

IN THE COURT OF APPEALS OF IOWA

No. 9-628 / 08-1381
Filed November 25, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSE GREGORIO TOPETE-DUENAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, James D. Scott,
Judge.

Jose Topete-Duenas appeals from conviction of second-degree sexual
abuse. **REVERSED AND DISMISSED.**

Judy L. Cuevas-Freking, LeMars, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, and Coleman McAllister, County Attorney, for appellee.

Heard by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, J.

Jose Gregorio Topete-Duenas (Topete) appeals from his conviction for second-degree sexual abuse. We reverse.

I. Background Facts and Proceedings.

While taking a shower in the evening on September 23, 2007, nine-year-old E.S. called her mother, Christine, into the bathroom and told her that the father of a neighborhood friend had “stuck his hand down my pants” earlier that day. E.S. and her mother went to the police department and E.S. was briefly interviewed that evening by Michael DeBruin. Officer DeBruin arranged for another interview with the Child Advocacy Center in Sioux City the following day. DeBruin’s subsequent investigation resulted in the filing of charges of lascivious acts with a child and second-degree sexual abuse against Topete.

The trial court granted Topete’s application for appointment of interpreter and appointed certified interpreter Piet Koene. However, in an order following pretrial conference, the court filed an order that included: “defense counsel will arrange an interpreter for Defendant and the county attorney will arrange an interpreter for witnesses and the Court.” At trial, the interpreter appearing for Topete was Frank Gonzalez.

Five days before trial, the State provided notice of additional witnesses and minutes of testimony for Topete’s wife, Jaylene, their eight-year-old son Eric, and nine-year-old niece Yesenia Diaz. Topete moved to bar these late-noticed additional witnesses. At a pretrial hearing, Topete’s counsel acknowledged that he was “aware of these witnesses,” but did not “know that the State intended to call them.” The court denied the motion to bar the witnesses “under the condition

that the late added witnesses be made available to defense counsel at 1:30 today.”

The State dismissed the lascivious acts charge on the morning of trial. The case went to the jury on the sexual abuse charge only. Topete objected to the State’s intention to admit two videotaped interviews he had with police,¹ one on September 24 and one on October 2, 2007. Counsel conceded that Topete’s prior statements were not hearsay; however, he argued that Topete’s appearance in jail garb (in the October 2 video) was unfairly prejudicial, and that other statements included in the videos were testimonial in nature and should be barred. The court ruled the September 24 video was admissible and reserved ruling on the October 2 until it could be previewed.

At trial, Christine S. testified that E.S. was nine and in fourth grade on Sunday, September 23, 2007. In the middle of that afternoon, Eric Topete (who lived across the street) came to the door and asked if E.S. or her brother Jacob could play. All three children left to play outside. E.S. was wearing elastic-waist shorts and a t-shirt. Christine recalled that it was a hot day. She testified she would occasionally look out the window and see the children playing in Eric’s yard or in an empty adjacent lot. Christine called E.S. in for supper (Jacob had returned earlier) and E.S. went back outside to play after eating. Christine called E.S. to come in when it was starting to get dark outside. Christine further testified that E.S.’s bedtime was 8:30 p.m., so she came inside at approximately eight o’clock and grumbled about having to take a shower. Christine testified that

¹ Piet Koene acted as interpreter during police interviews.

she noticed nothing out of the ordinary. E.S. went into the bathroom and then called to her mother saying, "I need to talk to you."

Q. So what did you do? A. So I got up and went into the bathroom and she asked me to close the door. We don't have a vent in our bathroom, so being hot, the steam from the bathroom, it gets very, very warm in there. We just leave the door open. So I went in and I closed the door.

Q. What happened next? A. She stuck her head out of the shower and said—

[Defense counsel]: Your Honor, I will object that I think this question calls for hearsay at this time.

The Court: State claim an exception?

[Prosecutor]: Can we approach, Your Honor?

The Court: You may.

(An off-the-record discussion was had.)

