IN THE COURT OF APPEALS OF IOWA

No. 7-203 / 96-0199

000731

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

WILLIAM RAY SIMMONS,

Defendant-Appellant.

Appeal from the Iowa District Court for Appanoose County, James P. Rielly and James D. Jenkins, Judges.

Defendant appeals from judgment and sentences entered, following a bench trial, for two counts of second-degree sexual abuse, two counts of lascivious acts with a child, and dissemination and exhibition of obscene materials to minors. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Mark E. Kruse, County Attorney, for appellee.

Heard by Cady, P.J., and Vogel, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

PER CURIAM.

Defendant-appellant William Ray Simmons appeals from judgment and sentences entered, following his conviction of two counts of second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3(2) (1993), two counts of lascivious acts with a child in violation of Iowa Code sections 709.8(1)-(4), and dissemination and exhibition of obscene materials to minors in violation of Iowa Code section 728.2. Defendant contends the trial judge abused his discretion in allowing into evidence a purported prior consistent statement. Defendant further contends the sentencing judge abused his discretion in imposing the sentence because he was not familiar with the record. We affirm the conviction. We affirm the sentence.

Defendant was charged with two counts of second-degree sexual abuse, two counts of lascivious acts with a child, and dissemination and exhibition of obscene materials to a minor on April 17, 1995. The State alleged defendant sexually abused his stepdaughter, H.C., and showed her a dirty movie. The events were to have occurred from 1992 to 1994 in Appanoose County, Iowa.

Defendant was tried without a jury in December 1995. H.C., born March 25, 1985, testified defendant touched her vaginal area with his hand and tongue, instructed her to rub his penis, attempted sexual intercourse, and showed her a dirty movie. She also testified after defendant and her mother separated in the summer of 1994, she went to visit defendant in July 1994. This visit occurred in the State of

Illinois.[1] She said defendant had a cold sore on his lip and he kissed her on the mouth and vaginal area. The stepdaughter developed a rash on her vagina in September 1994 and informed her mother. The doctor who examined her referred the case to the Department of Human Services. Cultures were taken of the child's sores.

Dr. Kathleen Opdebeeck testified cultures taken of the sores tested positive for herpes simplex virus type one. She testified this type of herpes is a viral infection which usually manifests as a cold sore and is spread by mouth or saliva. She further testified eighty percent of the population evidences a history for the presence of herpes. A microbiologist testified defendant's blood was tested and he had been infected with the herpes simplex virus, but the microbiologist was not able to determine if the virus was herpes simplex one.

Beverly, H.C.'s mother, testified she and defendant were getting divorced. She testified H.C. was five or six years old when she accused her biological father of improperly touching her. H.C. later recanted that allegation.

Officer Paul Barnes, of the Centerville Police Department, testified concerning his investigation of the allegations against defendant. Over defense counsel's hearsay objection, Barnes testified H.C. told him she was sexually abused by defendant. The court allowed the testimony as a prior consistent statement. Defendant testified and denied any sexual contact with H.C.

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[1] The charge was not based on the Illinois events.

Judge James Rielly, the trial judge, made extensive written factual findings and found defendant guilty on all counts.

Judge James Jenkins sentenced defendant to two indeterminate twenty-five-year terms for the second-degree sexual abuse charges, two indeterminate five-year terms for the lascivious acts charges, and an indeterminate one-year term on the dissemination charge. He ordered all terms to run consecutively.

Defendant contends Judge Rielly improperly allowed a prior consistent statement in evidence. The State contends error was not preserved on the hearsay issue because defense counsel's objection was only to inadequate foundation. We disagree.

Defendant contends the trial court abused its discretion in allowing as a prior consistent statement the following:

> PROSECUTOR: A couple other questions, Officer Barnes. You interviewed H.C. on one occasion, is that correct?
> OFFICER BARNES: That's correct.
> PROSECUTOR: Did she state that she had been sexually abused or molested by [defendant] at 557 North 10th in Centerville?

