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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

288

STATE OF IOWA,

Plaintiff-Appellee,

vs.

THOMAS ALLEN ORR,

Defendant-Appellant.

Filed November 20, 1984

4-355
83-1138

Appeal from the Iowa District Court for Marshall County - M. D. Seiser, Judge.

Defendant appeals his conviction for lascivious acts with a child in violation of Iowa Code section 709.8 (1983). AFFIRMED.

Charles Harrington, Appellate Defender, and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendant, Thomas Orr, appeals his conviction for lascivious acts with a child in violation of Iowa Code section 709.8 (1983). He asserts: (1) that a new trial should have been granted due to newly discovered evidence; (2) that certain statements should not have been admitted over hearsay objection; (3) that he was denied effective assistance due to trial counsel's failure to object to certain testimony allegedly constituting inadmissible hearsay; and (4) that the evidence was insufficient to support the trial court's verdict of guilty. We affirm.

Thomas Orr lived with Maxine Miller and her three children for approximately one and one-half years. On March 9, 1982, Maxine and her daughter Valerie met with Linda Fulton of the Department of Social Services (DSS) and a policeman to discuss Orr's possible sexual abuse of Valerie. Based on an interview with Valerie, Fulton determined that Orr had on several occasions touched Valerie's genitals and breasts. She referred Valerie to a Dr. Reinertson, a physician who examined Valerie. Maxine also signed a complaint with the police. Orr was forced to leave the Miller residence a few days later and subsequently was charged with lascivious acts with a child.

Maxine continued to date Orr after he was forced to leave the Miller residence and after he was charged, and defendant frequently visited the Miller residence. Because Maxine continued her relationship with Orr, DSS filed a Child In Need of Assistance (CHINA) petition, and Valerie was removed from Maxine's care and placed in a foster home.

After Orr was forced to move out and before trial, Maxine contacted Orr's trial counsel in an effort to help Orr. She told the trial counsel she believed Orr was innocent.

Orr's trial was held before the bench. Maxine and Valerie were the prosecution's main witnesses. On cross-examination Maxine testified that she originally went to the Department of Social Services because she was jealous and

suspected Orr was seeing another woman. She admitted stating, in a deposition taken by Orr's counsel, that Orr had not fondled Valerie and that he had acted toward the child in a fatherly way. Additionally, she admitted stating that a person from the DSS strongly tried to convince her that Orr was guilty of the charge. She also admitted she was at times afraid the DSS would take Valerie from her if she did not cooperate in the case against Orr.

Valerie was eleven years old at the time of the trial. The trial court found her competent to testify, and she was sworn as a witness. Before she was able to testify about the events in question, Orr's attorney conducted a voir dire. Valerie's testimony on voir dire showed that she was not living with her mother at that time, that she feared she might not be able to return to living with her mother, and that she was afraid she might not be able to return to her mother if she didn't say the right things while testifying. However, she stated she would not lie so that she could return to her mother. Orr's attorney then moved that she be ruled incompetent to testify. The trial court denied that motion and the direct examination proceeded.

Valerie stated that Orr had touched her genitals. At the conclusion of her testimony it was unclear to the trial court whether the contact she testified to was on the outside of her clothing as opposed to the inside, so the court suggested that the attorneys explore that issue. Valerie then testified the contact was inside of her clothing.

A week later, when trial resumed, Orr's attorney called Valerie as a witness to have her elaborate about a time when Orr slapped her in the buttock area. The county attorney then, on cross-examination, asked her if Orr had ever touched her inside of her clothing. She said he had not.

Orr's attorney called both Linda Fulton and Dr. John Reinertson. On cross-examination the prosecutor had both witnesses testify to statements made by Valerie to the witness. Orr's attorney objected to that testimony when Fulton was testifying, but made no objection when Reinertson testified.

The trial court found Orr guilty of lascivious acts with a child on May 13, 1983. Orr filed a motion for a new trial, based on newly-discovered evidence, on June 22, 1983. A hearing on the motion was held, and the motion was overruled. Orr was then sentenced to a term of imprisonment not to exceed five years.

