

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**STATE OF IOWA,**

)

Plaintiff-Appellee,

)

Filed November 29, 1982

vs.

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LEWIS LAVOY DECOTEAU,

)

2-327
66865

Defendant-Appellant.

)

Appeal from Greene District Court - James C. Smith, Judge.

Defendant appeals from his conviction for sexual abuse in the second degree in violation of Iowa Code §§ 709.1 and 709.3 (1979), asserting (1) that the evidence that a sex act occurred was insufficient to support the jury's verdict of guilty; (2) that the court should have excluded as irrelevant evidence that defendant's wife was out of town on the day of the attack; and (3) that he was denied his right to a speedy trial when he was not brought to trial within 90 days after filing of the information. **AFFIRMED.**

Francis Hoyt, Jr., Chief Appellant Defender, and Charles Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

Defendant, Lewis Lavoy DeCoteau, appeals from his conviction for sexual abuse in the second degree in violation of Iowa Code §§ 709.1 and 709.3 (1979), asserting: (1) that the evidence that a sex act occurred was insufficient to support the jury's verdict of guilty; (2) that the court should have excluded as irrelevant evidence that defendant's wife was out of town on the day of the attack; and (3) that he was denied his right to a speedy trial when he was not brought to trial within 90 days after filing of the information. We affirm.

On August 28, 1980, after leaving an elevator board meeting, the victim proceeded north on Highway 65 near Churdan, Iowa. At this point a pickup truck forced her auto off the road. The driver of the pickup truck then broke into her car and assaulted the victim. The assault was interrupted when another car arrived at the scene and the assailant fled through an adjoining pasture. One of the occupants of the second car identified defendant as the man he saw fleeing from the scene.

On October 13, 1980, a county attorney's information was filed charging the defendant with violation of Iowa Code §§ 709.1 and 709.3. Defendant was tried to a jury and was convicted. This appeal followed. Additional facts will be discussed in the pertinent portions of this opinion.

I. Scope of Review. Our review is on assignment of error only. Iowa R. App. P. 4.

II. Speedy Trial. Defendant asserts that the trial court erred in overruling his motion to dismiss the charge for failure to bring him to trial within ninety days after the information was filed. The State argues that there was good cause attributable to the defendant for the delay. We agree with the State.

It is important for our discussion of the speedy trial issue to detail the chronology of events. The information was filed on October 13, 1980, thus establishing January 11, 1981, as the ninetieth day. On October 20, 1980, defendant

filed a notice of his intention to rely on intoxication as a defense. Pursuant thereto the State, on October 27, 1980, filed an application for an examination of defendant at the Oakdale facility. On October 29, 1980, the defendant joined with the State in requesting an evaluation at Oakdale. Both applications were granted by the court on October 30 and November 3, respectively. Defendant also filed motions to suppress and for change of venue on November 3rd. Because of the examination and pending motions, the court continued trial from the original date of December 9th to a date uncertain, but which was to become certain on the return of the defendant from Oakdale. Defendant returned from Oakdale on December 19, 1980. The court, on January 6, 1981, established January 13, 1981, as the date for hearing on defendant's pending motions. On January 14th, the court overruled defendant's motion to suppress on each division. On January 13th, defendant withdrew notice of his intention to rely on the intoxication defense.

Defendant made his first motion to dismiss on speedy trial grounds on January 16, 1981. The matter was duly resisted by the State. Before a court ruling, however, defendant, on January 19, 1981, moved for a continuance of at least four weeks and filed a waiver of his right to a speedy trial during the period of continuance. On January 20, the court overruled defendant's motion to dismiss on the basis that the "90 days is not effective in this case by virtue of the . . . status of the pleadings . . . additionally . . . on defendant's motion for continuance, trial of the above captioned matter has been continued until a date subsequent to February 15th, 1981." The February 15th date posed witness problems for the State and it requested a trial date of February 17th or a date after March 12, 1981. Trial was set for March 17, 1981, and on that date defendant once again moved to dismiss. Defendant's motion was overruled and the matter proceeded to trial on March 17th, a total of 155 days from the date on which the information had been filed. However, in light of defendant's request for a continuance, we believe any delay after January 19th is not subject to attack

because of defendant's waiver of his speedy trial rights. Our focus, thus, is on the delay from January 11th to January 19th.

