FILED
DEC 27 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-558 / 89-1663

STATE OF IOWA,

Appellee,

vs.

MICHAEL JOSEPH SCHILDMEYER,

Appellant.

345

Appeal from the Iowa District Court for Delaware County, William J. Klotzbach, Judge.

The defendant was accused of sexually abusing a four-year-old boy in his wife's day care center. He appeals his conviction, following a jury trial, for second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, Acting State Appellate Defender, Ahmet S. Gonlubol, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Roxann M. Ryan and Virginia Barchman, Assistant Attorneys General, James Nussle, Delaware County Attorney, for appellee.

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

HAYDEN, J.

Michael Schildmeyer was employed at a day care center operated by his wife. He was accused of sexually abusing a four-year-old boy at the day care center.

A jury found Schildmeyer guilty of sexual abuse in the second degree. He appeals. We affirm.

Schildmeyer contends the district court abused its discretion by ruling the four-year-old victim was competent to testify.

Schildmeyer also challenges the sufficiency of the evidence to support the conviction. Schildmeyer notes most of the evidence against him came from the testimony of the child victim and the testimony of one former employee of the day care center. Schildmeyer argues the child victim is too young to distinguish fact from fantasy. Schildmeyer also argues the victim had recently been warned about improper touching and could have become confused over incidents in which Schildmeyer helped the victim with a zipper after he urinated. Schildmeyer also argues the former employee, who testified Schildmeyer had on several occasions taken the victim into a bathroom and closed the door, was disgruntled and harbored ill will toward Schildmeyer's wife.

We first consider the issue of the child's competency. We find this issue to be determinative on the other issues raised on appeal.

> The competency of a person to testify is governed generally by Iowa Rule of Evidence 601. The rule

> was amended, effective July 1, 1985, to provide that "a child ... is presumed to be competent." Iowa R. Evid. 601. If the child's competency is questioned, then the rule requires the court to determine whether
>
> > (1) the child is mentally capable of understanding the questions being asked;
> > (2) the child is able to formulate intelligent answers and communicate impressions and recollections regarding the incident about which the child is to testify; and
> > (3) the child can understand the responsibility to tell the truth.

State v. Andrews, 447 N.W.2d 118, 120 (Iowa 1989).

> The trial court is afforded a wide latitude of discretion in ruling on the competency of witnesses. State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978). On appeal, we will reverse a trial court determination in this regard only on a showing that the trial court abused its discretion. Id.

State v. Brotherton, 384 N.W.2d 375, 377 (Iowa 1986).

Mere inconsistent statements are not enough to render a child incompetent to testify. Id. at 378. We examine the record as a whole to determine whether the witness was incompetent. Id. ("The record as a whole, however, does not show complainant lacked competency to be a witness.")

Unlike the child in Andrews, this young lad was not shy and reticent. Andrews, 447 N.W.2d at 121. Rather, he appears to be rather intelligent and communicative for his age. To begin with, the little boy is extremely well oriented as to location of his home, where he went to day care, who his parents were, his little sister, his own age, his birth date, and the identities of his preschool teachers. Further, the child is consistent and unwaivering in his testimony, looking at the record as a whole.

We set out the applicable portion of the four-year-old victim's testimony:

> Q. Why don't you tell me the things that you did there that you didn't like to do. What kind of things were there?
>
> A. Toys, and Mike gets kind of -- I don't know what it is.
>
> Q. Mike gets kind of something?
>
> A. And I don't know what it is.
>
> Q. Okay. Well, what does Mike get that you don't like?
>
> A. Upstairs.
>
> Q. It was upstairs, okay. Do you remember where upstairs?
>
> A. He didn't play with my nubbin upstairs but downstairs.
>
> Q. You're going to have to tell me that again. I don't know what --
>
> A. He don't play with my nubbin upstairs. He play with my nubbin -- he plays downstairs.
>
> Q. He doesn't play with your nubbin upstairs; he plays with it downstairs?
>
> A. Um-hum.
>
> Q. And what is your "nubbin," Mitch?
>
> A. I don't know.
>
> Q. Okay. You can tell me what your nubbin is. What does that mean? What does "nubbin" mean?
>
> A. I don't know.
>
> Q. Well, you said he plays with your nubbin?
>
> A. (Nods head affirmatively).
>
> Q. Where is that nubbin?
>
> A. (Indicating).

