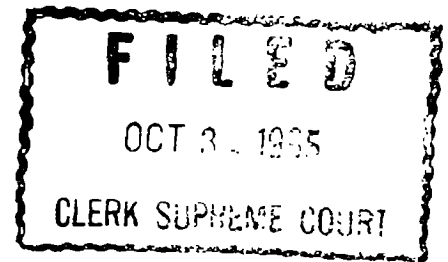


IN THE COURT OF APPEALS OF IOWA

No. 5-420 / 94-0695



STATE OF IOWA,

Appellee,

vs.

DAVID TIMOTHY ODERMANN,

Appellant.

Appeal from the Iowa District Court for Emmet County, Charles H. Barlow,
Judge.

Defendant appeals judgment and sentences, following jury trial, entered upon
his convictions of two counts of assault with intent to commit sexual abuse and one
count of second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds Lapointe,
Assistant **State** Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney
General; Lynn K. Fillenwarth, County Attorney; and Richard Meyer, Assistant
County Attorney, for appellee.

Heard by Donielson, C.J., and Hayden and Cady, JJ.

DONIELSON, C.J.

Defendant David Odermann was charged with two counts of assault with intent to commit sexual abuse, in violation of Iowa Code section 709.11 (1993), and one count of second-degree sexual abuse, in violation of section 709.3(2). Odermann was convicted of the crimes charged and now appeals. We affirm.

In March 1993, S.D., who was then eight years old, told her third-grade teacher, Ron Swalve, that her dad had touched her in inappropriate ways. Odermann was married to S.D.'s mother, and Swalve testified S.D. referred to Odermann as "Dad." S.D. told Swalve her dad had kissed her on the lips. She also stated he would touch her private parts with his toes or his hand. Swalve testified S.D. was upset and very anxious when she talked to him. S.D. testified she told Swalve within one or two days after the last incident.

Helen McDonald, a therapist at Northwest Iowa Mental Health Center, treated S.D. for trauma associated with sexual abuse. McDonald testified S.D. told her Odermann has kissed her on the mouth, and on at least one occasion had stuck his tongue in her mouth. S.D. told McDonald that Odermann had touched her between her thighs and had inserted his toe into her vaginal area. Steven Mayhew, the director of psychological services at the Center, also evaluated S.D. S.D.'s statements to Mayhew were consistent with those she made to McDonald.

Dr. Michael Jung, a medical doctor, evaluated S.D. for suspected child abuse. Dr. Jung testified S.D.'s hymen showed signs of penetration. He stated the condition of S.D.'s hymen was consistent with the insertion of a toe into her vagina.

S.D. testified that on two occasions when she went to give Odermann a kiss good night, he stuck his tongue in her mouth. She testified a third incident occurred when Odermann had been tickling her with his foot and he had touched her in her vaginal area with his foot. She stated the touching made her feel uncomfortable and when she turned to get away, she felt a sharp pain inside her private area.

S.K. testified she and her mother had previously lived with Odermann. S.K. testified that when she was about seven years old she had been sexually abused on two occasions by Odermann. She stated when she was thirteen Odermann had placed his tongue in her mouth.

Defendant denied the charges against him. He admitted he had pled guilty to one count of assault with intent to commit sexual abuse due to his activities with S.K. He admitted he may have stuck his toe in S.D.'s vagina, but stated he did not have an intent to **do anything** wrong. William Pischke, a child abuse investigator for the Iowa Department of Human Services, testified Odermann told him he did not think he had stuck his tongue in S.D.'s mouth, but if he had done so, it was because he had been drinking.

A jury found defendant guilty of the crimes charged. The district court denied defendant's motion for new trial and motion in arrest of judgment. Defendant was

sentenced to a term of imprisonment not to exceed twenty-five years on the conviction for second-degree sexual abuse, and a term of imprisonment not to exceed two years on each count of assault with intent to commit sexual abuse. These terms are to run concurrently. Defendant has appealed.

I. Hearsay

A. Defendant first claims Swalve's testimony of his conversation with S.D. was hearsay. Under Iowa Rule of Evidence 802, hearsay evidence is not admissible. The State contends S.D.'s statements to Swalve come within the excited utterance exception in rule 803(2).

The excited utterance exception applies generally to statements made under the influence of the excitement of an incident, rather than on reflection, fabrication, or deliberation. *State v. Augustine*, 458 N.W.2d 859, 860-861 (Iowa App. 1990). The lapse of time is only one of several relevant factors which the trial court must weigh in ascertaining the spontaneity of the hearsay statement. *State v. Hy*, 458 N.W.2d 609, 611 (Iowa App. 1990). Other factors properly to be considered include the extent to which questioning elicited statements that otherwise would not have been volunteered, the age and condition of the declarant, the characteristics of the event being described, and the subject matter of the statements. *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986). The admission of hearsay under this exception lies largely within the discretion of the trial court. *Id.*

We **find** no abuse of discretion in the district court's decision to allow Swalve to testify to S.D.'s statements to him. S.D.'s statements were made within one or two days after Odermann had sexually abused her with his toe. Swalve testified S.D. was upset and very anxious. We find that as in *Hy*, S.D. told a figure of authority of the assault as soon as practicably possible. *See Hy*, 458 N.W.2d at 611. We conclude her statements come within the excited utterance exception to the hearsay rule.

