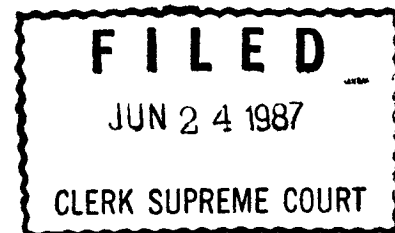


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed June 24, 1987

221

vs.

)

ROGER W. JAMES,

)

7-105
86-133

Defendant-Appellant.

)

Appeal from the Iowa District Court for Tama County (No. CR 1933),
Thomas L. Koehler, Judge.

Defendant appeals from his conviction on charges of sexual abuse in the second and third degrees, asserting that evidence relating to the fact of complaint by the victim should have been excluded on the ground that it was too remote in time, that a flight instruction should not have been given, and that he was denied effective assistance by certain acts of trial counsel. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Richard R. Vander Mey III, Assistant County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

PER CURIAM

On April 25, 1985, the appellant, Roger W. James, was charged by trial information with sexual abuse in the second degree, sexual abuse in the third degree, and lascivious acts with a child. These charges stemmed from allegations of James's sexual contact with the son of his common-law wife. Trial commenced on October 14, 1985, and four days later the jury returned verdicts finding James guilty as charged on each of the three counts. On December 20, 1985, the district court denied James's motion for new trial but granted his motion in arrest of judgment as to the lascivious acts verdict. James was sentenced to concurrent indeterminate sentences not to exceed twenty-five years on count one and not to exceed ten years on count two. This appeal followed.

I.

James maintains the district court erred in allowing into evidence certain complaint testimony. The testimony with which we are concerned was given by the victim's mother, Joycè James, with whom James had been living since 1979. During the State's case-in-chief, Joyce testified that on February 8, 1985, the victim told her "that [the defendant] had been doing homosexual things with him." James now argues that the time lapse between the last alleged act of sexual abuse and the victim's complaint, some four to five months, renders the complaint testimony inadmissible.

As a threshold matter the State contends this issue was not preserved for appeal because, although James protested the testimony via pretrial motion in limine, he failed to timely object to its admission during trial. We disagree. While the general rule is that a ruling on a motion in limine which only grants or denies protection from prejudicial references to the challenged evidence does not preserve the inadmissibility issue for review, State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979), where the ruling reaches the ultimate issue and declares

the evidence admissible or inadmissible, it constitutes a final ruling and need not again be raised at trial. Id. See also State v. Harlow, 325 N.W.2d 90, 91 (Iowa 1982). In the present case, the district court, in its ruling on defendant's motion, reached the ultimate issue and found the testimony admissible. James was not required to renew his objection during trial in order to preserve error. Accordingly, we turn to the merits of James's argument.

In the context of a prosecution for rape, our supreme court has stated that "[a]ssertions by testifying witnesses as to the fact of complaint uttered to them by the prosecutrix are admissible in this type of case when offered as corroboration of the prosecuting witness." State v. Grady, 183 N.W.2d 707, 713 (Iowa 1971); see also State v. Stevens, 289 N.W.2d 592, 595-96 (Iowa 1980). Such statements do not involve the rule against hearsay as the purpose of their admission is limited to a demonstration that a complaint was uttered by the victim. Grady, 183 N.W.2d at 713. These principles have been transferred from cases which were formerly prosecuted pursuant to our rape statute, e.g., Grady, 183 N.W.2d 707; see Iowa Code Chapter 698 (1966), and applied to contemporary prosecutions under our sexual abuse statute. Stevens, 289 N.W.2d at 595; see Iowa Code Chapter 709 (1985); cf. State v. Smith, 282 N.W.2d 138, 140 (Iowa 1979) (decisions under former statutes applicable in context of contemporary equivalent rules of criminal procedure).

Grady explained the relevancy of a lapse of time between the act complained of and the actual complaint in the following manner:

Lapse of time before complaint is made is not the sole test of admissibility when the fact of complaint is offered as a fact corroborative of the prosecutrix in a rape case. Delay is subject to explanation and goes only to the credibility and weight of the evidence and is, therefore, a subject of consideration for the jury. This is not to say that a complaint may not be so long delayed as to rob it of all force, and hence warrant a refusal to receive it in evidence.

(citations omitted). James contends the present case is one in which the delay necessitates exclusion.

We disagree. In Grady, our supreme court recognized that in certain cases a delay between crime and complaint may result from the "timidity or fear" of the victim. 183 N.W.2d at 714. The law therefore indulges in the presumption that the victim may delay complaint until the "opportunity [to complain] offers, or at least when [the victim is] no longer controlled by conditions of restraint in character," Id. at 714-15 (quoting State v. Bebb, 125 Iowa 494, 496, 101 N.W. 189, 189 (1904)). In the present case, the victim resided with James, who had allegedly warned the victim that he would "get in trouble" if he told anyone about the sex acts. According to the victim's mother, the victim made the complaint following an argument between herself and James during which she told James that she was moving out of their home and after which James "left the house, screaming, practically hysterical with me." The victim testified that he overheard portions of this argument and was aware that immediately before James left he told the victim's mother that she could keep her car. In addition, the victim testified that several weeks previous to the complaint he and his mother had watched a news program dealing with sexual abuse of children. The program, according to the victim's testimony, had suggested that children report such abuse to someone they trusted. James and the State stipulated at trial that such a program had aired over a national network on or about the evening of January 3, 1985.