The Court: Under the exception discussed at bench, the objection is overruled. Do you remember the question, ma'am?

A. Yes.

The Court: You may answer.

A. She told me that Eric's dad had stuck his hand down the front of her pants and.

[Defense counsel]: Your Honor, then I'll object to any further testimony.

....

Q. Can you describe your daughter's demeanor when she was in the shower when you were visiting with her? A. She was kind of scared. Ashamed. Near tears.

Q. What specifically led you to believe that? A. She was holding her head down. Her voice was shaky.

E.S. testified that on September 23, after getting home from church she changed clothes and ate lunch. She described what she was wearing. E.S. testified that she went to Eric's house and knocked on his door and asked his mother if he could play. Eric came out and they went to the side yard to play baseball. When asked what time it was that they were playing baseball, E.S. testified that it was after lunch and after supper. She and Eric then played in the sand of an adjacent empty lot. E.S. testified she wanted Eric's cousin Yesenia to join them. Eric went inside and when he came back out he told E.S. his mother

was calling Yesenia. Eric went to the garage to get his bicycle to go pick up Yesenia.

E.S. testified she went to the garage with Eric. Eric left to ride to Yesenia's house and E.S. was standing near the garage watching Main Street for his return because Eric said he would be back in five minutes.

Eric's father, Jose Topete, was sitting in a green Jeep parked outside the garage. The driver's side door was open and Topete's feet were positioned outside of the Jeep. He was listening to "Spanish" music. E.S. testified that Topete then asked her what kind of music she liked. She told him "country" and he changed the music playing on the radio. Topete told her to "come behind the door" of the Jeep. E.S. did, and then he "stuck his hand down my pants." E.S. testified it made her feel "uncomfortable." E.S. said "he did it twice." When asked why "it stopped the second time," E.S. testified that "he saw Eric coming up the driveway probably." She further testified that Topete said in English, "Don't tell anybody." E.S. stated she decided to tell her mother "[w]hen I remembered it in the shower." She testified: "I told her, 'Mom, you know Eric's dad?' She said, 'Yes.' And I told her, 'He touched my—me in my inappropriate part.'"

Eric Topete testified that on September 23 he went to the Sioux Falls zoo with his aunt and cousins while his parents went to a restaurant for lunch. When his aunt brought him home, E.S. and Jacob were playing outside. Eric went inside without playing with them. He testified his aunt went inside as well. Eric called Yesenia to come play. His mother was in her room watching T.V. Eric testified his father was outside in his Jeep listening to music: the door was open,

one foot was inside the Jeep and the other was out. Eric testified he went outside to ask his father to go pick up Yesenia.

Q. So when you were outside asking your dad, who was outside? A. My dad and me.

Q. Was E.S. there? A. Yes.

Q. Where was E.S.? A. She was right by me.

Q. Was there anybody else there? A. Her brother.

Q. Okay. Jacob? A. Yeah.

Eric testified that he rode his bicycle over to get Yesenia and when he came back with her, just E.S. and Jacob were outside. His father was not there and his mother was inside. The four children started playing kickball. They played for “[f]ive minutes” and then E.S. and Jacob had to leave because Eric and Yesenia were going to eat. After supper he and Yesenia went back outside to play. He testified he did not play with E.S. or Jacob again that day.

Yesenia also testified that when she arrived with Eric, Topete was not outside or at the house. She testified that E.S. and Jacob were there and the four children played together.

Topete’s spouse, Jaylene Topete, testified that on September 23 she and Topete and other relatives went out to lunch in Sioux City and returned home about 4:00 or 4:30 p.m. Eric was not with them as he had gone to the zoo with Jaylene’s sister and her two sons. Upon returning home Jaylene and Topete took a nap. Topete got up to answer the telephone when it rang. Jaylene heard him say in Spanish, “I’ll be right over.” Jaylene remained in bed watching television. She heard the back door open and she “assumed he left.” Jaylene testified that shortly after that the door opened again and it was Eric who had returned from the zoo. She testified he came in alone and asked if he could call

