05/23/95 STATE MINNESOTA v. MICHAEL A. KVEENE

COURT OF APPEALS OF MINNESOTA

May 23, 1995

STATE OF MINNESOTA, RESPONDENT
v.
MICHAEL A. KVEENE, APPELLANT

Appeal from District Court, Ramsey County; Hon. Edward S. Wilson, Judge. District Court File # C0941526.

Considered and decided by Lansing, Presiding Judge, Schumacher, Judge, and Peterson, Judge.

The opinion of the court was delivered by: Lansing

LANSING, Judge

A jury found Michael Kveene guilty of one count of public officer misconduct and one count of lewd or lascivious behavior. The district court denied his posttrial motions for vacatur or a new trial. We affirm the denial, holding that public officer misconduct can be based on conduct that violates another statute, and that it was not reversible error for the district court to admit two Spreigl incidents and deny admission of the victim's counseling records and the testimony of her civil attorney.

FACTS

Michael Kveene, a St. Paul police officer, was convicted of misconduct of a public officer under Minn. Stat. ? 609.43(2) and lewd or lascivious behavior under Minn. Stat. ? 617.23. The evidence supporting the convictions involved Kveene's touching the buttocks of eighteen-year-old D.W. while on duty.

D.W. testified at trial that during July 1992, Officer Kveene frequently visited her place of employment, made sexually explicit conversation, touched her hair and shoulders affectionately without invitation, and on his last visit "grabbed [her] butt" from behind while

she was answering the phone. D.W. did not tell her employer of the incident but reported it to the St. Paul police in September 1993.

The prosecution offered two Spreigl incidents at trial to show common scheme or plan and absence of mistake. One involved Kveene making sexually explicit conversation with a fourteen-year-old babysitter, rubbing her buttocks, and exposing himself to her. The other involved Kveene making sexually explicit conversation with a seventeen-year-old babysitter and touching her buttocks.

Officer Kveene denied touching D.W. His theory of the case was that D.W. fabricated the claim after reading a newspaper article about him and the fourteen-year-old babysitter. Following his conviction and the denial of his posttrial motions, Kveene brought this appeal.

DECISION

I

Kveene first asserts that he cannot be charged under Minn. Stat. ? 609.43(2) for acts chargeable under another statute. Minn. Stat. ? 609.43(2) (1994) provides that

[a] public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both:

(2) In the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in that capacity.

Under Kveene's interpretation of the statute, the clause "for which no other sentence is specifically provided by law" precludes application of Minn. Stat. ? 609.43(2) to his actions because Minn. Stat. ? 617.23 provides a sentence for the grabbing conduct. The state disputes this interpretation, contending that the clause merely means that if the unlawful conduct is prohibited by a statute for which no punishment is prescribed, then the punishment is the gross misdemeanor penalty of not more than one year imprisonment and a fine of not more than $3,000, or both.

Statutory interpretation presents a question of law that we review de novo. State v. Zacher, 504 N.W.2d 468, 470 (Minn. 1993). The few cases interpreting Minn. Stat. ? 609.43(2) have not focused on parsing this statutory language and none have involved defendants simultaneously tried and convicted under another statute. But see State v. Ford, 397 N.W.2d 875, 877 (Minn. 1986) (school teacher originally charged with one count of sodomy under Minn. Stat. ? 609.293, subd. 5, and one count of fornication under Minn. Stat. ? 609.34, but convicted only of public misconduct); State v. Andersen, 370 N.W.2d 653, 656 (Minn. App. 1985) (mayor originally charged with disorderly conduct but convicted only of public misconduct).

Nonetheless, Ford and Anderson both recognize a legislative intent to hold public officials to a higher standard of conduct for actions taken in their official capacities. In Ford, the supreme court cited the "proper three-part test" for analyzing charges under the statute:

(1) whether the act charged was done by a public officer or employee; (2) whether the act

was committed while the defendant was acting in his official capacity as a public officer or employee; and (3) whether the act was either forbidden by law or in excess of his lawful authority.