B. Defendant believes the State expected S.D. to deny at trial the incident involving defendant's toe. He claims the State then presented for impeachment purposes the testimony of McDonald, Mayhew, and Dr. Jung concerning S.D.'s statements to them, which would have been otherwise inadmissible hearsay evidence. Our supreme court has condemned prosecutorial maneuvering in which the State places a witness on the stand who it expects to give unfavorable testimony solely for the purpose of introducing otherwise inadmissible evidence. *State v. Tracy*, 482 N.W.2d 675, 679 (Iowa 1992).

We find the present situation is distinguishable from that discussed in *Tracy*. In the **present case**, S.D.'s testimony at trial was not inconsistent with her previous statements **as related** by other witnesses. At trial, S.D. stated defendant had placed his foot on her vaginal area. She also stated she felt a sharp pain in her private area. We find this is not inconsistent with previous statements she had made that defendant had placed his toe in her vagina. We conclude the testimony of McDonald, Mayhew, and Dr. Jung was not introduced to impeach S.D.

Furthermore, we find these witnesses' statements were admissible under the exception to the hearsay rule found in rule 803(4), statements for purposes of medical diagnosis or treatment. Statements made by a child abuse victim concerning the identity of the abuser made to a physician during an examination are reasonably pertinent to diagnosis or treatment, where the abuser is a member of the victim's immediate household. *Id.* at 681 (*citing United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985)). In order to come within this exception, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment, and the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis. *Id.*

We find the statements made to Dr. Jung clearly come within this exception. We also find the statements made to McDonald and Mayhew, who were therapists, come within the exception. S.D.'s motive in making the statements to the therapists was for the purpose of promoting treatment of the emotional damage caused by the sexual abuse. The therapists testified that finding out the identity of the perpetrator was **important** for purposes of treatment, especially where the perpetrator was a member of **the** victim's household. We conclude the district court did not abuse its discretion in admitting the statements in question.

II. Prior Bad Acts

Defendant contends the district court abused its discretion in allowing S.K. to testify to prior incidents where she had been sexually abused by defendant. He

claims **this evidence** was unduly prejudicial. He also states the evidence was too far removed **in the past** and not sufficiently similar to the alleged activities involving S.D. to be relevant.

Iowa Rule of Evidence 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In considering admissibility of evidence of prior bad acts, the court must find that the evidence is relevant for one of the independent purposes listed in rule 404(b). *State v. McDaniel*, 512 N.W.2d 305, 308 (Iowa 1994). If the evidence is relevant, then the court must determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). This is a discretionary determination for the trial court to make. *McDaniel*, 512 N.W.2d at 308. We will reverse its decision only when we find a clear abuse of discretion. *Casady*, 491 N.W.2d at 785.

Here, **defendant** admitted to the toe incident, but stated he did not have an intent to **do anything** wrong. S.K.'s testimony was then relevant to show intent, motive, and absence of mistake. The lack of other evidence of defendant's intent may enhance the probative value of other-crimes evidence. *Id.* at 786. Also, the district court issued a cautioning instruction to the jury, which lessened the prejudice associated with the evidence. We find no abuse of discretion in the district court's

determination that the probative value of the evidence was not outweighed by its prejudicial nature.

III. Sufficiency of Evidence

Defendant claims there is insufficient evidence in the record to support his conviction. In particular, he claims there is insufficient evidence of any sexual intent with regard to the kissing incidents or the toe incident. He states these were only innocent activities.

When a criminal defendant challenges the sufficiency of evidence to support a conviction, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We must uphold the conviction if there is substantial evidence in the record to support it. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). We view the evidence in the light most favorable to the State. *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981).

The jury was not required to accept defendant's claim that he did not intend to sexually abuse S.D. See *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa App. 1990). The testimony of S.K. showed defendant had engaged in similar acts with her, such as putting his tongue in her mouth. However, defendant had additionally performed sex acts with S.K. which involved oral sex and genital to genital contact. From S.K.'s testimony, the jury could infer that by putting his tongue in S.D.'s

mouth, **defendant** intended to engage in a sex act with her. Additionally, the jury could refuse to believe defendant's statement he had accidentally placed his toe in S.D.'s vagina. We conclude there is sufficient evidence in the record to support the jury's verdict.

IV. Medical Evidence

Defendant contends the district court abused its discretion by permitting Dr. Jung to testify regarding physical evidence of penetration. He states S.D.'s testimony at trial did not allege penetration, and therefore, there was no adequate foundation for admitting the doctor's testimony.

We have already determined that penetration by defendant's toe could be inferred from S.D.'s trial testimony. S.D. stated defendant had tickled her private area with his foot, and that when she tried to get away she felt a sharp pain within her vagina. We conclude there was adequate foundation to admit Dr. Jung's testimony.

After considering all issues raised by defendant on appeal, we affirm defendant's convictions. Costs of this appeal are assessed to defendant.

AFFIRMED.