IN THE COURT OF APPEALS OF IOWA

No. 3-290 / 91-1230

FILED
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CLERK SUPREME COURT

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**STATE OF IOWA,**

Appellee,

vs.

**MICHAEL D. ARMENT,**

Appellant.

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Appeal from the Iowa District Court for Poweshiek County, Richard J. Vogel, Judge.

Michael D. Arment appeals the judgment entered upon his conviction, following a jury trial, of sexual abuse in the first degree in violation of Iowa Code section 709.2. **AFFIRMED.**

Kermit L. Dunahoo of Dunahoo Law Firm, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher, Jr. and James Kivi, Assistant Attorneys General, and Michael W. Mahaffey, County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

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**OXBERGER, C.J.**

On September 11, 1992, at 4:00 p.m., the child's mother left for work, leaving the child with her live-in boyfriend, Michael D. Arment. At approximately 6:45 p.m., Arment phoned the mother and reported the child was bleeding between her legs. The mother returned home to find the child lying naked on a towel on the living room floor. The child was whimpering and bleeding from her vagina. The child was twenty-seven months old at the time. The mother took the child to the hospital. Surgery was required to repair the internal and external wounds. The treating physician opined the injuries were consistent with repeated trauma caused by an erect male penis. Further testimony indicated the bleeding could not have been prompted by an earlier injury. Arment was the only person with access to the child between 4:00 p.m. and 6:45 p.m.

The State charged Arment with sexual abuse in the first degree and second degree in violation of Iowa Code sections 709.2 and 709.3.

Arment filed an application for evaluation of the child to determine her recollection of the events and her ability to communicate events. The district court appointed Dr. Barbara Cavallin, a clinical child psychologist, to evaluate the child. During one of the sessions, after the child returned from the bathroom with her mother, she named her uncle as the perpetrator. When Dr. Cavallin questioned

her further, the child was unable to remember what she said. After examining the child, Dr. Cavallin opined the child would be a very unreliable witness. Dr. Cavallin concluded the child was being coached.

The case proceeded to trial without the testimony of the child. A jury found Arment guilty of sexual abuse in the first degree. Arment filed a motion in arrest of judgment and a motion for a new trial. The court overruled both motions. The sentencing court entered judgment on the conviction and sentenced Arment to life imprisonment. Arment appealed.

While the appeal was pending, Arment sought limited remand to pursue a motion for new trial. The motion was granted. Arment filed a motion for new trial based upon a claim of newly-discovered evidence. The newly-discovered evidence consisted of the child's alleged posttrial statements to her mother and her baby-sitter naming her uncle as the perpetrator.

Following an initial hearing, the district court ordered the child to be evaluated again by Dr. Cavallin. Although Dr. Cavallin was unable to meet with the child for the full eight hours requested, she did not believe that the child had much more to say. Dr. Cavallin noted that the child was becoming more anxious as the sessions continued. Dr. Cavallin felt that it would not be in the child's best interest to testify before a judge or a jury.

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Arment filed a motion for continuance and an application to obtain the child's testimony. Arment asked the court to reopen the evaluations with Dr. Cavallin, or in the alternative, appoint a different psychologist. He also filed a notice of intent to offer the hearsay testimony of the baby-sitter and the mother. The court denied the motion for continuance. Arment renewed his motion for continuance and requested an evidentiary hearing.

A hearing was held on the motions. The district court denied Arment's request to obtain the child's testimony or to arrange for a different psychologist's evaluation and denied the motion for a continuance. On the motion for a new trial, Arment attempted to introduce the testimony of the mother and the baby-sitter as an exception to the hearsay rule. Both filed affidavits stating the child had spontaneously named her uncle as the perpetrator.

The district court denied the motion for a new trial. The court determined the statements made by the child were inadmissible hearsay and the statements did not fall within an exception to the hearsay rule.

## I. Denial of Motion for Continuance.

Arment first contends the district court erred in denying his motion for continuance on the motion for new trial.

