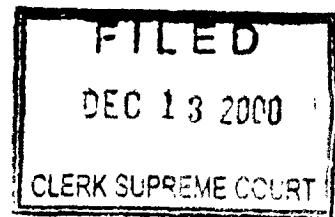


IN THE COURT OF APPEALS OF IOWA

No. 0-677 / 00-0706
Filed December 13, 2000



STATE OF IOWA,
Appellee,

vs.

KENNETH RAYMOND MEDLEY,
Appellant.

Appeal from the Iowa District Court for Marion County, Dale B. Hagen,
Judge.

On appeal from his conviction for second-degree sexual abuse, defendant contends the trial court erred in overruling his objection to certain hearsay testimony and that he was provided ineffective assistance of counsel.

AFFIRMED.

Susan E. Stockdale of Roehrick, Hulting, Krull & Blumberg, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kristin E. Mueller and Scott D. Brown, Assistant Attorneys General, Terry E. Rachels, County Attorney, and Jane A. Orleans, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Hecht, JJ.

VOGEL, J.

On appeal from his conviction for second-degree sexual abuse, Kenneth Raymond Medley contends the trial court erred in overruling his objection to certain hearsay testimony and he received ineffective assistance of counsel. We affirm.

Background facts. On August 24, 1999, Kathryn McCombs entrusted her two daughters, ages four and two years, into Glenda Monsma's care. Monsma's adult son, Medley, lived in the residence with her. When McCombs returned to pick up her children, the girls were alone in the care of Medley. As soon as she arrived, her older daughter, who appeared upset, ran to her, hugged her and stated, "Mommy, Kenney had me touch his pee-pee." Upon hearing this statement, McCombs looked to Medley who shrugged and responded with "whatever." McCombs left with her daughters and when they were in the car, questioned the four-year-old regarding what had transpired between her and Medley. Her daughter repeated her earlier statement and added, "Kenney touched my pee-pee." McCombs contacted the police and filed a complaint.

Lori Rockwood, from the Department of Human Services (DHS), and Officers John Van Haaften and David Beukelman went to Monsma's house to investigate McCombs' report. Medley was asked to come to the police station and answer some questions. He was then placed in an interview room with Officers Van Haaften and Beukelman and DHS investigator, Rockwood. Medley was primarily interviewed by Officer Van Haaften, with Officer Beukelman and

Rockwood sitting in on the interview. During the course of the interview, Medley admitted to various sexual contacts with both of McCombs' daughters.

Medley was convicted of two counts of second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3(2) (1999). Finding Medley's confession as to McCombs' two-year-old daughter was not adequately corroborated at trial, Medley was sentenced to an indeterminate twenty-five year term of incarceration on one count of sexual abuse. He now appeals.

Scope of review. In the case of hearsay rulings, we review for correction of errors at law. See *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). Admission of hearsay evidence is prejudicial to the non-offering party unless the contrary is shown. *Id.* If hearsay has been admitted, prejudice to the non-offering party is presumed unless the contrary is affirmatively established. *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996). Admission of hearsay alone is not a valid ground for reversal where the State has upheld its burden of proving the challenged evidence did not impact on the jury's verdict of guilty. *State v. Barrett*, 445 N.W.2d 749, 754 (Iowa 1989); *State v. Nims*, 357 N.W.2d 608, 609 (Iowa 1984). Furthermore, prejudice has not been established where substantially similar evidence has been admitted but was not objected to. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992).

Hearsay. Medley alleges the trial court incorrectly allowed hearsay testimony to be presented to the jury. He further claims he was prejudiced by the hearsay testimony because it was the only corroborating evidence to his confession. The State argues the trial court correctly allowed the child's initial

statement into evidence under the excited utterance exception and Medley cannot show he was prejudiced by the second statement, as it was cumulative.

Medley appeals the admission of the two statements made by the older child, under separate legal theories. McCombs testified as to her daughter's statements, both when she arrived at the Monsma house and in the car on the way home. At trial, Medley's attorney objected to the admission of the conversation in the vehicle as being hearsay but made no objection to the admission of the initial statement made by McCombs' daughter. Therefore, Medley appeals the initial statement under a claim of ineffective assistance of counsel.

