IN THE COURT OF APPEALS OF IOWA

No. 2-015 / 91-260

FILED
MAR 2 : 1992
CLERK SUPREME COURT

425

STATE OF IOWA,

Appellee,

vs.

CRAIG LESLIE GARDNER,

Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Gardner appeals his conviction, following a jury trial, for sexual abuse in the third degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Denver D. Dillard, County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

Craig Gardner was accused of committing a forcible sex act with his children's fourteen-year-old baby-sitter. Gardner denied any sexual contact had occurred. Gardner suggested the baby-sitter had fabricated the accusation because she became upset after being reprimanded by him for leaving the children unattended.

Gardner was charged with sexual abuse in the second degree. A jury found him guilty of the lesser-included offense of sexual abuse in the third degree. He was convicted of the latter charge and sentenced as a habitual offender.

Gardner appeals his conviction. He raises three issues on appeal.

Gardner first contends the district court erred in admitting a videotaped interview of the victim which was conducted by a social worker from the Child Protection Center. Gardner argues the videotaped interview was prejudicial hearsay and therefore inadmissible. We disagree.

Iowa Rule of Evidence 801(d)(1)(B) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if:
> (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, . . .

The victim was vigorously cross-examined during which she made inconsistent statements concerning her memory and matters contained in a prior deposition. Parts of the cross-examination specifically related to the child's present memory and whether she made up parts of her testimony on direct examination. We conclude the child's out-of-court statements to the social worker were admissible to rebut the implication of recent fabrication. See State v. Brotherton, 384 N.W.2d 375, 380-81 (Iowa 1986). We affirm on this issue.

Gardner next contends the district court erred by responding to a question from the jury without securing his presence. During jury deliberations the jury directed a question to the court. They asked to see depositions and an admission. The court asked defense counsel if he perceived "any problem with dealing with this without Mr. Gardner." Counsel responded in the negative. The court went on to discuss with both attorneys what the response to the jury should be. The court denied the jury's request by writing "No" on the note from the jury.

Defendant's right to be present is derived from the sixth amendment and implemented by Iowa Rule of Criminal Procedure 18(5)(g) which provides:

> After the jury has retired for deliberation, . . . if it desires to be informed on any point of law, arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information may be given, in discretion of the trial court. . . . Where the court gives the jury additional instructions, this shall appear of record. Provided, that the

> procedure described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

Defendant asserts although his trial counsel was present and purported to waive his presence, the right to be present for judge-juror communications is personal and cannot be waived by counsel. See State v. Snyder, 223 N.W.2d 217, 222 (Iowa 1974).

We do not address the merits of defendant's claim because this issue was not properly preserved. Defendant was required to preserve the claimed error by raising the issue in his motion for new trial. See State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). Defendant failed to do so.

Finally, Gardner contends his trial attorney rendered ineffective assistance by failing to object to hearsay evidence. Gardner also contends his trial attorney was ineffective by failing to preserve the issue of defendant's presence during the communication between the court and jury.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We

conclude there is an inadequate record for us to adjudicate the defendant's claim without counsel's explanation for his conduct. We preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.