IN THE COURT OF APPEALS OF IOWA

No. 1-929 / 10-2045
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELIAS IBRAHIM ELIAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Russell G. Keast, District Associate Judge.

Defendant appeals from conviction of indecent exposure. **AFFIRMED.**

Christopher A. Kragnes Sr. of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Jerry Vander Sanden, County Attorney, and Heidi Carmer, Assistant County Attorney, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

DANILSON, P.J.

The defendant, Elias Elias, appeals from a conviction of indecent exposure. Because there is substantial evidence from which the jury could find the defendant exposed his genitals to the victim, he did so with the specific intent to arouse his sexual desires, and he had reason to know the victim would be offended by his conduct, and because the charges here are different and distinct from the charge previously dismissed; we affirm the conviction.

I. Background Facts and Proceedings.

On September 19, 2008, a trial information was filed charging Elias with assault with intent to commit sexual abuse, in violation of Iowa Code section 709.11 (2007). Elias demanded a speedy trial. On December 3, 2008, the State filed a motion to dismiss in the interest of justice and without prejudice, contending it could not procure the victim for trial as she was in Lebanon and lacked financial resources to return to the United States. The motion to dismiss without prejudice was granted on December 9, 2008.

The State re-filed the charge of assault with intent to commit sexual abuse in February 2010. Elias again demanded a speedy trial. He moved to dismiss on grounds the district court erred in granting the December 2008 motion to dismiss without prejudice. The district court reconsidered its December 2008 ruling and concluded the dismissal should have been granted with prejudice as it was not in furtherance of justice.[1] The court further found the recent charge

[1] The district court's December 9, 2008 ruling notes:

> The victim and her family have returned to Lebanon to live following the alleged incident which forms the basis of the criminal complaint. The victim and her family are staying in contact with the County Attorney's

"compromise[d] the Defendant's right to a speedy trial asserted" in the earlier-filed case because the charge now filed was the same offense. The court dismissed the trial information filed in February 2010 with prejudice "thereby barring all future prosecutions for the same offense and any lesser included offenses."

On May 27, 2010, the State filed a trial information charging Elias with lascivious conduct with a minor, in violation of Iowa Code section 709.14 (2007); indecent exposure, in violation of section 709.9; and assault causing bodily injury, in violation of section 708.1 and 708.2(2). Elias entered pleas of not guilty. He then moved to dismiss the trial information, contending the current charges were barred by the court's February 2010 dismissal. The district court ruled the current charges "are separate and distinct offenses" from the crime of assault with intent to commit sexual abuse and were not barred by the prior dismissal.

Jury trial began on August 23, 2010.

A.D. testified that on June 6, 2008, the last day of school for the then fourteen-year-old, she received a telephone call from her mother that she was to begin working that evening at 6 p.m. for the defendant, Elias Elias, a family

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> Office and wish to cooperate with the prosecution of this matter. The only obstacle appears to be the funds to get the victim from Lebanon to Cedar Rapids, Iowa, for trial. The State and the victim's mother have explored various options to fund travel, but it will be impossible to procure travel funds in the timeframe required for speedy trial.

However, in depositions taken in May 2010, the victim's mother stated she had telephoned and left a message for the prosecutor on Saturday November 29, that she had just learned she and the victim would be able to attend the trial. They arrived in the United States on December 3, 2008, with a return flight to Lebanon scheduled for December 14, which information was not provided to the district court before it issued its ruling on the State's motion. Apparently, the State was not aware they were arriving, but did meet with the victim and her mother when they arrived.

friend[2] who owned a restaurant. A.D.'s boyfriend drove her to the restaurant where Elias trained her on her new job responsibilities. A.D. testified Elias and she talked during lulls in business "about like sexual history, I guess, and drug use of marijuana." Elias asked her if she had had sex. She stated she was uncomfortable with the conversation because it "wasn't something appropriate and was just not necessary at all."

A.D.'s father, with whom she was to spend the weekend,[3] telephoned her and said he could not pick her up from work. A.D. asked and Elias agreed to give her a ride to her father's home after work.

A.D. and Elias left the restaurant between 11:00 and 11:15 p.m. They stopped at A.D.'s mother's house so A.D. could pack an overnight bag.[4] Because it was a high crime area, A.D. asked Elias to accompany her inside. As A.D. was packing, she told Elias he could enter her bedroom. Their discussion included questions A.D. had about drugs terms she did not understand. A.D. stated that after she finished packing, the two continued to sit on the bed and talk. A.D. testified Elias told her "he wanted to tell me something" and when she leaned toward him, he pinned her on the bed and made statements "that he knows I like it and that he's the best." He then forced his hands down her pants and touched her buttocks and vaginal area. She told him to stop, that she was expected at her father's, her mother would be calling, and she had her period. A.D. testified he pulled her shirt down and kissed her left breast. A.D. stated he

[2] Elias was a friend of her mother's nephew; the nephew lived with A.D., her mother Marianne, and sister, for two years.