Yesenia to come over to play. She heard Eric telephone Yesenia and then he left to go get his cousin. Jaylene went outside about 6:00 p.m. to check that Eric and Yesenia had gotten back to the house and saw Eric, Yesenia, E.S., and Jacob playing baseball or kickball. At about 6:15 or 6:30, Jaylene had Eric and Yesenia accompany her on a walk. The three mailed letters at the post office, dropped off a city payment, and then went to the park. They did not return to the Topete home until after dark. When they returned, Topete was asleep in bed. Jaylene testified that Topete often sat in his Jeep in the driveway² to listen to “his Spanish music.”

Jaylene testified that on September 24 a police officer came to her house and stated that he needed to talk with Topete, but gave no other information. Jaylene picked Topete up from work and took him to the police station. When Topete returned home he told her about E.S.’s allegation.

On cross-examination, Jaylene testified that she and E.S.’s mother had spoken about a registered sex offender that lived next door to E.S. Christine S. was very concerned about his presence. She also testified that Topete did not use English very often and that it is difficult to understand him when he does.

Officer DeBruin testified that he met E.S. and her mother at the police station on the evening of September 23, 2007. Over the hearsay objection of defense counsel, overruled by the court,³ DeBruin testified that E.S. complained

² Jaylene testified the Jeep’s transmission does not work and that it remained in the driveway at the time of trial.

³ The Court ruled it would “receive a limited amount of this testimony, and in accordance with yesterday’s ruling and discussion. Objection is noted and overruled. I want you to listen carefully to the questions when you answer Officer.” We note that the ruling and discussion to which the court refers were not transcribed.

“[t]hat Mr. Topete had placed his hand inside of her underwear, her shorts and her underwear, and fondled her genital area.”

Topete renewed his objection to the admissibility of the two videotaped interviews. The court ruled:

After reviewing the interviews, the court finds that they are admissions and not hearsay, that there is an apparent inconsistency between the two interviews and they, therefore, are relevant. And after balancing probative value versus prejudice under Rule 5.403, the court finds that the danger of unfair prejudice or confusion does not substantially outweigh the probative value.

And in viewing the prejudicial effect of the interview, I note that it was—the interview appeared to take place in an office type setting. The camera angle was from above. Basically we see the top of everybody’s head. While it’s apparent that the dress of the defendant is different, it’s difficult to even make out that it’s a prison uniform. And in any event, the interview itself appears to be done in a fairly professional office like setting.

I find that the prejudicial effect does not substantially outweigh the probative value and I therefore will receive what is to be marked as Exhibit 12.

Topete did not testify at trial. The State played the two videotaped interviews in which Topete, through an interpreter, denied touching E.S.

Topete now appeals, contending there is insufficient evidence to sustain the conviction. He raises additional issues, which we need not address in light of our resolution of his insufficiency claim.

II. Scope and Standards of Review.

We review sufficiency-of-evidence claims for correction of errors at law. *State v. Johnson*, 770 N.W.2d 814, 819 (Iowa 2009). If the jury’s findings are supported by substantial evidence, we will not disturb the findings on appeal. *Id.* Evidence is substantial if, when viewed in the light most favorable to the State, it

would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

III. Discussion.

Sufficiency of evidence of sexual abuse. Performing a sex act with a child under the age of twelve constitutes sexual abuse in the second degree. See Iowa Code §§ 709.1(3), .3(2) (2007). A “sex act” is “any sexual contact between two or more persons by: . . . contact between the finger or hand of one person and the genitalia or anus of another person.” *Id.* § 702.17. Topete argues the State did not present sufficient evidence to prove sexual contact. We agree.

The record before this court does not establish contact between Topete’s finger or hand and E.S.’s genitalia or anus.⁴ “[T]he term ‘genitalia’ broadly describes and includes many organs associated with the reproduction apparatus. Included is the vulva, which includes the symphysis pubis, a prominence covered by hair.” *State v. Martens*, 569 N.W.2d 482, 486 (Iowa 1997). E.S.’s testimony is vague, her gestures were not reduced to words, she was not asked to demonstrate on a doll, and nowhere does she state that Topete’s hand made contact with her genitalia.⁵

Q. Did he say anything while he was doing that? A. No.

Q. Where exactly did he stick his hands in your pants? A.

To the inappropriate part.

