IN THE COURT OF APPEALS OF IOWA

No. 8-191 / 97-406

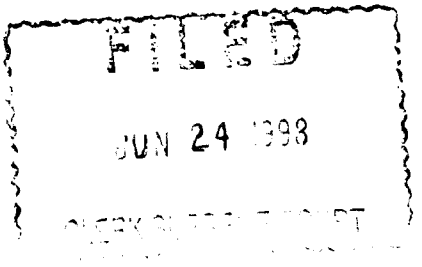
STATE OF IOWA,

Appellee,

vs.

MICHAEL JOE SMOTHERS,

Appellant.



Appeal from the Iowa District Court for Warren County, William H. Joy, Judge.

Michael Joe Smothers appeals from the judgment and sentence entered upon his conviction of sexual abuse in second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Kevin Parker, County Attorney, and Patricia L. Notch, Assistant County Attorney, for appellee.

Considered by Cady, C.J., and Vogel, and Mahan, JJ.

PER CURIAM

This is an appeal by a defendant challenging his conviction for sexual abuse in the second degree, in violation of Iowa Code section 709.3(2). We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Michael Smothers was charged with sexually abusing his stepdaughter, Amanda. Amanda, who was then eleven years old, testified Smothers touched her breasts and vaginal parts. She also testified Smothers forced her to touch his penis on one occasion. A jury found Smothers guilty of second-degree sexual abuse. Smothers appealed.

I. Smothers claims the State did not present sufficient evidence of a "sex act" to support his conviction. Under section 702.17, sexual contact between the finger or hand of one person and the genitalia of another person is included in the definition of "sex act." Smothers believes Amanda's testimony that he touched her vaginal parts was too vague and did not show he touched her genitalia.

We uphold a jury verdict unless the record lacks substantial evidence to support the charges. *State v. Capper*, 539 N.W.2d 361, 364 (Iowa 1995). Substantial evidence means evidence that could convince a rational jury the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.*

The supreme court has defined "genitalia" as meaning more than the vagina. *State v. Martens*, 569 N.W.2d 482, 486 (Iowa 1997). The term "genitalia" includes various external and internal organs concerned with reproduction, including the

vagina and vulva. *Id.* We find the evidence Smothers touched Amanda's "vaginal parts" is sufficiently specific to show he had contact with her genitalia. We note there was also evidence Smothers forced Amanda to touch his penis, which would also constitute a sex act. We find there was sufficient evidence in the record to support Smother's conviction.

II. Smothers contends he received ineffective assistance due to his trial counsel's failure to: (1) object to the marshaling instruction; (2) object to the prosecutor's comments on his right to remain silent; and (3) object to evidence of prior bad acts.

We generally preserve ineffective assistance of counsel claims for postconviction relief actions, in order to allow an opportunity to fully develop the record and provide counsel with an opportunity to respond to the claim. *State v. Goodson,* 503 N.W.2d 395, 399 (Iowa 1993). We determine Smother's claims of ineffective assistance of counsel should be preserved for postconviction proceedings where a more complete record may be developed.

We affirm defendant's conviction for second-degree sexual abuse. Costs of this appeal are assessed to defendant.

AFFIRMED.