IN THE COURT OF APPEALS OF IOWA

No. 22-0841
Filed March 27, 2024

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KODY RYAL MILLER,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Tod Deck (suppression hearing) and James N. Daane (trial), Judges.

The defendant challenges his conviction for simple misdemeanor assault.

AFFIRMED.

Priscilla E. Forsyth (until withdrawal), Sioux City, and Krisanne C. Weimer of Weimer Law, P.C., Council Bluffs, for appellant.

Brenna Bird, Attorney General, and Thomas E. Bakke and Joshua A. Duden, Assistant Attorneys General, for appellee.

Considered by Tabor, P.J., and Badding and Chicchelly, JJ.

TABOR, Presiding Judge.

Kody Miller challenges his conviction for simple misdemeanor assault.[1] He contends the State presented insufficient evidence and the district court should have granted his motion to suppress DNA testing of his blood sample collected in an unrelated operating-while-intoxicated (OWI) case. We need not resolve his suppression issue and find sufficient evidence in the record to affirm.

I. Facts and Prior Proceedings

On New Year's Eve 2019, sixteen-year-old B.G. was sleeping over at her friend A.E.'s house. A.E.'s dad, Ryan, and his girlfriend, Carrie, had to work that evening and left A.E. to babysit her three-year-old sister, J.E. The teens were playing with the toddler when Carrie's friend, Kendra, arrived unexpectedly. Kendra, who was already intoxicated, recruited the teens to chauffeur her, using her car, to a bar in the next town over. The teens agreed and, with J.E. along for the ride, drove Kendra to the bar. While out and about, they bought gas and snacks at the grocery store, then headed back to A.E.'s house. Once there, they saw that J.E. had spilled snacks inside Kendra's car. After the teens cleaned up, they noticed the dome light wouldn't shut off. Not wanting to drain the car battery, they were fiddling with the switch when Miller "just popped up out of nowhere."

Miller, a family friend, was living in a camper parked near A.E.'s house. Ryan and Carrie allowed Miller, who was thirty-five, into their house to use the

[1] The supreme court granted discretionary review and transferred the case to the court of appeals. *See* Iowa Code § 814.6(2)(d) (2022); *Tyrell v. Iowa Dist. Ct.*, 413 N.W.2d 674, 675−76 (Iowa 1987).

shower and spend time with the family; A.E. testified that Miller got along well with J.E. After A.E. asked him to help, Miller fixed the dome light.

That problem solved, the teens took J.E. inside. After the toddler fell asleep in her room, the teens went to A.E.'s room and got ready for bed. B.G. changed "out of the uncomfortable clothes" she was wearing into a new bra, a robe, and shorts. But about twenty minutes later, the teens heard J.E. go downstairs. They followed and saw Miller sitting in a living room chair with J.E. on his lap. They had not heard him come into the house. Hoping the toddler would go back to sleep, B.G. snuggled with her on a mattress on the living room floor. A.E. took the couch. They all watched TV, turning it off after J.E. fell asleep.

Then Miller moved to the mattress so that J.E. was situated between him and B.G. At trial, B.G. recalled that Miller started "caressing" her hand. She said, "My brain is just going crazy at this point. I don't know what to do, how to react." Miller's advances continued. He rubbed B.G.'s thigh for what she estimated was five minutes. Then he got up and lay down—this time right next to B.G. Miller resumed rubbing her thigh, before fondling her vagina over her shorts and underwear. Again, his conduct escalated. B.G. heard Miller unzip his pants and remove his belt. Then he pulled down her shorts and underwear and lay on top of her. B.G. testified that she felt "[s]tress, anxiety, because there's nothing I could do." She told the jury that he "penetrated [her] with his penis" and stopped after ejaculating. Before getting up to leave, he whispered in her ear, "I'll be right back." Those words marked the first time that he'd spoken directly to her that night.

Soon after Miller left, A.E. woke to find B.G. sitting up, in tears. B.G. said: "He raped me." The teens conferred in A.E.'s room and then went back down to

watch J.E. Meanwhile, Miller had returned, and B.G. was "[f]rightened" and "[d]idn't know what to do, how to react." He asked B.G. if she wanted some candy, which she accepted but did not eat.

Ryan and Carrie returned in the early morning hours of New Year's Day. A.E. told them what happened to B.G. Ryan confronted Miller. Rather than deny the act, Miller said, "[S]he was walking around in a robe." Ryan interrupted him, scolding: "Well, that's when you should have turned around and walked out."

