

IN THE COURT OF APPEALS OF IOWA

No. 1-187 / 90-1291

FILED

MAY 29 1991

CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

THOMAS DEAN WILSON,

Appellant.

457

Appeal from the Iowa District Court for Polk County,
Ray Hanrahan, Judge.

Wilson appeals his convictions, following a jury trial,
for third-degree sexual abuse and incest. **AFFIRMED.**

Peter Berger of Berger & Culp, P.C., Des Moines, for
appellant.

Bonnie J. Campbell, Attorney General, Julie Ann
Halligan, Assistant Attorney General, John P. Sarcone,
County Attorney, and Scott Rosenberg, Assistant County
Attorney, for appellee.

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

HAYDEN, J.

Thomas Wilson was accused of sexually abusing his twelve-year-old daughter. He was convicted by jury trial of third-degree sexual abuse and incest.

Wilson appeals, alleging the trial court erred in denying his motion for mistrial based upon an expert witness giving her opinion on the victim's veracity. Wilson claims the testimony (1) violated the court's earlier ruling on his motion in limine and (2) invaded the province of the jury by giving an opinion on the ultimate factual question of guilt or innocence. The district court refused to grant a mistrial, holding that Wilson's attorney had invited the challenged testimony by his cross-examination questions. We affirm.

Our review is for errors of law. Iowa R. App. P. 4.

At Wilson's trial the State introduced testimony by two experts, a family therapist who had treated the victim and a psychiatrist. Wilson filed three separate motions in limine, seeking to restrict the expert witnesses' testimony. The district court granted all three motions in limine.

Among other things, the court's rulings barred the family therapist from testifying about whether or not children who report sexual abuse are generally telling the truth. The trial court's rulings were based on the rule stated in the Iowa Supreme Court case of State v. Myers, 382 N.W.2d 91, 97 (Iowa 1986). We point out initially

admission of testimony violating Myers does not require automatic reversal. See State v. Brotherton, 384 N.W.2d 375, 378-80 (Iowa 1986).

On direct examination of the family therapist, the prosecuting attorney carefully steered clear of the topics covered by the motions in limine. However, during cross-examination Wilson's attorney began probing in the area covered by the motions in limine. We set out the pertinent portions of the transcript.

Q. You're aware of some papers and leading psychiatric journals, in fact, in recent years about fabrication of sexual abuse in divorce and custody cases? A. Yes, I am.

Q. Just like you have carried a bunch of literature, there is other literature which documents where there are cases where adolescents and mothers fabricate charges sometimes. Is that true that there are papers on that? A. Yes.

Q. And would you agree with me, Mrs. Levine, that when someone says an adolescent denies that she was abused that there could be another explanation for her denial? That the explanation might be that it never happened? I mean, that certainly is a possibility. A. No.

Q. You don't think that ever could happen?

MR. ROSENBERG: Your Honor, could I interrupt for a minute? I think we need to approach the bench for a minute.

(A short bench discussion was held.)

Q. Mrs. Levine, what I'm asking is this: You just testified in response to Scott's questions that there is remembering and delayed reporting which is one in the same, correct? A. Yes.

Q. No, I'm asking you wouldn't there be, for example, discussed in these articles, these papers I'm talking about, another explanation for denial? A. No. There has not been from the articles that I have read, Mr. Berger. They have not brought that out in the articles that I have read that I have with me especially today.

Q. Well, they may not agree with those articles, right? A. I don't believe children lie about abuse, and I don't see it involved in this case, that that's what has happened.

This is the answer to which Wilson objects. Wilson's attorney immediately requested a recess, at which this short discussion took place.

(The following record was made in chambers, outside the presence of the jury.)

MR. BERGER: Can I make my record?

THE COURT: You better get the defendant.

MR. BERGER: May I proceed?

THE COURT: Yes.

MR. BERGER: Thank you, Judge. I would like the record to reflect that just before or actually just after I started my cross-examination of Mrs. Levine, Scott Rosenberg called a side bar with the Court and myself, and Mr. Rosenberg alerted the Court that he was worried that I might be eliciting questions he was assuming that could cause a mistrial.

THE COURT: And alerted the defendant's counsel?

MR. BERGER: Absolutely. Absolutely, Judge. And I proceeded to do what I feel was a very responsive and responsible cross-examination of this witness within the guidelines that this Court has established in its ruling pursuant to the motions I filed. This witness just testified to two matters which are in violation of the rulings, and they are in violation of Iowa law. She testified that children don't lie, in her opinion, and that has nothing to do with anything that I elicited from her, Your Honor; and, secondly, she testified that in her opinion in this case [M] is telling the truth. I am at a loss on how to proceed right now, and I want to have a conference with my client as to whether or not I want to move for a mistrial.

These are completely contrary matters that I think Mrs. Levine knows better. I don't feel I elicited -- the only way I could have proceeded and not have this happen was to waive all my questions and I decided to ask her a few. And I think it's right for me to ask -- for me to be able to ask her simple cross-examination questions. She went so far beyond of what I was inquiring of, so I guess all I'm saying I was going to make this record. I was in a position to be able to proceed at that time. I don't know whether or not Tom wants a mistrial. I think I need to have time to have a conference with my client to find out whether I want to ask for one.

