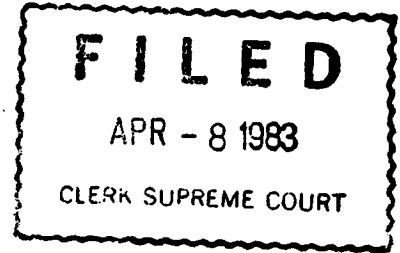


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 8, 1983

vs.

)

$$\frac{2-422}{68063}$$

KEVIN ROY CHRISTIANSON,

)

Defendant-appellant.

)

Appeal from Johnson District Court, Robert Osmundson, Judge.

Defendant appeals from his conviction on two counts of sexual abuse in the second degree in violation of Iowa Code sections 709.1(3) and (2). AFFIRMED

Linda Del Gallo, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven M. Foritano, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

SNELL, J.

Defendant appeals from his conviction on two counts of sexual abuse in the second degree in violation of Iowa Code sections 709.1(3) and 709.3(2).

On or about July 26, 1981, Jude Dutton, aged eight, and his sister Tawnya, aged five, were left by their mother, Cindia Dutton, at a babysitter's trailer in the Meadowbrook Trailer Court in Iowa City. While playing outside, Jude was hurt. The babysitter, Kelly Medford, aged eleven, then took Jude and Tawnya to defendant's trailer. The defendant was Cindia Dutton's boyfriend and was well acquainted with the Dutton children.

According to Jude's testimony, once he and Tawnya were alone with defendant, they were instructed to bathe and put on T-shirts belonging to defendant. Defendant then called the children into the living room, where he subjected them to various acts of sexual abuse. After warning the children not to tell their mother what happened, defendant let the children sleep the rest of the night.

At trial the State introduced testimony from two witnesses, over defendant's hearsay objections, concerning statements made to them by Jude on the morning after the alleged incident. Kelly Medford testified that Jude was acting strangely when she saw him the next morning, and that in response to a question as to what was wrong, he told her that the defendant had made him give the defendant a "blow job." Witness Marcia Derrig testified that, in response to her query as to what was the matter, Jude told her that a "certain person" had made him do adult things. Both witnesses testified, without objection being raised, that they believed that Jude was telling the truth.

Cindia Dutton was called as a witness for the defense. Her testimony was offered to impeach the credibility of Jude Dutton. Cindia stated that she and defendant had discussed sending Jude to a military school, and that the Veterans

Administration would pay his tuition. One of the jurors subsequently telephoned the Veterans Administration and was informed that veterans' benefits were not available to pay Jude Dutton's tuition at military school. This information was communicated by him to the other jury members. After deliberation, the jury returned a verdict of guilty on both counts of sexual abuse. Defendant's motion for a new trial was denied.

Defendant appeals from his conviction on four grounds: (1) hearsay evidence was erroneously admitted; (2) the evidence of guilt was insufficient with regard to one of the charges; (3) a new trial should have been granted due to juror misconduct; and (4) various acts and omissions of trial counsel denied him effective assistance of counsel.

I. Scope of Review

Because this is an appeal from a criminal conviction, our scope of review is an independent evaluation of the totality of the circumstances on all issues involving the alleged violation of basic constitutional safeguards, and on error on other issues. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

II. Issues on Appeal.

A. The Hearsay Issue

Defendant asserts that the testimony given by Kelly Medford and Marcia Derrig concerning the substance of statements made to them by Jude constitutes inadmissible hearsay. We do not agree. It is well settled that there are two types of statements made by a victim of sexual abuse which may be admitted as evidence at trial. One type is not hearsay at all and the other falls within the excited utterances exception to the hearsay rule. State v. Grady, 183 N.W.2d 707 (Iowa 1971).

As a general rule, testimony concerning the fact that the victim made a complaint of sexual abuse is not considered hearsay. The reasoning behind this rule is that there is a presumption that an individual who is sexually molested will complain of it, and testimony that such a complaint was made may be offered to forestall the assumption that no complaint was made and that the offense never occurred. See People v. Burton, 55 Cal. 2d 328, 359 P.2d 433 (1961). Testimony by witnesses to whom a complaint was voiced may be offered to corroborate the fact of complaint. Grady, 183 N.W.2d at 713.

The scope of testimony which is permissible under this rule is circumscribed. Because such testimony is competent only for the purpose of establishing or corroborating the fact that a complaint was made, testimony given on direct examination concerning the substance of the complaint is hearsay except to the extent that it is required to identify the occurrence complained of with the offense charged. Id., at 716. The limitation on the scope of permissible testimony has been relaxed, however, in cases such as this one, where the complaining victim was very young. See State v. Powers, 181 Iowa 452, 164 N.W. 856, State v. Andrews, 130 Iowa 609, 105 N.W. 215, and State v. Grady, 183 N.W.2d 707 (Iowa 1971).

In Andrews, the court stated that it was proper for witnesses to relate enough of the eight-year-old victim's complaint "to show of what act of the defendant she complained." Id. at 610. This court is of the opinion that the testimony of Marcia Derrig falls within these confines, and thus was properly admitted.

