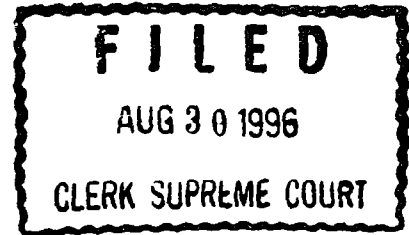


IN THE COURT OF APPEALS OF IOWA

No 6-405 / 95-1530



STATE OF IOWA,
Appellee,

vs.

KATHERINE MARIE EMERSON,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey
and Bryan J. McKinley, Judges.

Katherine Emerson appeals the judgment and sentence entered upon her
conviction of lascivious acts with a child in violation of Iowa Code section 709.8
(1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, and Paul L. Martin, County Attorney, for appellee.

Considered by Sackett, C.J., and Habhab and Huitink, JJ.

HUITINK, J.

Kathleen Marie Emerson appeals her conviction of lascivious acts with a child in violation of Iowa Code §709.8 (1995). We affirm.

Emerson was charged with this offense following allegations that she had inappropriate sexual contact with an eight year old boy. The record includes this child's testimony that while he was staying with Emerson, she removed all of his clothing, all of hers except her bra, and touched her "private to his private." The record also indicates that the child related this version of events to his grandmother and his mother shortly after they allegedly occurred.

Emerson challenges her conviction claiming the eight year old child was not competent to testify. She also argues that her conviction lacks sufficient evidentiary support.

I. Competency

The district court has broad discretion in determining the competency of a witness. *State v. Andrews*, 447 N.W.2d 118,120 (Iowa 1989); *State v. Brotherton*, 384 N.W.2d 118, 120 (Iowa 1989). We will not interfere with the district court's competency determination absent a clear abuse of discretion. *Andrews*, 497 N.W.2d at 120. In order to show an abuse of discretion there must be a showing that the court exercised its discretion on grounds that are clearly untenable and unreasonable. *Id.*

Iowa Rule of Evidence 601 provides “[e]very person of sufficient capacity to understand the obligations of an oath or affirmation is competent to be a witness except as otherwise provided by these rules.” The district court must assess (1) the witnesses mental capacity to understand the nature of the question put to him or her and communicate intelligent answers thereto; and (2) the witnesses appreciation of the moral responsibility to speak the truth, which is the essence of the nature of the oath, *State v. Brotherton*, 384 N.W.2d at 377

The district court resolved this issue following a competency hearing prior to trial. The record of this hearing includes the child’s testimony that he is eight years old, in the third grade, had been in a courtroom before and he was required to tell the truth if he testified at the trial. Emerson cites the child’s negative response to her attorneys inquiry concerning the child’s familiarity with the consequences of being untruthful as evidence contradicting the district courts competency determination. She also cites the child’s reply that “you might get in trouble or you might not” to the courts question, “what happens when you tell a lie?”

Our review of the record leads us to conclude that the district court correctly assessed the child’s ability to understand the oath and the consequences of telling a lie. The child answered “no” when asked if he knew what could happen to him or others if he did not tell the truth. However, when the same question was rephrased by the court the child answered, “you might get into trouble or might not.” The district court

was in the best position to measure the contextual implications of the child's response. We are unable to say the district court abused its discretion by inferring from this response that the child understood his obligation to tell the truth and the consequences of his failure to do so. We accordingly affirm on this issue.

II. Sufficiency of the Evidence

Emerson also challenges the sufficiency of the evidence supporting her conviction. She argues that when considering the record as a whole, the evidence creates nothing more than mere speculation that the alleged crime occurred. Specifically, she refers to the testimony of defense witness Cheri Lynn Hakanson who stated that on one occasion, Emerson was on the phone with Hakanson nearly the entire time that the child was in Emerson's care.

We review claims of insufficiency of the evidence for errors at law. Iowa R. App.P.4. Upon a challenge to the evidence supporting a jury verdict, the verdict will be upheld if there is substantial evidence to support it. *State v. Convers*, 506 N.W.2d 422 (Iowa); *accord*, *State v. Barret*, 445 N.W.2d 749, 753 (Iowa 1989). Evidence is "substantial" if it would have convinced a rational fact finder that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Constable*, 505 N.W.2d 473 (Iowa 1993). When considering insufficiency of the evidence challenges, we examine the evidence in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). We consider all evidence presented at trial, not just the

evidence supporting the verdict. *Id.* All legitimate inferences and presumptions that can fairly and reasonably be deduced from the evidence are resolved in favor of the State. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

We find substantial evidence supporting Emerson's conviction. The child testified that during one of the two times he was in Emerson's care in February or March of 1995, Emerson took all of her clothes off except her bra and took all of his clothes off and she "started humping me ...She was moving around on me." When asked what part of her body was moving around on him, the victim stated "her private." When asked what part of him she was touching, the victim responded, "my private". The victim's mother testified that some time later the child told her about the incident and became upset.

The jury was free to accept or reject Emerson's evidence contradicting the child's version of these events including Hakanson's testimony regarding their telephone conversation. Moreover, we are not convinced that the child's inability to provide an exact time and date sufficiently rebuts the inference of guilt resulting from the states evidence. We also affirm on this issue.

AFFIRMED.