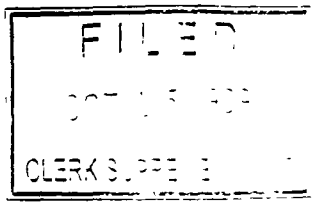
**IN THE COURT OF APPEALS OF IOWA**

No. 1999-182 (9-406) / 98-1214
Filed October 15, 1999




**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**RICKY LEE WEAVER,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Cherokee County, Robert C. Clem, Judge.

The defendant appeals his conviction and sentence for second-degree sexual abuse. Defendant appeals contending among other things: (1) his sixth amendment rights were violated and the district court erred in denying his request to depose the child; (2) the evidence was not sufficient to support the conviction; (3) the elements of the crime were not supported by the district court's findings (4) the trial court erred in admitting DNA evidence taken from his sweatpants and underwear; (5) the district court should not have allowed his wife Ramona to testify about her beliefs and feelings, and (6) the district court erred in allowing certain hearsay as well as verbal evidence. **AFFIRMED IN PART, AND REVERSED AND REMANDED FOR NEW TRIAL.**

Gaylen V. Hassman of Engelbrecht, Ackerman & Hassman, Waverly, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik and Charles N. Thoman, Assistant Attorneys General, and Mark R. Cozine, County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

**SACKETT, C.J.**

Defendant-Appellant Ricky Lee Weaver was convicted after a bench trial of second-degree sexual abuse of his stepdaughter born in December of 1992 in violation of Iowa Code section 709.3(2) (1997). The abuse alleged by the state to have been committed on Saturday, May 17, 1997, resulted in the child then four years of age suffering a laceration in the perineum with a tear completely through the hymen and the posterior fourchette. Medical evidence was that the injury was similar to injuries caused by an erect adult penis or multiple fingers. The child never testified. Defendant cared for her during part of the period the injury was alleged to have occurred.

Defendant on appeal contends among other things, (1) his sixth amendment rights were violated and the district court erred in denying his request to depose the child, (2) the evidence was not sufficient to support the conviction, (3) the elements of the crime were not supported by the district court's factual findings, (4) the district court erred in allowing DNA evidence, (5) the district court should not have allowed his wife Ramona to testify about her beliefs and feelings, and (6) the district court erred in allowing certain hearsay as well as verbal evidence. We affirm in part and reverse and remand for a new trial.

The child lived with her mother, defendant's wife Ramona Weaver, and defendant. The Weavers have a daughter of their own born in 1996. At the time of the incident the Weavers lived in a mobile home. Ramona worked full time during

weekdays and Saturdays, and defendant worked during the day as a truck driver and in the evening at his father's farm.

Ramona testified at trial laying out her version of events at or near the time of the injury. The district court found Ramona credible and made its determination of defendant's guilt primarily on the basis of the testimony.

The following facts come from Ramona's testimony. Ramona returned home from work on Friday, May 16, 1997, between 5:00 and 6:00 p.m. Defendant had picked the children up from the babysitters and was home with them when Ramona arrived home. Defendant then left for his father's. Later Friday evening Ramona took the girls to the farm where she gave a four-wheeler ride to the victim. The victim had to straddle a wide seat to ride the four-wheeler. Ramona also took the two girls to a restaurant for pizza and at 9:00 put the girls to bed. The defendant came home about 10:00 or 11:00. Defendant wore a pair of maroon sweat pants to bed that night.

On Saturday, May 17, Ramona got up at around 6:00 - 6:30 and left for work shortly thereafter. Defendant and the girls were still asleep. Defendant cared for the girls while Ramona was at work. Ramona returned from work at around 3:00 p.m. Sheila Fisher and her husband and child, defendant and the two girls were in the trailer. The Fishers had been there since around 2:00 - 2:30. Sheila Fisher, who was Ramona's half sister, frequently cared for the girls. The Fishers left forty-five minutes later. Nobody indicated anything unusual had happened.

After the Fishers left, the defendant again left for the farm wearing jeans. Ramona then discovered the victim was bleeding from the vagina. Ramona pulled down the child's underpants and saw blood. She changed the victim's clothes and went with the girls to look for defendant to find out what happened. Ramona and the girls were at the farm for an hour. Ramona talked with defendant for thirty minutes and then took the girls home. Between 6:22 and 7:00, Ramona made phone calls to her father, to Sheila, and to her sister-in-law Michelle Weaver. Ramona asked Michelle to send defendant home. He returned. They talked about what happened and decided to take the victim to Sioux Valley Hospital in Cherokee. The child was examined, and it was decided that she should go to a Sioux City Hospital. The victim was taken to Sioux City. Ramona and defendant went back to the trailer to get something and drove together with their daughter to Sioux City. Ramona stayed in the hospital until Monday.

Other evidence at trial came from two Sioux City doctors. Dr. Jung said the child was the victim of a sexual assault. Rape kits were used to collect specimens from both the victim and the defendant. The victim's DNA was not found on the defendant nor was the defendant's DNA found on the victim.

