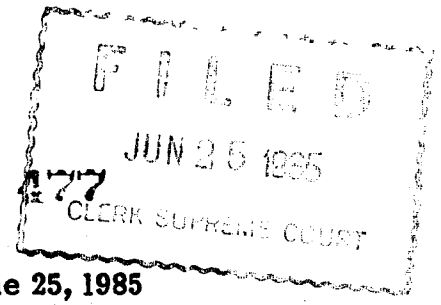
IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,	)	
Plaintiff-Appellee,	)	**Filed June 25, 1985**
vs.	)	
MICHAEL E. MARTIN,	)	**5-218** / **84-1159**
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Scott County - J. Hobart Darbyshire, Judge.

Defendant appeals from his conviction of sexual abuse in the second degree in violation of Iowa Code section 709.3. AFFIRMED.

Randy J. Hohenadel of Wells, McNally & Bowman, Davenport, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

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

HAYDEN, J.

Defendant appeals from his conviction of sexual abuse in the second degree in violation of Iowa Code section 709.3. On appeal he asserts: (1) the trial court abused its discretion in determining that the five-year-old victim was competent to testify; (2) the trial court improperly denied defendant's motion to excuse a juror who during the course of the trial discovered that he was acquainted with the victim's grandfather; (3) the trial court incorrectly denied defendant's motion for judgment of acquittal; (4) defendant was denied effective assistance of counsel; and (5) the trial court improperly allowed into evidence hearsay statements of the victim made to a police officer at a hospital.

Our review of this action is on assigned error. Iowa R. App. P. 4. However, on issues involving the violation of basic constitutional safeguards we make an independent evaluation of the totality of the circumstances which is the equivalent of a de novo review. State v. Cuevas, 322 N.W.2d 910, 911 (Iowa Ct. App. 1982). The sixth amendment right to effective assistance of counsel is a basic constitutional safeguard triggering a de novo review. Sims v. State, 295 N.W.2d 420, 422-23 (Iowa 1980).

I. Defendant was accused of sexually abusing his daughter, Jessica, who was four years and three months old at the time of trial. Defendant argues that Jessica was incompetent to testify due to her young age.

In deciding whether a witness is competent to testify the trial court should determine whether the witness has the mental capacity to understand the nature of the question, can communicate intelligent answers, and has the moral responsibility to tell the truth. State v. Harvey, 242 N.W.2d 330, 336 (Iowa 1976). The trial court has discretion in determining the competency of witnesses and its determination wil only be reversed upon a showing of abuse of discretion. State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982).

In this case the trial court examined Jessica outside the presence of the jury. Jessica responded in an intelligent fashion to all of the questions asked,

often in phrases or sentences rather than monosyllables. She stated that she knows the difference between the truth and a lie, that she teaches her little sister to always tell the truth, that she remembered some of the things which happened at her father's house, and that she would say if she was unable to remember something. The trial court did not abuse its discretion in finding Jessica competent to testify.

II. During the trial one of the jurors informed the trial court he recognized a man seated in the courtroom and realized it was the victim's grandfather. The trial court denied defendant's motion to excuse the juror. In order to prevail on this claim of error defendant must show that the juror was biased against him. See State v. Cuevas, 288 N.W.2d. 525, 534 (Iowa 1980). The record does not support such a finding. The juror had talked to the grandfather on several occasions at a bar which both frequented. They were mere acquaintances. The juror did not even know that this other man had a family. The juror stated that he would be able to be fair and impartial. We cannot presume prejudice to defendant on these facts. See State v. Hickman, 337 N.W.2d 512, 515 (Iowa 1983).

III. Defendant claims the trial court erred in denying his motion for judgment of acquittal based on the sufficiency of the evidence. In reviewing a trial court's ruling on a motion for judgment of acquittal we review the evidence in the light most favorable to the State. State v. Schertz, 328 N.W.2d 320, 321 (Iowa 1982). A refusal to grant the motion will withstand challenge if there is substantial evidence in the record to support the charge. Id.

There was evidence in the record in this case that defendant had touched his daughter's vagina with his hands and penis. There was also evidence that Jessica's vagina was red and swollen the morning after she had stayed overnight at defendant's house. Defendant offered no explanation for Jessica's condition nor did he offer any reason why Jessica would fabricate the story. There was sufficient evidence of sexual abuse by defendant.

IV. Defendant also claims that he was denied effective assistance of trial counsel. In order to show that an act or omission of counsel constituted ineffective assistance, defendant must show that counsel failed to perform an essential duty and prejudice resulted therefrom. Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). Defendant must overcome a presumption that counsel is competent. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984). The prejudice component of the claim may be addressed without deciding whether counsel's performance was deficient. Id. The prejudice must be such that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, ___ U.S. ___, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984); Taylor, 352 N.W.2d at 685.

Defendant alleges that his trial attorney constantly pressed him for money and refused to subpoena witnesses defendant requested because of lack of funds. If these allegations are true we do not condone an attorney placing his own welfare above that of his client. However, in this case we find no prejudice to defendant. There was no showing that the character witnesses defendant requested would have been beneficial to his case.

V. Finally, defendant argues that the trial court erred in allowing a police officer to testify concerning statements made by Jessica at the hospital. Defendant argues that these statements were inadmissible hearsay and cites State v. Brown, 341 N.W.2d 10 (Iowa 1983). In Brown the supreme court reversed a trial court ruling allowing a police officer to testify concerning a five-year-old sexual abuse victim's identification of his assailant from a photograph array. The supreme court held that the statements did not fall into the excited utterance exception to the hearsay rule both because the victim was described as "calm" at the time of the identification and because the statement was not spontaneous but was a specific reasoned response to a question designed to elicit that particular information. Id. at 12-13. The supreme court also held that the residual hearsay exceptions of Federal Rules of Evidence 803(24) and 804(b)(5) were not applicable because the trial court did not make the specific findings necessary to support

them and because the victim did not testify and was not available for cross-examination. Id. at 14-15.

We find the present case to be distinguishable from Brown and we hold that the statements of Jessica to Officer Armetta were admissible as excited utterances. Jessica and her sister spent the night with their father and the next morning their mother noticed that their genitals were red and swollen. Evidence shows that Jessica became very agitated at the discovery. The girls were immediately taken to the hospital where they were examined. Officer Armetta testified that she was with Jessica during part of the examination. She described Jessica's emotional condition as "upset" but "coherent." This is a very different situation from the one in Brown where the declarant was calm at the time of the identification.

Furthermore, the nature of the statements and the way in which they were elicited in this case differ significantly from Brown. In Brown the police officer showed the victim several photographs and asked the child to point out the man who hurt him. Brown, 341 N.W.2d at 13. The child pointed to the defendant's picture. The question demanded that the child reflect and deliberate before responding. In this case Officer Armetta testified that she stated to Jessica: "I understand that there's been some things happening between you and your father." Jessica then poured out the story without any further questioning. These statements are not prevented from being spontaneous just because the officer first broached the subject. Brown, 341 N.W.2d at 13. State v. Watson, 242 N.W.2d 702, 704 (Iowa 1976).[1]

Since we find all of defendant's specifications of error to be meritless, we affirm this conviction.

AFFIRMED.

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[1] The summary disposition of Watson's petition for postconviction relief on other grounds was reversed by the supreme court in Watson v. State, 294 N.W.2d 555 (Iowa 1980).