permissible discretion in excluding the testimony.

Defendant also contends that the prohibition against this inquiry denied him his right of confrontation under the sixth amendment. Because this issue was not raised at trial, however, we do not address it on appeal. See State v. Taylor, 310 N.W.2d 174, 178 (Iowa 1981).

II. Proposed Alibi Instruction

The trial court submitted to the jury the following uniform instruction on "alibi:" "If after consideration of all the evidence you have a reasonable doubt as to whether the accused was present at the time and place the alleged offense was committed, you should acquit the defendant." Defendant had requested a similar instruction which would have included the following language: "The burden of proof is on the State to prove that the accused was present at the time and place the alleged offense was committed." The court refused to submit defendant's version to the jury, and defendant contends that its ruling constituted an abuse of discretion. We disagree.

In State v. Johnson, 243 N.W.2d 598 (Iowa 1976), the Iowa Supreme Court was confronted with a similar argument regarding the trial court's refusal of a requested instruction. In affirming the denial of the instruction, the court reasoned:

> All instructions must be read and considered together and related to each other, not piecemeal or in artificial isolation. If an instruction covers the legal principles involved, as they are raised by the facts of the case, the trial court has the right to choose its own language to best accomplish that purpose. [R]equested instructions may be properly refused if a point thereby raised is substantially given or covered by those submitted.

Id. at 604 (citations omitted). See also State v. Jones, 193 N.W.2d 509, 514 (Iowa 1972).

In the instant case the marshalling instructions required the State to prove, beyond a reasonable doubt, "each and every allegation of the charges." They further required the jury to acquit defendant unless the State met its burden of proving defendant guilty beyond a reasonable doubt. The jury was required to consider each instruction "in light of and together with every other instruction." To include defendant's proposed addition to the alibi instruction would have been superfluous in light of the other instructions. The trial court did not err in refusing it. See State v. Jones, 193 N.W.2d 509, 514 (Iowa 1972).

Having considered and rejected each of defendant's contentions on appeal, we affirm the decision of the trial court.

AFFIRMED.