IN THE COURT OF APPEALS OF IOWA

No. 0-420 / 09-1041
Filed August 11, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LAWRENCE JAMES BOHNENKAMP,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Defendant appeals from his conviction and sentence of sexual abuse in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Lawrence J. Bohnenkamp appeals from his conviction and sentence of sexual abuse in the third degree in violation of Iowa Code sections 709.4(2)(c) and 702.17 (2007). He contends (1) the district court should not have admitted the alleged victim's cell phone records because they contained hearsay and were not admissible as a business record, and (2) there is insufficient evidence to support the jury's verdict. We affirm.

I. BACKGROUND AND PROCEEDINGS. The jury was presented with the following evidence. Defendant and the alleged victim, A.Y., met in May 2007. At the time, A.Y. was fourteen and the defendant was twenty-seven. At trial, A.Y. testified she met defendant when she was at a friend's house and the defendant gave her and her friends a ride to and from a party. The defendant allegedly told A.Y. he was twenty years old. Shortly after this initial meeting, defendant and A.Y. began communicating over the phone and the defendant invited A.Y. to "hang out." On approximately June 2, 2007, knowing her parents would not allow her to hang out with an older man, A.Y. lied to her parents and received permission to spend the night at a friend's house. A.Y. then called defendant and arranged for him to pick her up in Kalona, Iowa. She walked with a friend to the designated meeting place and waited until he arrived. Defendant and A.Y. watched a movie at defendant's apartment and then had vaginal sex in his bedroom. A.Y. testified she had vaginal bleeding on the mattress during this encounter. Defendant drove A.Y. home the next day. A.Y. believed she spent

the night at defendant's perhaps one or two other nights and had sex with defendant at those times also.

A.Y.'s father testified that in early June of 2007, A.Y. told him she had had sex with someone. Eventually she stated it was with the defendant. A.Y.'s father then obtained the records for A.Y.'s cell phone and identified the calls made between A.Y. and the defendant. A.Y. and her parents then filed a report with the police and gave them the cell phone records.

A police officer that investigated the allegations testified that he executed a search warrant on defendant's apartment and discovered two spots on a mattress that appeared to be blood stains. He cut off the top portion of the mattress and sent it to the department of criminal investigation laboratory, along with buccal swabs obtained from A.Y. A criminalist from the lab testified that she performed screening tests on the stains and positively identified it as blood. She then extracted a DNA mixture from the stains indicating the presence of more than one person's DNA. She identified a major and secondary contributor. The DNA profile of the major contributor matched the DNA located on the buccal swabs taken from A.Y. The other DNA identified in the stain was too weak for conclusive interpretation. She could identify that the secondary contributor was male. She was never delivered a DNA sample from the defendant. She testified that even with a known sample from the defendant, due to the weak stain sample, she would only be able to either exclude Bohnenkamp as a contributor or not exclude him as a potential contributor.

One of A.Y.'s friends testified that she walked with A.Y. and waited with her until defendant picked her up on the evening of June 2. She testified that the next day A.Y. told her she had sex with defendant. She also stated that at one point defendant called her and asked her not to tell the police that she saw him and A.Y. together.

The defendant testified and agreed that A.Y. had stayed at his apartment one night but denied ever having sexual contact with her. He testified that A.Y., another female, and an unidentified male arrived at his apartment late one night and wanted a ride home. He agreed to give them a ride but not until morning. The group fell asleep watching a movie. When he awoke, A.Y. and the male were in his bed under the covers. Eventually the male woke up and left the apartment without talking to the defendant. When A.Y. and her friend woke up, the defendant gave them a ride home. When asked why he had young people at his apartment, defendant testified that he was interested in one of A.Y.'s older friends.

II. CELL PHONE RECORDS. Defendant contends the court erred in admitting A.Y.'s cell phone records. He argues the records contained hearsay evidence and were not admissible under the business record exception. The State asserts the telephone records were not hearsay because there is no declarant and they were not offered to prove the truth of the matter asserted. It also claims even if the records did constitute hearsay evidence, there was no resulting prejudice.

Our review of hearsay claims is for correction of errors at law. *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006). Hearsay evidence is inadmissible unless permitted by another rule, statute, or constitutional provision. Iowa R. Evid. 5.802; *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c).

The State first asserts that the records were only used to prove the plain fact that calls were made between defendant's phone and A.Y.'s phone and not "offered to prove the truth of the matter asserted." We find the records were offered and relevant to prove the truth of the contents of the records: the time and frequency of calls between A.Y. and defendant. The records were "offered to prove the truth of the matter asserted." *See State v. Lain*, 246 N.W.2d 238, 242 (Iowa 1976) (finding a telephone bill was hearsay because it was offered to prove the telephone calls were made as the bill purported to show).

If the cell phone records were produced through a fully automated system and generated by a computer, there was no declarant and it is not hearsay. *See State v. Reynolds*, 746 N.W.2d 837, 843-44 (Iowa 2008) (acknowledging the possibility that if a bank's error records and information provided via an automated 1-800 information line are produced reliably and generated by a computer, there is no human declarant and the information is nonhearsay). However, to reach this conclusion, there must be some evidence in the record to establish that the information is computer-generated non-hearsay as opposed to

computer-stored hearsay. *See id.* Likewise, a court cannot admit a telephone record under the business record exception, without evidence and foundation in the record showing that it meets the requirements of the exception. *Lain*, 246 N.W.2d at 242. An adequate foundation requires evidence that the phone records were made in the regular course of the telephone company's business, near the time the actual calls were made, or other evidence showing the sources of information used to generate the record. *Id.* There is no such evidence in the record before us.