We begin our analysis with Iowa Rule of Criminal Procedure 27(2)(b), which provides:

If a defendant indicted for a public offense has not waived his or her right to a speedy trial, he or she must be brought to trial within 90 days after the indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

This speedy trial provision "is both more specific and more stringent than the constitutional speedy trial requirement." State v. Petersen, 288 N.W.2d 332, 335 (Iowa 1980) Failure to comply with the 90-day requirement results in dismissal absent: (1) a waiver of speedy trial by defendant; (2) delay attributable to the defendant; or (3) good cause for the delay. Id.

The principles guiding our consideration of "good cause" are delineated in Petersen, 288 N.W.2d at 335.

Good cause, under our rule, focuses on only one factor: the reason for the delay. If the reason for the delay is sufficient, the other factors are not needed. If the reason for the delay is insufficient, the other factors will not avail to avoid dismissal.

Yet, the reason for the delay cannot be evaluated entirely in a vacuum. The surrounding circumstances bear on the focal point of the inquiry, that is, the reason for the delay. The surrounding circumstances often include matters that will seem familiar: length of delay, whether the defendant asserted his right to a speedy trial, and whether he was prejudiced about the delay. But, considered only as surrounding circumstances, these matters are important, if at all, only insofar as they bear on the sufficiency of the reason itself. The shortness of the period, the failure of the defendant to demand the speedy trial, and the absence of prejudice are legitimate considerations only insofar as they affect the strength of the reason for delay.

The burden is on the State to show good cause for the delay. State v. LaPlant, 244 N.W.2d 240, 242 (Iowa 1976).

The primary justifications for the delay appear to be the examination of the defendant and the pretrial motions of the defendant. The trial court postponed ruling on these motions until defendant was returned from Oakdale. The court has recognized that the processing and consideration of pretrial motions may constitute "good cause." State v. Truax, 232 N.W.2d 861, 863 (Iowa 1975). It has further been held that delays due to the mental examination of the defendant constitute "good cause." See State v. Watts, 244 N.W.2d 586, 587 (Iowa 1976). In the present controversy, we find that the mental examination and the requested court rulings have a cumulative effect which compel a finding of good cause. Accordingly, we affirm the trial court in overruling defendant's motion to dismiss.

III. Sufficiency of the Evidence. Defendant argues his conviction for sexual abuse in the second degree is not supported by substantial evidence that he committed a sex act. We disagree. In examining the record to determine sufficiency of the evidence, we are governed by the principles set forth in State v. Schrier, 300 N.W.2d 305 (Iowa 1981).

In reviewing motions for a directed verdict and a new trial based upon sufficiency of the evidence in criminal cases, [the] court views the evidence in a light most favorable to the State. All legitimate inferences which may fairly and reasonably be deducted therefrom will be accepted. [citations]. It is necessary to consider all of the evidence when determining evidential sufficiency. [citation] A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. [citation] Similarly, a jury verdict of guilty is binding upon this court unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of the evidence. [citation] Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. [citation]

... 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 the use of artificial sex organs or substitutes therefore in contact with the genitalia or anus.

Iowa Code § 702.17 (1979).

The pertinent portions of the victim's trial testimony are as follows:

QUESTION: ... Did you at some time while this was going on end up nude?

ANSWER: Yes.

QUESTION: Okay. Did the defendant touch you at all after your clothes were off?

ANSWER: Yes.

QUESTION: With his hands?

ANSWER: Yes.

QUESTION: Where did he touch you?

ANSWER: He handled my breasts and he fondled my genitals.

Appendix at 53.