James's attempt to analogize the present case to those in which the excited utterance exception to the rule against hearsay was held not to apply to similar time lapses is misguided. The theoretical basis for the excited utterance exception is that a given set of circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances

free of conscious fabrication. Iowa R. Evid. 803(2) (committee comment (1983)); Fed. R. Evid. 803(2) (advisory committee note); see State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981). It follows from this theoretical basis that as the time lapse between the exciting circumstances and the utterance increases so does the capacity for reflection and the probability of conscious fabrication. The admissibility of complaint testimony, however, is in no way dependent upon the presence of circumstances producing both a condition of excitement and a resulting statement. Rather, the admissibility of complaint testimony is contingent only upon the satisfaction of two foundational requirements: (1) the victim being a witness at trial, and (2) the complaint being voluntary. Grady, 183 N.W.2d at 715. James does not challenge the satisfaction of either element.

We do not believe the district court erred in admitting the testimony.

II.

James contends the district court erred in submitting a flight instruction to the jury. At the conclusion of the evidence the jury was given the following instruction:

If you find an offense included in the Trial Information was committed and that the defendant thereafter fled from the scene of the crime for the purpose of avoiding or retarding prosecution, then such flight is a circumstance you may consider in determining the guilt or innocence of the defendant.

The credit and weight, if any, to be given such circumstance is for the jury to determine from a consideration of all the evidence in the case.

James argues that this instruction suggests that he left Iowa because he was guilty. As a result, he claims the instruction invaded the province of the jury and was highly prejudicial. Our supreme court recently dealt with the permissibility of a substantially identical flight instruction in State v. Marsh, 392 N.W.2d 132 (Iowa 1986). The court in Marsh stated that flight instructions are rarely advisable and should be cautiously given due, in part, to their propensity

to unduly emphasize certain evidence. Id. at 134. As in Marsh, however, we do not think the defendant here has shown he was prejudiced by the instruction. The instruction, contained in II Iowa Uniform Jury Instruction (Criminal) No. 214, is a correct statement of the law. Any inferences to be drawn from James's departure from Iowa were left to the jury in its consideration of all the evidence. Nor do we think the instruction excluded any possible justifiable reasons for leaving the scene. The instruction expressly leaves to the jury the determination of why James left the state. We find no reversible error in the giving of this instruction.

III.

James argues he was denied effective assistance of trial counsel. This claim finds its genesis in a uniquely confusing attempt by Roger James, his wife Joyce James, and Roger James's original attorney to resolve this case short of trial. Within three weeks of his arrest, James contacted his court-appointed attorney, Michael Shepherd, and asked him to draft an agreement which had been suggested by James's wife. The agreement was to provide that in exchange for Roger James's promise to undergo counseling with the goal of preserving their marriage, Joyce James would agree not to testify, not to allow her son—the victim—to testify, and to recommend to the county attorney that the charges against Roger James be dropped. Shepherd drafted the agreement, denominated an "Agreement for Counseling," and an April 30, 1985, meeting was scheduled for the agreement's signing. The meeting was held in the Marshall County Jail where Roger James was incarcerated because he was unable to post bail.

At this point, the relevant testimony begins to diverge. All pertinent witnesses agree that Roger James admitted the truth of the allegations against him at some point during the meeting. Roger and attorney Shepherd contend

that the admission was made because Joyce refused to sign the agreement, which expressly states that it "in no way shall be interpreted to be an admission by the defendant of any guilt," without Roger's confession of guilt. Joyce maintains she posed no such ultimatum. The agreement was never signed. Shepherd subsequently withdrew as James's counsel. Joyce testified at trial that Roger had made the statements admitting his guilt at the meeting.

Roger maintains that the statements were the product of ineffective assistance of counsel. He contends that attorney Shepherd, if competent, would have: (1) advised him not to talk to anyone, including his wife, about the case; (2) informed him that the agreement proposed by Joyce was improper, unenforceable, and illegal; (3) not arranged the meeting at which the self-incriminating statements were made; and (4) not asked him to admit or deny the truth of the allegations against him in the presence of Joyce, an inquiry Roger claims Shepherd made at the meeting. In addition, James argues that his trial counsel, who prior to trial unsuccessfully attempted to suppress the testimony on the grounds of spousal and attorney-client privilege, was constitutionally ineffective because he failed to object to the testimony on the ground that it was the product of ineffective assistance of prior counsel.

Our appellate courts have stated a preference for deferring consideration of ineffective counsel claims until the postconviction relief stage. State v. Taylor, 310 N.W.2d 174, 179 (Iowa 1981). In this way, the record can be developed so that a defendant's claim can be thoroughly evaluated. Id. Although our courts depart from this preference when the record on appeal is adequate for a determination of an appellant's claim, State v. Ogilvie, 310 N.W.2d 192, 195 (Iowa 1981); State v. Poyner, 306 N.W.2d 716, 719-20 (Iowa 1981), the present case does not present us with such a situation. Accordingly, we decline to address the merits of James's claim.

The district court is affirmed.

AFFIRMED.

Oxberger, C.J., and Snell, J., concur; Sackett, J., specially concurs.