FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-206 / 90-870

572

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ARTHUR B. BENNETT,

Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Gary E. Wenell, Judge.

Defendant appeals from his convictions, following a jury trial, for three counts of second-degree sexual abuse and one count of indecent contact with a child. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Mark Joel Zbieroski, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Carol Chase, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ., but decided en banc.

SACKETT, J.

The issue in this appeal is whether the trial court erred in admitting testimony defendant-appellant Arthur B. Bennett claims should have been excluded as hearsay. We affirm.

Defendant was accused of sexually abusing a young girl. He was convicted following a jury trial of three counts of sexual abuse and one count of indecent contact with a child.

The victim, who was ten years old at the time of trial, testified to a series of encounters with defendant. The encounters started when the victim was about eight years old. The last encounter occurred on January 30, 1989, when the victim went to defendant's home in the afternoon to vacuum. The victim testified defendant put his hand up her shirt and touched her breasts. The victim also testified about alleged prior incidents where defendant put his penis in her vagina and once tied her to a bed rail and put his penis in her mouth. The victim was not cross-examined, and the defendant did not attempt to discredit or impeach her testimony.

The victim was examined by Dr. Michael Jung, a physician at Marian Health Center. Dr. Jung found the victim's anus dilated with an irregular outline. It was his opinion an object had penetrated the victim's anus. The doctor found no scars on the victim's hymen. The defendant testified and denied the events had taken place.

Defendant contends the trial court erred in overruling his objection to alleged hearsay testimony of an emergency room nurse, the victim's mother, and two police officers. The State contends all hearsay was admissible either as a victim's complaint, an excited utterance, or medical history.

In examining hearsay challenges, we look to Iowa R. Evid. 801(c) which defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. The general rule has been to exclude hearsay, but the exclusion is subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness. See McCormick on Evidence, 1107 (3d ed. 1984).

Defendant first claims the trial court erred in admitting the testimony of Denise Wright, a staff nurse at Marion Health Center. The State contends Wright's testimony was properly admitted as medical history. Wright saw the victim in the emergency room on January 30, 1989. Wright saw the victim prior to her examination by Dr. Jung. Wright testified she took a history from the victim and the victim stated she had been abused. Over defense counsel's hearsay objection, Wright was allowed to testify as follows:

> Q. What history was given to you? A. The history was that she had been asked to go over to the neighbor's house to clean the house and that at times she had taken her clothes off over there.

Q. Did you record all of that history? A. Yes.

Q. Did she give you further history? A. She stated that it had happened in the past, and that she had just told her mother about it that day.

Q. Who did she name as the neighbor? A. Mr. Bennett.

Q. And did she tell you why she told her mother that evening? A. She told me that she had learned in school about abuse. That's what she was learning in school.

Q. Did she tell you, as part of the history, what the neighbor Arthur Bennett had done in the past when her clothes would be taken off? A. Yes.

Q. What was that? A. That he put his thing down there.

Q. Those were her words? A. Yes

Defendant first argues Wright is not the type of professional whose testimony comes under the medical privilege exception. To qualify as medical history, statements need not be given to a physician. A nurse such as Wright, admitting a patient to a hospital emergency room, is clearly the type of professional to whom this exception is directed. See McCormick at 840; Advisory Committee's Note, Fed. R. Evid. 803(4).

Defendant's next argument is Wright's testimony is not admissible as medical history. Medical history is considered reliable because of the probability a patient will not make false statements to a physician when he or she is expecting the physician to render medical treatment based on the statements. See State v. Mueller, 344 N.W.2d 262, 265 (Iowa App. 1983). Although the statements are not entirely spontaneous in that they are responses to

questions, the fact a person believes the effectiveness of treatment he or she receives is dependent on their accuracy is considered to assure their reliability. See McCormick, at 839.

The medical history exception may also encompass statements made to a physician concerning the cause of the condition for which treatment is sought. However, where a statement as to causation enters the realm of fixing fault, there is a doubt whether the physician or a patient does in fact consider statements fixing fault in making a diagnosis. See McCormick at page 840.

The testimony of the emergency room nurse, Wright, identifying defendant as the perpetrator of the sexual abuse, is a statement fixing fault. See State v. Red Feather, 205 Neb. 734, 736, 289 N.W.2d 768, 771, (1980). A State's question asking a doctor, who took a history from a sexual abuse victim, the identification of a perpetrator was improper. See State v. Grady, 183 N.W.2d 707, 715 (Iowa 1971).