When B.G. returned home, she told her family about Miller's actions. Her mother called law enforcement. B.G. underwent a medical exam including a rape kit. She was also interviewed at the child protection center and by law enforcement. While talking to the police officer, she denied taking Kendra to a bar and denied accepting candy from Miller. B.G. later explained that she was worried she would get in trouble.

The State charged Miller with third-degree sexual abuse. During their investigation, officers obtained a warrant to collect DNA from Miller by buccal swab. They also had a sample of his blood taken six months earlier during an OWI investigation. Miller moved to suppress the DNA obtained from the blood sample, arguing use of that evidence from an unrelated investigation violated his constitutional rights. The district court denied that motion. Police sent B.G.'s underwear, the rape kit, the buccal swab, and the blood sample to the Iowa Division of Criminal Investigation (DCI). At trial, a DCI criminalist testified that a DNA profile developed from semen in B.G.'s underwear was consistent with Miller's blood sample and the buccal swab.

After hearing the evidence, the jury received marshaling instructions on third-degree sexual abuse and the lesser included offenses of assault with intent to commit sexual abuse and simple misdemeanor assault. Sexual abuse required proof that Miller performed a sex act with B.G. that was by force or against her will, and assault with intent to commit sexual abuse required proof that Miller assaulted B.G. with the specific intent to commit a sex act by force or against her will. The jury acquitted Miller of sexual abuse and assault with intent to commit sexual abuse but found him guilty of assault. Miller contests that conviction.

II. Discussion

A. Sufficiency of the Evidence

Miller challenges the sufficiency of the evidence supporting the verdict. We review for errors at law. *State v. Geddes*, 998 N.W.2d 166, 171 (Iowa 2023). We take the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *Id.* "Evidence is substantial if it is 'sufficient to convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.'" *State v. Cook*, 996 N.W.2d 703, 708 (Iowa 2023) (citation omitted). We make all "legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence." *Id.* (citation omitted).

For assault, the State had to prove two elements: (1) Miller did an act intended either (a) to cause pain or injury or result in physical contact that was insulting or offensive to B.G. or (b) to place B.G. in fear of immediate physical contact that would have been painful, injurious, insulting, or offensive to her and (2) he had "the apparent ability to do the act." *See* Iowa Code § 708.1(2)(a), (b) (2019).

Miller argues that because the jurors acquitted him of sexual abuse and assault with intent to commit sexual abuse, they found any sex act was consensual.[2] From there, he segues to the assault offense, asserting that he did nothing offensive or insulting, nor did he cause pain or injury to B.G. And he asserts the State offered no evidence that he intended to hurt or insult B.G. or make her uncomfortable.

To evaluate his argument, we turn to the record. B.G. did not waver from her account of Miller's actions on the mattress. True, she agreed on cross-examination that she did not find it offensive when Miller was "caressing" her arm or thigh. She also acknowledged that Miller did not threaten her or use a weapon. She conceded she did not pull away or tell him to stop. To explain her paralysis, she testified: "My brain shut down. I didn't know what to do." When asked if Miller restrained her, she noted that he lay on top of her. She was five foot three and "barely a hundred pounds." And he was taller and heavier. She agreed Miller did not pin down her hands. She told the jury that she tried shaking J.E. awake while Miller was on top of her. The State also offered corroborating testimony from A.E., who was on the couch when Miller was on the mattress with B.G.

Miller's sole witness was K.K, a friend of B.G.'s at the time. K.K. testified that B.G. told her she lied about Miller raping her "because she had not gotten her

[2] Miller's argument suggests that a verdict on the lesser included offense of simple misdemeanor assault was incompatible with that implicit finding. But in inconsistent-verdict cases—a challenge Miller is not explicitly raising—our courts have allowed inconsistencies resulting from the jury's exercise of its power of leniency. *See, e.g.*, *State v. Fintel*, 689 N.W.2d 95, 101 (Iowa 2004).

way with Kody." But K.K. was not without bias. On cross-examination, K.K. admitted that she disliked B.G., and that her mother knew Miller.

Considering this evidence, we return to the assault verdict. A jury's finding of guilt on a lesser included offense implies acquittal on the greater offenses. *See Green v. United States*, 355 U.S. 184, 190 (1957) (discussing double jeopardy principles). By acquitting Miller of the greater offenses, the jury signaled that it did not find proof beyond a reasonable doubt that Miller performed a sex act or intended to perform a sex act by force or against B.G.'s will. The State contends those jury's findings did not exclude the possibility that Miller acted with the specific intent to engage in physical contact that was insulting or offensive to B.G., which is all that is required for assault. We agree with the State's contention.