[3] A.D.'s mother and father were divorced.

[4] A.D.'s mother, however, was at her boyfriend's home in Palo, Iowa, several miles away.

got up off her and "unzipped his pants and took out his penis." She testified he rubbed his erect penis and asked her to "give him a hand job." She refused. Eventually, they left the house, and Elias drove her to a friend's house. He told her if she need help lying to her parents, he would help. He also told her she should not tell anyone because he did not want to ruin his relationship with her parents. A.D. further testified she told her friend's mother she had been assaulted. A.D. then called her boyfriend, who came to the friend's house, and she told him what had happened. They stayed at the friend's house "for a few hours" to calm down, and then her boyfriend drove A.D. to Palo where her mother, Marianne, was staying. She told her mother what happened, and her mother called police and then took A.D. to the Child Protection Center at a hospital where she was examined and photographs were taken of bruises on her arms. A.D. stated Elias telephoned her after dropping her at her friend's and stated he had telephoned her mother and said he dropped A.D. off at her father's. She said he called several more times, but she did not answer.

Marianne testified she had spoken with A.D. a couple of times while A.D. was at the restaurant on June 6. She learned A.D.'s father could not pick her up so Marianne said she would come pick A.D. up and asked A.D. what time she would be done because she was twenty to twenty-five minutes away. Elias heard A.D. speaking with her mother on the telephone and offered to give A.D. a ride; at one point, he took A.D.'s phone from her and told her mother "don't worry about it, I will take her home." A.D. called Marianne later and said she was leaving the restaurant. Marianne stated she then saw A.D. very early the next morning in Palo. A.D. was "really frightened. She was crying, agitated, scared."

A.D. told Marianne Elias "tried to rape her." Marianne testified she called Elias and asked why he would do such a thing. She said Elias "paused at first and then he started denying." She then called the police and took A.D. to the hospital. Marianne testified A.D. had bruises on her arms that were not there previously.

A.D.'s boyfriend and the mother of A.D.'s friend where Elias had dropped her off also testified about A.D.'s emotional condition at that time.

Elias testified in his own defense. He stated he had had an intimate relationship with Marianne. Elias testified he knew A.D. "very well" because he spent a lot of time at Marianne's house. He stated A.D. asked him for a ride home from work because her father was at the casino. Elias also stated A.D. trusted him like a brother and talked to him about topics like boyfriends because her parents were "very strict" and did not approve of A.D.'s boyfriend. He stated A.D. asked him to accompany her inside because hers was not a safe neighborhood; they were inside "not more than ten minutes"; he locked the door upon entering because Marianne always insisted on locking the door. Elias denied any physical contact with A.D. He further denied he exposed his penis. Elias testified A.D. convinced him to drop her off at her friend's so she could hang out. He explained the numerous telephone calls he made to A.D. after 11:50 p.m. were to try to arrange a ride for her to work the following day.

The jury found Elias guilty of indecent exposure, but not guilty of lascivious conduct with a minor or assault causing bodily injury. Elias appeals, contending

there is insufficient evidence to sustain the conviction.[5] He also asserts the court erred in denying his motion to dismiss on speedy trial grounds.

II. Sufficiency of the Evidence.

We review sufficiency of evidence challenges for correction of legal error. *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008). A verdict will be upheld if supported by substantial evidence. *State v. Acevedo*, 705 N.W.2d 1, 3 (Iowa 2005). Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Fintel,* 689 N.W.2d 95, 99 (Iowa 2002).

Indecent exposure is defined in Iowa Code section 709.9, which provides in pertinent part:

> A person who exposes the person's genitals or pubes to another not the person's spouse . . . commits a serious misdemeanor, if:
>
> 1. The person does so to arouse or satisfy the sexual desires of either party; and
>
> 2. The person knows or reasonably should know that the act is offensive to the viewer.

Here, the jury was instructed that to convict Elias of indecent exposure, the State was required to prove:

> 1) On or about June 6, 2008, the defendant exposed his genitals or pubes to [A.D.], who was not then the defendant's spouse;
>
> 2) The defendant did so with the specific intent to arouse or satisfy his sexual desires;
>
> 3) [A.D.] was offended by the defendant's conduct;
>
> 4) The defendant knew or reasonably should have known that the act of exposure was offensive to [A.D.]

[5] He asserts that if trial counsel did not adequately preserve this issue in not reasserting a motion for directed verdict following defendant's evidence, then trial counsel was ineffective. Because we address the sufficiency claim, we need not address the ineffective-assistance-of-counsel claim.

See State v. Isaac, 756 N.W.2d 817, 819 (Iowa 2008) (noting above four elements of crime of indecent exposure). Elias contends the record "is devoid of any proof" of the first, second, and fourth elements claim because, he argues, A.D.'s testimony was that she looked away and she could not describe his penis. This argument is not convincing.

