

FILED

MAY 31 1983

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
 Plaintiff-Appellee,)
 vs.)
 WILLIAM HOLLAND,)
 Defendant-Appellant.)

Filed May 31, 1983

2-525
 68594

Appeal from Linn District Court, L. Vern Robinson, Judge.

Defendant appeals from his conviction for lascivious acts with a child in violation of Iowa Code section 709.8, and indecent exposure in violation of Iowa Code section 709.9. REVERSED AND REMANDED.

Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Michael Jordan, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Doneilson, Snell, and Schlegel, JJ.

Hayden, J., takes no part.

PER CURIAM

Defendant appeals from his conviction for lascivious acts with a child in violation of Iowa Code section 709.8, and indecent exposure in violation of Iowa Code section 709.9. We reverse and remand.

On November 13, 1981, the victim, a six and one-half year old child, was for a period of time left in the care of defendant, who was the husband of the child's regular babysitter. On November 26, after a visit to his pregnant aunt, the child related the facts of life to his mother, who asked him how he had obtained the information. He told her that he had "figured it out" and would not discuss it further. The next day she again asked him where he had obtained the information and he responded that he couldn't tell her because he would go to prison if he did. He then told her that defendant was the source of the information but, in response to a question, denied that defendant had touched him. The following week, when the mother brought up the subject again, the child stated that defendant "had done something in the sink" and, after first denying it, stated that he had touched defendant's genitals with a glove on. At trial defendant objected to the mother's testimony on hearsay grounds only with regard to the first of three separate conversations.

Over objection that the procedure was prejudicial and violated defendant's constitutional right to confront witnesses, the child was permitted to testify at trial with a blackboard screening him from defendant's view. A television camera arrangement permitted defendant and his counsel an opportunity to observe the child's demeanor during his testimony. Defense counsel was advised in advance of the procedure to be employed, but declined an opportunity to discuss it with perspective jurors during voir dire. The child testified that on the night in question defendant had told him how babies are made, that he did not currently remember what he had been told, but that he had told his mother what defendant had said. He then stated that defendant had done something in the bathroom sink,

but that he did not remember what it was and that defendant had asked him to touch defendant, but that he did not remember whether he had done so and that he thought he had told his mother what had happened but did not remember what he told her. He then testified that he had touched defendant's genitals, that he didn't know why he had done it, but that defendant had not asked him to, that he remembered putting on his glove, but did not remember why, and that while he was in the bathroom defendant had taken his bathrobe off.

Defendant testified that on the night in question he had told the child the facts of life and that he later masturbated in the bathroom sink only to discover that the child was watching him through an open doorway. He testified that his bathrobe was on, although open, and that he did not touch the child and the child did not touch him.

On appeal, defendant asserts: (1) that the trial court erred in admitting hearsay testimony of the victim's mother; (2) that the trial court erred in permitting the placing of a blackboard to screen defendant from the victim's view during the victim's testimony; (3) that the evidence was insufficient to support the jury's verdict of guilty; and (4) that he was denied effective assistance of counsel. Because we consider determination of the first issue raised on appeal to be dispositive, we will not address the other issues raised by defendant.

I. Scope of Review

Because this is an appeal from a criminal conviction, our scope of review is an independent evaluation of the totality of the circumstances on all issues involving the alleged violation of basic constitutional safeguards, and on assigned error on all other issues. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

II. Admission of Hearsay Testimony

A. Preservation of Error.

A threshold issue we must address is whether defendant has preserved error on this issue. At trial, defendant made his hearsay objection when the victim's

mother was asked what the victim said to her during the first of three conversations. Defendant objected generally to "anything that might have been said by the child to the mother on the basis that it [is] hearsay." The State admitted that the statements were being offered to prove the truth of the matters asserted, but argued that they were, nevertheless, admissible. The trial court overruled defendant's objection, and the State continued its questioning about the three conversations. Defendant did not renew his objection. However, at the close of the State's case, defendant moved to strike the testimony of the victim's mother on hearsay grounds. This motion was also overruled.

Defendant has adequately preserved error on this issue. we do not require that defendant make repeated objections to the same type of evidence in order to preserve error. "Once a proper objection has been made and overruled, an objector is not required to make further objections to preserve his right on appeal when a subsequent question is asked raising the same issue." State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976).

B. Testimony of the Victim's Mother

It is well settled that there are two types of statements made out of court by a victim of sexual abuse which may be admitted as evidence at trial. One type is not hearsay at all, and the other falls within the excited utterance exception to the hearsay rule. State v. Grady, 183 N.W.2d 707, 716 (Iowa 1971).