McCombs testified at trial that upon arriving at the Monsma house to retrieve her children from daycare, her older daughter approached her immediately, hugged her and stated, "Kenney had me touch his pee-pee." Medley's trial counsel failed to object to the admission of this statement as hearsay. Upon reviewing the record, we find even if this statement had been objected to, it could have been admitted under the hearsay exception of an excited utterance. Iowa R. Evid. 803(2). Iowa Rule of Evidence 803(2) defines an excited utterance as follows:

A statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition.

This exception applies generally to statements made under the influence of the excitement of an incident, rather than on reflection or deliberation. *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986).

Medley argues this exception does not apply because it cannot be established when the abuse occurred, in order to determine whether the child was “under the stress or excitement caused by the event or condition.” When McCombs arrived at 3:30 p.m., she testified the children were there alone with Kenney. In addition to this testimony, Medley’s girlfriend, Amy Nokes, testified she left Medley alone in Monsma’s home with the children at about 2:30 p.m. Therefore, the record indicates Medley was in the home alone with the children for about an hour prior to McCombs’ arrival. This information was corroborated by Medley during the police interview. Upon McCombs’ arrival, she noticed her older daughter was visibly upset, as she immediately came over and hugged her. The statement, “Mommy, Kenney had me touch his pee-pee,” immediately followed. Although the statement was likely not made immediately after the abuse occurred, it was made as soon as possible when the mother arrived on the scene. See *State v. Hy*, 458 N.W.2d 609, 611 (Iowa App. 1990) (finding four-year-old child’s statements to mother as soon as alone with her and to father upon his return from a business trip the morning following her sexual abuse fell under the excited utterance hearsay exception). Therefore, we find this statement falls within the excited utterance exception to the hearsay rule. Any hearsay objection Medley’s trial counsel could have made would have been futile and, thus, he breached no essential duty by failing to lodge an objection.

Medley contends the second hearsay statement admitted through McCombs’ testimony was regarding the conversation with her daughter on the drive home from Monsma’s house. He claims these statements do not fall within

the excited utterance exception because they were the daughter's response to questions asked by McCombs. The State asserts these statements do meet the definition of an excited utterance because, although the statements were in response to questions by her mother, that is only one of several factors to be considered. *Id.* The court has previously stated:

To determine if a statement is spontaneous, the trial court must consider the circumstances under which the statements were made. Relevant factors include the nature of the startling event, whether the use of questions led to statements which otherwise would not have been made, the age and condition of the declarant, the subject matter of the statements used, and the lapse of time. No one factor is conclusive on whether a statement is admissible.

Id. (citing *State v. Watts*, 441 N.W.2d 395, 398 (Iowa App. 1989)). The State urges the nature of the abuse sustained by the child, the young age and the short period of time between the occurrence and the statements qualify the second statements in the car to also fall into the excited utterance exception to the hearsay rules.

Regardless of whether the second statements should have been excluded by the trial court, we find Medley was not prejudiced by their admission into evidence. The nature of the statements was a reiteration of the child's initial statement of sexual contact. Because the initial statement met the criteria of an excited utterance, the second statement, although expanding the nature of the sexual contact, was largely cumulative. It did not impart any new information to the jury and, therefore, cannot be found to be prejudicial to Medley when the earlier or previous statement would have been admitted under the excited utterance exception. See *State v. Wixom*, 599 N.W.2d 481, 484 (Iowa App.

1999) (stating evidence that is merely cumulative cannot be said to injuriously affect the party's rights).

Ineffective assistance of counsel. Medley alleges his trial attorney was ineffective on two additional grounds; failing to present evidence at the suppression hearing regarding the voluntariness of his confession and failing to investigate claims to discredit McCombs' testimony. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984).

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App. 1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice, a defendant must prove there is a reasonable probability that but for counsel's unprofessional error, the result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). A reasonable probability is one sufficient to undermine confidence in the outcome. *State v. Carrillo*, 597 N.W.2d 497, 500 (Iowa 1999).