On Sunday, May 18, the Weaver's trailer was searched. No blood or other evidence of a sexual assault was found. What was found was a pair of maroon sweat pants on the top of a laundry basket. These were the sweat pants Ramona claimed defendant wore Friday night, but she did not know what happened to them Saturday.

The district court convicted defendant finding the injuries sustained by the victim were not self-inflicted or accidental but were the result of a sex act by another. The court then found the court was firmly convinced of the defendant's guilt and found beyond a reasonable doubt that the defendant committed the act on May 17, 1997.

Defendant first contends the district court in denying his request to depose the alleged victim violated his sixth amendment right. Defendant filed an application to take the victim's deposition. The victim had not been listed as a prosecution witness. At the hearing on defendant's request the district court was told that the state had indicated it might introduce into evidence a video taped interview of the victim. The defendant alleged he should have an opportunity to examine her even if she were not called as he had a right under the sixth amendment to confront witnesses. He also advanced to the district court that it was probable that the deposition would yield exculpatory evidence. The defendant pointed to contradictions by the victim as to when the bleeding started and what caused the bleeding. The district court denied defendant's request for the deposition.

The victim did not testify. The state was to subsequently request permission to introduce a video tape in evidence showing the child interviewed. The district court denied the request finding the state had failed to show necessity as other evidence was available that was not hearsay, namely the testimony of the child who had not been shown to be unavailable.

Defendant contends he was denied his right of confrontation of the victim. Defendant asserts the trial court violated his constitutional rights to due process and his rights under Iowa R. Crim. P. 12(2). The state agrees defendant's challenge under Iowa. R. Crim. P. 12 was preserved, but claims the constitutional claims advanced by the defendant were not. The state advances further the defendant did not show the victim was not available as a witness or that the evidence would have been favorable to his position.

The right of confrontation guarantees a criminal defendant the right to face-to-face confrontation and cross-examination of those who testify against him or her. *State v. Wagner*, 410 N.W.2d 207 (Iowa 1987). The applicable portion of the rule provides:

> 1. By Defendant. A defendant in a criminal case may depose all witnesses *listed* by the state on the indictment or information or notice of additional witnesses in the same manner and with like effect and with the same limitations as in civil actions except as otherwise provided by statute and in these rules.
>
> 2. Special Circumstances. a. Whenever the interests of justice and the special circumstances of a case make necessary the taking of the testimony of a prospective witness not included in subsection 1 or 3 of this rule, *for use at trial*, the court may upon motion of a party and notice to the other parties order that the testimony of the witness be taken by deposition. Iowa R. Cr. P. 12(1) & (2). (Emphasis supplied)

Discovery rulings are within trial court's sound discretion and we review them only for abuse of that discretion. *State v. Gates*, 306 N.W.2d 720, 725 (Iowa 1981).

Error in administration of discovery rules is not reversible absent a demonstration that the substantial rights of the defendant were prejudiced. 410 N.W.2d 207, *State v. Wagner* (Iowa 1987), *State v. Grimme*, 338 N.W.2d 142. 146 (Iowa 1983); *State v Webb*, 309 N.W.2d 404, 413 (Iowa 1981).

To trigger the right of compulsory process, a defendant must make a plausible showing the testimony of the individual otherwise unavailable to the defendant was both material and favorable to his or her defense. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193, 1202 (1982)., *State v Wagner*, 410 N.W.2d 207 (Iowa 1987). This requirement is embodied in Iowa R. Crim. P. 12, which, although allowing a defendant to depose all witnesses listed by the State on its trial information, requires a defendant to establish the necessity for deposing other persons. A defendant who makes no showing the evidence hoped to be obtained will be material and favorable to his or her defense has no right to compulsory process and has failed to demonstrate "special circumstances" as required by rule 12(2), *Wagner*, 410 N.W. 2d 207.

Defendant's claim focuses on alleged contradictory statements by the victim as to where and when she started bleeding. We recognize that inconsistency in the victim's statements of the event could be favorable to defendant.

However, the state argues defendant did not show the witness was not available for trial and absent such a showing she was subject to the subpoena power of the court and was available. The state advances this is because Iowa R. Crim. P.

12(2) is not a discovery provision but a means to preserve testimony. The state suggests in addressing its unavailability argument we look to interpretations of Fed. R. Crim. P. 15(a). However, in *State v. Groscost*, 355 N.W.2d 32 (Iowa 1984), the court recognized the federal rule prohibits discovery while Iowa does not. We agree however with the state that Iowa R. Crim. P. 12(2) is a means of preserving testimony for trial and is not intended to provide a means of discovery. We do not find the district court abused its discretion on this issue.

The next issue is whether the trial court erred in denying defendant's motion for judgment of acquittal. The scope of review for this issue is for errors at law, *State v. Cartee,* 577 N.W.2d 649, 651 (Iowa 1998). The question is whether substantial evidence supports the verdict. *Id.*

Substantial evidence is defined as proof which could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.* In making this determination, the record is viewed in the light most favorable to the state, without regard to contradiction or inconsistencies and assisted by all reasonable inferences, *State v. Robinson*, 288 N.W.2d 337, 338 (Iowa 1980). If there is substantial support for the verdict in the record, the verdict is conclusive. *Id.* All evidence at trial is considered, not just the evidence that supports guilt. *State v. Smith,* 508 N.W.2d 101, 102 (Iowa App. 1993). Where the verdict is clearly against the weight of the evidence, a new trial should be granted. *Robinson*, 288 N.W.2d at 338.

Defendant claims that the evidence was insufficient to support the conviction. He contends that Ramona was not a credible witness because her testimony contains unexplained contradictions and is contradicted by the physical evidence. He argues further that Ramona's testimony was inadequate for the court to find he had the opportunity to commit the crime. He also asserts that there was speculation as to what the sex act was, where and when it occurred, and how it happened.

The state contends the evidence was sufficient to support the verdict. It argues that Ramona's testimony was not contradictory, nor were her reactions to her child's injury unusual. Further, the state asserts the physical evidence did not contradict Ramona's testimony and that defendant had the opportunity to commit the crime within the time during which the injury occurred.

Normally, it is for the jury or trier of fact to determine credibility of witnesses. *Smith*, 508 N.W.2d at 102. However, the application of this rule is limited where the testimony of a witness may be so impossible, absurd and self-contradictory that it should be deemed a nullity by the court. *Id.* at 103. It is also the role of the trier of fact to reconcile any conflicting testimony. However, this rule does not apply where the only evidence of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. *Id.*

Defendant relies on *Smith* to support his argument Ramona's testimony was so contradictory and in conflict with the physical evidence that it came within the exceptions to the rules stated above. In *Smith*, the court viewed a witness' testimony

as a whole as self-contradictory, lacking experiential detail and describing scenes that border on the surreal. The witness in this case had told a Department of Human Services interviewer that it was over five times, and later stated that he had not touched her at all. She did not remember any details, such as if the defendant had removed her underwear, whether he touched her on her clothes or the skin or for how long he had touched her. She also testified that she was abused during a birthday party where eighteen people were in the room opening presents.

Defendant argues that Ramona's testimony is not credible because Ramona had two contradictory versions of the events of Friday night that would indicate she had been alone with the child either after work or through much of the evening, depending on which version of hers one believes.

Defendant also claims that Ramona's actions were not those of a mother who believed her husband had just sexually abused her child. He focuses on her delay in taking the child for medical treatment for several hours despite being advised by her sister-in-law to do so, and when she did so, she invited her husband and her other child to go to the hospital with her. She also had not initially told Michelle about the blood and told her that if they took the child to the hospital she might have to tell the hospital what had happened.

Ramona testified the first thing she did after discovering her child had blood on her underwear was to put the panties in cold water and change the child's clothes. She recalled that she did not look at her to see what was wrong with her because when

she touched the child's legs, the child screamed. She then went to the farm to talk with the defendant to try to find out what had been going on. She was at the farm for an hour. She said that upon returning, home she gave the child a bath because the child asked for it. Next, she called the farm and spoke with Michelle to ask her to send the defendant home. She also called her folks and Sheila because she was nervous not knowing what was wrong with her child. We recognize, as defendant argues, that these are not the steps one would assume a mother would take under similar circumstances. However, the fact she may have taken inappropriate steps does not render her testimony unbelievable.

Defendant also points out that at the Sioux Valley Hospital in Cherokee, Ramona was described by an emergency room nurse as unemotional and unexpressive. However, other witnesses testified to the contrary about Ramona's emotional state while at the hospital and while at home after discovering her child's injury.

Dr. Jung testified that when he interviewed the child during his examination of her, Ramona "seemed upset, appropriately upset" and was supportive. Sheila testified that when Ramona called her, she was hysterical and crying. Michelle also described Ramona as "panicked" when she called her.

Defendant places significance on Ramona's instruction to the victim to "say nothing" about her injuries while she was alone in the car with the girls on the way

back from the farm after talking with defendant. Later, the victim told Dr. Jung her mommy would get mad at her if she told what had happened.

Ramona's explanation of why she had told the victim not to say what had happened was that she wanted her to say nothing until she had things "figured out". The victim expressed fear her mother would be angry with her to Dr. Jung while Ramona was out of the exam room. Ramona then came into the room, she told the victim that it was okay for her to answer the doctor's questions about what had happened to her and encouraged her to do so. Ramona's instruction to the victim to be silent, while questionable and indicative of poor judgment, does not render her testimony surreal or unbelievable.

Defendant also focuses on Ramona's statements to hospital nurses that she was afraid of losing her child and that she told the victim if she went to the hospital she would have to tell the doctor what had happened. The statement to Michelle was also inconsistent with Ramona's testimony that she had said to Sheila that she did not know what had happened. Although these statements show fear and confusion on Ramona's part, they do not render her testimony absurd.