The officer said the abuse was to have occurred at 557 North Tenth. The evidence is the child lived at that address from April 1992 to October 1992. The statement is hearsay. The question is whether it comes under one of the exceptions to the hearsay rule.

Iowa Rule of Evidence 801(d)(1)(B) states in pertinent part:

> (d) Statements Which Are Not Hearsay. A statement is not hearsay if:
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> (1) Prior Statements by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.
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> . . . .

Id. This rule is, in substance, identical to Federal Rule of Evidence 801(d)(1)(B). *State v. Johnson*, 539 N.W.2d 160, 165 (Iowa 1995).

The admission of prior consistent statements is limited to situations where there is impeachment alleging intentional fabrication as the result of an improper motive and the consistent declaration was made before the improper motive arose. *See id.* A witness's prior consistent statement is admissible as nonhearsay to rebut a charge of recent improper motive under Iowa Rule of Evidence 801(d)(1)(B) only if the statement was made before the alleged improper motive to fabricate arose. *Id.*

In cross-examining H.C., defendant sought to show inconsistency in her testimony concerning the house or houses she lived in when the abuse occurred. The testimony was properly admitted.

Defendant also contends Judge Jenkins abused his discretion in sentencing defendant. Defendant objected to Judge Jenkins serving as the sentencing judge. The objection was overruled. Defendant contends Judge Jenkins was not the trial judge and the record does not indicate he read the presentence investigation. Defendant supports his position by relying on Iowa Rule of Criminal Procedure 18(7)(b)(2)

which provides:

> If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilty, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he or she cannot perform those duties because he or she did not preside at the trial or for any other reason, he or she may in his or her discretion grant a new trial.

Defendant contends the rule, at the very least, requires there should be a showing that the sentencing judge is familiar with the case. Defendant also contends it is relevant that the decision to find him guilty did not come easily to Judge Rielly. He points to Judge Rielly's statement at the end of the trial where he said:

> Well, I will take the matters under advisement . . . . I do want you to know that these are the kinds of cases that are very difficult. It's one of these things that makes you wake up in the middle of the night and worry about whether you are making the right decision because if the testimony of H.C. is credible, is true, it's a terrible crime. It's just a very serious matter. If on the other hand it's not true, it's a terrible thing to put upon a defendant. It's a very difficult decision.

The State does not directly address defendant's claim that his position is supported by Iowa Rule of Criminal Procedure 18(7)(b)(2). The State argues there is no case law supporting defendant's position. Defendant advances there is no case law interpreting the rule on which he relies.

The question is whether Judge Jenkins abused his discretion in denying defendant's objection that he was not being sentenced by Judge Rielly who heard and decided the case.

We first determine whether the record shows Judge Jenkins was sufficiently familiar with the case. Judge Jenkins noted that he called Judge Rielly on the date of sentencing. Judge Jenkins stated Judge Rielly knew he would not be present for the sentencing when he set it, Judge Rielly said he had no particular wish to sentence defendant, and Judge Rielly knew of no reason why Judge Jenkins should not do the sentencing. Judge Jenkins went on to relate he had Judge Rielly's findings of fact and conclusions of law which recited the facts he found after hearing the evidence, and he was comfortable with proceeding. Judge Jenkins had sufficient information to proceed with the sentencing. *See State v. Wrage*, 279 N.W.2d 4, 6 (Iowa 1979).

Defendant contends the sentencing judge failed to read the presentence investigation report. The State contends all the record shows is that Judge Jenkins failed to read the victim impact statement and did not consider it. The sentencing judge's statements as to the presentence investigation report do not clearly state he read it. There are, however, references made in Judge Jenkins' statements in sentencing defendant that show Judge Jenkins had read the report. Judge Jenkins did not abuse his discretion in denying defendant's objection to his rendering sentence.

AFFIRMED.