

IN THE COURT OF APPEALS OF IOWA

No. 1-153 / 10-0799
Filed April 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES MICHAEL KASS,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Defendant appeals his conviction for lascivious conduct with a child.

AFFIRMED.

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant State Appellate Defender, and Alana Stamas, Appellate Defender Student Intern, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Ralph Potter, County Attorney, and Christine Corken, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

In January 2010, a jury found James Kass guilty of lascivious conduct with a child. The State was required to prove Kass's contact with the child was done "with the specific intent to arouse or satisfy the sexual desires of the defendant or" the child. Kass now argues the State failed to prove specific intent because he was asleep and accidentally touched the child. We affirm.

I. Background Facts and Proceedings.

In March 2009, Kass's nine-year-old step-granddaughter, A.S., and her younger sister spent the night at his home. A.S., her mother, and her siblings lived next door and the children frequently spent the night with their grandparents. On this occasion, both A.S.'s sister and Kass's wife, the girls' grandmother, slept downstairs.

At trial in January 2010, A.S. testified she and Kass lay on the upstairs bed watching television together. A.S. was face-down with her head at the bottom of the bed. Kass was on his back with his head on the pillow at the head of the bed. A.S. was under a separate blanket and was fully-clothed in non-stretchy jeans with both a button and a zipper. A.S. fell asleep.

A.S. testified she woke up because Kass's hand was in her pants. A.S. explained she was now lying on her back, her head was on a pillow at the top of the bed, her pants were unbuttoned and unzipped, and Kass's hand was inside her jeans, touching her genitals. The blanket was still around A.S. and she was scared. A.S. testified:

Q. Okay, and what was the first thing you remember when you woke up? A. My button and zipper was undone.

Q. Did you undo your button and zipper? A. No.

....

Q. Well, where was [Kass]? A. He was on the other side of the bed.

Q. And what was he doing. A. Sleeping.

Q. And then what did he do when you noticed your button and zipper were undone? A. Still sleeping.

....

Q. Did you count to sixty when [Kass's] hand was on your private spot? A. Yes.

Q. And why did you do that? A. 'Cuz so I could sneak away.

....

Q. . . . Now, and I just wanted to clear something else up . . . did you say that you thought he was asleep? A. Yes.

Q. Why did you think he was asleep? A. 'Cuz he wasn't moving at all.

....

Q. Do you know if he was asleep or not or are you guessing? A. Guessing.

Q. . . . [W]hat made you think he might have been asleep?
A. Because he wasn't moving.

A.S. testified she left the bedroom, went downstairs, and slept with her sister. A.S. and her sister left the next morning. A.S. explained:

Q. Did you go home then? A. Yes, I went to tell my mom.

Q. And what did you tell your mom? A. That [Kass] toucheded (sic) my private area and my mom started crying.

Q. And what happened next? A. My mom called the police.

A.S. was interviewed at the police station. Bev Kueter, a child protective worker with the Department of Human Services, sat in on the interview and testified A.S. did not change her description of the events. Officer Shannon interviewed A.S. and testified: "I don't remember her story changing once."

Officer Shannon also explained:

Q. At some point did she make a statement about what condition [Kass] was in or A. [A.S.] had made a comment, I believe, it was a brief comment, that she thought maybe he was sleeping at the time.

Q. Okay, and did you ask her to follow up on that? A. Yes. I asked her what made her believe that, and she said . . . sometimes [Kass] will talk in his sleep. I asked her if at the time of the incident if [Kass] was talking or making any noises, and she said no.

The same morning, Kass volunteered to talk with officers at the police station. He was interviewed for two hours. Officer Hauptert testified Kass changed his statements about whether A.S. was still in bed with him in the morning when he woke up. Eventually, Kass admitted he was in bed alone in the morning. Kass initially denied touching L.S, but then changed his story. Officer Hauptert explained how Kass's statements about contact varied:

As I said, initially there were denials. At that point . . . I provided some different scenarios as to how this may have happened We had asked if it was accidental

Q. And who raised the accidental part first? A. I did.

. . . .