Defendant notes that Ramona could not remember the color of the sweat pants she claimed defendant was wearing on Friday night until she was shown them by the prosecution at trial and when asked, didn't she recall telling an investigator the color of these sweat pants. Ramona had reported to the police near the time of the incident

that they were maroon. When asked if she recalled this fact she replied that she probably did.

Defendant also finds it contradictory that Ramona testified that she did not see any blood in the trailer upon returning from work. However, this was also corroborated by Sheila who testified that she also saw no blood when she visited the trailer on Saturday afternoon.

We agree with defendant that Ramona's testimony contains contradictions and lack of details. We find it difficult at time to rectify her testimony with the physical evidence. Her testimony leaves a number of unanswered questions. We cannot however, find she testified to surreal situations that were impossible or absurd as did the witnesses in *Smith*. Therefore, we find that Ramona's testimony does not come within the exception set forth in that case.

The critical issue is whether the physical evidence combined with Ramona's testimony that defendant had the opportunity to commit the crime was sufficient to support a conviction.

The only physical evidence that links defendant with the crime is the maroon sweat pants which Ramona testified that defendant was wearing on Friday night. Tests performed on blood stains on these sweat pants revealed DNA that was consistent with that of the victim.

In addition to the blood stains on the sweat pants, the court found that blood stains were also found on the swabs of the defendant's penis and that there were

samples of blood from defendant's underwear, which were not sufficient to indicate that the blood was the victim's. The court also found that visual examination of the defendant by Dr. Michael indicated that he had no apparent injury which would have caused bleeding.

Regarding the issue of opportunity, Ramona testified that defendant came home on Friday night between 10:00 and 11:00. On Saturday morning at approximately 7:00, while defendant and the children were asleep, she went to work. At that time she left both of their children in defendant's care at their home from that time until she returned after work at around 3:00 or 3:30 p.m. It is unrefuted that the defendant did not leave home during the night after he went to bed or that the victim was with anyone else that day after Ramona went to work and before the Fishers arrived at the residence at about 2:30.

Dr. Jung testified that the injury occurred within twenty-four hours of his examination of the child, which was at 1:05 a.m. on Sunday, May 18. He also stated that the injury was probably inflicted within a twelve to twenty-four hour range, which would have been between approximately 1:00 a.m. and 1:00 p.m. on Saturday. Consequently, the medical evidence supports a finding the assault occurred at a time defendant was either home with the children or caring for them.

In *State v. Mulder*, 313 N.W.2d 885 (Iowa 1981), it was held that there was sufficient evidence to convict the defendant of first degree murder where the evidence upon which the jury's verdict was based was purely circumstantial. In this case, the

court considered circumstantial evidence to be as probative and convincing as direct evidence. *Id.* at 888.

In *Mulder*, the victim was killed by a single shot from a .22-caliber rifle which had been stolen by defendant about a week from the murder. The defendant was in the immediate vicinity of the victim's home at the time of the murder so that he easily could have committed the crime. When the rifle was found in an abandoned meter pit, it contained fingerprints that were identified as being consistent with those of the defendant. No other fingerprints were found on the weapon. The jury did not believe either of the four different versions that the defendant gave of what he had done with the rifle after he had stolen it. Defendant argued not only that the expert testimony regarding the fingerprints was not only tenuous and inconclusive, but even if the fingerprints had been his, they did not necessarily connect defendant with the murder because his prints would be there from his handling of the gun at the time of the theft.

However, *Mulder* does not contain other facts which are potentially exculpatory to defendant as in the current case. There are so many contradictions and inconsistencies in Ramona's statements and actions which, even if the court found her to be a credible witness and reconciled the conflicting portions of her testimony in her favor, her testimony could also just as easily be regarded as not reliable. This is significant because the entire issue of opportunity depends on the testimony of Ramona being true.

Other facts brought out by defendant appear to be inconsistent with defendant having committed this crime. Defendant voluntarily invited the Fishers into the trailer. He left for the farm shortly after Ramona had returned and the Fishers had left. There was no blood found in the trailer by investigators. The sweat pants were found by investigators in a conspicuous place on top of the laundry basket. If defendant had cleaned up the blood or destroyed any other evidence of this crime, and he had used the sweat pants in the assault and had gotten the victim's blood on them, would he have left the bloody sweat pants in an open and conspicuous place on top of the laundry basket for all to see? If he had in fact assaulted the victim, would he have volunteered the information at the hospital that she had been bleeding from the vaginal area since morning?

Viewing the evidence in the light most favorable to the state without regard to contradictions and inconsistencies and assisted by reasonable inferences we find the verdict was supported by substantial evidence. *See Robinson*, 288 N.W.2d at 338. Therefore, the trial court did not err in denying defendant's motion for judgment of acquittal.

Defendant also claims that the court's findings were not adequate to in that the elements of the crime were not met. We do not agree.

The elements of the offense of sexual abuse in the second degree are: (1) the defendant committed a sex act under 709.1 and (2) the act was committed against a child under the age of twelve, Iowa Code section 709.3(2) (1977). A "sex act" means

sexual contact and includes contact between the genitalia of one person and the genitalia of another or contact between the finger or hand of one person and the genitalia or anus of another, Iowa Code section 702.17.