We cannot say the same for the testimony of Kelly Medford, however. In State v. Ogilvie, 310 N.W.2d 192, 195 (Iowa 1981), the court provided that "[s]tatements which go beyond describing the nature of the act and the time and

place of its occurrence may be hearsay. Specifically, statements which identify the accused are hearsay. . . ." The presumption here is that identification in such circumstances is of no value in corroborating the fact of complaint, but rather is offered as proof of the victim's assertion that the defendant was the assailant. See Grady, 183 N.W.2d at 718, and State v. Stevens, 289 N.W.2d 592, 596. Because the statements testified to by Kelly served to identify defendant as Jude's assailant, we hold that they constituted hearsay.

The second type of statement of victim referred to in Grady is the hearsay statement admissible as an excited utterance. The State argues that even if Kelly Medford's testimony concerning the substance of Jude's complaint is hearsay, it is admissible under this exception to the hearsay rule.

An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981). See also, Fed. R. Evid. 803(2). The determination as to whether or not the declarant was under such stress at the time the statement was made is left to the discretion of the trial court. State v. Haines, 259 N.W.2d 806, 810 (Iowa 1977).

Several factors are to be weighed by the trial court in reaching its decision. These include, but are not limited to, evidence of declarant's demeanor at the time the statements were related, the age of the declarant, the time elapsed between the event and the utterance, and the circumstances under which the utterance was made. The crucial determination is whether the utterance was impulsive rather than reflective, since the latter entails a risk of fabrication. See State v. Stevens, 289 N.W.2d 597 (Iowa 1980). No single factor is conclusive. Thus, in State v. Stafford, 237 Iowa 780, 23 N.W.2d 832 (1946), statements made fourteen hours after a rape were held admissible under a res gestae theory, because the circumstances were such that the trial court could have found that they were made while declarant was still under the stress caused by the attack upon her.

The record in the present case provides evidence from which the trial court could have determined that Jude's statements to Kelly Medford were made while he was under the stress of excitement caused by the occurrences of the prior evening. Kelly testified that when Jude spoke to her, he was upset, and that he and Tawnya cried a little bit. Such conduct is evidence of spontaneity. See Ogilvie, 310 N.W.2d at 196, and State v. Knupp, 310 N.W.2d 181, 184 (Iowa 1981).

The fact that the statement given was in response to a question is not conclusive on the issue of spontaneity. Where the answers given are such that they do not "merely repeat the language of the questions, but [are] independent answers," the test of spontaneity may be met. Haines, 259 N.W.2d at 810.

Similarly, a lapse of time between the event and the declaration is not conclusive. In State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978), the court stated that "time is not a necessarily controlling factor and a declaration that is closely related to the incident although separated by some length of time is permitted to come in under the exception." We note that Jude's first opportunity to say anything about the incident was the following morning. The fact that Jude made use of that opportunity may be considered evidence of spontaneity.

For the reasons stated above, we hold that the trial court did not abuse its discretion by admitting the testimony of Kelly Medford concerning statements made to her by Jude Dutton.

B. Sufficiency of Evidence

Defendant asserts that the State presented insufficient evidence to convince a rational jury beyond a reasonable doubt that he committed second-degree sexual abuse upon Tawnya Dutton. The standard of review to apply when insufficiency of evidence supporting a conviction is raised on appeal was delineated in State v. Robinson, 288 N.W.2d 337 (Iowa 1980). "In reviewing these rulings we view the

evidence in the light most favorable to the State. . . If there is substantial support for the verdict in the record, the jury verdict is conclusive." Id., at 338. Evidence may be considered "substantial" where a reasonable mind would accept it as sufficient basis upon which to reach a conclusion. See General Telephone Co. of Midwest v. Iowa State Commerce Commission, 275 N.W.2d 364 (Iowa 1979).

The State of Iowa does not require a victim of sexual abuse to take the stand and testify. Furthermore, the verdict of the jury is not dependent upon the number of witnesses; rather the weight of the testimony is the controlling factor. Wiese v. Hoffman, 86 N.W.2d 861 (Iowa 1957). Where a child is adjudged a competent witness, his credibility and the weight accorded his testimony are matters for the jury to decide. State v. Ragona, 232 Iowa 700, 5 N.W.2d 907 (Iowa 1942). Defendant does not challenge the competency of Jude Dutton.

In reviewing the record, we conclude that a reasonable mind could accept Jude's testimony, if believed, as a sufficient basis upon which to support the conclusion that the defendant had engaged in acts of sexual abuse upon the person of Tawnya Dutton. Consequently, we hold that defendant's contention is without merit.

C. Allegations of Juror Misconduct

Defendant alleges that there were two instances of prejudicial juror misconduct which warrant a new trial. In one instance, the jury received evidence that was not authorized by the court when one of the jurors contacted the Veterans Administration, after hearing the testimony of defense witness Cindia Dutton, to determine whether veterans' benefits were available to pay Jude's tuition at military school. In the second instance, defendant contends that he was prejudiced by another juror's failure to disclose during voir dire or on her juror questionnaire that her son had been a victim of sexual abuse.

