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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Filed November 20, 1983

Plaintiff-Appellee,

)

vs.

)

3-237
68648

LUCIOUS CLIFTON PRINCE,

)

Defendant-Appellant.

)

Appeal from Linn District Court, William L. Thomas, Judge.

Defendant appeals from his conviction of second-degree sexual abuse as defined in Iowa Code section 709.3. **AFFIRMED.**

Fern S. Schupeck, Assistant Appellate Defender, for defendant-appellant.

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

Heard by Oxberger, C.J., and Snell and Hayden, JJ. , but considered en banc.

OXBERGER, C.J.

Defendant Lucious Clifton Prince was accused of sexually abusing his step-daughter, Chelinda Prince, in June 1981. Defendant appeals from his conviction of second-degree sexual abuse as defined in Iowa Code section 709.3. On appeal, defendant asserts (1) that there was not an adequate factual foundation for the doctor to give his opinion on the issue of penetration; and (2) that the trial court violated defendant's constitutional right of confrontation when it unduly limited his cross-examination of the victim's mother. We affirm.

I. Opinion Testimony

The general rule is that expert testimony is admissible if the witness is shown to be qualified and the facts upon which he bases his opinion are sufficient to enable a witness so qualified to express an opinion which is more than a mere conjecture. Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973). The " 'admission of opinion evidence rests largely in the sound discretion of the court and considerable leeway is allowed in this field of evidence for the reason that no matter how the opinion question is phrased or formulated, it remains an opinion which the trier of facts is at liberty to reject. Therefore, only in clear cases of abuse would admission of such evidence be found prejudicial.' " Ganrud at 314-15 (quoting Bengford v. Carlem Corporation, 156 N.W.2d 855, 865-66 (Iowa 1968)). Prince asserts that Dr. Hilliard's examination was inadequate for the purpose of determining whether Chelinda's condition was consistent with a person who has had sexual contact because of the limited nature of the examination. Dr. Hilliard testified that although his examination of Chelinda was not as complete as those performed on adults, it was consistent with usual examinations performed on children. Dr. Hilliard at all times made it clear on what set of circumstances he based his opinion. He testified that this was strictly a visual examination, not a digital or finger examination. He was careful to qualify his answers accordingly.

Therefore, we do not agree that his examination was inadequate under this set of circumstances; nor do we agree that Dr. Hilliard's opinion was mere speculation.

Prince, next, asserts that the issue of sexual penetration was not a proper subject for opinion testimony as it invaded the province of the jury. Dr. Hilliard testified that he could not conclusively say that Chelinda had been sexually abused, nor that her condition upon observation was not caused by birth or some other circumstances. He did testify that Chelinda's condition was consistent with having had sexual penetration, but never testified that sexual penetration was the only possibility. An expert witness may express his opinion as to the possibility, probability, or actuality of the matter of fact about which he is interrogated without being an invasion of the province of the jury even though it passes upon an ultimate fact which the jury must determine. Winter v. Honeggers' and Co., Inc., 215 N.W.2d 316, 321 (Iowa 1974). Applying the foregoing facts to the rule, we find no merit in Prince's assertion. Alternatively, Prince argues that even if the examination was adequate and penetration was a proper subject for opinion testimony, there was insufficient factual basis to support an opinion of whether Chelinda's condition was consistent with a person who has had sexual intercourse. For reasons we will not reiterate as they were stated previously, we disagree.

Next, Prince asserts that there was insufficient factual foundation for the State's hypothetical question, or alternatively, there was insufficient factual basis for an opinion on such. An expert witness is permitted to give an opinion in response to a hypothetical question if the facts in the record or thereafter shown are such as will support the expression of such an opinion. State v. Boner, 203 N.W.2d 198, 200 (Iowa 1972). The question posed was such:

Q. This is a hypothetical question. Considering what you observed in Chelinda Prince's case, would penetration of a penis of one or two inches have been sufficient to cause the condition you saw?

A. Yes.

Dr. Hilliard had clearly explained his mode of examination. He testified as to his observations pursuant to that examination. His answers were given in accordance with his limited examination. We have reviewed the record and find the facts of the record support the opinion. Therefore, the trial court correctly overruled Prince's objections.

We find no clear abuse of the trial court's discretion in the admission of Dr. Hilliard's opinion testimony. Therefore, we affirm that portion of the trial court's ruling.

II. Cross-Examination

The scope of cross-examination is limited to matters inquired into on direct examination or matters which pertain to the witness's credibility, bias, ill-will, hostility or interest in the case. State v. Cuevas, 288 N.W.2d 525, 530 (Iowa 1980). Prince claims it was error for the trial court to limit the cross-examination of Mrs. Prince and not allow defense counsel to cross-examine her concerning an incident where Chelinda had lied about a school official. We need only decide whether the matter was inquired into on direct examination as that was the only objection specifically lodged. See State v. Taylor, 310 N.W.2d 174, 177 (Iowa 1981). The direct testimony in issue is as follows:

MR. DILLIARD: You said that you've known Chelinda to lie to you or to tell lies. Would you consider any of those unusual situations?

