IN THE COURT OF APPEALS OF IOWA

No. 0-114 / 09-0579
Filed May 12, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES ERIC POTTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Paul L. Macek (motion to dismiss) and Mark D. Cleve (trial), Judges.

The defendant appeals from his convictions for two counts of sexual abuse in the second degree, challenging the sufficiency of the evidence supporting the findings of guilt. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, E. Frank Rivera, Assistant Appellate Defender, and Jordan Smith, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Thomas Andrews and Karen Doland, Assistant Attorneys General and Eric McBurney, Student Extern, Michael J. Walton, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

VAITHESWARAN, P.J.

The State charged Charles Potter with three counts of second-degree sexual abuse involving three relatives. A jury found him guilty on the first two counts. On appeal, Potter maintains the evidence was insufficient to support these findings of guilt.

Our review is for substantial evidence. *State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007). We are obligated to view the evidence in the light most favorable to the State. *Id.*

I. Count I

The jury was instructed that the State would have to prove the following:

> 1. On or about the 30th day of June, 2008, the Defendant performed a sex act with B.P.
> 2. The Defendant performed the sex act while B.P. was under 12 years of age.

The jury was further instructed that the term "sex act" includes "sexual contact . . . [b]etween the genitals of one person and the genitals or anus of another . . . [or] [b]etween the finger or hand of one person and the genitals or anus of another person." The jury was also advised that "[s]kin-to-skin contact is not required," and

> [p]rohibited contact occurs when (1) the specified body parts or substitutes touch and (2) any intervening material would not prevent the participants, viewed objectively, from perceiving that they had been touched.

Potter argues that there was insufficient evidence to support this count because B.P. "testified he was wearing his clothes and Charles Potter stopped when [B.P.] asked him to." Under the cited instruction, the clothing interface does not preclude a finding that a sex act was committed. *See also State v.*

Pearson, 514 N.W.2d 452, 455 (Iowa 1994) (holding skin-to-skin contact is not required to establish a "sex act" under Iowa Code section 702.17 (2007)). We must look to the facts of each case to determine whether the clothing prevented contact. *Id.*

We turn to the record. In 2008, B.P. spent the night with his uncle, sleeping in the same room as Potter. The next morning he went home and told his aunt that Potter "was getting close to him, and that he tried to put it in, but B.P. said if he did, then he'd tell." B.P. was emotional when he recounted this information.

B.P.'s parents reported the incident to the police. A detective interviewed Potter and obtained a written statement from him that was admitted at trial. In pertinent part, the statement said:

> So what I remember is waking up on the bed with my underwear on when I . . . had pants on and I was a sleep on the floor. I'm not sure if something happened or not but now that I think about it I'm not sure and if anything did then I just want to say sorry to my cousins. . . . I told [B.P.] if something happens if I try touching you wake me up. . . . So like I said I'm not sure what happend but if something did I didn't mean for it to so I'm sorry.

At trial, B.P. testified that Potter "tried to touch my privates and my butt . . . but he couldn't because my pants were on." When pressed for more detail, B.P. testified that Potter "put his hands on my front part." The prosecutor then asked,

> Q. He put his hands on your pants like where your penis was? A. Yeah.
> Q. So between his hand and your penis, your clothes were in between? A. Yeah.
> Q. You had your pants on? A. (Witness nods head.)
> Q. But he was touching that area of your body? A. Yeah.

B.P. also testified Potter tried to pull down his pants and put "his penis on me."

Based on this evidence, a rational jury could have found that contact occurred between Potter's hand or penis and B.P.'s covered penis or anus. *See* Iowa Code § 702.17; *Pearson*, 514 N.W.2d at 456. The evidence is substantial and, accordingly, we affirm the jury's finding of guilt as to Count I.

II. Count II

The jury was instructed that the State would have to prove the following:

1. On or about the 24th day of May 2002, the Defendant performed a sex act with S.P.
2. The Defendant performed the sex act while S.P. was under 12 years of age.

In his brief, Potter argues there was insufficient evidence to find him guilty because S.P. "gave inconsistent stories about what may have occurred, and the examining doctor found her body 'normal.'" At oral arguments, the defense presented a different argument, focusing on the State's trial information and, specifically, the May 24, 2002 date mentioned in that document and in the jury instruction quoted above. The defense asserted the State was obligated to present sufficient evidence of a sex act on that date, and subsequent acts could not be used to bolster its case. As noted, this argument was not raised in the written brief and was, accordingly, waived.[1] *See* Iowa R. App. P. 6.903(2)(*g*)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."). However, even if the argument had been raised, the trial record undercuts it.

[1] The brief states without further elaboration that "[a]ll the evidence under Iowa Code Section 701.11, 5.404b, and 5.403, as well as the testimony, characterized Charles Potter as a bad person." Even if this assertion had been expanded in the brief, it is not the same argument made at oral arguments.

The State filed a notice of intent to offer specific evidence of other incidents of sexual abuse, pursuant to Iowa Code section 701.11.[2] The defense responded with a motion to sever Count I from the remaining two counts on the ground that the evidence from the first count would be more prejudicial than probative on the other two counts.