A.D. testified Elias "unzipped his pants and took out his penis." She testified he rubbed his erect penis and asked her to "give him a hand job." From this testimony, the jury could reasonably find A.D. observed Elias's genitals, whether or not she could specifically describe them. *See id.* (describing indecent exposure as "essentially a visual assault crime"). Further, A.D.'s testimony that Elias rubbed his penis, which was erect, is sufficient from which the jury could infer the act was done to arouse the sexual desires of the defendant. *See Jorgensen*, 758 N.W.2d at 837 (noting clear sexual motivation of defendant openly masturbating); *Isaac*, 756 N.W.2d at 820 ("Whether a defendant's exposure of his genitals to another person was done for the purpose of arousing the sexual desires of himself or the viewer can be inferred from the defendant's conduct, his remarks, and the surrounding circumstances.").

The defendant contends because A.D. "called the Appellant down to her room, she was curious about illegal substances, and was initiating conversation," there was no evidence he "would know the alleged conduct would be offensive to the victim." We are unable to understand how initiating conversation, even if that conversation is about illegal substances, indicates an acceptance of exposure to another's genitals.

"Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). A.D. testified she was afraid. Her reaction upon Elias's exposure of his genitals was to turn around. She refused his request that she give him a "hand job." The jury could reasonably infer the defendant "should have known that the act of exposure was offensive" to A.D. Because there was substantial evidence to support the jury's verdict, we need not reach Elias's argument that his counsel was ineffective for failing to move for a directed verdict at the close of the evidence.

III. Speedy Trial.

Elias contends this prosecution was barred by the December 9, 2008 dismissal of the charge of assault with intent to commit sexual abuse, which the district court later found to have been for failure to provide a speedy trial. We review speedy trial issues for correction of errors at law. *State v. Abrahamson*, 746 N.W.2d 270, 273 (Iowa 2008).

"A dismissal for failure to provide a speedy trial is an 'absolute dismissal, a discharge with prejudice, prohibiting reinstatement or refilling of an information or indictment charging the same offense.'" *Id.* (quoting *State v. Johnson*, 217 N.W.2d 609, 612 (Iowa 1974)). We employ a two-step analysis. *Id.* First, we determine whether the initial charge was dismissed for speedy-trial reasons. The initial charge of assault with intent to commit sexual abuse was so dismissed. Consequently, we must "look to whether the subsequent charge is for the 'same offense' previously dismissed on speedy trial grounds." *Id.*

"[T]he "same offense" test applied in the speedy trial context focuses on whether the two offenses are in substance the same, or of the same nature, or same species, so that the evidence which proves one would prove the other." *Id.* at 275 (internal quotations omitted) (citing *State v. Moritz*, 293 N.W.2d 235 (Iowa 1980)).

Elias acknowledges "there are indeed different elements to prove in indecent exposure" than assault with intent to commit sexual abuse. However, he argues that because the charges are based on the same alleged facts of June 6, 2008 as the previous charge, and "this is merely an alternative means of the same offense." We disagree and reject his attempt to bring his case within the reasoning of *Abrahamson*, 746 N.W.2d at 275-76 (concluding in the affirmative that manufacturing and conspiracy counts arising from a common set of facts, and charged under the same statutory provision—section 124.401(1)—are one offense for purposes of determining whether a dismissal with prejudice of one of them under rule of criminal procedure 2.33 bars the refiling of both of them). We conclude indecent exposure and assault with intent to commit sexual abuse are not the "same offense" for speedy trial purposes. *See State v. Burton*, 231 N.W.2d 577, 578 (Iowa 1975) ("We are unable to accept defendant's premise that the speedy indictment and speedy trial time limitations relating to the burglary charge were applicable to the separate robbery charge simply because both charges arose from the same episode. The charges of burglary with aggravation and robbery with aggravation are separate and distinct offenses; each contains elements not included in the other. They are not the 'same offense.'"). A person who exposes oneself in violation of section 709.9

commits conduct that is offensive to the viewer, but the offender may have no intent to commit sexual abuse. A person who commits assault with intent to commit sexual abuse in violation of section 709.11 can be convicted without any exposure. Each requires a different overt act. *See State v. Moritz*, 293 N.W.2d 235, 239 (Iowa 1980). Although both crimes are in the same code chapter, each is a separate and distinct crime. The facts also reflect Elias's conduct included offensive contact or touching and when his advances were unsuccessful, he then proceeded to expose himself—two distinct offenses. The trial court did not err in ruling the State was not barred from charging Elias with the current offense.[6]

AFFIRMED.

[6] The defendant's fleeting and unsupported reference to a violation of his "Constitutional rights and due process rights" is not adequate to raise such a claim. *See State v. Hernandez–Lopez*, 639 N.W.2d 226, 233 (Iowa 2002) ("Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court. This general rule includes constitutional issues.").