IN THE COURT OF APPEALS OF IOWA

No. 7-947 / 07-0122
Filed January 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT EARL ARMSTRONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, Gary D. McKenrick, Judge.

The defendant appeals from his convictions for two counts of second-degree sexual abuse and two counts of third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie Knipfer, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Mike Wolf, County Attorney, and Ross Barlow, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

BAKER, J.

Robert Armstrong appeals from his convictions for two counts of second-degree sexual abuse and two counts of third-degree sexual abuse. We affirm.

Background Facts and Proceedings.

On August 21, 2006, Armstrong was charged with four counts of sexual abuse, Iowa Code §§ 709.1, 709.3(3), 703.2, 709.4(2)(c)(4) (2005), based on the alleged August 7, 2005 rape of then fifteen-year-old T.R. At trial, T.R. testified that around 5:00 p.m. while walking through an alley in Clinton, a car driven by Robert Armstrong approached her. T.R. did not know Robert, but she did know Michael, Robert's brother who was in the passenger seat. Michael offered T. R. a ride, and she climbed into the back seat.

T.R. claimed that Robert then drove the car to Eagle Point Park. When T.R. told them she needed to go home, Robert told her that she "knew what they were up there for." Michael then got a folding chair out of the trunk and instructed T.R. to sit in it. T.R. testified then that one of the men gave her a beer, and Robert informed her he wanted her to perform oral sex. Despite her protests, Robert put a purple condom on and put his penis in T.R.'s mouth. T.R. refused to do anything, so Robert stepped back and removed the condom.

Michael then approached, wearing the same type of condom, and told T.R. to "do it for him." When T.R. again refused and started to run, Michael and Robert grabbed her by the upper body and legs. They carried her into a wooded area. Robert continued to hold T.R.'s upper body so Michael could remove her pants. Michael placed his penis in her vagina. After awhile, he stopped, saying

he had already "done ten years" and that he would "do ten more" if she told on him.

The brothers then left. T.R. collected her pants, but could not find her underwear. As she walked from the park, T.R. observed a van driven by a man for whom she had babysat, Larenzo Dodd. She approached him and informed Dodd she had been raped. Dodd drove T.R. to her home and she informed her mother what happened.

Sufficiency of the Evidence.

On appeal, Robert first claims the "evidence was insufficient . . . to prove beyond a reasonable doubt that Michael aided and abetted [him] in the commission of the alleged sex act." Accordingly, it appears Robert is only challenging his conviction under Count I, as a principal in T.R.'s rape. *See* Iowa Code § 709.3(3). We review a court's ruling on challenges to sufficiency of the evidence, such as motions for judgment of acquittal, for correction of errors at law. Iowa R. App. P. 6.4; *State v. Hutchinson*, 721 N.W.2d 776, 780 (Iowa 2006).

The State questions whether Robert has preserved error on his insufficiency claim. "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). Even if a motion for judgment of acquittal is filed, error is not preserved if the specific claim is not included. *Id.* Here, Robert's trial counsel moved for a directed verdict and filed a motion for a new trial and a motion in arrest of judgment challenging the

sufficiency of the evidence. In moving for a directed verdict, counsel argued simply "the State has not met its burden of proof to present a prima facie case to the jury regarding the four-count trial information." In later moving for judgment of acquittal, counsel "renew[ed his] motion for judgment of acquittal for the same reasons set forth at the close of the State's evidence." It appears counsel did not state the specific ground of error that he claims here on appeal.

Assuming without deciding error was preserved, however, we would conclude substantial evidence supports Robert's convictions. The court instructed the jury that in order for it to find Robert guilty of Count I, it had to find that he engaged in a sex act with T.R. and that during that sex act he was aided and abetted by one or more persons. T.R. testified that after Robert and Michael drove her to the park, Michael took a chair out of the trunk and set it up. It was on that chair that T.R. was forced to perform oral sex on Robert. Michael then approached her for oral sex, but she resisted. After that, both men forcibly carried her to the woods, where Michael took off T.R.'s underwear and Robert held her arms. This evidence establishes that Michael aided and abetted Robert in his sexual abuse of T.R.

Merger.

Next, Robert claims the court erred in failing to merge the second-degree sexual abuse charges with the third-degree sexual abuse charges. We review alleged violations of the merger doctrine under Iowa Code section 701.9 for errors at law. *State v. Belken*, 633 N.W.2d 786, 794 (Iowa 2001).

Iowa Code section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Section 701.9 "codifies the double jeopardy protection against cumulative punishment." *State v. Gallup*, 500 N.W.2d 437, 445 (Iowa 1993). The statute applies if, looking at the elements of two offenses, the greater offense cannot be committed without also committing the lesser. *State v. Caquelin*, 702 N.W.2d 510, 511 (Iowa Ct. App. 2005). If one offense is a lesser included offense of the other, the district court may only enter judgment on the greater offense. *State v. Beecher*, 616 N.W.2d 532, 537 (Iowa 2000).

We thus look to the elements of the offenses. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000). The essential elements of Robert's second-degree sexual abuse are (1) a sex act, (2) in which the person is aided and abetted by another, (3) that is committed by force or against the will of the victim. Iowa Code § 709.3(3). The essential elements of his third-degree sexual abuse convictions are (1) a sex act, (2) between persons who are not cohabiting as husband and wife, (3) while the other person is fourteen or fifteen years old, and (4) the defendant is four or more years older than the victim. Iowa Code § 709.4(2)(c)(4).

We conclude third-degree sexual abuse is not a lesser included offense of second-degree sexual abuse since sexual abuse in the third degree contains an element not shared by sexual abuse in the second degree. Iowa Code section 709.3(3) requires proof of a third-party's involvement, as well as the use of force. Those elements are not present in section 709.4(2)(c)(4), which requires the

victim be a minor age fourteen or fifteen. Considering these elements, merger is inappropriate. We therefore affirm Robert's convictions and sentence.

AFFIRMED.