⁴ We note that even if the evidence established such contact, whether that contact was sexual in nature would also be a question. See *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994) (noting that whether contact is sexual in nature depends on many factors including: sexual motivation; the relationship between the defendant and the victim; whether anyone else was present; the length of the contact; the purposefulness of the contact; whether there was a legitimate, nonsexual purpose for the contact; where and when the contact took place; and the conduct of the defendant and victim before and after the contact).

⁵ Our review is limited to E.S.’s words as the prosecutor failed to make a record indicating where E.S. pointed on the three occasions she testified “like this.”

- Q. What do you mean by that? A. Down here in front.
- Q. Let me ask you this: What part of his body did he put inside your pants? A. His hand.
- Q. Was it one or two hands? A. One.
- Q. Do you remember if it was his right or left hand? A. I don't remember. I think it was his left.
- Q. [E.S.], was he facing you? A. Yes.
- Q. Now, did he have—you know what the back side of your and the palm of your hand, do you know what those are? A. Yes.
- Q. Can you show the jury how he put his hands in your pants? A. Like this.
- Q. So the palm of the hand was closest to your tummy? A. Yes.
- Q. Did he put his entire hand, including his palm, inside your pants? A. Yes.
- Q. So where was the waistline of the pants on your hand—on his hand, excuse me? A. It was right here.
- Q. So it was on your wrist basically? A. Yeah.
- Q. And how close to you—to him were you when his hand was in your pants? A. I don't know.
- Q. Now, I want to be sure that you know which hand it was. You thought—you said you thought it was the left hand, right? A. Yes.
- Q. Was his hand, [E.S.], like this or was it like this? A. It was like this.
- Q. Okay. Okay. I didn't explain that very well, did I? Okay. So let's say did he turn his arm around like this or did he put it like this? A. He put it like this.
- Q. Okay. So if he put his hand like this, are you sure it was his left hand? A. Yes.
- Q. And you're saying the palm, this part of his hand, was on your body? A. Yes.

E.S. was then asked to demonstrate for the jury. After her demonstration, the prosecutor continued:

- [E.S.], I apologize I have to ask you these questions, but you said he touched your inappropriate part, right? A. Yes.
- Q. And I need to understand what that means. What part of your body are you talking about? A. Right down here.
- Q. Do you know what the word "genital area," do you know what that means? A. No.
- Q. Your mother testified a few minutes ago . . . that she instructed you that if anybody touched you in a bad spot, you should tell her, right? A. Yes.

Q. What spots did she not want you to be touched in? A. Right here and down here.

Q. And you referred to your chest and your genital area? A. Yeah.

Q. Is that right? And when he touched you, he touched you on your skin under your underpants, right? A. Yes.

... ..

Q. Did he ever put his fingers inside you? A. No.

Q. What did he do with his fingers when they were in your pants? A. Nothing.

The most liberal reading of this testimony shows contact of hand to E.S.'s skin under her shorts and underwear, but does not establish contact with her genitalia. E.S. testified that she did not know what the "genital area" meant. Neither she nor her mother elaborated on their meaning for the term "inappropriate part." We can only assume that E.S.'s demonstration somehow indicated that there was contact between Topete's hand and E.S.'s "genital area" from the prosecutor's questions and promptings. We cannot be sure that the "genital area" is the same as "genitalia." We conclude that the evidence is insufficient to support the conviction of sexual abuse in the second degree.

IV. Conclusion.

Because the evidence at trial was insufficient to support the conviction, we reverse the conviction. We do not remand for retrial. *State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003) ("[A] case will not be remanded for retrial when the evidence at trial was insufficient to support the conviction . . .").

REVERSED AND DISMISSED.