At a hearing on the motion, defense counsel conceded: "[W]e're certainly well aware that the county attorney is not bound by a specific date in the Trial Information." The prosecutor then stated: "[W]hat we're alleging is that between the years of 2002 and 2008, when these children were under the age of 12, the defendant had sexual contact with them." She continued, "We are alleging for victims B.P. and S.P. that this occurred on at least two occasions for each of those victims. So essentially, your Honor, what we have is many years and numerous acts, one count representing each victim." She also asserted that the "acts occurred in 2002, 2004, and 2008" and "in 2002 all three of these victims

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[2] Iowa Code section 701.11(1) states:

> In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This evidence is not admissible unless the state presents clear proof of the commission of the prior act of sexual abuse.

Our supreme court recently held this statute violated "the due process clause of the Iowa Constitution as applied . . . because it permits admission of prior bad acts against an individual other than the victim in the case to demonstrate general propensity." *State v. Cox*, ____ N.W.2d ____, ____ (Iowa 2010). A due process challenge to section 701.11 has not been raised in this case.

were present." Finally, the prosecutor summarized the issue concerning dates as follows:

> I know there is case law and I know that [defense counsel] knows that—realizes that the State doesn't have to hone in on a particular date that these events occurred, so long as they occurred in the statute of limitations. So the fact that Count 1 refers to the 30th day of June, and Counts 2 and 3 refer to the 24th day of May, 2002, that is not something that the jury will have to consider.

In response, defense counsel focused on the prejudicial effect of considering all three counts together and did not challenge the prosecutor's assertion that the jury could consider any acts between 2002 and 2008 notwithstanding the specific date in the trial information.

After the hearing, the district court issued a ruling denying the motion to sever and stating in pertinent part:

> The specific allegations of abuse occurred in the years 2002, 2004, and 2008, with all three victims being present in the structure in which the alleged acts occurred. . . . The allegations suggest that Counts 1, 2, and 3 are part of a common scheme or plan and therefore are required to be charged in one trial information. Further Section 701.11 of the Iowa Code would apply. That is to say that the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant.

The court determined that the only issue was whether the evidence was unfairly prejudicial. The court concluded it was not.

At trial, the district court instructed the jury that "[t]he State does not have to prove the specific date on which the crime occurred." *See State v. Brown*, 400 N.W.2d 74, 77 (Iowa Ct. App. 1986) ("The date fixed in the indictment or information for the commission of a crime is not material, and a conviction can be returned upon any date within the statute of limitations, absent a fatal variance

between the allegations and proof."); *see also State v. Griffin*, 386 N.W.2d 529, 532 (Iowa Ct. App. 1986) (holding statute defining crime of second-degree sexual abuse "does not make a particular time period a material element of the offense"). In closing argument, the prosecutor recounted the evidence surrounding the 2004 incident in some detail and advised the jury that it could find Potter guilty of Count II based either on that evidence or on the evidence surrounding the 2002 incident. During deliberations, the jury questioned the court about the date listed in Count II, writing, "We want to make sure this is correct date rather than 2004 for Count 2 for [S.P.]." After discussing the question with counsel, the court advised the jury to look in part at the instruction on specific dates quoted above. Potter's counsel did not object to this response to the jury's question.

In sum, Potter's trial attorney conceded that the 2002 date in Count II of the State's trial information was not dispositive of the evidence the State could present on that count; the district court allowed evidence of sex acts post-dating 2002; and the court instructed the jury that the State would not have to prove a specific date. In effect, this case was tried on an understanding that either the 2002 alleged incident or the 2004 alleged incident could furnish the basis for a finding of guilt on Count II.

We turn to the evidence supporting Count II. S.P. was four years old in 2002 and, not surprisingly, by the time of trial was not able to testify to an incident of sex abuse in that year. She did, however, testify to abuse in 2004, stating she was playing house with Potter when he "put his finger up my—my pee pee." She said that when she got home she started to bleed and her mother

took her to the hospital. A registered nurse, who was also trained as a sexual assault nurse examiner, examined S.P. and testified that she had "multiple injuries to her genitalia. Both to her bottom, to the anal area, and also to her vaginal area." She attributed the injuries to sexual abuse. A child abuse investigator with the Department of Human Services confirmed S.P.'s story. She testified that S.P. told her she was playing house with Potter when he put his finger in her vagina. She stated it hurt when he did that, and she started to bleed. While the investigator acknowledged that this story differed from the version the child told her in an earlier interview, the jury could have reasonably believed that her later version of the incident was more believable than her initial story. *See State v. Laffey*, 600 N.W.2d 57, 60 (Iowa 1999) (finding evidence sufficient to sustain defendant's convictions for second-degree sexual abuse despite inconsistencies and differences in victims' testimony).

The evidence summarized above amounts to substantial evidence in support of the jury's finding of guilt on Count II. Accordingly, we affirm that finding of guilt.

We affirm Potter's judgment and sentence for two counts of second-degree sexual abuse.

AFFIRMED.