QUESTION: ... Was he saying anything to you at this time?

ANSWER: All the time that he was pressing on my throat and all the time from the time we got to the pick-up and I was leaning back on it, he kept repeating over and over and over, louder and more angry: Let me fuck you or I'm going to kill you, let me fuck you or I'm going to kill you. When we were onto the ground—

QUESTION: —Excuse me. When you were on the ground, was he touching you?

ANSWER: Yes.

QUESTION: Could you describe how he was touching you?

ANSWER: Trying to spread my legs, saying spread your legs or I'll kill you. Let me fuck you or I'll kill you over and over and—

QUESTION: —Did you?

ANSWER: As far as touching, he was trying to separate my legs.

QUESTION: Answer.

ANSWER: With his hands.

QUESTION: Did you finally part your legs?

ANSWER: Yes.

QUESTION: And what did your assailant do?

ANSWER: He laid on me with his penis touching me.

QUESTION: To the best of your knowledge did your assailant penetrate you at all?

ANSWER: No.

Appendix at 60-61.

It is undisputed that no genitalia to genital penetration occurred. Penetration, however, is not required in order for the act to constitute a sex act. See State v. Howard, 284 N.W.2d 201, 203 (Iowa 1979). The court in Howard concluded a sex act had occurred where the victim described the "intertwining of pubic hair." Id. The court in State v. Whetstine, 315 N.W.2d 758 (Iowa 1982), held that genital to genital contact was not required and that digital penetration of the genitalia is a sex act within the meaning of section 702.17.

In the present case there is testimony that the defendant had removed his trousers and was attempting to separate the victim's legs. The victim further testified that the defendant laid on her and placed his penis on her nude body as he repeated his threatening demands. The victim also testified that the defendant "fondled" her genitals.

Defendant makes a semantic argument based upon the Webster Dictionary definition of "fondle" and the traditional notions of a sex act. Defendant argues that "fondle" means to "handle tenderly [or] lovingly." However, we believe that the hypertechnical distinction defendant attempts to draw belies the reasonable inferences to be drawn from his conduct.

Admittedly, there is no direct evidence of the commission of a sex act, however, circumstantial evidence is as probative. See State v. Howard, 284 N.W.2d at 203. We conclude that from the evidence presented that a rational jury confronted with these facts could reasonably have concluded that a sex act occurred.

We do not find this to be piling one inference on top of another ... [citation] It was necessary for the trial court to make only one inference: that sexual contact must have occurred due to the position of the bodies. "[T]he choice between inferences to be drawn from circumstantial evidence is peculiarly the province of the [factfinder]." [citation]

Id. at 204.

IV. Exclusion of Evidence. Defendant further argues that the trial court erred by permitting the State to introduce evidence that defendant's wife was in Nebraska at the time of the offense. He argues that such evidence is irrelevant.

"Evidence is relevant if it renders the existence of a fact more probable or less probable with it than without it." Thompson v. Bohlken, 312 N.W.2d 501, 509 (Iowa 1981). Irrelevant evidence will be excluded. See State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979).

Defendant argues the only possible purpose for the introduction of such evidence was to show that the defendant had a propensity to commit a sex act because of sexual deprivation due to his wife's absence. The State argues that such evidence is relevant to the whereabouts of the defendant after the assault. The State theorizes that the defendant spent the remainder of the night after the attack hiding in the fields to elude pursuit.

While this court is not totally persuaded by the State's argument, we find that the admission of such testimony if erroneous at all was not prejudicial. Where no constitutional infirmity is alleged, this court applies a less stringent standard to "determine whether a ruling on admission of evidence was prejudicial:

Does it sufficiently appear that the legal rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?" See State v. Trudo, 253 N.W.2d 101, 107 (Iowa), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189 (1977). "Prejudice must be shown before any error will require reversal." State v. Cole, 295 N.W.2d 29, 40 (Iowa 1980).

We find no prejudice here and, accordingly, affirm the trial court.

AFFIRMED.