The State is not privileged in a sexual abuse case to prove the victim complained a particular person assaulted him or her until the defendant has brought out the details of the complaint or has introduced evidence impeaching the victim's testimony, unless the statement identifying the perpetrator was identified in an excited utterance. See Grady, 183 N.W.2d at 718. The statements made to Wright

were not excited utterances. No evidence was introduced impeaching the victim. The nurse's testimony identifying the defendant as the perpetrator should not have been admitted.

Defendant next contends the trial court erred in allowing the victim's mother to testify to what the victim told her on January 30, 1989. Over objection, the victim's mother testified on January 30, 1989, her daughter told her a person had done bad things to her. The victim's mother was allowed to elaborate and testify the victim said defendant put his hands up her shirt.

A victim's complaint to appropriate authorities is not considered hearsay. Grady, 183 N.W.2d at 716; State v. Griffin, 386 N.W.2d 529, 535 (Iowa App. 1986). However, if the statement goes beyond describing the nature of the act and the time and place of its occurrence and gives details of the complaint, it may be hearsay. State v. Ogilvie, 310 N.W.2d 192, 195 (Iowa 1981); Grady, 183 N.W.2d at 716-18; State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980). The trial court did not abuse its discretion in admitting the mother's testimony as a complaint.

Defendant next contends the trial court erred in admitting the testimony of two police officers who questioned the victim on separate days. Sioux City police officer Lisa Claeys interviewed the victim at the Marian Health Center on January 30, 1989. A hearsay objection was made to the following testimony:

Q. What was the complaint that occurred on January 30, 1989, which is that date? A. She stated that Mr. -- that Art Bennett had reached his hand up inside her shirt and toughed her in the upper chest area.

Q. Did she give any specific date? A. That date she stated that he had reached his hands up inside of her shirt. Over a period of a year she had indicated several different incidences that had happened.

Q. When you say incidents, what do you mean? A. She indicated that on numerous occasions that she had lain in bed -- Mr. Bennett's bed naked and that he had lain on top of her. She stated that when he was laying on top of her that he did put his penis -- and that was the term that she used -- up inside -- inside or in an area that she directed me to or pointed to, which was in the vaginal area.

Sioux City police officer Douglas Young interviewed the victim on February 3, 1989. Over objection, Young testified:

Q. During the interview what complaint did she make? A. She elaborated on the incident where Mr. Bennett put his hands up under her shirt. She also spoke of other sexual acts that took place over a long period of time.

Q. Did she tell you where these happened? A. The acts took place at Arthur Bennett's residence. And I believe it's 115 North Alice.

Q. Did she tell you when they occurred? A. It was hard for (the victim) to put any -- associate any time with any particular event. She did indicate that she thought that it had occurred at least over the last year, maybe two years, but she was unable to associate any events with any particular time during that period.

Q. What did you do in order to have her explain to you what had happened? A. At one point during my interview with (the victim) I did produce some anatomically correct dolls for her to demonstrate to me what type of sex acts took place.

The State contends this evidence was properly admitted as a complaint or excited utterance. When a witness testifies to a victim's complaint of the act, the testimony is not hearsay. See Ogilvie, 310 N.W.2d at 195. The fact of the complaint is admissible as corroboration of the complainant's testimony. Ogilvie, 310 N.W.2d at 195; State v. Stevens, 289 N.W.2d 592, 595 (Iowa 1980). The testimony did not fall under the complaint exception.

The trial court has discretion in determining whether evidence is admissible as an excited utterance. See State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986); Stevens, 389 N.W.2d at 596; Ogilvie, 310 N.W.2d at 195. The fact that statements alleged to be excited utterances are made in response to questions tends to negate spontaneity. See Ogilvie, 310 N.W.2d at 196. The proximity of the statements to the event, as well as the fact that the victim's statements did not merely repeat the questioners' statements, are factors to consider in determining the statements spontaneous. See Grady, 183 N.W.2d at 714; State v. Haines, 259 N.W.2d 806, 810 (Iowa 1977). In criminal prosecutions, this exception to the hearsay rule generally applies when the statement is made under the influence of the excitement of the incident rather than on reflection or deliberation. Ogilvie, 310 N.W.2d at 196. Statements which go beyond describing the nature of the act and the time and place of its occurrence may be hearsay. Ogilvie, 310 N.W.2d at 195.