397 N.W.2d at 879. The third prong of the test derives directly from the statutory language and requires proof that the charged act was forbidden by law or outside the public official's scope of authority. Thus Kveene's interpretation of State v. Serstock, 402 N.W.2d 514, 516-17 (Minn. 1987), that "forbidden by law" and "outside the public official scope of authority" are elements of one another rather than distinct and alternative requirements separated by "or," is defeated by the statute.

Although the language of Minn. Stat. ? 609.43(2) is "not a model of clarity," see State v. Ford, 377 N.W.2d 62, 66 (Minn. App. 1985), rev'd on other grounds, 397 N.W.2d 875 (Minn. 1986), the statute provides criminal sanctions for behavior of a public officer or employee, acting in an official capacity, that violates the law or exceeds the official's authority. Officer Kveene, in committing conduct for which he was convicted under Minn. Stat. ? 617.23 in police uniform and while on duty, also violated Minn. Stat. ? 609.43(2).

II

The district court admitted evidence of the prior incidents of misconduct with the two teenage babysitters to show common scheme or plan. See Minn. R. Evid. 404(b). To determine the admissibility of other-misconduct evidence, the district court must make express findings that (1) clear and convincing evidence shows the defendant participated in the other misconduct, (2) the other-misconduct evidence is relevant and material, and (3) the probative value of the other-misconduct evidence is not outweighed by its potential for unfair prejudice. State v. DeWald, 464 N.W.2d 500, 503 (Minn. 1991). Admission of other-misconduct evidence will be upheld unless an abuse of discretion is clearly shown. Id.

The district court found that the prior incidents of misconduct were proven by clear and convincing evidence. Kveene conceded the clear and convincing nature of the proof at the pretrial hearing. The court also found that the past misconduct was relevant to the charged offense because of the similarity in making sexually suggestive conversation and touching the buttocks of young women, and the sufficiently close time period between the past misconduct and the charged offense. See State v. Bolte, N.W.2d , (Minn. April 14, 1995) (court considers whether sufficiently close relationship in modus operandi and time exists between charged offense and other misconduct in determining relevancy and materiality). Although some differences between the past misconduct and the charged crimes exist, absolute similarity is not required to establish relevancy. See State v. Filippi, 335 N.W.2d 739, 743 (Minn. 1983).

In weighing the probative value against the prejudicial effect, the district court must consider the extent to which the other-misconduct evidence is crucial to the state's case. See State v. Slowinski, 450 N.W.2d 107, 114 (Minn. 1990) (other-crime evidence admissible when "necessary to support the state's burden of proof"). The district court specifically found that the Spreigl evidence was necessary to prove the state's case because the charged offense consisted of one incident of touching and the lone testimony of the victim. Because the district court's findings are supported by the record, we find no abuse of discretion in admitting the two incidents of past misconduct.

III

The final issue appealed is the district court's evidentiary ruling prohibiting Kveene from admitting D.W.'s counseling records and the testimony of her civil attorney. Kveene contends that the inability to present this information to the jury prejudiced his theory of the case that D.W. fabricated the claim after reading a newspaper article about him and the fourteen-year-old babysitter.

The district court excluded the counseling records and civil attorney's testimony as irrelevant

evidence because the facts of D.W.'s counseling and the retention of a civil attorney had already been introduced during D.W.'s direct and cross examination. See Minn. R. Evid. 403 (relevant evidence may be excluded if cumulative). There is a basis for the judge's ruling since Kveene had already elicited from D.W. that she sought counseling well after the touching incident, that she filed a civil suit against Kveene before the criminal action began, and that she came forward with the complaint after reading the newspaper account of Kveene and the babysitter.

The exclusion of the additional evidence is not directly comparable to the limitation of cross-examination in State v. Pride, 528 N.W.2d 862 (Minn. 1995). The facts of this case differ from those in Pride because Kveene was not denied the opportunity to cross-examine D.W. or to question her credibility by eliciting other motives for accusing the officer. See id. at 867. He was only prevented from introducing cumulative evidence. Because the jury had ample evidence through D.W.'s direct and cross-examination testimony that could support Kveene's theory of the case, the district court did not abuse its discretion in making this evidentiary ruling.

Affirmed.

Harriet Lansing

May 16, 1995.

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