As to the first allegation, the State does not deny it, but argues that there was no prejudice. It is well settled that "[i]n order to justify a new trial on the basis of misconduct of jurors it must appear the misconduct was calculated to, and it is reasonably probable it did influence the verdict." Harris v. Deere & Co., 263 N.W.2d 727, 730 (Iowa 1978). This requirement has not been met here.

To begin with, we note that Cindia's testimony which, to quote the trial court, "would tax the credulity of all but the most naive and gullible. . .", was directly contradicted by the testimony of five different witnesses. Her credibility was already under attack. Error in the admission of evidence is not prejudicial where substantially the same evidence is in the record without objection. State v. Jurgenson, 225 N.W.2d 310 (Iowa 1975).

Defendant has submitted six juror affidavits as evidence of prejudice. The affidavits contain statements which assert that the lack of credibility of defense witnesses was an important factor in their deliberations, and that the information given concerning the availability of veterans' benefits helped to convince them that Cindia was lying. Such statements, however, inhere in the judgment and are not competent to challenge a verdict on the grounds of juror misconduct. See State v. Rouse, 290 N.W.2d 911 (Iowa 1980). "We are obliged to ignore statement or affidavits of jurors as to whether the communications influenced their verdict. The principle is well settled a juror may not. . . state what influenced the jury in reaching the verdict." State v. Hahn, 259 N.W.2d 753, 757 (Iowa 1977).

The ultimate issue is whether the trial court abused its discretion by refusing to grant defendant's motion for a new trial based on allegations of juror misconduct. We hold that it did not. The trial court has broad discretion in ruling on motions for a new trial on grounds of juror misconduct. Harris. In ruling on

defendant's motion, it was obliged to ignore the jurors' affidavits and rely on evidence of objective fact. The objective evidence does not tend to support defendant's allegation that he was prejudiced by this instance of juror misconduct.

As to the second allegation of juror misconduct, defendant has failed to make either the voir dire proceedings or the juror questionnaire part of the record on appeal. Without such a record this court has nothing to review. See State v. Mark, 286 N.W.2d 396 (Iowa 1979).

D. Ineffective Assistance of Counsel

Defendant asserts that various acts and omissions of trial counsel denied him effective assistance of counsel. Defendant points out counsel's failure to object to certain testimony, waiver of the right to challenge a court ruling, and failure to disclose newly discovered evidence.

The present record, however, does not disclose why defendant's trial attorney pursued the course of action he did or why he neglected to take certain steps. Because of the insufficiency of the record, we are unable to determine this issue.

AFFIRMED.

All judges concur except Oxberger, C.J., and Schlegel, who dissent.

SCHLEGEL, J. (concurring in part; dissenting in part)

I dissent from that portion of the majority opinion which holds that defendant was not prejudiced by jury misconduct. I would reverse and remand for a new trial.

When defendant alleges jury misconduct as a grounds for new trial, he or she "must first prove the facts by competent evidence; establish that they did constitute misconduct; and show they probably influenced the verdict." State v. Folck, 325 N.W.2d 368, 372 (Iowa 1982). In determining such issues, we may not consider matters which inhere in the verdict such as "what parts of the record or instructions were or were not considered, the jurors' discussion, their motivations, mental or emotional reactions, [or] their votes." State v. Rouse, 290 N.W.2d 911, 916 (Iowa 1980). "On the other hand, evidence of external matters improperly brought to bear on the deliberations may be used to attack a verdict. These 'objective' facts may be testified to by a juror." Id.

The State has conceded that there was one act of juror misconduct but denies that the incident could reasonably have tended to influence the verdict. The misconduct referred to was the fact that one juror, acting on his own initiative, contacted the Veterans Administration and learned that Jude's mother was wrong when she testified that certain tuition could be paid by the military due to her ex-husband's status as a disabled veteran. Defendant justifiably cites this misconduct as an "external matter" which should not have been part of the jury's deliberations. It was misconduct that may well have prejudiced the jury against defendant by focusing on the lack of credibility of Jude's mother.

Of greater importance, however, was the presence of the jury of a woman whose own eight-year-old son had been sexually abused. The mere presence of such a juror in an emotionally-charged case such as this cannot but constitute prejudice to the defendant's right to a fair trial. The mere accusation 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. One having experienced a similar episode to that alleged would undoubtedly be influenced by any evidence in support of the charge. Surely this is another "external matter" which should not have been before the jury during its deliberations. That this episode was actually considered is demonstrated by affidavits signed by some of the jurors stating that this woman told the other jurors during deliberations that her son had been sexually abused but did not mention it at the time the jury was being selected.

Under these circumstances, I believe the verdict is so tainted that it cannot stand. I would grant defendant's motion for new trial.

Oxberger, C.J., joins this partial dissent.