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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

No. 1-201 / 90-453

STATE OF IOWA,

Appellee,

vs.

FRANK L. COMSTOCK, JR.,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul and Gary E. Wenell, Judges.

Comstock appeals his conviction, following a jury trial, for sexual abuse in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Brian K. Sissel, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Carol J. Chase, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Frank Comstock was accused of sexually abusing a six-year-old girl. A jury found him guilty of sexual abuse in the second degree, and he has appealed the resulting convictions.

Comstock contends the district court abused its discretion by allowing two other children, including the victim's sister, to testify Comstock had sexually abused them. Comstock argues this testimony was inadmissible under Iowa Rule of Evidence 404(b) because it was evidence of other crimes or bad acts offered to prove his bad character. The State responds the evidence was admissible under an exception to rule 404(b) because it showed a pattern of very similar sexual abuse incidents and was therefore relevant to show identity. In support of its argument the evidence showed a pattern of similar crimes, the State notes all three girls reported they were abused in the middle of the night while staying as guests in a house occupied by Comstock. The State also notes the abuse of the victim's sister occurred on the same night and in virtually the same sequence of events as the abuse of the victim herself.

Comstock next contends the district court abused its discretion by admitting alleged hearsay testimony from the victim's aunt. The aunt testified both the victim and her sister had reported the sexual abuse by Comstock. The State responds the aunt's testimony was not hearsay under

Iowa R. of Evid. 801(d)(1)(B) because both witnesses had previously testified, been cross-examined, and their testimony impeached. Therefore, the aunt's testimony recounted a prior consistent statement by the witnesses "offered to rebut an express or implied charge . . . of recent fabrication or improper influence or motive." Iowa R. of Evid. 801(d)(1)(B).

Finally, Comstock contends the district court should have suppressed incriminating statements he made to investigating officers. It is agreed by both sides the officers asked Comstock certain questions, and obtained certain possibly incriminating responses, prior to giving him the Miranda warnings. The officers then gave him the Miranda warnings. Questioning continued, and Comstock made further incriminating comments. The district court suppressed the comments made before Comstock was given the Miranda warnings. However, the district court declined to suppress the incriminating comments made after the Miranda warnings. Comstock argues the post-Miranda comments should have been suppressed because they were tainted by the improper pre-Miranda questioning.

Our review of the evidentiary issues is on errors of law. Iowa R. App. P. 4. Determinations of relevance of evidence rests within the sound discretion of the trial court and will be reversed only upon a showing such discretion has been abused. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984).

I. Testimony of Prior Acts

Comstock claims the trial court erred in allowing testimony of prior acts with children other than the alleged victim. This testimony, Comstock alleges, violates the rule against character evidence, Iowa R. Evid. 404(b).

These other witnesses were two girls, both age nine, who testified Comstock engaged in sexual conduct with them in a manner substantially the same as with the alleged victim in this case.

The Iowa Supreme Court has considered this objection in a number of cases. See, e.g., State v. Plaster, 424 N.W.2d 226, 228-31 (Iowa 1988); State v. Spaulding, 313 N.W.2d 878, 880-82 (Iowa 1981). Allowing evidence of prior acts with other victims bolsters the credibility of the complaining witness, usually the victim of the sexual abuse. Spaulding, 313 N.W.2d at 881-81. It also may tend to show a similar modus operandi. Plaster, 424 N.W.2d at 230-31.

In the present case the testimony of the two older girls corroborated the testimony of the victim. The victim here was only six years old. Having the two nine-year-old girls testify bolstered her credibility. As the activities attributed to Comstock by all three girls were almost identical, their testimony further shows a similar pattern of behavior or modus operandi. This testimony also goes towards the issue of identity, tending to show Comstock, and not another, sexually abused the victim.

We hold the admission of the two girls' testimony is permitted under the exception to the rule against character evidence. It corroborates the victim's testimony, and it indicates a similar pattern of behavior or modus operandi. Also it is permitted as proof of identity.

II. Hearsay Testimony

Comstock's second complaint on appeal is the trial court abused its discretion in admitting the testimony of the victim's aunt. He claims portions of the aunt's testimony violated the rule against hearsay evidence, Iowa R. Evid. 802.

A. The aunt first testified to statements made by the victim's sister, one of the nine-year-old witnesses. At the time of the aunt's testimony this witness had already testified. The defense attorney had already attempted to impeach the witness's testimony on cross-examination. Therefore, the State could repair the witness's credibility by introducing evidence of a prior consistent statement. Prior consistent statements are not hearsay by definition. Iowa R. Evid. 801(d)(1)(B).

Although the trial court did not rely on this ground when making its ruling, we may affirm for any ground appearing in the record. See State v. Brotherton, 384 N.W.2d 375, 380 (Iowa 1986). We determine the trial court did not abuse its discretion in admitting this evidence. We affirm on this issue.

B. Comstock next complains the trial court erred in allowing hearsay testimony of the victim in this case. The six-year-old victim had been reluctant to discuss the incident. However, when a policeman came to her aunt's house to investigate the incident, the six-year-old stood up on the couch and yelled, "[Comstock] put his dick in me, mom."

As in the case of the other witness's statement, this testimony by the aunt came in after the victim had testified. The defense attorney had already cross-examined the victim, impeaching her testimony. Thus, the aunt's testimony concerning the child's prior statements was admissible as a prior consistent statement under Iowa R. Evid. 801(d)(1)(B). See Brotherton, 384 N.W.2d at 380.

The trial court did not abuse its discretion in admitting the testimony of the aunt concerning the victim's prior statements. We affirm the trial court on this issue.

III. Coerced Statements and Miranda Warnings

In his last assignment of error, Comstock alleges the trial court erred in admitting statements made to police after Comstock received Miranda warnings. The arresting police officer had talked to Comstock on a previous occasion. At that time Comstock had indicated he may need help.

After the police officer had placed Comstock under arrest, he informed Comstock if he wanted help [dealing

with child sex abuse], Comstock would first have to admit to the sex abuse. The police did not give Comstock his Miranda warnings until a few minutes later at the police station. The trial court suppressed any statements made before the Miranda warnings.

Comstock now argues the trial court erred in not suppressing all his statements made during this conversation. He asserts all of the conversation was tainted by the police officer's impliedly coercive statement if he wanted help, he would have to admit to the child sex abuse. He claims the Miranda warnings given in the middle of this conversation were insufficient to attenuate the taint.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

We determine this case is controlled by State v. Whitsel, 339 N.W.2d 149 (Iowa 1983). There the Iowa Supreme Court recognized confessions obtained through offers of leniency by police officers were involuntary. Id. at 153. However, the supreme court held an offer of psychiatric help was not tantamount to a promise of leniency. Id. at 153-54.

This is essentially the situation here. The police statement basically pointed out the requirements for psychiatric help in sex abuse problems. At most, the police officer amounted to an offer of psychiatric help in return for a confession. This does not rise to the level of coercion necessary to implicate the fifth amendment.

Additionally, whatever taint may have arisen due to the police officer's statement was removed by the subsequent Miranda warnings. Comstock does not allege his waiver of these warnings was not knowingly and intelligently made. Under the totality of the circumstances, we determine Comstock's post-Miranda statements were not involuntary or coerced. We affirm the trial court's admission of these statements.

The trial court is affirmed on all issues.

AFFIRMED.