I. Denial of Motion for New Trial. Orr moved for a new trial based on newly-discovered evidence. This evidence consisted of the testimony of two Morman missionaries who had been living with Maxine and her children before the trial. The affidavit of one Staves showed she would testify that Maxine complained to the DSS to get Orr out of her life and that Valerie had voluntarily stated that Orr "never did anything to me." The affidavit of the other witness, one Talamantes, showed she would testify about the relationship between Maxine and Orr, and that she got the impression from Maxine that Tom was innocent.

The trial court overruled the motion on the grounds that due diligence had not been shown and that the evidence would be cumulative. Orr claims the trial court's ruling was error. We disagree.

The decision whether to grant a new trial was in the discretion of the trial court. We will not disturb the decision on appeal unless Orr carries the heavy burden of proving the trial court abused its discretion and prejudice resulted therefrom. See State v. Lindsey, 302 N.W.2d 98, 101 (Iowa 1981). See also Iowa R. App. P. 14(f)(3). To meet his burden, Orr must show that the evidence: (1) was discovered after judgment; (2) could not have been discovered earlier in the exercise of due diligence; (3) was material to the issue, not merely impeaching or cumulative; and (4) would probably change the result if a new trial were granted. Lopez v. State, 318 N.W.2d 807, 811 (Iowa Ct. App. 1982). He has not met his burden. We agree with the trial court that the two witnesses' testimony would be cumulative and unlikely to change the result of this case. The trial court did not abuse its discretion.

II. Admission of Hearsay. Orr contends the trial court erred in allowing Fulton to testify about statements made to her by Valerie that Orr had touched Valerie's breasts and genitals. The testimony was objected to on the grounds that it was hearsay. The trial court, however, overruled the objection. We hold that the trial court correctly admitted the testimony into evidence.

Our holding is based on rule 801(d)(1)(B) of the Iowa Rules of Evidence. Rule 801(d)(1)(B) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if:
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> (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, ...

Valerie—the declarant—testified at the trial before Fulton testified. She was cross-examined by Orr's counsel, who tried to show that her testimony was improperly influenced or motivated. The statements that Fulton testified to were largely consistent with Valerie's testimony. We therefore believe that rule 801(d)(1)(B) applied in this situation and that Fulton's testimony was admissible. We also point out that our decision is consistent with decisions in similar circumstances in other jurisdictions. E.g., State v. Conroy, 131 Ariz. 528, 531, 642 P.2d 873, 876 (Ariz. Ct. App. 1982); State v. Jenkins, 326 N.W.2d 67, 71 (N.D. 1982); State v. Kaiser, 34 Wash. App. 559, 565, 663 P.2d 839, 842 (1983); Thomas v. State, 92 Wis. 2d 372, 389-90, 284 N.W.2d 917, 926 (1979).

Orr argues that rule 801(d)(1)(B) should not apply because he allegedly did not charge Valerie with improper influence or motive, but instead made those charges against her mother, Maxine. That argument is without merit. On the voir dire examination of Valerie, Orr's counsel alluded to fears she had of being prevented from returning to her mother's home if she did not say the right things. Such action was clearly an implied charge that Valerie's testimony was improperly

motivated. Moreover, we believe Orr's charge that Maxine testified because of improper influences and motivation was meant to apply to Valerie also. Valerie talked to the DSS and police because of Maxine's efforts.