(Emphasis added.)

We believe Mr. Berger was right on point when he said the "only way I could have proceeded and not have this

happen was to waive all my questions. . . ." Instead, he "decided to ask her a few." This is, of course, the gamble every trial attorney takes when dealing with an adverse witness. Evidence harmful to his own case may come out if he presses too hard for a particular answer on cross-examination and is unwilling to accept the witness's proffered testimony.

However, we believe Mr. Berger did more than step into a delicate area of cross-examination. He should have requested yes or no answers. Also, he should have framed his question more precisely so as to avoid the objectionable testimony. In this case, Mr. Berger, contrary to his protestations, actually pushed the witness to testify as she did. To illustrate this, we set out the trial court's reasoning in denying Wilson's motion for a mistrial:

THE COURT: Well, I would say that on this case it was probably -- there was probably more discussion about what evidence would be admissible and what wouldn't before the trial than there is on most cases. I think the Court ruled on three motions in limine before the trial and set out very specifically what the State would be allowed to go into and what the State wouldn't be allowed to go into. One of the things the Court did rule out was any testimony about whether children lied or told the truth that report sex abuse. Mr. Rosenberg was very careful in all his -- with all his witnesses and especially with the witness Levine not to go into any of the matters or ask any questions that would likely elicit any answers that pertained to things that the Court ruled inadmissible.

On cross-examination after the witness answered at least once Mr. Berger's question to the effect that there was nothing in the literature that she had read about children fabricating stories and there being a delay and Mr. Rosenberg asked to approach the bench and

stated that he was fearful that the line of questioning which defendant's counsel was pursuing might cause the witness to state something that the witness shouldn't be stating, the Court at that time told counsel for the State and counsel for the defendant the Court couldn't prohibit the defendant from cross-examining the witness, but he would have to take the risk of what the witness might say in response to that line of questioning. And I think it was on the very next question that came out. Under those circumstances the Court feels that defendant prompted the answer that the defendant got, and defendant's motion for mistrial will be denied.

We determine under this record the defendant's attorney invited the witness to answer as she did. He had filed the motions in limine specifically relating to this witness and this topic of testimony. He was specifically warned by the trial court his line of questioning may well elicit the objectionable response. The prosecuting attorney went so far as to request a sidebar conference to alert the trial court and defense counsel as to the possible direction and danger of the defense counsel's line of questioning.

Defense counsel chose to ignore the warning both of the trial court and the prosecuting attorney. He immediately proceeded to elicit the objectionable testimony after the sidebar conference. We have examined the pertinent portions of the transcript carefully. We determine the witness endeavored to avoid the objectionable testimony. However, defense counsel refused to accept her answers. He essentially forced her into the situation where she responded as she did. We cannot say she was unresponsive or unreasonable in her answer, given the line of

questioning and wording of counsel's questions. We agree with defense counsel he should be allowed to cross-examine the State's witnesses. He cannot, however, cry "Foul" when his own questioning elicits the very response he claims entitles his client to a mistrial. The Iowa Supreme Court case in an analogous situation has commented:

Although plaintiff's references to insurance may not be technically responsive to the questions asked they are such answers as may be expected of an unskilled witness to questions of the kind asked by defendant's counsel.

Stewart v. Hilton, 247 Iowa 988, 998, 77 N.W.2d 637, 643 (1956).

We determine Wilson's counsel invited the Myers violation. "Our courts have recognized that where a defendant has committed or invited the alleged error, he or she will not be permitted to complain of any error." State v. Bolinger, 460 N.W.2d 877, 880 (Iowa App. 1990).

We further note Wilson declined the trial court's offer to admonish the jury to disregard the offending testimony.

If evidence is improperly admitted but is later withdrawn with a cautionary statement to the jury to disregard it, there is no error except in extreme instances where the prejudicial effect would probably remain to influence the verdict despite its exclusion.

State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970).

We do not find this case an "extreme instance." We respect the defense counsel's tactical decision not to have the objectionable testimony brought back to the jury's attention at the end of the trial. However, we believe an

immediate objection and an immediate admonishment to the jury would have gone far to alleviate any damage. See id. Here Wilson's attorney, instead of objecting immediately, and asking to have the answer stricken and the jury admonished, chose to exit the court and have the jury dismissed for the day with the objectionable statement as the last bit of evidence in their minds.

We determine the trial court did not err in denying Wilson's motion for a mistrial because of the admission of the objectionable testimony. We affirm the trial court on all issues.

AFFIRMED.

Donielson, P.J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent. I most respectfully disagree with the majority assertion that counsel for the defendant invited the violation of the limine order and State v. Myers, 382 N.W.2d 91 (Iowa 1986). The answer was purely a volunteered statement and was not responsive to the question asked. It is obvious that the witness was a bit irritated at the questioner and lowered the boom on him.

We are here faced with a case where there was a claim that the charge may have been fabricated. It was important for defense counsel to obtain an admission that there was literature which was recognized and which confirmed that these cases were sometimes fabrications. That was what counsel tried to elicit. The question did not ask for the witness's opinion on whether children lie. Counsel did not ask the witness for her opinion in this case.

I believe a mistrial should have been granted. I would reverse.