As stated above, the statute only requires that a sex act was performed on a child under the age of twelve. It does not require, as claimed by the defendant, that the state prove specifically what the sex act was, where it occurred, when and how it happened. That a sex act occurred is clear from the medical testimony. Dr. Jung testified that the injury was a penetrating injury similar to injuries known to have been caused by an adult erect penis or multiple fingers. His professional opinion was that such an injury could not have been self-inflicted, accidental or caused by straddling a seat while riding a four wheeler. The first element of the offense was proved by the state. The second element of the offense was also established, since the victim of this crime was four years old at the time of the offense. Accordingly, we hold that the findings were adequate in that the elements of the crime of second degree sexual abuse were met.

Defendant next contends trial court erred in denying defendant's motion for a new trial. The test to be used by trial courts in ruling on a motion for new trial is whether the verdict was contrary to the evidence. *State v. Ellis,* 578 N.W.2d 655, 659 (Iowa 1998). "Contrary to the evidence" means "contrary to the weight of the evidence". *Id.* The "weight of the evidence" refers to a determination by the trier of

fact that a greater amount of credible evidence supports one side of an issue or cause than another. *Id.*

Trial courts have wide discretion in deciding motions for new trial, *Ellis*, 578 N.W.2d at 659. If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted. *Id.* at 658, 659. The power to grant a new trial on this ground should be exercised with great caution and be invoked only in exceptional cases where the evidence preponderates heavily against the verdict. *Id.*

Applying the weight of the evidence standard to the facts discussed above, it does not appear that this is one of the exceptional cases where the evidence weighs heavily against the verdict. At most, the evidence contains inconsistencies and matters that are unexplained. Accordingly, we hold that the trial court did not abuse its discretion and err in denying defendant's motion for new trial.

Defendant contends the district court should not have admitted Ramona's testimony concerning her feelings. The testimony he objects to are statements made by Ramona during direct examination by the state concerning her current intention to divorce defendant. Ramona first testified that before the time of the assault, she had not intended to divorce him. Asked by the state why she was in the process of getting a divorce form defendant, defendant objected to the question contending the evidence was irrelevant. The state claimed the evidence was relevant for purposes of showing Ramona's lack of an improper motive to testify. Such a motive had been suggested

during discovery. The court overruled defendant's objection and allowed Ramona to testify she believed that defendant had hurt her child. She explained her feelings about being torn in two because of it.

Defendant argues that this testimony should not have been admitted because it was not relevant, since there had been no cross-examination to suggest an improper motive in an effort to impeach her. Defendant also asserts that admission of this testimony was improper because Ramona's opinion he hurt the child was not based on fact and as such, had no probative value. Defendant points out that Ramona had even testified earlier that the child never told her that defendant put his fingers inside her. He also contends that the admission of Ramona's opinion was prejudicial because it enabled a grieving mother to gain the judge's sympathy.

The state claims Ramona's testimony was relevant because it went to her bias. It asserts that it should be allowed to raise the subject on direct examination because it would have been a permissible area of cross-examination. The state argues that it was important for the fact finder to know that Ramona's testimony was not being influenced by the pendency of a divorce proceeding. Further, the state contends the testimony was not prejudicial because the lack of the court's reference to it shows that it was not considered by the district court in its decision. The state advances it was clear throughout the trial that Ramona believed that defendant committed the assault and testimony as to her opinion he did was no surprise to the court.

On evidentiary issues we review for an abuse of discretion, *State v. Aricivia*, 495 N.W.2d 364, 367 (Iowa App. 1992). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* The scope and extent of cross-examination is largely within the discretion of the trial court, *State v. Hinsey*, 200 N.W.2d 810, 816 (Iowa 1972). However, that discretion should be exercised only after the right of cross-examination has been fully and fairly exercised. *Id.* This reasoning can be logically applied to the present situation where there was an objection by the defense to questions concerning a potential subject of cross-examination. Since the defense had not had the opportunity to cross-examine Ramona regarding bias, the court's ruling on the admissibility of her testimony concerning this was premature, and, the admission of this testimony was improper.

The state cites numerous cases in which, in situations where government witnesses had agreed to testify on its behalf in exchange for immunity from prosecution or for the benefit of a plea bargain agreement, the government was allowed to disclose the witness' motivation for testifying in advance of cross-examination. *See: United States v. Borello*, 766 F.2d 46, 57 (2nd Cir. 1985), *United States v. Edwards*, 631 F.2d 1049, 1051 (2nd Cir. 1980). However, this exception is limited to such situations and does not apply here.

Probative value gauges the strength and force of the relevancy of the evidence presented. *State v. Mast*, 578 N.W.2d 250 (Iowa App. 1998). Ramona's testimony

lacked probative value, and was hence not relevant, since it was merely an opinion not based on fact. She did not witness the assault and she testified that the victim never told her that defendant committed it. Ramona's opinion also should not have been admitted.