Maxine's possible influence on Valerie forces us to consider whether Valerie's statements to Fulton should have been excluded because they were not made before Maxine had the opportunity to improperly influence Valerie. A similar question was considered in United States v. Parodi, 703 F.2d 768 (4th Cir. 1983). In that case the court stated:

> We recognize that there is a split in the authorities on this question whether Rule 801(d)(1)(B) conditions admissibility of prior consistent statements corroborative of an allegedly impeached witness's testimony on the absence of a motive to fabricate at the time the prior statements were made. Clearly the Rule itself includes no such limitation upon admissibility for this limited purpose. The Rule itself sets forth but two express conditions for the admissibility of such testimony for this purpose: 1. The prior statement must be "consistent with [the witness's in-court] testimony;" and 2. There must be "express or implied charge . . . of recent fabrication or improper influence or motive" against the witness. If the drafter of the Rule intended any other conditions for admissibility, it must be assumed they would have added them. They did not.

Id. at 784. The Parodi court went on to point out that the trial court has latitude in this area and that failure to admit rehabilitating testimony because of a possible improper motive would be "counter to 'the great principle of completeness, now enacted in Rule 106.' " Id. at 786 (quoting United States v. Rubin, 609 F.2d 51, 68 (2d Cir. 1979) (Friendly, J., concurring)). We believe the reasoning and result of Parodi is consistent with Iowa law. Valerie's statements were admissible in spite of possible improper influence by Maxine. "The fact that [her] statement may have been the result of undue influence exerted by another will not of itself prevent its admissibility, but rather it affects the weight to be given the statement by the trier of fact, the court in this case." Thomas, 92 Wis. 2d at 390,284 N.W.2d at 926.

III. Ineffective Assistance of Counsel. Orr also contends he suffered from ineffective assistance of counsel because his trial attorney did not object to the

admission of statements made by Valerie to Dr. Reinertson. This contention has no merit.

The admissibility of Valerie's statements to Dr. Reinertson is governed by the same principles that applied to her statements to Fulton. The circumstances surrounding her statements to Dr. Reinertson are not significantly different from the circumstance surrounding her statements to Fulton. Thus, we hold that the statements to Dr. Reinertson were admissible under rule 801(d)(1)(B). Because the statements were admissible, Orr was not prejudiced and his ineffective assistance claim must fail. See State v. Miles, 344 N.W.2d 231, 233-34 (Iowa 1984).

IV. Sufficiency of the Evidence. Orr challenges the sufficiency of the evidence. In reviewing the sufficiency of the evidence the court considers the evidence in a light most favorable to the State and considers all the evidence. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The verdict must be supported by substantial evidence, which is evidence that could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id. at 339. Direct and circumstantial evidence are equally probative, and the evidence must raise a fair inference of guilt and do more than create speculation, suspicion or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 308 (Iowa 1981). Here the evidence when considered as a whole in the light most favorable to the State supports a finding of guilt.

To prove that Orr committed lascivious acts with a child the State was required to prove Orr touched Valerie's pubes or genitals and that he did so with the intent to arouse or satisfy his sexual desires. Iowa Code § 709.8 (1981). There is sufficient evidence for each element.

The following evidence of defendant's guilt, although controverted, was produced at trial. Valerie testified that Orr touched her genitals when he looked inside her underwear after her bath, that on one occasion he touched her genitals

inside her pajamas, and that he touched her breasts. This testimony was corroborated by Valerie's statements to Fulton and Dr. Reinertson. Maxine testified that she had observed defendant touch Valerie's breast and pull down her underwear, and that Valerie had complained that defendant touched her vagina. Thus, there was ample evidence that Orr touched Valerie's pubes or genitals.

The required intent could be inferred from several factors in evidence. First, there was testimony that Orr would often look inside Valerie's underwear after she took a bath. Although Orr testified he did so to check whether her underwear was clean, he did not check Valerie's two brothers. Thus, one could infer he was actually acting for sexual gratification or arousal. Second, Orr's touching of Valerie's breasts evinces a sexual motivation. Finally, Uniform Jury Instruction No. 215 states that a finding of intent may be arrived at by such reasonable inferences and deductions as may be drawn from the facts proved by the evidence, in accordance with common experience and observation. It could reasonably be inferred that defendant's touching of a young girl's genitals was done with a sexual intent.

Orr's conviction was supported by substantial evidence.

AFFIRMED.