

IN THE COURT OF APPEALS OF IOWA

No. 2-327 / 11-0677
Filed June 27, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL JOHN RYAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Randy S. DeGeest, District Associate Judge.

Michael John Ryan appeals the judgment and sentence entered following his conviction of assault with intent to commit sexual abuse and prostitution.

AFFIRMED.

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant Appellate Defender, and Kevin B. Patrick, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Mary Triick and Calynn M. Walters, Legal Interns, Rose Anne Mefford, County Attorney, and Misty White, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Michael John Ryan appeals the judgment and sentence entered following his conviction of assault with intent to commit sexual abuse and prostitution. He contends the district court erred in denying his motion for judgment of acquittal because a fatal variance existed between the date of the act alleged in the trial information and the date of the act established in the evidence. He also contends the evidence is insufficient to establish his guilt.

I. Background Facts and Proceedings.

Michael Ryan was serving a prison sentence in Fort Madison when he came to know another prisoner named Adam. After Ryan's release, he lived in Country Life Health Care in Oskaloosa. In October 2008, Adam moved into Country Life as well, and the two men resumed a friendship.

In the months leading up to November 2010, Adam alleges Ryan asked him to engage in certain sex acts. Specifically, Ryan wrote down a list of sex acts he wanted Adam to engage in and showed the list to Adam. Ryan offered to give Adam twenty dollars if Adam would let Ryan masturbate him. He offered Adam twenty dollars if Adam would perform oral sex on him. On one occasion, Ryan slapped Adam on the buttocks. Adam testified that "about the same time period in November [2010]," Ryan grabbed Adam's penis through his clothing.

In November 2010, Adam was reading a newspaper in his room while Ryan sat on his bed and played video games. Ryan laid on top of Adam so that his penis was against Adam's buttocks and whispered in his ear, "We need to meet tonight." Charles Sytsma, maintenance worker at Country Life, witnessed

the incident and talked to Adam about it afterward. He told Adam that if Ryan made him uncomfortable, he should report the incident.

Adam did report the incident, and Ryan was arrested for assault with intent to commit sexual abuse and prostitution. Ryan waived his right to a jury trial and a bench trial was held on February 23, 2011. Adam testified regarding Ryan's behavior in the months leading up to the incident of November 30, 2010. Adam testified he did not report Ryan earlier because he was scared Ryan might try to hurt him.

On February 25, 2011, the district court found Ryan guilty on both counts. He was sentenced to an indeterminate ten-year term of imprisonment and ten years of parole on the assault charge, and two years of work release or parole on the prostitution charge, to be served concurrently.

II. Scope and Standard of Review.

We review sufficiency-of-the-evidence claims for the correction of errors at law. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). We will uphold a verdict where substantial evidence supports it. *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *Id.* We consider the entire record, not just the evidence supporting guilt when making sufficiency-of-the-evidence determinations. *Id.* However, we view the evidence in the light most favorable to upholding the verdict, including legitimate inferences and presumptions that may be fairly and reasonably deduced from the record. *Id.*

III. Variance.

Ryan first contends the trial court erred in denying his judgment of acquittal because there was a fatal variance between the date charged in the trial information and the date of the acts shown at trial. While the trial information charges Ryan for crimes that occurred “on or about November 30, 2010,” only one act took place on that date. The other acts for which evidence was presented at trial occurred in the months leading up to that date.

The purpose of an indictment or trial information is to apprise the defendant of the crime charged so that he or she may have the opportunity to prepare a defense. *State v. Davis*, 581 N.W.2d 614, 616 (Iowa 1998). Requiring the State to prove an offense in the manner charged is a means of protecting a defendant from being misled by the charging instrument, not an end in itself. *State v. Grice*, 515 N.W.2d 20, 22 (Iowa 1994). While an information need not detail the manner in which an offense was committed, if the State specifies one way of committing a crime, it must be proved to have been committed that way. *Id.* at 22-23.