Q. . . . [W]hen you first provided this scenario to Mr. Kass, what was [his]response? A. He denied that it happened, it wasn't an accident, it didn't even happen at all.

. . . .

Q. What was the progression Mr. Kass provided to you? A. Again, it was initial denial multiple times, and after the denial it had come to he said it could be possible. After he said it could be possible he made reference that it might have happened but he didn't remember and then eventually to he did remember that it happened and an explanation.

Q. . . . [W]hat was the explanation that [Kass] provided you? A. He eventually told us that he was asleep and when he woke up his hand was in her pants, and when he realized this he immediately removed his hand and it was over. . . . He had made previous reference that it could have been his wife or he thought it may have been his wife because that had happened before.

Officer Hauptert also testified: (1) Kass stated it was not uncommon for A.S. and him to sleep together, and (2) Kass explained his wife would sometimes sleep on the couch downstairs because she had to go to work early in the morning.

Officer Hauptert explained Kass's demeanor during the interview changed from curious and somewhat relaxed to "emotionally upset, crying at some points, angry with himself and kind of in disbelief." Further:

Q. Did you talk to him about the awake, asleep . . . discrepancy? A. Yes.

Q. And what did he say? A. Again, I believe he said he couldn't remember. He kept saying he was asleep and he woke up, and after we got to that point at the end of the interview, he said he was asleep, and when he woke up, his hand was there and he didn't know how it had gotten there, didn't remember it getting there.

Q. And did you talk to him about being asleep or awake at that point? A. Yes.

Q. And what did he say? A. He—at that point he was awake but—and we had talked about whether he was groggy or not. However, prior to that he said he was asleep so he didn't know exactly how his hand had gotten there.

At trial, Kass's wife testified she gets up at 4:30 a.m. for work four days a week and she slept downstairs on the couch for two years:

A. Why do I sleep on the couch is I need to be away. I need to be on my own. I need to be away.

Q. Away from what? A. Of Jim [Kass].

Q. . . . [W]hy don't you sleep in your bed with [Kass]? A. Because he would take my clothes off.

. . . .

Q. And during that time [in the past when she and Kass slept together in the same bed] did you ever wake up and he had his hand in your pants? A. Yes.

At the conclusion of the evidence at trial, the jury was instructed:

Because determining the defendant's specific intent requires you to decide what he was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's specific intent.

The jury returned a verdict of guilty and this appeal followed.

II. Insufficient Evidence.

Kass argues the evidence is insufficient because “[a]ll evidence supported the conclusion that Kass was asleep . . . and not able to form the specific intent necessary to commit this crime.” We review for errors at law. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001).

A.S. testified she was “guessing” Kass was asleep; therefore, Kass’s assertion of “all evidence” is not supported by the record. Additionally, the jury is “free to reject certain evidence and credit other evidence.” *State v. Nitchee*, 720 N.W.2d 547, 556 (Iowa 2006). A reasonable juror could conclude nine-year-old A.S.’s “guess” was incorrect.

Further, the credibility of witnesses is for the factfinder to decide except for those rare circumstances where the testimony is absurd, impossible, or self-contradictory. See *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998). None of those factors apply to A.S.’s testimony. Two separate witnesses testified A.S.’s statement was consistent during her interview at the police station the next morning.

The jury also heard testimony: (1) Kass’s story about an accidental touching while being asleep only emerged during his interview after the police suggested that scenario to him, and (2) Kass’s story of the evening’s events changed as his interview progressed. When viewing the evidence in the light most favorable to the State, we conclude a rational trier of fact could have found

Kass was not asleep and had the requisite specific intent.¹ Because substantial evidence supports the jury's verdict, we affirm.

AFFIRMED.

¹ Due to our resolution of this issue, we need not address Kass's argument: "A person who is asleep is even less capable of forming specific intent than an intoxicated person."