IN THE COURT OF APPEALS OF IOWA

No. 7-363 / 06-1337
Filed July 12, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUSTIN ADAM DEMOSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Monroe County, Annette Scieszinski, Judge.

Justin Adam DeMoss appeals his judgment and sentence for second-degree sexual abuse and indecent contact with a child. **CONVICTION AFFIRMED; NO-CONTACT ORDER VACATED AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, Steve Goodlow, County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Justin Adam DeMoss appeals his judgment and sentence for eleven counts of second-degree sexual abuse, class B felonies in violation of Iowa Code section 709.3(2) (2003), and twelve counts of indecent contact with a child, aggravated misdemeanors in violation of section 709.12. He argues the district court erred in (1) denying his motion for judgment of acquittal; (2) denying his motions for mistrial and new trial; and (3) determining the length of the no-contact order. We affirm the conviction and vacate and remand the no-contact order for resentencing.

I. Background Facts and Proceedings

Sometime around May 20, 2005, eleven-year-old C.G. reported "bad touching" by DeMoss. C.G. was interviewed and examined on May 31, 2005. The medical examination revealed no physical evidence of sexual assault. The physician who performed the exam, Dr. Mark Easter, nonetheless concluded based on C.G.'s behavior and statements he had been assaulted no more than twenty times, but at least "four to eight times or so."

The same day, Sheriff Daniel Johnson located DeMoss. He told DeMoss he wanted to talk to him at the Law Center. DeMoss agreed to go with Johnson and rode in the front seat of the patrol car. DeMoss asked Johnson why they were going to the Law Center, and Johnson told him they would talk when they got there. Sergeant Todd Stewart joined Johnson and DeMoss when they arrived. DeMoss signed a statement waiving his *Miranda* rights. When asked if he knew why he was there, DeMoss answered he had heard rumors involving himself and C.G. The officers told him they knew about the situation and advised

DeMoss to tell the truth. According to both officers, DeMoss answered their questions and admitted to fondling C.G. at least twelve times and performing anal sex with him ten or eleven times. He then wrote out and signed a three-page statement describing how he had gone from baby-sitting C.G. in November 2004, to being his friend, and to being a sexual partner in April and May 2005.

DeMoss was friends with some of C.G.'s older siblings and had helped baby-sit for the younger children, including C.G., while their mother worked late. In November C.G.'s mother asked if C.G. could move in with DeMoss due to C.G.'s behavioral problems and other difficulties. C.G. moved in with DeMoss on November 20, 2004. The arrangement was only supposed to last one month, but C.G. continued living with DeMoss for six months. During some of that time, DeMoss shared an apartment with two other individuals. According to DeMoss's statement, in February 2005, C.G. allegedly began both asking DeMoss, who is homosexual, about DeMoss's sexual orientation and questioning his own orientation. It was at that time, DeMoss wrote, that the two "began to see each other." DeMoss claimed he told C.G. they could not engage in a sexual relationship due to their age difference. DeMoss and C.G. moved into a two-bedroom house on April 20, 2005. According to DeMoss's statement, it was at this time he and C.G. began engaging in sexual activities. The statement goes on to describe in detail the progression of those activities. It states the two had sexual intercourse eleven times and oral sex three times. The statement also mentions hand-to-genital contact, but does not state a specific number of occasions.

At trial DeMoss testified he never had sexual contact with C.G. He stated the written statement only recounted the rumors he heard about himself and C.G. He also stated officers gave him suggestions for details and dates. C.G. testified via closed circuit television. He stated DeMoss took off their clothes and touched C.G.'s anus with his penis and inserted his penis into C.G.'s anus. He testified this happened "several times" but could not state exactly how many times. On cross-examination, defense counsel elicited affirmative answers to whether the abuse occurred once, twice, and three times. When asked if it happened four times, C.G. stated he did not know. He testified he did not remember "the particulars about all the contacts."

On the second day of trial, DeMoss moved for mistrial. The trial judge had asked the court reporter, outside the presence of the jury, whether any witness had yet spoken to the issue of identity. The court reporter acknowledged no one had pointed to the defendant. The judge told the court reporter to advise both attorneys the judge had asked whether identity was in the record. Both attorneys agreed there had been no evidence as to identity. The court heard arguments concerning the motion outside the presence of the jury, then denied it. The State recalled Sergeant Stewart to identify DeMoss.

The jury found DeMoss guilty of eleven counts of second-degree sexual abuse and twelve counts of indecent contact with a child. The district court sentenced him to indeterminate terms of imprisonment not exceeding twenty-five years on each count of second-degree sexual abuse and indeterminate terms of imprisonment not exceeding two years and a $500 fine on each count of indecent

contact. The court ordered the sentences to run concurrently. It also issued a twenty-six-year no-contact order for the child and his family. DeMoss appeals.