Statements which identify the accused are hearsay and inadmissible unless they come within an exception to the hearsay rule. Ogilvie, 310 N.W.2d at 195; Stevens, 289 N.W.2d at 595-96. The statements given to the police officers should not have been admitted. They were made in response to direct questioning. They were made after the victim had been questioned by other persons. The statement to the second officer was made over three days after the last encounter, a time not in such proximity with the event so as to avoid any presumption of fabrication. See State v. Haines, 259 N.W.2d 806, 810 (Iowa 1977); State v. Swanson, 228 N.W.2d 101, 104 (Iowa 1975); State v. Crawford, 202 N.W.2d 99, 101 (Iowa 1972).

The admission of hearsay evidence is presumed to be prejudicial unless it is affirmatively established no prejudice resulted. See State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979). Defendant argues its admission was prejudicial because the State's case stands on the credibility of the victim, and the testimony of the witnesses buttressed the victim's testimony. The defendant also points out that the medical testimony is not conclusive.

The State contends even if some of the evidence was not admissible, it was not prejudicial. The State contends any error was tempered by limiting instructions, and the hearsay did not impact the verdict. The State argues if we

affirm admission of one of the four witnesses' challenged testimony, then the testimony of the other witnesses is cumulative. See State v. Plaster, 424 N.W.2d 226, 232 (Iowa 1988); State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984); State v. Whitfield, 315 N.W.2d 753, 755 (Iowa 1982).

We have affirmed the admission of the victim's mother's testimony. The testimony of the other three witnesses parrot her testimony. When we consider the cumulative nature of the testimony, together with the limiting instruction given by the trial court, we find any error not to be prejudicial.

AFFIRMED.

All judges concur except Schlegel, J., who specially concurs.

SCHLEGEL, J. (specially concurring)

Assuming the State has not waived the issue of lack of prejudice from the erroneous introduction of hearsay, I concur in the finding by the majority that the testimony of the nurse and of the two police officers should not have been admitted. I also concur that under the law of Iowa such admissions were without prejudice to the defendant and, therefore, agree with the result. There was evidence by the victim and evidence properly admitted from the mother. The evidence of the three other witnesses was substantially similar to or identical to the evidence given by the victim and the mother.

The Iowa Supreme Court has held that hearsay evidence, improperly admitted, may be without prejudice (or harmless) if it is cumulative to evidence properly in the record. In State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978), the court held that cumulative evidence admitted in error is not prejudicial if "there is a multiplicity of other sources of information which duplicate [the] testimony." In the case of State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979), the court found that hearsay evidence, in order to be nonprejudicial, must be "substantially similar" to the evidence in the record and must be reliable. Finally, in State v. Brotherton, 384 N.W.2d 375, 379 (Iowa 1986), the court determined there was no prejudice because the evidence was "cumulative to the previous admissible testimony."

While it is a very well-established rule that if erroneously admitted evidence is merely cumulative to other evidence in the record there is no prejudice, it is difficult to divine the rule for its application. We should adopt a definite analysis for determining if cumulative evidence can be found truly nonprejudicial. One such analysis has been asserted by Professor Martha A. Field:

> Three requisite elements of the cumulative evidence test [are] suggested: (1) There should be substantial similarity, in type of evidence and incriminating factual details, between the tainted evidence and the untainted evidence of which it is "cumulative." (2) The untainted evidence should be indisputable, either because the facts are in some way affirmatively accepted by the defendant or for other reasons. (3) Care should be taken that the "untainted" evidence in no way derives from the "tainted" evidence.

Field, Assessing the Harmlessness of Federal Constitutional Error--A Process in Need of a Rationale, 125 U. Pa. L. Rev. 15, 55 (1976).

If this analysis were to be applied in this case, it would appear that the tainted evidence (the hearsay testimony of the two police officers and the nurse) would not meet the second element. However, since the untainted evidence would have to be the testimony of the victim, corroborated by the untainted testimony of the mother, it would appear that while not undisputed by the defendant, this testimony would have substantial probative value and would be very reliable evidence. Were this analysis adopted, it would add clarity to the analysis of error

which may be prejudicial or nonprejudicial because of its cumulative nature.

I believe that such hearsay evidence should only be found excusable on the basis of lack of prejudice if: (1) it is substantially similar to other evidence properly in the record; (2) the properly admitted evidence is direct evidence of a highly probative nature; and (3) the properly admitted evidence in no way derives from the hearsay evidence.

"Nonprejudicial error" is used above in order to avoid the use of the oxymoronic expression "harmless error." No error can be "harmless" when it adds to the confusion of the body of law. Error may not cause harm to a defendant or a defendant's rights, but that can best be expressed as being without prejudice to the defendant.

The adoption of a definite rule or process to determine the effect of erroneously admitted hearsay will avoid a pragmatic approach to the decision of cases.