Suppression hearing. Medley filed a motion to suppress the admission of his police interview and confession, alleging the statements were not voluntarily made. The motion was overruled and the police interview and written confession were allowed into evidence at trial.

The State has the burden of establishing by the preponderance of evidence the confession is voluntary. In determining whether a confession is voluntary, we look at all the circumstances under which it was given. No one factor is determinative. The court in *Davis* listed the following as factors in determining voluntariness of confessions:

“... the defendant's age, experience, prior record, level of education and intelligence; the length of time the defendant is interrogated; whether physical punishment was used; defendant's ability to understand the questions; defendant's physical and emotional condition; whether any deceit or improper promises were used in gaining the admission; and any mental weaknesses the defendant may possess. In the event the questioning was custodial, defendant's knowledge and waiver of his Miranda rights and the length of his detention would also be considered.”

State v. Brown, 589 N.W.2d 69, 73 (Iowa App. 1998) (citations omitted).

Medley alleges he is a lower functioning individual and made the statements merely to escape an uncomfortable situation in which he felt extreme stress. At trial, his attorney presented the testimony of several people, including Monsma, Medley, and Dr. Garfield, a clinical psychologist. The crux of this evidence was that Medley is a low functioning individual who is gullible and easily persuaded. Medley maintains he was separated from his mother, taken to the police station, overwhelmed by the presence of three investigators in the room, asked suggestive questions and, after initially denying the abuse, eventually agreed with the officer's statements in a desire to end the stressful situation and be allowed to leave.

The State countered this theory, presenting the testimony Officer Van Haaften and Lori Rockwood, who stated Medley was calm and responsive during the interview. They testified he did not appear to be confused or disoriented but answered questions appropriately and felt comfortable enough to ask for a drink of water. There were no threats or intimidation by the officers during the interview. The interview room door remained open for most of the three-hour questioning period. Officer Van Haaften testified he asked open-ended questions, using specific terms or phrases only to clarify Medley's answers. Further, Medley did not deny his actions very long into the interview. Close to the beginning of the interview, he was asked why he did "it" but was not told specifically what the "it" was. He responded that he was driven by a lack of sex and then went on to admit what he had done to McCombs' daughters. When questioned about another female child in the care of his mother, Medley consistently denied having had any sexual contact with her because he respected her and her mother. Medley's witness, Dr. Garfield, testified Medley achieved a ninety-one on an I.Q. test, which is at the low end of the normal range. Officer Van Haaften testified he was familiar with Medley as he had been a reliable informant on a prior criminal investigation. All of the evidence, including that which tended to optimize Medley's lower functioning, was presented at trial. Having failed on the same proposed evidence at the trial, he cannot offer a reasonable probability that a presentation of these same witnesses attacking the voluntariness of his confession, would have rendered a different outcome on the suppression motion. Therefore, we find Medley cannot show

that he was prejudiced by his attorney's failure to present witnesses at the suppression hearing.

Additional investigation. Finally, Medley argues his counsel was ineffective in failing to investigate a potential witness who claims to have knowledge of information that could have been damaging to the testimony of Kathryn McCombs. The State asserts Medley cannot show prejudice on this issue, as there was overwhelming evidence against Medley and an effort to impeach McCombs would not have changed the outcome of the trial.

Medley contends a potential witness, Eric Martins, had observed men visiting McCombs at her home and such testimony would have served to counter McCombs' testimony that she did not have any male overnight guests. In addition, Medley claims Martins discovered that McCombs told another person that she had set up Medley. If presented, Medley argues this would have served to undermine her testimony altogether.

The State claims Medley cannot show he was prejudiced by his trial counsel's failure to investigate and call this witness. The remaining evidence, including the child's statement, the physical evidence of vaginal redness in both girls, the opportunity Medley had when left alone with the children on several occasions and his confession to having committed such acts would have rendered the same result. Therefore, we find Medley cannot claim he was prejudiced by his counsel's failure to investigate a potential witness.

Having considered all issues on appeal, we affirm the conviction.

AFFIRMED.