

IN THE COURT OF APPEALS OF IOWA

No. 0-20 / 89-274

FILED

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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RICKY JON RASMUSSEN,

Appellant.

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Appeal from the Iowa District Court for Shelby County,
James M. Richardson, Judge.

The defendant appeals the judgment and sentence entered by the trial court, following a jury trial, finding him guilty of second-degree sexual abuse, dissemination and exhibition of obscene material to minors. **AFFIRMED.**

Richard O. McConville and Lawrence F. Scalise of Scalise, Scism, Sandre & Uhl, Des Moines, for appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; Jeffrey L. Larson, County Attorney; for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Ricky Jon Rasmussen and his wife, Zeli, are dairy farmers near Harlan. The couple had two children, one of whom died in an accident. Because they were unable to have any more children of their own, they sought adoption help from the Department of Human Services (Department). The agency placed sisters, D.B. and M.B., in the Rasmussen home as foster children. At the time, D.B. was twelve and M.B. was seven years old.

Rasmussen began experiencing problems with D.B. about ten days after her arrival. Rasmussen was concerned about what he described as sexual advances towards him by the twelve-year-old. He contacted the Department. D.B. was removed from the home. Her younger sister, M.B., remained. Rasmussen, Zeli, and M.B. periodically went to counseling sessions with Dr. Mark Beischel in an attempt to become a family unit.

The family relationship with M.B. began to sour in the fall of 1987, when she visited the Lincolns, her previous foster parents. Dr. Beischel suggested the Rasmussens should limit M.B.'s contact with the former foster parents. The girl became combatant and uncooperative. During this time period, M.B. told Rasmussen Kim Kenkel, a baby-sitter, would play a game with her and Rasmussen's son, Corey, (a year older than M.B.) called "truth or dare." The game involved walking around the room naked and "licking and doing other things to other people's privates."

In March 1988, the Rasmussens began the process of adopting M.B. Although the Rasmussens thought M.B. was pleased, she told Donna Watts of the Department she did not want to live with them. M.B. was removed from the Rasmussen home and eventually returned to the Lincolns. M.B. began seeing Dr. Beischel for more counseling. She told him about the sex games with Kenkel. After a number of counseling sessions, M.B. told Dr. Beischel about sexual involvement with Rasmussen.

Based on this information, Rasmussen was ultimately charged with second-degree sexual abuse. A search of the Rasmussen home revealed several copies of pornographic magazines and movies. At trial, Watts testified she had taken M.B. to lunch in April 1988, and the girl told her about things she had done with Rasmussen. M.B. also told Watts Corey Rasmussen had attempted to have intercourse with her.

Dr. Beischel testified on behalf of the State. He stated common characteristics of abused children include aggressiveness, acting out by running away, depression, and often sexual acting out. He also testified as to his theory about how abused children recollect abuse. He then opined M.B. was a very aggressive child, very angry, and was often tempted to run away. He repeated what M.B. had told him about Rasmussen's behavior.

This testimony was allowed into evidence over defense counsel's motion in limine and subsequent objections. The

trial court ruled defense counsel's cross-examination of M.B. placed in controversy the witness's motive and the possibility of improper influence by the psychologist. Therefore, Iowa Rule of Evidence 801(d)(1)(B) would allow the testimony.

Kim Kenkel was also called to testify. Kenkel denied M.B.'s allegations oral sex had occurred during her baby-sitting sessions, but admitted there was fondling with the hands.

M.B. testified when she told Rasmussen about these sexual games, Rasmussen began having sexual contact with her. M.B. testified Rasmussen would place a hard rubber object in her genital area, and she was forced to have oral sex with Rasmussen numerous times.

Rasmussen testified he was rarely, if ever, left alone with the girl, but during the time in question a foreign exchange student was also living with the family. Zeli Rasmussen also testified their farm routine and school schedules left little time for M.B. to be alone with Rasmussen.

During the trial, Becky Dubois, an employee of the Department of Human Services, was observed by the trial judge looking directly at M.B. and nodding or shaking her head during M.B.'s testimony. The judge recessed the court and questioned the spectator in chambers with the attorneys and court reporter present. Defendant chose not to ask for a mistrial. The court ordered all those connected with the

State, the new adoptive home, or who would be called later as State witnesses sequestered from the courtroom until M.B.'s testimony was completed. The State witnesses were sequestered until they had testified. Dubois reentered the courtroom during Rasmussen's testimony and again visually and verbally expressed her agreement or disagreement with testimony.

The case was ultimately submitted to the jury, which found Rasmussen guilty on all counts. Rasmussen filed numerous posttrial motions which the trial court denied. Rasmussen was sentenced to a term not to exceed twenty-five years on the sexual abuse charge and concurrent one-year terms on the remaining charges. Rasmussen has appealed.

Rasmussen argues the trial court erred in admitting Watts' and Beischel's testimony into evidence since it was cumulative, prejudicial, and served as blatant attempts to provide opinions on M.B.'s truthfulness. Rasmussen contends the trial court should have granted a mistrial when it was discovered that a member of the jury was a cousin of Kim Kenkel, a State witness. Rasmussen contends the trial court should have granted his motion for judgment of acquittal since there was no actual substantiated evidence of sexual abuse, only the ever-changing stories of M.B. Rasmussen raises the issue of ineffective assistance of counsel for various reasons including ineffective and unnecessary cross-examination, failure to inquire about Kenkel's relationship with the juror, and failure to submit

contradictory evidence. Finally, Rasmussen maintains the trial court should have ordered a mistrial when the court became aware of Becky Dubois' actions in court.

We affirm the conviction.

Our scope of review is on errors assigned. Iowa R. App. P. 4. When a defendant is alleging error involving a constitutional right, such as ineffective assistance of counsel, we make an independent evaluation of the totality of the circumstances. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

I. TESTIMONY OF SOCIAL WORKER AND PSYCHOLOGIST.

Defendant argues the trial court improperly admitted testimony of Department of Human Services worker Donna Watts and the psychologist, Dr. Beischel. Watts testified about M.B.'s background and the girl's placement and removal from the Rasmussens. Watts related to the jury what M.B. told her about specific incidents with Rasmussen.

Dr. Beischel testified to the common behavior characteristics of abused children. These include depression, extreme anger and frequent runaway attempts. He stated in his opinion M.B. was suffering from depression, had made some runaway attempts, and was very angry. Beischel explained to the jury children who have been sexually abused will recount events differently each time they tell the story because people remember only bits and pieces of information at a time. Both adults and children, he stated, will fill in the pieces they can't

recall. Because the story will be told differently each time, you must look for the consistencies, as "that's the only thing you have to go on."

The psychologist further testified M.B. told him of oral sex with defendant and she was ordered by Rasmussen to place a hard rubber object in her vaginal area.

Rasmussen contends the testimony of Watts and Beischel was improperly admitted. He maintains there was no "vigorous" cross-examination or effort to impeach M.B.'s testimony. The purpose of their testimony was solely to bolster M.B.'s testimony and was cumulative and repetitive. He relies on Iowa Rule of Evidence 801(d)(1)(B) and State v. Brotherton, 384 N.W.2d 375 (Iowa 1986).

We conclude the testimony falls squarely within the parameters of State v. Brotherton and Iowa Rule of Evidence 801(d)(1)(B). The trial court did not err in allowing the testimony.

A prior statement by a witness testifying at trial is admissible if 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. Iowa R. Evid. 801(d)(1)(B).

Defendant's claim M.B.'s credibility was not attacked during cross-examination is not borne out by our reading of the record.

The defense counsel at trial elicited from the girl the fact she did not like staying at the Rasmussen's home. This testimony opened the door to the possibility she fabricated her allegations to Beischel and Watts in order to be reunited with the previous foster parents.

