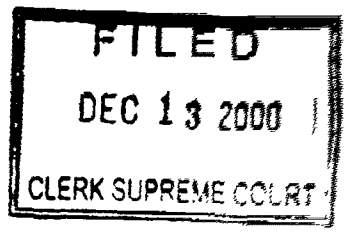
IN THE COURT OF APPEALS OF IOWA

No. 0-585 / 99-1142
Filed December 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN LEE FORD,
Defendant-Appellant.

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

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of second-degree sexual abuse in violation of Iowa Code section 709.3 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Denver D. Dillard, County Attorney, and Russell G. Keast, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

MAHAN, J.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of second-degree sexual abuse in violation of Iowa Code section 709.3 (1997). He contends (1) the district court erred in admitting multiple hearsay statements into evidence, or in the alternative, his trial counsel was ineffective in failing to preserve this issue for appeal, and (2) the evidence was insufficient to support the verdict. We affirm.

Ford babysat Courtney, an eight-year-old girl, and Ashley, her playmate, between December 1998 and February 1999. Courtney testified Ford touched her "private" with his fingers while she played Nintendo in the living room. Ford, Courtney, and Ashley were laying on the floor. Ford asked Courtney to lay on his back. Courtney was laying on Ford's back, covered with a blanket, when he unbuttoned her pants and touched her under her clothes with his fingers. Ashley, also covered with a blanket, was laying beside Courtney and Ford. Ashley could not see Ford touch Courtney. Courtney testified this occurred between five and ten times. Courtney testified Ford also picked her up, carried her to her bedroom, pulled down her pants, and licked her privates. Ford did this more than once.

Theresa, Courtney's mother, testified Ford lived nearby with Trina, Ashley's mother. Ford volunteered to watch Courtney. Between the fall of 1998 and January or February 1999, Ford watched Courtney and Ashley between fifteen and twenty-five times. Theresa testified about an instance when Ford and Trina came over to her home. Ford told Theresa that Amanda, another child in

the neighborhood, said Ashley told her about Ford touching her (Ashley's) private parts and peeing in her (Ashley's) mouth. Ford was concerned Amanda might spread rumors about Courtney and Dennis, