

IN THE COURT OF APPEALS OF IOWA

No. 9-524 / 88-1692

FILED

JAN 25 1990

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RODNEY ALLEN TURECEK,

Defendant-Appellant.

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Appeal from the Iowa District Court for Clay County,
Joseph J. Straub, Judge.

The defendant appeals a judgment and sentence entered
by the trial court following a jury trial finding him
guilty of sexual abuse in the second degree. **REVERSED AND
REMANDED FOR NEW TRIAL.**

Ed Kelly of Kelly & Morrissey, Fairfield, and Emil
Trott, Jr. of Barrett & Trott, Des Moines, for appellant.

Thomas J. Miller, Attorney General; Amy M. Anderson,
Assistant Attorney General; and Mike L. Zenor, Clay County
Attorney; for appellee.

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

HAYDEN, J.

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Rodney Turecek was convicted of second-degree sexual abuse following a jury trial stemming from an incident involving a thirteen-year-old baby-sitter. The girl, J.B., had become acquainted with Rodney; his fiancée, Barbara; and her two children from a previous marriage. The day before the couple's wedding, J.B. was asked to baby-sit for Barbara's children. According to J.B.'s testimony, she noticed Rodney and Barbara go into the bedroom and shut the door. She heard them have intercourse. About half an hour later J.B. was called into the bedroom. Upon entering, Rodney pulled her onto the bed. Rodney and Barbara took off J.B.'s clothes, tied her up with cloth rope, and handcuffed her. The couple then began to fondle her. Barbara eventually left the room and Rodney had intercourse with her.

According to J.B., she subsequently made a telephone call to a friend in Ohio, and then went home. J.B.'s sister noticed the marks on J.B.'s wrist. J.B. explained she had gotten into a fight with her boyfriend and he had tied some ropes on her hands. This incident allegedly occurred on July 24, 1987. J.B. did not tell her mother about the incident until September. The next day her mother called the authorities.

A search warrant was issued on September 15 which authorized search and seizure of "handcuffs, telephone

records, bathrobes with cloth belts and pornographs [sic] magazines." The police officers seized a copy of the book, The Joy of Sex, along with numerous other sexually-explicit magazines located throughout the Turecek home.

Prior to trial, Rodney filed a motion to suppress material seized with an improper warrant, which the trial court overruled. He subsequently filed a motion in limine requesting the court to instruct the county attorney not to mention the pornographic books, magazines, and other material found in his home. The trial court sustained the motion in limine except as to the book, The Joy of Sex, and ruled the State could introduce it for the limited purpose to show Barbara's five-year-old son had used the book for coloring-in the sexual illustrations.

At trial, Rodney and Barbara denied having abused J.B. They testified J.B. had gotten into some vodka which had been in the kitchen, and then burst into the bedroom in a drunken state. Rodney testified J.B. stormed out of the house after he and Barbara refused to tell her what they were doing in the bedroom, but returned a short time later. She remained at the Turecek's until she was sober enough to go home, at about 11:00 p.m. Rodney and Barbara also testified numerous friends visited their home that evening, and they took J.B.'s picture with those friends.

Rodney and Barbara testified the children were never exposed to pornographic materials. In rebuttal, the State

introduced The Joy of Sex book to show Barbara's son had colored in the illustrations. The State also introduced testimony of Deputy Sheriff Kramer, who was in the Turecek house when it was searched. Over Turecek's hearsay objections, Kramer testified to a conversation which took place between Barbara's five-year-old son and an unnamed witness unavailable for testimony. According to Kramer, during the search the boy was asked if he remembered the last time J.B. came and baby-sat. He allegedly responded the last time she baby-sat his daddy had taken her into the bedroom and "screwed" her.

The jury ultimately found Rodney guilty as charged. The trial court denied his motion for a new trial. Rodney was sentenced to a prison term not to exceed twenty-five years. Rodney has appealed.

Rodney contends the search warrant was overly broad and general and the court erred in not suppressing The Joy of Sex and other seized materials. Rodney further argues such materials were irrelevant to the case or, if relevant, their probative value was not outweighed by the danger of unfair prejudice. Rodney asserts even if the materials were properly admitted for a limited purpose, the trial court should have given a limited instruction to the jury upon final submission of the case. Rodney also believes the trial court erred in overruling his hearsay objection to Deputy Kramer's testimony. Finally, Rodney contends the

trial court erred in refusing to instruct the jury on simple assault as a lesser-included offense of second-degree sexual abuse.

The trial court erred in not instructing the jury on the lesser-included offense. We reverse and remand for a new trial.

1. **Lesser-Included Offense.** After reviewing the proposed final draft of the jury instructions and, prior to final arguments, Rodney specifically requested a jury instruction on simple assault as a lesser offense included within the charged offense of second-degree sexual abuse. After consideration, the trial court denied the request.

At the time this case was tried, the trial court did not yet have the benefit of State v. Jeffries, 430 N.W.2d 728 (Iowa 1988), filed two months later. Jeffries held trial courts were to automatically instruct on a lesser-included offense if the legal test is met regarding a greater offense with support in the evidence. Id. at 737. This "modified approach" was held to be retroactive to all cases pending on appeal at the time Jeffries was filed. State v. Royer, 436 N.W.2d 637, 640 (Iowa 1989).

Jeffries retained the rule that to preserve error a defendant must request a lesser-included offense instruction or object to the court's failure to give it. State v. Jeffries, 430 N.W.2d at 737. Rodney preserved error by requesting the instruction.

The court denied the requested instruction because it concluded lack of justification is a separate element of assault and, therefore, cannot be a lesser-included offense to sexual abuse. We disagree. The supreme court has held that justification is an affirmative defense to assault, not an element of the crime. State v. Delay, 320 N.W.2d 831, 835 (Iowa 1982).

In a case involving third-degree sexual abuse and assault while participating in a felony, the supreme court reasoned:

Manifestly, an assault is committed when a sex act is performed by force or against the will of another. Compare section 709.4(1) (sexual abuse in the third degree) with section 708.1 (assault). The intent requirements are of the same character. For assault, it is sufficient if the defendant intends to offensively touch someone, section 708(1); for sexual abuse, the defendant must generally intend to commit the proscribed sexual contact.

State v. Johnson, 291 N.W.2d 6, 9 (Iowa 1980). The court held assault while participating in a felony was a lesser-included offense of sexual abuse in the third degree. Id. at 10.

A comparison of Iowa Code section 709.3(3) (sexual abuse in the second degree), with section 708.1 (assault), shows assault is a lesser-included offense of sexual abuse. The trial court erred in not giving the requested instruction.

This refusal to submit assault to the jury was prejudicial and thus, reversible error.

Because this case is remanded for a new trial, we will address the other issues raised by appellant.

2. **Search Warrant.** The trial court was correct in concluding the search warrant described the items to be seized with sufficient particularity to conduct a legal search.

The fourth amendment requires search warrants describe the objects to be seized with particularity. Coolridge v. New Hampshire, 403 U.S. 443, 467, 91 S. Ct. 2022, 2038-39, 29 L. Ed. 2d 564, 583 (1971). This avoids the "general, exploratory rummaging in a person's belongings," which a general warrant would allow. Id. Nevertheless, "the requirements for warrants are practical and not abstract. Elaborate specificity is not required." State v. Bakker, 262 N.W.2d 538, 545 (Iowa 1978). "Where the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the general class of items will suffice because less particularity can be reasonably expected than for goods (such as those stolen) whose exact identity is already known at the time of issuance." United State v. Johnson, 541 F.2d 1311, 1314 (8th Cir. 1976). If evidence is significantly related to a crime under investigation, it is subject to seizure. State v. Hall, 235 N.W.2d 702, 717 (Iowa 1975), appeal after remand, 249 N.W.2d 843 (Iowa 1977), cert. den. 434 U.S. 822, 98 S. Ct. 66, 54 L. Ed. 2d 79 (1977).

The search warrant application was based on police interviews with the thirteen-year-old victim who told police she was restrained and sexually abused. She stated she was restrained with cloth belts from bathrobes and handcuffs. She also told the police there was sexually explicit and pornographic magazines in the house. The description of the items to be seized was as specific as possible under the circumstances. The material was seized for evidentiary purposes and significantly related to a crime under investigation. It was a lawful warrant.

3. **Sexually Explicit Material.** The admission into evidence of The Joy of Sex and the other sexually-explicit material seized from the Turecek home was a hotly contested issue before and during the trial. The trial court considered the arguments of both sides prior to admitting the evidence at various stages of the proceedings. The evidence was admitted for the limited purpose of impeaching the credibility of witnesses, not as substantive evidence of the defendant's guilt or innocence. If these materials are offered into evidence again, this court cautions the trial court to take a close look at the respective weights of the relevancy and the inflammatory and prejudicial effect upon the jury.

We agree with Turecek the trial court erred in not giving the requested jury instruction limiting the purposes for which the jury could consider this material. It should have been given when the case was submitted to the jury.

4. The Hearsay Objection. Barbara Turecek's son was called as a witness by the State during its case-in-chief. The State's purpose in calling the six year old was to impeach the boy. The State placed the defendant's son on the witness stand, anticipating he would deny stating to an unnamed third-party that the last time J.B. baby-sat, Daddy "screwed her." This statement was allegedly made when the boy was five years old. When he did, in fact, deny making this statement, Deputy Sheriff Kramer testified he overheard the five year old say this to the third person. Kramer's testimony was given over Turecek's hearsay objection, which he raises again in this appeal.

The trial court did not err in admitting this testimony as a prior, inconsistent, out-of-court statement because it was offered for impeachment purposes and, therefore, does not come within the definition of hearsay. State v. Hill, 243 N.W.2d 567, 570 (Iowa 1976).

REVERSED AND REMANDED FOR NEW TRIAL.