The next consideration is whether the admission of Ramona's testimony regarding her feelings caused defendant to be unfairly prejudiced at trial. Unfair prejudice is an undue tendency to suggest decisions by the fact finder based on an improper bias, often an emotional one. *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997). However, the court also stated that since the whole purpose of evidence is to sway the fact finder toward an outcome that favors one party, most evidence that damages a party's case is not prejudicial. *Id.* Consequently, unfairly prejudicial evidence is evidence which appeals to the jury's "sympathies, arouses a sense of horror, provokes its instinct to punish or triggers other mainsprings of human action which may cause a jury to base its decision on something other than the established propositions in the case.". *Id.*

Although the rules of evidence are applicable both to bench and jury trials, there is less need for strict application of evidence rules in a bench trial. *State v. Farnum*, 397 N.W.2d 744 (Iowa 1986). In a bench trial the prejudicial effect of the admission of irrelevant evidence is greatly reduced. *See: State v. Casady*, 491 N.W.2d 782, 786 (Iowa 1992) in which it was held that the admission of other crimes is less prejudicial in a bench trial.

Evidence of Ramona's opinion the defendant had hurt her child and her feelings about defendant should not have been admitted. The evidence was prejudicial to defendant. While standing alone, the admission of these statements may not justify a new trial, we consider the prejudice in with prejudice caused by other errors.

Defendant contends the trial court erred in allowing Michelle Weaver to testify to a statement made by defendant about statements made by the victim. Michelle Weaver testified during direct examination she had a phone call from Ramona where Ramona expressed concern about having to tell the doctor what had happened and had hesitated to take the victim to the hospital in order to wait for defendant. During cross-examination the state asked Michelle if defendant told her at the hospital that the victim was saying that defendant had put his fingers inside her and that defendant had then said that he didn't do it. Defendant objected to this evidence on the grounds it went beyond the scope of the direct examination and was hearsay. The judge ruled that although he had concerns the statement went beyond the scope of direct, it was not hearsay.

Defendant claims the admission of Michelle's statement of what the victim said is reversible error for three reasons. First defendant contends because the statement was attributable to the victim it violates defendant's Sixth Amendment right to confrontation because the victim, the declarant, did not testify at trial.

appears that prejudice resulted. *Hamilton v. O'Donnell*, 367 N.W.2d 293, 296 (Iowa App. 1985).

In the present case Michelle's testimony during cross-examination clearly went beyond her testimony during the direct examination. It is obvious that the state questioned Michelle in order to get the victim's statement into the record. If the state had merely wanted to give Ramona a chance to explain her actions, it could have simply asked her why she had been hesitant to take her child to the hospital. The statement does not offer an explanation of Ramona's state of mind. Instead, it directly relates to the issue of how the assault was committed and who committed it.

Defendant also contends that Michelle's statements were hearsay. He claims that the first was double-hearsay because Michelle testified about what defendant said about what the victim had said.

The scope of review in the case of hearsay rulings is for the correction of errors at law, because admission of hearsay evidence is prejudicial to the nonoffering party unless the contrary is shown. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

Hearsay is defined as "a statement other than one made by the declarant, while testifying at the trial, offered in evidence to prove the matter asserted." Iowa R. Evid. 801(c). Statements not offered for proof of the matter asserted are not hearsay and should not be excluded., *State v. Ross*, 573 N.W.2d at 914; *State v. Summage*, 532 N.W.2d 485, 487 (Iowa App. 1995). Hearsay is generally inadmissible unless it falls within one of the enumerated exceptions set forth in the rule, Iowa R. Evid. 805.

In order to determine whether a statement is hearsay, the "real" purpose for which the evidence was offered must be determined. In making this determination, the relevant record is reviewed to see if purpose of offering the challenged testimony that is voiced by the [offering party] can reasonably be found. An objective test based on all circumstances is used. *Summage*, 532 N.W.2d at 487.

Here, the state claims that the purpose of Michelle's testimony that defendant told her the victim "is saying I put my fingers in her" and "I didn't do it" was not explained by the prosecutor at trial. It contends though the prosecutor argued it was an admission of a party opponent, it was not clear the purpose of the offer was to establish an admission. Since defendant's statement "I didn't do it" was not an admission, the state contends that it is more reasonable to conclude that the state wanted to remove any implication that Ramona was trying to protect herself from prosecution. Again the state is claiming that these statements were offered to rebut defendant's implication that she was afraid to take her child to the doctor for fear her crime would be discovered.

It is clear the purpose of the state's offer of this testimony was to get into evidence the victim's statement that fingers were used by defendant to commit the assault. Since this statement was, in fact, offered to prove the matter asserted, it is hearsay. The relevance of the defendant's denial of guilt which followed this statement depends on the truth of the matters asserted, and thus, this statement is also hearsay.

These two statements also do not fall within any of the exceptions to the rule. There is no claim by the state that the first statement comes under any of these exceptions. The state simply argued that it was not hearsay. Regarding the second statement, it does not fall within the exception for admissions of a party opponent under Iowa R. Evid. 801(d)(2), since it was a denial of guilt. Accordingly, these two statements should not have been admitted into evidence by the trial court.

