IN THE COURT OF APPEALS OF IOWA

No. 3-203 / 12-0209
Filed May 15, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNIE LEE GRAY,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Johnnie Gray appeals his judgment and sentence for third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, and Jerry Vander Sanden, County Attorney, for appellee.

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

VAITHESWARAN, P.J.

Johnnie Gray appeals his judgment and sentence for third-degree sexual abuse. He contends there is insubstantial evidence to support the jury's finding of guilt. *State v. Hennings*, 791 N.W.2d 828, 832-33 (Iowa 2010) (setting forth standard of review). In the context of that argument, he also asserts that admissions he made to a police investigator were not adequately corroborated. *See* Iowa R. Crim. P. 2.21(4) ("The confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that the defendant committed the offense.").

The jury was instructed the State would have to prove the following elements of sexual abuse in the third degree:

> 1. On or about the 19th day of October, 2009, the defendant performed a sex act with [P.H.].
> 2. The defendant performed the sex act by force or against the will of [P.H.].

The jury was further instructed on the meaning of "by force or against the will":

> Concerning element Number 2 . . . the State must prove that the defendant committed a sex act "by force or against the will" of [P.H.]. In order to do so, however, the State does not have to prove that [P.H.] physically resisted the defendant's acts. The force used by the defendant does not have to be physical. If the consent or acquiescence of the other is procured by threats of violence towards any person or if the act is done while the other is under the influence of drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.
>
> You may consider all of the circumstances surrounding the defendant's act in deciding whether the act was done by force or against the will of [P.H].

In a recorded police interview, Gray admitted he had sex with P.H. The key question was whether the sex was by force or against P.H.'s will. On this question, the jury could have found the following facts.

P.H. testified that she and Gray had been "drinking buddies" for about six years. During that time, they had no romantic or physical relationship. One afternoon, P.H. spent the afternoon drinking with Gray. Also present was Gray's neighbor.

In time, the neighbor returned to his apartment. Gray and P.H. went to Gray's apartment, and P.H. consumed drugs. P.H. realized she was in no shape to make it home safely and asked if she could sleep on the couch. Gray agreed. P.H. went to bed fully clothed and covered with a sheet.

P.H.'s next recollection was "[w]aking up . . . buck naked from the waist down" with the sheet no longer covering her body. She "could tell something had happened" because she "was wet down there" and "felt different." She "realized [Gray] must have [] done something to" her because, in her words, "there's no way that I would have taken my clothes off from the waist down at all at someone else's house." P.H. went into Gray's bedroom and started punching and hurling epithets at him. Gray told her "he was sorry, he didn't mean it."

P.H.'s testimony alone constituted substantial evidence in support of the second element and in support of the jury's finding of guilt. *State v*. *Knox*, 536 N.W.2d 735, 742 (Iowa 1995) ("The only direct evidence is the complainant's testimony. . . . [U]nder today's law that is sufficient to convict."). But the jury had more. The jury also could have considered Gray's admission that, when he had sex with P.H., she "was halfway passed out, halfway woke." That admission was corroborated by P.H.'s testimony.[1]

[1] The State argues that Gray did not raise the adequacy of the corroboration evidence in his motion for judgment of acquittal and, accordingly, we need not address it. While the

We recognize Gray went on to say that his sex with P.H. was consensual. Gray corroborated that assertion with testimony from his neighbor, who characterized P.H. as "a little flirty," said P.H. twice kissed Gray on his lips, and asserted that P.H. told him it was time for her to be alone with Gray. Despite this contrary evidence, the jury could have chosen to believe P.H.'s testimony and Gray's initial characterization of P.H.'s state of mind. *Id.* ("[T]he jury was in the best position to judge whom and what to believe."). The jury might have deemed Gray's attempts to discredit P.H.'s allegation far-fetched. Specifically he asserted that a third party entered the apartment and raped P.H. while he was out purchasing cigarettes and alcohol. The jury could have surmised that if Gray truly believed his earlier sex with P.H. was consensual, there would have been no need to suggest that someone else sexually assaulted her.

Because substantial evidence supports the jury's finding of guilt, we affirm Gray's judgment and sentence.

AFFIRMED.

State is correct that corroboration was not specifically mentioned, Gray did assert that there was insufficient proof of sex "by force or against P.H.'s will." Because Gray's admission went to this question, we consider the admission as well as evidence corroborating the admission. *See State v. Meyers*, 799 N.W.2d 132, 139 (Iowa 2011) (addressing corroboration of confession in the context of a challenge to the sufficiency of the evidence); *State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999) (choosing to pass on error preservation problems to affirm on the merits).