(1) fact of complaint

As a general rule, testimony concerning the fact that the victim has made a complaint of sexual abuse is not hearsay. It is evidence corroborating the fact of complaint, and is offered to dispel the presumption that complainant's story is a fabrication.

In a case such as the present, where the nonconsenting victim of a sex offense testifies to its commission, the theory of admissibility of evidence of a complaint which is consistent with her testimony... is this: It is natural to expect that the victim of such a crime would complain of it, and the prosecution can show the fact of complaint to forestall the assumption that none was made and that therefore the offense did not occur

People v. Burton, 359 P.2d 433, 443-44 (Cal. 1961).

One of the requirements for the application of this rule is that the complaint must have been made voluntarily. An utterance made in response to a demand for explanation is not admissible. "Where the circumstances indicate that but for the questioning there would probably have been no voluntary complaint, the answer is inadmissible." State v. Grady, at 714 (quoting State v. McGhuey, 153 Iowa 308, 313-14).

In the present case, the victim related the details of the charged offense only after repeated questioning by his mother. We are of the opinion that, in the absence of her interrogation, there would have been no complaint. The complaint was therefore not voluntary, and testimony corroborating the fact of complaint was improperly admitted.

Even if the victim's complaint had been voluntary, his mother's testimony would still have been inadmissible because its scope vastly exceeded that which is permissible under the rule. Her testimony contained a rambling narrative outlining the details of the alleged offense, and specifically identifying defendant as the guilty party. The scope of permissible testimony is limited to the fact of complaint including, of course, so much of the complaint as is necessary to identify the act complained of to the offense charged. State v. Andrews, 130 Iowa 609, 610 (1905). "Statements which go beyond describing the nature of the act and the time and place of its occurrence may be hearsay. Specifically, statements which identify the accused are hearsay." Sate v. Ogilvie, 310 N.W.2d 192, 195 (Iowa 1981).

(2) excited utterance

Testimony which is not admissible to corroborate the fact of the victim's complaint may nevertheless be admissible if it falls within the excited utterance exception to the hearsay rule. An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." State v. Ogilvie, at 196. It is

admissible "[w]hen the declaration is spontaneous and in such proximity in point of time with the incident to avoid any presumption of fabrication." State v. Haines, 289 N.W.2d 806, 810 (Iowa 1977).

The key requirement which must be met for a statement to be admitted as an excited utterance is that the statement must have been made spontaneously. "These statements must meet a requirement of spontaneity in order to possess a circumstantial guarantee of trustworthiness for admissibility." State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980).

Several factors in the present case weigh against a finding of spontaneity. To begin with, the victim's statements were made in response to his mother's questions. In State v. Haines, the court applied the res gestae exception to declarations made by a child in response to specific questions. However, in noting that the test of spontaneity had been met, that court stated:

It should be noted the child's answers to the mother's questions did not merely repeat the language of the questions, but were independent answers to the same. Such fact, coupled with the irrefutable evidence the child made the statements while in an excited state, persuade us they meet the test of spontaneity.

Id. at 810. In the case at bar, the victim's answers to a large extent mirrored the language of the questions. They were not independent answers. More important, the evidence indicates that the victim was not upset or excited, and probably would not have said anything but for his mother's repeated questioning.

More troubling than the fact that the victim's statements were made in response to specific questions is the fact that they were made some three weeks after the alleged incident. While time is not necessarily a conclusive factor, a delay of this length raises a strong presumption that the statements were reflective rather than impulsive. Absent evidence to dispel that presumption, statements not made in close proximity in point of time with the incident are inadmissible.

If the evidence discloses circumstances such that it is likely that, despite the delay, the victim was still under the stress caused by the attack upon him at

the time the statements were made, they may be admitted. In State v. Paulson, 265 N.W.2d 581 (Iowa 1978), for example, statements made by the victim to his doctor two hours after his injuries were sustained were properly admitted as excited utterances, since "the child was severely injured and that. . . fact lessens the likelihood of fabrication." Id., at 586. In that same case, however, the court held that the trial court did not err in refusing to permit the victim's mother testify regarding statements made by the victim to her some 38 days later, since they were too remote from the incident to fall within the excited utterance exception to the hearsay rule.

In the present case we do not think that the evidence supports a supposition that the victim was still under the stress caused by the alleged incident at the time the statements were made. To the contrary, the evidence persuades us that the victim's statements were not spontaneous declarations. They do not contain the requisite circumstantial guarantee of trustworthiness, and therefore, do not qualify as excited utterances. The trial court erred in admitting them. Because the admission of hearsay evidence is presumed to be prejudicial (see State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979)), we reverse and remand for a new trial.

REVERSED AND REMANDED.