Defense counsel also cross-examined M.B. about sexual knowledge she might have obtained from videos rather than actual sexual abuse by Rasmussen. Improper influence by Watts and Beischel, agents of the Department, was also explored on cross-examination. It is clear defense counsel raised the issue of improper influence on the part of Beischel and Watts and the issue of M.B.'s possible motive for fabricating events. M.B.'s prior consistent statements were, therefore, admissible "to rebut the partially successful cross-examination of the complainant." State v. Brotherton, 384 N.W.2d 375, 380 (Iowa 1986).

Rasmussen also claims Dr. Beischel's testimony regarding the common characteristics of sexually-abused children and his assessment of M.B. was introduced for the impermissible purpose of convincing the jury M.B. fit the description of an abused child.

Rasmussen did not preserve error on this claim. Defense did not object to this specific line of questioning at the time the psychologist testified. Issues not presented in the trial court may not ordinarily be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985).

II. ALLEGED JUROR MISCONDUCT. Defendant contends he is entitled to a new trial because one of the jurors, Steven Kenkel, was related to the witness, Kimberly Kenkel.

Our review of a trial court's decision regarding juror misconduct is deferential. "Unless [an] abuse of discretion appears . . . an appellate court will not ordinarily disturb the ruling on a motion for a new trial based on a misconduct ground." State v. Lampman, 342 N.W.2d 77, 80 (Iowa App. 1982).

The rules regarding review of post-trial motions based on jury misconduct are well settled.

. . . [T]o impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and; (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict We do not find an abuse of discretion . . . unless the action of the trial court is clearly unreasonable under the attendant circumstances.

State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984) (citations omitted).

The Cullen court stated "our cases hold a new trial is justified only when it appears the misconduct was calculated to, and with reasonable probability did, influence the verdict." Id. citing Harris v. Deere & Co., 263 N.W.2d 727, 730 (Iowa 1978). The difference between a possibility and a reasonable probability is significant,

and the reasonable probability hurdle is not easy to satisfy. Id. at 28.

The trial court, in its ruling on defendant's motion in arrest of judgment and for a new trial, concluded there was no showing this unknown distant relationship to one of the State's witnesses in any manner influenced juror Steven Kenkel. The court stated in its findings of fact:

Jury trial commenced in this matter on December 14, 1988. At said time voir dire of the jury panel was performed by both parties. One, Steven Kenkel, was so questioned. Issues of his relationship, if any, with members of a State's witness Kim Kenkel's family were explored. Steven did not know Kim Kenkel or her father although they may be distantly related since they shared the same last name. After trial commenced, as per his affidavit, Steven Kenkel became aware that he and Kim were distantly related. However, such relationship is not within the fourth degree of affinity or consanguinity.

We affirm the trial court's finding. According to our computations based on the affidavit submitted by Father Nelo Leto, the relationship between juror Steven Kenkel and Kimberly Kenkel falls within the sixth degree of consanguinity. This is indeed, a distant relationship.

Steven Kenkel submitted an affidavit in which he said he did not know of this relationship until after the trial began. He further stated "the fact there is a distant relationship between myself and Kim Kenkel had no affect whatsoever on my jury deliberations. I weighed the testimony of Kim Kenkel the same as I did any other witness, and did not consider the distant relationship."

Iowa Rule of Criminal Procedure 17(5)(d) provides a challenge for cause may be made for any of the following:

(d) Affinity or consanguinity, within the fourth degree, to the person alleged to be injured by the offense charged, or on whose complaint, or at whose instance, the prosecution was instituted, or to the defendant, to be computed according to the rule of civil law.

Juror Kenkel's relationship with Kim Kenkel was not within the fourth degree of consanguinity. The relationship was not with the victim of the alleged abuse nor was it with the defendant. Rather, it was with a witness for the State whose testimony did not implicate the defendant. Defendant, although unaware of the distant relationship between these two, was aware they shared the same last name. He had an opportunity to remove Steven Kenkel from the jury panel and chose not to do so. Defendant has failed to convince this court there is a reasonable probability the juror's distant relationship to witness Kim Kenkel influenced the verdict.