II. Standard of Review

We review a challenge to the sufficiency of the evidence for errors at law. *State v. Nitcher*, 720 N.W.2d 121, 134 (Iowa 2006). Our review of the district court's denial of DeMoss's motions for mistrial and new trial on the basis of judicial impartiality is abuse of discretion. *See State v. Choudry*, 569 N.W.2d 618, 620 (Iowa Ct. App. 1997); *State v. Mann*, 512 N.W.2d 528, 532 (Iowa 1994). To the extent DeMoss alleges constitutional error, we review de novo. *State v. Bowers*, 725 N.W.2d 435, 441 (Iowa 2006). We review the district court's sentence for errors at law. *Id.*

III. Merits

A. Sufficiency

DeMoss concedes there is sufficient evidence to convict him of one count of second-degree sexual abuse and two counts of indecent contact. He argues, however, there is insufficient evidence to convict him of all eleven counts of second-degree sexual abuse and twelve counts of indecent contact.

Generally, an out-of-court confession alone does not warrant conviction unless there is independent corroborating evidence confirming the confession. *State v. Polly*, 657 N.W.2d 462, 466 (Iowa 2003). The State must show sufficient evidence to corroborate DeMoss's written statement in order for that statement to constitute the basis of his conviction. *See id.* at 467. There need not be corroborating evidence for every element of the crime charged. *Id.* at 467. Further, "[c]orroboration need not be strong nor need it go to the whole case so

long as it confirms some material fact connecting the defendant with the crime." *Liggins*, 524 N.W.2d 181, 187 (Iowa 1994). Individual items of circumstantial evidence, though not enough individually to provide sufficient corroboration, may be taken as a whole to corroborate the confession. *Id.* The existence of corroborating evidence is a legal question for the court; the sufficiency of that evidence is a fact question for the jury. *State v. Liggins*, 524 N.W.2d 181, 187 (Iowa 1994).

In reviewing sufficiency-of-the-evidence claims, we look to whether the verdict is supported by substantial evidence. *State v. Bower*, 725 N.W.2d 435, 441 (Iowa 2006). Evidence is substantial if a rational jury would be convinced of the defendant's guilt beyond a reasonable doubt. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). We consider all the evidence in the record, but view it in a light most favorable to the verdict. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006).

In this case, first, C.G. told Dr. Easter sexual contact with DeMoss "happened lots of times," in both the daytime and nighttime. He testified on direct examination it happened several times. Second, Dr. Easter himself concluded sexual contact occurred four to eight times or so, but less than twenty times. Third, C.G. spent several nights with DeMoss when DeMoss was baby-sitting him. DeMoss also had unlimited access to the child when the two were living together for six months. Fourth, Dr. Easter found no evidence of physical trauma, but noted it had been two weeks since the last alleged sexual encounter and opined there would be little trauma if lubrication was used and the contact was not rough. DeMoss's statement indicated he "eased" C.G. into anal sex.

Fifth, DeMoss also wrote what appears to be a love letter to C.G., though DeMoss never gave the child the letter. In the letter, DeMoss asks C.G.'s forgiveness for the "one thing" that happened one night. He states his "conscience is full of guilt." He also references C.G. getting out of bed and going upstairs when someone came to the door. At that point, the letter states, "reality began to sink in for me." Sixth, DeMoss testified most of his written confession was true, including the child's purported interest in sexual orientation and sex and the child's perception that the house was their "first place together." The only parts he denies are those having to do with sexual contact. Finally, DeMoss concedes there is evidence sufficient to convict him of one count of second-degree sexual abuse and two counts of indecent contact.

We conclude there is sufficient evidence to support the jury's verdict.

B. Judicial Impartiality

DeMoss claims he was denied a fair trial when the trial judge asked whether identification evidence had been entered into the record. He argues the judge's interference caused him prejudice.

According to the Iowa Judicial Code, a judge must recuse himself or herself when his or her impartiality might reasonably be questioned. *See* Canon 3C(1). The test is based on the judgment of a reasonable person. *State v. Biddle*, 652 N.W.2d 191, 198. No recusal is necessary unless prejudice occurs. *Id.* "[A] trial judge has the duty to control and conduct its court in an orderly and proper manner." *State v. Cuevas*, 288 N.W.2d 525, 531 (Iowa 1980). Further, "[a] judge is allowed to manage the trial, including the order of proof." *Biddle*, 652 N.W.2d at 199.

In this case, the judge explained to both parties she was keeping track of the evidence that had been entered and wanted to check her recollection. The inquiry was made outside the presence of the jury and was not ex parte. Further, the judge did not offer advice to either party. *See State v. Glanton*, 231 N.W.2d 31, 34-35 (Iowa 1975). We therefore conclude the judge was simply fulfilling her role of managing the trial.

Even if we were concerned about the judge's question, we would have to conclude DeMoss was not prejudiced. Identity was not at issue during the trial. According to the court's rulings, witnesses gestured toward DeMoss during their testimony about him. Though the State must prove identity beyond a reasonable doubt, identity may be inferred or inherent in the record. *State v. Jenson*, 216 N.W.2d 369, 374-75 (Iowa 1974).

C. Sentencing

The State concedes and we agree that DeMoss was improperly sentenced as to the no-contact order. DeMoss was sentenced on August 14, 2006. He was therefore subject to new Iowa Code section 664A.5 (2007). The portion of his sentence concerning the no-contact order is vacated.

We affirm DeMoss's conviction, vacate the no-contact order, and remand for resentencing on the no-contact order.

CONVICTION AFFIRMED; NO-CONTACT ORDER VACATED AND REMANDED FOR RESENTENCING.