Q. Where are you pointing?

A. Right here.

Q. And where is that?

A. My nubbin is there.

Q. And where is that? Can you point again.

A. (Indicating).

Q. Okay. Let the record reflect that the witness is pointing between his legs. What is the your nubbin? Do you know what that is?

A. Hum-hum.

Q. You've got to tell me what that is, what your nubbin is.

A. Penis.

Q. It's a penis; is that what it is?

A. (Nods head affirmatively).

Q. Do you have a nubbin?

A. (Nods head affirmatively).

Q. Okay. How did you learn that word? Do you remember how you learned that word.

A. No.

Q. No. But that means penis?

A. Yeah.

Q. Okay, and you have one?

A. Right.

Q. Okay, and did Mike play with that?

A. Um-hum.

Q. And where did he play with that?

A. Downstairs in the bathroom.

Q. He did. And did that happen at preschool?

A. Right.

Q. And did anything else happen.

A. No, just that.

Q. Just what?

A. (Indicating).

Q. How did he play with it?

A. With his hands.

Q. With his hands. Did he play with it with anything else?

A. His mouth too.

Q. Is that right? And how did he do that?

A. (No audible response).

Q. You don't know? Go on, you can tell. How did he do that?

A. Sucked on it.

Q. Is that right?

A. Right.

Q. And that happened in the bathroom too?

A. (No audible response).

Q. Where? Can you just point?

A. (Indicating).

Q. Okay, and what did he suck on?

A. My nubbin.

Q. Did he? And that happened in the bathroom too?

A. Right, downstairs.

Q. Okay, and did you like that?

A. No.

Q. You didn't.

A. Yeah, I don't.

Q. You don't like it?

A. Hum-hum, not at all.

Q. Okay. Why didn't you like that?

A. Because that means I hate it.

Q. Okay. It means you hate it?

A. Right.

Q. Okay, and you didn't like that at all?

A. Hum-hum.

Q. Why didn't you like that?

A. Because.

Q. Because why?

A. Because I just told you, because I just hate it.

In this case, the child has consistently referred to his penis as his "nubbin," a term he learned from his grandfather. When asked where his "nubbin" was, he consistently pointed to his lap.

The child was emphatic and consistent throughout his testimony as to the location where the sexual abuse occurred. The day care portion of the center was in the downstairs. The preschool portion was upstairs. Mike often was in charge of the day care, while his wife ran the preschool upstairs. The child consistently testified the abuse took place in the downstairs bathroom.

The child's aversion for the sexual fondling is likewise consistent with a typical young child's reaction. See Brotherton, 384 N.W.2d at 378. His knowledge of such sexual acts as "sucking" on the child's "nubbin" is consistent with the overall scenario. It is hard to imagine the child obtaining this specific knowledge at his tender age except by way of experience. Additionally, we note the young boy is very straight and direct in his testimony relating to the sexual fondling.

Other than the one witness Mike claims was biased against him, none of the other adult witnesses remembered seeing Schildmeyer alone in the bathroom with the little boy. However, the child indicated no adults were present when they emerged from the bathroom. The child further indicated other children were present when they came out of the bathroom. This would be consistent with an offender's wish to avoid detection. The child was clear in his answer only he and Schildmeyer were present during the sexual abuse in the bathroom.

> Q. When you say Mike would play with your nubbin, who else was there?
>
> A. Nobody, just me and Mike.

We are impressed with this young boy's candor, consistency, recall, endurance under pressure, and desire to tell the truth. We conclude he exhibited admirably those testimonial characteristics desired in a witness. The trial court did not abuse its discretion in permitting

this witness to testify. We affirm the trial court on this issue.

Schildmeyer additionally complains there is insufficient evidence in the record to support the jury's verdict. Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Upon a review of the evidence, we conclude there is substantial evidence to support the jury's verdict. We affirm on this issue.

AFFIRMED.

Schlegel, P.J., concurs; Sackett, J., specially concurs.

SACKETT, J. (specially concurring)

I concur specially. A careful review of all the child's testimony causes me to recognize the issue in this case is extremely close.