If hearsay evidence is erroneously admitted, we presume prejudice unless the contrary is affirmatively established. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996); *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986). If the hearsay evidence is cumulative because other evidence in the record establishes the same fact, the error will not be considered prejudicial. *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003); *State v. McGuire*, 572 N.W.2d 545, 547 (Iowa 1997).

We agree with the State that defendant suffered no prejudice by the introduction of the cell phone records. The records were admitted to establish defendant's interest in A.Y. and the timeline of events on June 2 and 3. The defendant admitted he had socialized with A.Y. so the records do not contradict his account of the events. The nature of the relationship between A.Y. and defendant was also described by A.Y. and her friend. The timeline of the alleged sex abuse was also established by A.Y. and her friend's testimony. Since the

cell phone records provided cumulative evidence, defendant suffered no prejudice by their admission.

III. SUFFICIENCY OF THE EVIDENCE. Defendant also contends the jury verdict cannot stand because there is insufficient evidence to support a finding that there was a sex act between defendant and A.Y. Counsel for defendant moved for a judgment of acquittal at the close of the State's evidence and before the case was submitted to the jury. Both motions were overruled.

We review the court's denial of a motion for judgment of acquittal challenging the sufficiency of the evidence for the correction of errors at law. Iowa R. App. P. 6.907; *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). A guilty verdict is binding on appeal if it is supported by substantial evidence. *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008); *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. Johnson*, 770 N.W.2d 814, 819 (Iowa 2009). We view the evidence in a light most favorable to the State, including any legitimate inferences and presumptions that can be fairly deduced from the record. *State v. Mitchell*, 568 N.W.2d 493, 502 (Iowa 1997). In determining whether there is substantial evidence to support the verdict, we examine all evidence in the record, not just that supporting a finding of guilt. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993); *State v. Howell*, 557 N.W.2d 908, 914 (Iowa Ct. App. 1996).

"The term 'sex act' . . . means any sexual contact between two or more persons" including "penetration of the penis into the vagina . . . ." Iowa Code §

702.17 (2007). To establish the sex act element, the State must prove the contact was between the specified body parts and was sexual in nature. *State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994). The contact's "sexual nature" can be shown by the type of contact and the circumstances surrounding it. *Id.*; *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1992). The jury was informed of this applicable law in instructions sixteen and seventeen.

The defendant argues the conviction is not supported by substantial evidence because the only evidence that a sex act occurred is the testimony of A.Y., the alleged victim. He argues there is no physical evidence to corroborate her claim that they had sex because the criminalist could not identify defendant as the secondary contributor of DNA in the mattress stain.

We find, viewing the evidence in a light most favorable to the State, there is substantial evidence to support the jury's verdict. Even if the only direct evidence of a sex act is the alleged victim's testimony, it is sufficient to sustain a finding of guilt. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998); *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995). A sex abuse victim's accusations also do not require corroboration to uphold the verdict. *See* Iowa R. Crim. P. 2.21(3) ("Corroboration of the testimony of victims shall not be required."); *Hildreth*, 582 N.W.2d at 170 ("This court has held that a rape victim's accusation need not be corroborated by physical evidence."); *Knox*, 536 N.W.2d at 742 ("The law has abandoned any notion that a rape victim's accusation must be corroborated."). Even though corroboration is not required, the physical evidence in this case reinforces A.Y.'s account of the sex act. She told the police she had bled during

intercourse with the defendant and her DNA was identified on a blood stain on the defendant's mattress. From additional circumstances and testimony, the jury could reasonably infer that he was the secondary contributor of DNA. The criminalist testified the additional DNA was from a male, and it was undisputed it was on defendant's bedroom mattress.

He also argues A.Y. is not credible, and therefore her testimony is not sufficient proof that a sex act occurred. He points out that A.Y.'s testimony cannot be relied upon because she initially lied to her parents and police. Generally, weighing the evidence and assessing the credibility of witnesses are duties for the jury. *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). There is a limitation to this rule where a witness's testimony can be deemed null if it is impossible, absurd, and self-contradictory. *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997) (quoting *Graham v. Chicago & Northwestern Ry. Co.*, 143 Iowa 604, 615, 119 N.W. 708, 711 (1909)); *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993). The limitation does not apply when other competent evidence corroborates, or provides a reason, for the witness's changed testimony. *See State v. Frank*, 298 N.W.2d 324, 329 (Iowa 1980). In such a case, the jury is given a "full opportunity to judge the credibility of the witness and ascertain the veracity or falsity of her testimony or any part thereof." *Id.* In the face of such conflicting testimony, the jury is free to believe or disbelieve any or all of a witness's account. *State v. Howell*, 557 N.W.2d 908, 914 (Iowa Ct. App. 1996).

Here the defendant pointed out inconsistencies in A.Y.'s report to her parents and the police. A.Y. provided explanations for why she was not truthful at times about the incident. The jury was free to believe or disbelieve any of her

testimony and any of defendant's. We find the verdict is supported by substantial evidence and therefore affirm the conviction.[1]

IV. CONCLUSION. We affirm defendant's conviction. Assuming the cell phone records were erroneously admitted hearsay, the defendant suffered no prejudice as they were cumulative of facts established by other properly admitted evidence. Substantial evidence supports the jury's verdict finding defendant guilty of sexual abuse in the third degree.

AFFIRMED.

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[1] We reach this conclusion without considering the evidence of A.Y.'s cell phone records.