IN THE COURT OF APPEALS OF IOWA

No. 7-745 / 06-1610
Filed December 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FREDDIE OWEN DRINKARD,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha M. Beckelman, Judge.

Defendant appeals his conviction for sexual abuse in the second degree. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Eisenhauer, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

I. Background Facts & Proceedings

In August 2000, allegations arose that Freddie Drinkard had sexually abused his six-year-old granddaughter, J.S. Drinkard was questioned by Detective Debora Protaskey of the Iowa City Police Department. In a written statement typed by Detective Protaskey and signed by Drinkard, he admitted:

> I have touched [J.S.], my six year old grand daughter, about 15 times. I have touched her on her genitals, over her clothing. This has occurred in Temple, Texas and in Iowa City, Iowa. It happened about three times in Iowa City during the one week that we were staying at the Alexis Park Inn. I touched her with my fingers on her clothing over her genitals, and I did it only because she wanted me to do it.

On September 22, 2000, Drinkard was charged with three counts of sexual abuse in the second degree, in violation of Iowa Code sections 709.1(3) and 709.3(2) (1999). The State alleged the sexual abuse occurred between August 2 to August 9, 2000. The case proceeded to a jury trial in August 2006, on one count of second-degree sexual abuse.[1]

J.S. testified that when she was five or six years old she stayed at the Alexis Park Inn and slept in the same bed as her grandparents. She stated that when her grandmother was out of the room, her grandfather placed his hand in her underwear and touched her vagina. She also testified to another incident, where she and her grandfather were in an apartment or mobile home, it was the afternoon, and she was wearing a Spongebob T-shirt. She stated at that time her grandfather put his hand down her underwear and touched her with his

[1] The reason for the long delay does not appear in the record. Drinkard was arrested on December 29, 2005, in Iowa.

hands, and he put his lips on her vagina. Detective Protaskey testified the Alexis Park Inn was in Johnson County and that the incident there allegedly took place in the week immediately preceding August 10, 2000.

Drinkard objected to jury instruction No. 15, which defined "sex act" to mean "any sexual contact between the mouth of one person and the genitals of another or between the finger or hand of one person and the genitals of another person." Drinkard stated that while there was evidence of mouth-to-genital contact, there was no evidence to show this contact occurred between August 2 to August 9, 2000, in Johnson County. The district court pointed out that the marshalling instruction required the State to prove a sex act occurred during the pertinent time frame in Johnson County. The court overruled the objection.

The jury returned a verdict finding Drinkard guilty of second-degree sexual abuse. The court denied his motion for new trial. Drinkard was sentenced to a term of imprisonment not to exceed twenty-five years. He now appeals, claiming he is entitled to a new trial because the district court improperly instructed the jury.

II. Standard of Review

We review issues regarding jury instructions for the correction of errors at law. *State v. Carey*, 709 N.W.2d 547, 551 (Iowa 2006). In this review we determine if they are correct statement of the law, and whether they are supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court should not instruct on issues which are not supported by substantial evidence. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 846

(Iowa 1997). We will not reverse the district court unless prejudice results from an erroneous jury instruction. *State v. Fintel*, 689 N.W.2d 95, 99 (Iowa 2004).

III. Merits

Drinkard contends that because J.S. did not know where or when defendant touched her on the vagina with his lips, the district court improperly included contact between the mouth of one person and the genitals of another in the definition of a sex act found in the jury instructions. Drinkard asserts the jury could have found him guilty of second-degree sexual abuse for mouth-to-genital contact even though there was no evidence such contact took place during the relevant time frame or within Johnson County.

The marshalling instruction provided:

> The State must prove all of the following elements of Sexual Abuse in the Second Degree:
>
> 1. On or about the 2nd through the 9th day of August, 2000, the defendant performed a sex act with [J.S.] in Johnson County, Iowa.
>
> 2. The Defendant performed the sex act while [J.S.] was under the age of 12 years.
>
> If the State has proved both of these elements, the defendant is guilty of Sexual Abuse in the Second Degree. If the State has failed to prove either one of the elements, the defendant is not guilty of Sexual Abuse in the Second Degree.

Jury instructions are considered as a whole. *State v. Newell*, 710 N.W.2d 6, 27 (2006). We do not consider the definition of a sex act standing alone; we also consider the marshalling instruction. Jurors are presumed to follow the jury instructions. *State v. Piper*, 663 N.W.2d 894, 915 (Iowa 2003). Thus, the jury could only have found Drinkard guilty if it found he performed a sex act with J.S. between August 2 to August 9, 2000, in Johnson County.

In his written statement Drinkard admitted touching J.S. on her genitals in Johnson County, during the week they were in Iowa staying at the Alexis Park Inn[2] An error in jury instructions is not prejudicial if it appears beyond a reasonable doubt that the error complained of did not contribute to the guilty verdict. *See Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 1837, 144 L. Ed. 2d 35, 51 (1999). Based on Drinkard's written admission that he had touched J.S. on her genitals at the Alexis Park Inn, we find that any error in instructing the jury on mouth-to-genital contact was not prejudicial. If no prejudice results from an erroneous jury instruction, we will not reverse the district court. *See Fintel*, 689 N.W.2d at 99.

We affirm defendant's conviction.

AFFIRMED.

[2] Drinkard admitted touching the genitals of J.S. over her clothing. A sex act may occur even though the specified body parts are covered by clothing. *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994).