Iowa courts consider both the indictment or information and the minutes of testimony filed when determining the adequacy of the allegations to apprise the accused of the crime charged. *Id.* at 23. The minutes of testimony filed in this case articulate a number of specific incidents that occurred in the months leading up to November 30, 2010, some that involved the offer of money in return for sex acts. Accordingly, any variance in the crime charged and the proof at trial was not prejudicial. *See id.*

IV. Assault With Intent to Commit Sexual Abuse.

Ryan contends the evidence is insufficient to find he committed assault with intent to commit sexual abuse. Specifically, he claims Adam's testimony that he was fearful about a future event that might happen shows he was not fearful of the immediate physical assault that allegedly took place on November 30, 2010. Ryan argues the evidence was insufficient to show Adam was injured or offended by his actions on November 30, 2010. Ryan also challenges the sufficiency of the evidence regarding his specific intent to commit sexual abuse.

In order to be convicted of assault with intent to commit sexual abuse, the State must prove beyond a reasonable doubt that "(1) the defendant assaulted the alleged victim, (2) with the intent to commit a sex act, (3) by force or against the will of the victim." *State v. Beets*, 528 N.W.2d 521, 523 (Iowa 1995). Iowa Code section 708.1(1) defines assault as an act "which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act." The question we must answer is whether the record provides sufficient evidence to allow a reasonable fact finder to find beyond a reasonable doubt that Ryan committed an act intended to result in physical contact that was insulting or offensive to another.

The district court concluded that, "On or about November 30, 2010, the defendant assaulted [Adam] by grabbing Adam[s] penis under his clothes with intent to commit sexual abuse." Under *State v. Pearson*, the touching over Adam's clothes could have been a sex act. 514 N.W.2d 452, 455 (Iowa 1994)

("[W]e hold that skin-to-skin contact is not required in order to establish a 'sex act' under section 702.17."). Prohibited contact may occur even though the specified body parts or substitutes are covered. *Id.* The sexual nature of the contact can be determined from the type of contact and the circumstances surrounding it. *Id.* The sexual nature of the act satisfies the intent element of the assault with intent to commit sexual abuse crime. We find the evidence is sufficient to establish Ryan assaulted Adam with the intent to commit sexual abuse.

Ryan also contends there was insufficient evidence to show a specific intent to commit sexual abuse. Our courts have held that when determining whether the evidence is sufficient to support an assault with intent to commit sexual abuse conviction, we look to the circumstances of the crime; "a sexual comment made by the defendant to the victim, touching in a sexual way, the removal or request to remove clothing, or some other act during the commission of the crime that showed a desire to engage in sexual activity" *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). On our review of the record, we conclude the testimony of the witnesses was sufficient to support the inference that Ryan acted with the intent to commit sexual abuse. *See State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994) (holding element of intent seldom susceptible to proof by direct evidence, but depends on inferences drawn from circumstantial evidence); *State v. Howard*, 404 N.W.2d 196, 198 (Iowa Ct. App. 1987) ("The fact finder may determine intent by such reasonable inferences and deductions

as may be drawn from facts proved by evidence in accordance with common experience and observation.”).

We find the attending circumstances point to the requisite intent. Here, Ryan grabbed Adam’s penis. In the months leading up to this, he had asked Ryan to engage in sex acts with him on numerous occasions. Given Ryan’s previous attempts to engage Adam in sex acts and the manner in which he grabbed him, we find the specific intent element was shown when viewing the evidence in the light most favorable to the State.

We affirm Ryan’s conviction for assault with intent to commit sexual abuse.

V. Prostitution.

Ryan also contends the evidence is insufficient to find he engaged in prostitution. Specifically, he argues the State should have been limited to proving the acts on the date charged—November 30, 2010—and that no prostitution occurred on that date.

Iowa Code section 725.1 states, “A person who sells or offers for sale the person’s services as a partner in a sex act, or who purchases or offers to purchase such services, commits an aggravated misdemeanor.” Adam testified Ryan offered him \$20 if he would allow Ryan to masturbate him. At that time, Ryan grabbed Adam’s penis through his clothing. Although this incident did not occur on November 30, 2010, Adam testified it happened in the few months leading up to that date. As already stated, the above-described incident was set forth in the minutes of testimony, and therefore, any variance in the date listed

trial information was not prejudicial. We find the evidence is sufficient to support the prostitution conviction.

AFFIRMED.