Our only job is to decide whether the evidence presented supports the verdict reached. It is not our duty to weigh that evidence, assess witness credibility, determine the plausibility of explanations, or resolve conflicting testimony. *State v. Brimmer*, 983 N.W.2d 247, 256 (Iowa 2022). In our limited role, we ask: was there substantial evidence that Miller committed an act intended to cause B.G. pain or injury, or result in insulting or offensive physical contact, or put her in fear of contact that would be painful, injurious, insulting, or offensive?

This record—viewed in the light most favorable to the State—reveals substantial evidence to satisfy the intent element of assault under Iowa Code section 708.1(2)(a) and (b). And the record shows that Miller acted in furtherance of that intent.[3] *See State v. Keeton*, 710 N.W.2d 531, 535 (Iowa 2006). We may

[3] The final element of assault—that Miller had the apparent ability to do the act—is not disputed on appeal.

infer the intent required by the assault statute from the circumstances of the interaction with B.G. *See id.* at 534. We view Miller as "intending the natural and probable consequences that usually follow" from his voluntary act. *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004).

We first assess Miller's actions. He stealthily entered A.E.'s house late at night, foisting himself into their babysitting duties. Despite being twenty years older and a "complete stranger" to B.G., he initiated intimate contact with her while a toddler lay between them. And he said nothing to ensure that she agreed to the physical contact. While Miller emphasizes that B.G. never voiced dissent to his advances, nothing in the evidence shows her affirmative consent either.

We next consider B.G.'s reaction. Although B.G. testified that she was not offended when Miller started rubbing her hand or her thigh when J.E. was separating them, the jury could reasonably conclude the nature of his conduct changed when Miller moved next to B.G. and escalated the touching. A reasonable juror could conclude that Miller intended to put B.G. in fear of injurious contact when he shifted his hand from her thigh to her genitals, unzipped his pants, and lay on top of her before penetrating her vagina with his penis.

B.G. experienced "[s]tress" and "anxiety" and felt there was "nothing [she] could do" when he pressed his much bigger body against hers. After Miller left, she immediately told A.E. that Miller "raped" her. A.E. could see that B.G. was upset. B.G. also testified to being "frightened" when she saw Miller in the kitchen again. While B.G.'s testimony is not dispositive, her "perceptions are properly considered" in determining Miller's intent. *Keeton*, 710 N.W.2d at 535. On this record, the jury could reasonably conclude that Miller intended his actions to result

in physical contact offensive or insulting to B.G. Thus, substantial evidence supports the guilty verdict on simple misdemeanor assault.

B. DNA Evidence

In seeking a new trial, Miller contends the district court should have granted his motion to suppress DNA test results from the blood sample collected in his OWI case. He notes that the warrant slated the blood for chemical testing only. Without a new warrant to perform DNA testing, he maintains that the results were inadmissible. He asserts admission of the results violated his rights under the state and federal constitutions. *See* U.S. Const. amend. IV; Iowa Const. art. I, § 8. "We review the district court's denial of a motion to suppress based on deprivation of a constitutional right de novo." *State v. Arrieta*, 998 N.W.2d 617, 620 (Iowa 2023).

But we need not decide whether using the blood sample violated Miller's constitutional rights. Even if the evidence should have been suppressed, the State can show beyond a reasonable doubt that the alleged error did not contribute to the assault verdict. *See State v. Effler*, 769 N.W.2d 880, 893 (Iowa 2009).

First, the challenged evidence was cumulative. Testing developed identical DNA profiles from the OWI blood sample and the buccal swab—obtained by a separate warrant during the sexual-abuse investigation. What's more, because the jury acquitted Miller of sexual abuse and assault with intent to commit sexual abuse, any DNA evidence identifying Miller's seminal fluid in B.G.'s underwear did not contribute to the verdict. Finally, Miller's defense was that the sex act was consensual, so he did not deny that his semen was in B.G.'s underwear. Thus, the DNA evidence made no difference to his assault conviction. We find beyond

a reasonable doubt that admitting the DNA profile of the blood sample did not contribute to the verdict. Miller is not entitled to a new trial.

AFFIRMED.