In his argument, Arment relies solely on State v. Fox, 491 N.W.2d 527 (Iowa 1992). In Fox, the court held a defendant is entitled to a meaningful opportunity to present a defense. Id. at 531. In essence, Arment claims the trial court's denial of continuance denied him the right to the victim's testimony at the hearing on the motion for new trial.

We disagree. State v. Fox, certainly reiterates a defendant's right to present a meaningful defense. However, we do not read Fox to allow a defendant to compel an incompetent witness to testify at a hearing on a motion for a new trial. Furthermore, the evaluating psychologist indicated no additional time was needed for evaluation: the victim was simply not reliable for testimony and may, in fact, be traumatized by further evaluation or compelled testimony. Accordingly, we affirm the district court's denial of Arment's motion for continuance of the hearing on the motion for new trial.

**II. Failure to Compel Child to Testify.**

Arment next contends the district court erred in failing to compel, or to allow access to, the child for testimony at the motion for new trial.

Dr. Cavallin conducted two evaluations of the child. The first occurred prior to trial. The second occurred following Arment's motion for new trial on the basis of newly-discovered evidence. Both parties stipulated to both

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the evaluations and to Dr. Cavallin as the evaluator. After both evaluations, Dr. Cavallin concluded the child was unable to discuss the incident. She also indicated she was concerned the child was being coached and did not believe the child would serve as a reliable witness. Finally, she reported she was concerned that additional evaluations would create too much pressure on the child and believed the child was becoming increasingly anxious.

We find the trial court's reliance on Dr. Cavallin's report wholly within its discretion. We note Arment is correct in acknowledging that any attempt to invoke Sixth Amendment confrontation clause rights would not be apropos in this case. See, e.g. Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). This is not the original trial, and the child is not the accuser nor is she competent to testify. Thus, we conclude the district court's ruling was well within its discretion, and we affirm.

**III. Exclusion of Hearsay Testimony.**

Arment next contends the district court erred in excluding as hearsay the proferred testimony of the child's mother and baby-sitter.

Arment claims the child's alleged statements to her baby-sitter constitute an excited utterance and, accordingly, are admissible hearsay under Iowa Rule of Evidence 803(2). Once again, the testimony was offered at Arment's hearing on the motion for new trial.

We review for an abuse of discretion. State v. Hy, 458 N.W.2d 609 (Iowa App. 1990).

The admission of hearsay under this exception lies largely within the discretion of the trial court, which must initially determine whether the out-of-court statements were induced by the excitement caused by the startling event which is being described. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986).

This incident occurred in September 1990. The child allegedly made her statement to the baby-sitter some time in July 1991. While we recognize authority allowing excited utterances some time after the startling event, we refuse to find a trial court abused its discretion in refusing to find the child's alleged statements, nearly one year later, were induced by the startling event. Likewise, we find no abuse of discretion in refusing to admit the mother's statements on similar discretionary grounds. We affirm the trial court.

**IV. Newly-Discovered Evidence.**

Finally, Arment contends the district court erred in failing to grant a new trial on the basis of newly-discovered evidence. Specifically, he contends the hearsay statements noted above constitute newly-discovered evidence.

To prevail on a motion for a new trial based on newly discovered evidence the defendant must show that: (1) the evidence was discovered after the verdict; (2) it could not have been discovered earlier in the exercise of due diligence; (3) the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) the evidence probably would have changed the result of the trial. State v. Allen, 348 N.W.2d 243, 246 (Iowa 1984) (citing State v. Gilroy, 313 N.W.2d 513, 521-22 (Iowa 1981); State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975)).

We do not find the alleged statements, noted above, to constitute newly-discovered evidence. The child was reevaluated and determined not competent to testify. Further, the low indicia of reliability noted in inadmissible hearsay also fails to constitute newly-discovered evidence. We affirm the district court.

**AFFIRMED.**