Rasmussen's attorney on this appeal relies on State v. Anderson, an unpublished court of appeals case. This opinion is of no precedential value not only because it was not published, but also because it was vacated by the supreme court. State v. Anderson. 448 N.W.2d 32 (Iowa 1989). In Anderson, the supreme court stated a new trial need not result from misconduct unless there is a reasonable probability the misconduct did in fact influence the jury in its deliberation. Id. at 34. (Emphasis added.)

Defendant also raises the issue of misconduct of a spectator who was nodding her head and "visualized her agreement and disagreement" of the testimony during the trial. Defendant has failed to show a reasonable probability the misconduct did in fact influence the jury's deliberations.

III. SUFFICIENCY OF THE EVIDENCE. Defendant asserts the evidence presented at trial was insufficient to convict him. Our review of the record in the light most favorable to the State convinces us there was substantial evidence from which the jury could infer Rasmussen was guilty of sexual abuse beyond a reasonable doubt.

It is well established the appellate court reviews the record in a light most favorable to the State. State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987). This "favorable light" includes the making of any legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). The test for whether the evidence is sufficient to withstand appellate scrutiny and support a verdict involves an inquiry as to whether the evidence is "substantial." State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). Evidence meets the threshold criteria of substantiality if it is evidence which would convince a rational factfinder the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

From the evidence presented at trial, a rational factfinder could have easily found Rasmussen was guilty of committing a sex act on M.B. The detail with which the nine-year old explained her sexual abuse, including the taste of semen and the size, shape, and other characteristics of an artificial sex organ, belies defendant's contention she was making up testimony. The jury was free to infer that watching pornographic movies would not provide the type of information available to M.B. It was entirely within the jury's province to find the credibility of Rasmussen and his spouse lacking and to therefore, discount their claims. State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984).

In view of the strength and particulars of M.B.'s testimony and the fact we are bound by the jury verdict unless it lacks substantial evidence to support the charges, State v. Blair, 347 N.W.2d at 419, it is clear the jury had sufficient evidence from which to infer Rasmussen's guilt. Defendant's insufficiency claim is without merit.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL. Rasmussen claims the trial court record alone evidences ineffective assistance of counsel. He enumerates four errors or omissions on the part of trial counsel which denied him effective aid and assistance of legal counsel as guaranteed by the constitutions of the United States and Iowa. He asks us to consider this issue on direct appeal because the

claims are apparent by reviewing the record. We reject his request to consider the issue on this appeal.

Resolution of claims of ineffective assistance of counsel is generally reserved for postconviction review because of the seriousness of the claim to counsel whose performance is being challenged, as well as to the fairness of the proceedings in which the ineffective assistance is alleged to have occurred. Kellogg v. State, 288 N.W.2d 561, 563 (Iowa 1980). There have been a few instances where the supreme court has reviewed the claim on direct appeal when the ineffectiveness is so obvious it may be determined on the basis of the trial record alone. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1976).

Defendant again relies on an unpublished court of appeals decision, State v. Johnson. This has no precedential value because the opinion was unpublished and vacated by the supreme court. State v. Johnson, 445 N.W.2d 337 (Iowa 1989). We refer defendant to Iowa Supreme Court Rule 10(f), as amended March 3, 1981, which states an unpublished opinion of the Iowa Court of Appeals may not be cited by a party in any other action or proceeding.

In Johnson, the defendant, convicted of sexual abuse in the second degree, claimed ineffective assistance of counsel for failure to object to the admission into evidence of allegedly-inadmissible testimony. Id. at 339. The supreme court ruled they would not consider defendant's ineffective assistance of counsel claim on direct appeal.

The reason given was the record did not provide a sufficient basis upon which to determine counsel's effectiveness, her rationale in allowing admission of certain evidence, or defendant's participation in those decisions. Id. at 340.

We decline to consider Rasmussen's ineffective assistance of counsel claim in this direct appeal. The claim has been adequately preserved, in order to be raised by application for postconviction relief.

AFFIRMED.