To warrant reversal, error in admitting evidence must have prejudiced defendant. *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998). When an error is not of constitutional magnitude, the test for prejudice for harmless error is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. *Id.* In determining the prejudicial effect of improperly admitted evidence, evidence presented that is not related to evidence alleged to have caused error is reviewed and weighed against any prejudicial effect. *State v. Holland*, 485 N.W.2d 652, 655 (Iowa 1992).

A hearsay statement is harmless only if there is other overwhelming evidence of defendant's guilt so that the prejudicial impact of the witness' statement is relatively insignificant. *State v. Hallum*, 585 N.W.2d 249, 256 (Iowa 1998). In making this assessment, the properly admitted evidence must be weighed against the hearsay statements. *Id.*

There is not overwhelming evidence of defendant's guilt. Michelle's statement as to what the victim said had a prejudicial impact. There is no other evidence the

victim accused defendant or that fingers were used in the assault, other than that of Dr. Jung who testified that fingers could have caused the injury. This evidence coupled with the inadmissible evidence of Ramona's feelings could have changed the outcome of the trial. Defendant should have a new trial.

We address three other issues that may come up on retrial. Defendant contends the trial court erred in allowing verbal and nonverbal hearsay evidence of the victim. At trial, defendant objected on the grounds of hearsay to the testimony of a Cherokee Sheriff's matron concerning what she overheard about the subject of "daddy" during Dr. Jung's interview of the victim. The court overruled defendant's objection and allowed the witness to testify that the victim was happy to see her mother and was concerned if defendant was there. The witness indicated that the child was "upset" and expressed this concern. Defendant again objected to the testimony of another emergency room nurse who stated that the victim had asked to see her baby sister and the girl was brought into the room. The victim took the blankets off the baby and looked the baby over, lifted up the arms and shirt, and looked at her abdomen.

The criteria for the admission of evidence is that the evidence must be relevant, and if the evidence is relevant, its probative value must outweigh prejudice which would be caused by its admission. *State v. Ellis*, 350 N.W.2d 178, 180 (Iowa 1984).

The test for relevancy was recently set forth in *State v. Harris*, 589 N.W.2d 239, 243 (Iowa 1999) as being whether the evidence offered would render the desired

inference more probable than it would be without such evidence. *See,* Iowa R. Evid. 401.

Whether the necessary minimum level of logical connection between the offered evidence and the fact to be proven exists is a legal question, lying within the broad discretion of the trial court, *State v. Tracy*, 482 N.W.2d 675, 680-81 (Iowa 1992), and will be reversed only upon a showing that such discretion has been abused. *State v. Gordon,* 354 N.W.2d 783 (Iowa 1984).

The state contends that the evidence brought out during the testimony of the Cherokee sheriff's matron was offered to provide a context within which the witness could testify as to her observations of the victim's demeanor and emotional condition at the time of the medical examination. The state argues that the evidence regarding the victim requesting to see her mother and her subsequent actions was an attempt to show that the victim's conduct was outside the norm for a child who was injured and such abnormal response makes it more likely that the injury was inflicted rather than accidental.

Defendant claims that the evidence of the child being happy to see her mother, concerned about where her stepfather was, and her request to see her little sister can be interpreted as a normal response to having been separated from her family, but that the state used it intending to communicate something more.

This evidence is not relevant to the material issues in this case. The child's happiness in seeing her mother, and when not seeing her stepfather and sister there,

wondering where they are, and wanting to see her sister and lifting up her sister's arms and shirt give no clues whatsoever as to whether defendant was connected in any way with the assault or if an injury was inflicted rather than being the result of an accident. The evidence should not have been admitted. We have reversed on other grounds and need not address the issue of its prejudice.

Defendant contends that since DNA tests failed to identify any of defendant's DNA on the sweat pants, he could not have been wearing them as Ramona had testified. We find that although DNA test results indicated the victim's blood was a source of the blood stains on the sweat pants, these results are inconclusive as to whether or not defendant was wearing the sweat pants on Friday night.

The state's expert witness, Marie Sides, testified that she conducted DNA tests on two separate samples from a pair of maroon sweat pants which were seized from a laundry basket in Weaver's trailer on the day after the offense occurred. For each sample a profile, or series of tests results, was compared with known samples of defendant, Ramona and the victim, to determine whether each person was eliminated as a potential donor of that DNA. Out of the seven DNA test results used in a profile, if one mismatch between the question and the known samples occurred, the person from which the known sample was taken was eliminated as being the donor of the questioned sample.

The first sample tested was from the inner side of a small piece of fabric which was cut out of the front crotch area of the sweat pants. Screening tests were positive

for the presence of blood and inconclusive for semen, which could not be identified by further tests. All seven of the test results for this area matched the DNA profile of the victim in this case and it was concluded that the profile was consistent with the blood having come from her. From this evidence, it was reasonable for the court to infer that the blood stains on the front crotch area of the sweat pants was that of the victim.