MRS. PRINCE: No more than my son or any other child I've observed.

(emphasis added). Defense counsel claims that when Mr. Dilliard used the term "unusual situations," he opened the door to a specific instance two years prior where Chelinda had lied about a school official. The trial court disagreed and stated that the redirect was concerned with whether the lying was unusual and did not go back into specific instances. The court also made note that the instance referred to happened at least two years prior to this case. The rule is that the scope of cross-examination is a matter which lies within the sound discretion of the trial court. State v. Ege, 274 N.W.2d 350, 357 (Iowa 1979). Its ruling will not

be disturbed unless there is a clear showing that such discretion has been abused. State v. Ivory, 247 N.W.2d 198, 203 (Iowa 1976). The ruling was not "clearly against the logic and effect of facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." See State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982). Therefore, we find the decision of the trial court was within the area where a trial court's discretion may permissibly range.

Prince also claims the trial court erred in not allowing defense counsel to cross-examine Mrs. Prince about alleged extramarital sexual relations. We disagree. The trial court granted the State's motion in limine to disallow any reference to any unfaithful sexual conduct on the part of Mrs. Prince. The general rule is that if a motion in limine is granted the court in its ruling should provide and advise counsel that counsel has a right to offer proof, in the jury's absence, of those matters covered in the motion; and if it appears in the light of the trial record that the evidence is relevant, material and competent, it may then be introduced. Twyford v. Weber, 220 N.W.2d 919, 923 (Iowa 1974). Failure to make an offer of proof of excluded testimony leaves nothing for review. State v. Johnson, 312 N.W.2d 144 , 147 (Iowa Ct. App. 1981). Prince's only offer of proof consisted of defense counsel purporting that Mrs. Prince would testify that she contacted venereal disease from some third party in 1980. We do not believe this offer of proof to be sufficient to allow review. Cf. Nizzi v. Lavery Sprayers, Inc., 143 N.W.2d 312, 315-16 (Iowa 1966). Even assuming error was preserved, we would still affirm the trial court's decision. One of Prince's several theories is that he wanted this evidence admitted to the jury to show that Mrs. Prince had an extramarital relationship, that the same relationship caused hostility within the marriage, that such hostility motivated Mrs. Prince to retaliate and that Mrs. Prince encouraged Chelinda to lie as a result of such retaliation. We find such arguments tenuous, at best, and do not agree that the trial court abused its discretion limiting the scope of cross-examination accordingly.

AFFIRMED.

All judges concur except Schlegel and Sackett, JJ., who dissent.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

The majority correctly points out that an expert witness may express his opinion as to the possibility, probability, or actuality of the matter of fact about which is being questioned. Winter v. Honeggers' and Co., Inc., 215 N.W.2d 316, 321 (Iowa 1974). However, as pointed out in Winter, expert testimony indicating that it is possible a given factual circumstance was the cause of the injury is insufficient, standing alone, to generate a fact question. Id. at 323. Expert testimony indicating probability or likelihood of a causal connection is necessary for this purpose. As the majority concedes, Dr. Hilliard did not testify that sexual penetration was the only possibility, only that the child's condition was consistent with having had sexual penetration. "When testimony of an expert witness that a described condition is merely 'possible' or 'might' exist as a consequence of a stated cause is coupled with other testimony, nonexpert in nature, that the described condition did not exist before occurrence of those facts alleged to be the cause thereof, a fact question as to causal relation is generated." Id. at 323. Strictly speaking, the testimony of the alleged victim and Mrs. Prince is sufficient additional testimony to allow the trial court to admit the testing of Dr. Hilliard. However, in this type of case, the testing of Dr. Hilliard is also necessary to corroborate the victim's testimony in proving the occurrence of a crime. This results in a circular argument whereby both rely upon the other in order to establish a case sufficient to generate a jury question.

I would require more certainty from an expert witness in a criminal case before admitting the expert testimony. If the factual foundation for an opinion is insufficient, it is nothing more than conjecture. Hegtvedt v. Prybil, 223 N.W.2d 186, 189 (Iowa 1974). The dictates of due process requires more in a criminal case, particularly when a crime such as the one above is charged. The mere accusations of the crime here involved makes a fair trial difficult at best. The existence of the charge causes the most fair-minded to struggle with natural prejudice. Accordingly, I dissent from the division I of the majority opinion.

Sackett, J., joins this dissent.