FILED
APR 20 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.) Filed April 20, 1988

MICHAEL WILLIAM DILLON,) 7-503
87-307

Defendant-Appellant.)

Appeal from the Iowa District Court for Story County (No. 11454), M. D. Seiser, Judge.

Defendant appeals his conviction of one count of incest, in violation of Iowa Code section 726.2 (1985), one count of sexual abuse in the third degree, in violation of Iowa Code seciton 709.4(2) (1985), and his concurrent sentences of five and ten years respectively. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and James F. Whalen, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; David L. Dorff, Assistant Attorney General; and Steven P. Marel, Assistant County Attorney, for plaintiff-appellee.

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

OXBERGER, C.J. 191

The defendant, Michael Dillon, appeals his conviction of one count of incest, in violation of Iowa Code section 726.2 (1985), and one count of sexual abuse in the third degree, in violation of Iowa Code section 709.4(2) (1985). He asserts the trial court erred in admitting hearsay testimony of the victim's friend that the victim told her defendant was sexually abusing her. We affirm.

The complainant, S.D., was the natural daughter of the defendant. She began living with her father when she was nine and one-half years old. Defendant was then living with his wife and their two children in Illinois. The family eventually moved to Roland, Iowa, after a short time in Calamus, Iowa. S.D. was just starting eighth grade at the time.

S.D. stated that her father began to have sexual contact with her when she was ten. The sexual activity consisted primarily of fondling, but it evolved into sexual intercourse when S.D. was eleven and continued until July 1985. S.D. was removed from the home in January 1986 by a social worker following the reporting of the activity.

At the trial S.D. testified concerning the sexual activity. She also testified she told her friend, Heather, about the sexual activity. On cross-examination, she admitted she made several prior inconsistent statements out-of-court. Defendant also inquired of S.D.'s relationship with her father and implied she may have had an improper motive for making her accusations. After S.D. was excused the State called S.D.'s friend, Heather.

Heather testified that S.D. told her in eighth grade that her father was sexually abusing her. Defendant objected to this and was overruled.

On appeal, defendant argues this testimony was hearsay and improperly admitted. We review for the correction of errors at law. Iowa R. App. P. 4.

Iowa Rule of Evidence 801(d)(1)(B) provides that a prior statement by a witness is not hearsay if:

> [T]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

We believe the present testimony comes within the ambit of this rule and is therefore not hearsay. This case falls squarely within the holdings of State v. Brotherton, 384 N.W.2d 375, 380-81 (Iowa 1980), and State v. Brown, 400 N.W.2d 74, 76 (Iowa App. 1986). As in those cases, the declarant, S.D., had already testified at trial and was cross-examined about the matters she revealed to Heather. A portion of the cross-examination dealt with S.D.'s relationship with her father in an obvious attempt to show that S.D.'s testimony was the result of her feelings toward her father. All of this testimony was elicited prior to Heather's testimony. In light of these facts, we conclude Heather's testimony was offered to rebut a charge of improper motive on S.D.'s part and, by virtue of rule 801(d)(1)(B), did not constitute hearsay. We therefore hold no error occurred. The defendant's conviction is affirmed.

AFFIRMED.