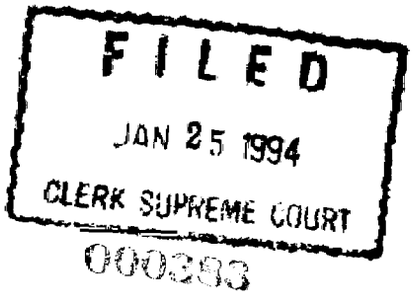
IN THE COURT OF APPEALS OF IOWA

No. 3-524 / 92-1821



STATE OF IOWA,

Appellee,

vs.

BRYAN S. MAY, SR.,

Appellant.

Appeal from the Iowa District Court for Scott County, C. H. Pelton, Judge.

Defendant appeals his conviction and sentence for sexual abuse in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, William Davis, County Attorney, and Joseph A. Grubisich, Assistant County Attorney, for appellee.

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

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OXBERGER, C.J.

Bryan May was charged with sexual abuse in the second degree. Jury trial commenced September 14, 1992.

Bryan Jr. was seven years old at the time of trial. He testified he experienced a bad touch from his father, he felt something hard on his bottom that hurt "a little bit." On cross-examination, his testimony was somewhat inconsistent with his testimony on direct examination.

During her testimony, Dorene May repeated statements made by Bryan Jr. relating to his father's behavior. The district court overruled May's hearsay objection.

Dr. Ozaki, a pediatrician, testified she observed a healing laceration in, and small bruises about, the child's anus. She testified the injuries were consistent with sexual abuse and anal penetration.

During trial, the district court stated one of the spectators and a juror knew each other. No objections or voir dire occurred as a result of this information. The jury found May guilty as charged.

May appeals.

May first challenges the sufficiency of the evidence supporting the verdict. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in

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the light most favorable to the State. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

In order to warrant a conviction for second-degree sexual abuse, the State was required to prove May performed a sex act with Bryan Jr. Iowa Code section 702.17 (1991) defines "sex act" as:

> . . . any sexual contact between two or more persons by: penetration of the penis into the vagina or anus; . . . contact between the finger or hand of one person and the genitalia or anus of another person; . . . or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Expert medical testimony established injury to Bryan Jr.'s anus from penetration. The physician testified the injuries were consistent with those of other victims of child abuse. In addition, Bryan Jr. testified May put something "hard" in his bottom. We find this evidence sufficient to sustain the conviction.

May next contends the district court erred in admitting hearsay testimony. We review for an abuse of discretion. State v. Watts, 441 N.W.2d 395, 398 (Iowa App. 1989).

Rule 803(2) allows "excited utterances," those statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The statement must meet a a requirement of spontaneity in order to possess a

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circumstantial guarantee of trustworthiness. Bratton v. Bond, 408 N.W.2d 39,45 (Iowa 1987).

Bryan Jr. made the remarks to his mother while he was in pain resulting from the abuse. It was not in response to a question. He made the statements to his mother at the first possible opportunity. We find this sufficiently reliable to warrant admission.

Finally, May contends his trial counsel was ineffective in failing to voir dire a juror who knew a spectator present at the trial.

In order to prevail on such a claim, appellant must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). In evaluating counsel's performance, we presume that counsel acted competently. See Risdal, 404 N.W.2d at 131.

We do not find, and May fails to provide, any authority indicating counsel had a duty to voir dire the juror regarding the spectator. There was no evidence of any interaction between the juror and the spectator nor any evidence of improper conduct. The juror notified the trial court he knew a spectator. The juror was instructed to avoid contact with the spectator, which he agreed to do. We conclude there was no breach of an essential duty and deny May's claim of ineffective assistance of counsel.

AFFIRMED.