However, the inside crotch profile was complicated because it contained DNA from more than one source. Ms. Sides explained that when a persons's genetic material is inherited, one factor is obtained from each parent so that two is the greatest number of factors a persons' type can have. If there are three or more factors, there is an additional source of DNA present, which was the case here. When there is more than one person's DNA present, and they are present in unequal or unequivalent amounts, one is stronger than the other. The sources of DNA were divided into major and minor contributors. The major contributor's profile was found to be consistent with the victim's DNA. This expert was unable to identify the source of the minor contributor. She did state, however, there were factors present which could not have been from the victim. Evidence was introduced that defendant was a potential source, but because a mixture was involved, she could not rule out anyone as a potential donor, so that it could have been a number of people. This expert also noted that, although she could not say what the source of the DNA was, and that screening tests

indicated the presence of blood, factors also can be picked up from persons who have worn the clothing.

The second sample was taken from a stain on the outside back leg of the sweat pants, near the knee. Screening tests revealed the presence of blood and did not find any semen. DNA tests of this sample showed one source of DNA which had a full match with the known sample of the victim. Again, it was reasonable for the court to conclude that it was the victim's blood on this area of the sweat pants.

Defendant's expert, Dr. Patrick Williams, testified that from the evidence that he had reviewed, he could not conclude that the defendant's DNA was present. Nevertheless, he agreed that there could have been a mixture of DNA from two sources on the sample from the inner crotch area of the sweat pants. He stated that this is because where there are small amounts of DNA involved, there are problems with breaking the mixture down per person.

Dr. Williams stated further that if a person wore a pair of sweat pants for six to eight hours, the chance that the person's DNA would be left on the pants by the body parts that came into contact with them is nearly absolute. But, he conceded that a barrier, such as underwear, between the body and the sweat pants could reduce that likelihood of finding DNA on them just because they were worn. This is because it is possible that the barrier could lessen the migration of exfoliated cells which contain DNA.

Thus, expert testimony regarding the DNA tests on the maroon sweat pants does not show that defendant could not have been wearing them on Friday night. Even though defendant's DNA was not identified on either place on the sweat pants from which samples were taken, DNA from a second unknown source was found taken from the inner surface of the crotch area. The defendant was not ruled out as a potential source of the DNA, but the source also could have been a number of other people. The lack of defendant's DNA being found on the outside of the sweat pants also does not show that defendant did not wear them, since the outer surface of clothing does not come into contact with the skin when it is worn.

Defendant argues that the admission of these DNA test results without an accompanying statistical probability of a random match is error. Specifically, defendant first contends that the state failed to present any statistical probability concerning the sample taken from the inside crotch area of the sweat pants, even though the state's expert's gave an opinion that the victim was a major contributor. Second, defendant claims that there was no statistical probability offered regarding defendant's underwear or other DNA tested material. Defendant points out that only on one stain on the sweat pants was there a full match on all seven markers, so that the fact finder would have to rely on assumptions about the statistical probability of the other samples where there was not a full match. He argues that the statistical probability would vary significantly for these samples.

Defendant's main concern is that there were test results in which no match was made, yet defendant was not ruled out as a potential donor of the DNA.

The test for the admission of scientific evidence is set forth in *State v. Brown*, 470 N.W.2d 30, 32 (Iowa 1991). It requires only that evidence be established as reliable and that it meets the general test for admission of expert testimony stated in Iowa R. Evid. 702. *Id.* The court in *Brown* also noted that the trial court has broad discretion in ruling on the admissibility of expert testimony and that reversal will only occur if it is found that the court abused its discretion and defendant suffered prejudice. *Id.*

Iowa R. Evid. 702 permits the testimony of qualified expert witnesses where scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.

In *State v. Williams*, 574 N.W.2d 293, 298 (Iowa 1998) the court addressed the issue of the reliability of DNA evidence produced by expert witnesses. It held that the admission of evidence of a DNA match without accompanying statistical probability of a random match is error. The court stated that although it has been held that DNA testing is sufficiently reliable to be admitted into evidence, "without statistical evidence, the ultimate results of DNA testing would become a matter of speculation". The court reasoned that without the probability assessment, the jury does not know what to make of the fact that patterns match and used the analogy that a " jury does not know whether the patterns are as common as pictures with two eyes

or as unique as the Mona Lisa." *Id. See*: *State v. Williams*, 574 N.W.2d at 297 for a discussion about the meaning of statistical probabilities for DNA.

The state's expert witness testified to statistics only regarding the DNA profile of the victim. The frequency of this profile for females within three racial groups were explained. DNA evidence concerning the blood stains that were found to be consistent with that of the victim were thus properly admitted into evidence under the test established in *Williams*. However, statistics concerning the defendant's DNA profile were not provided, and therefore, established , this evidence should not have been admitted.

We have considered defendant's other challenges and find them to be without merit.

**Affirmed in part, and Reversed and Remanded for new trial.**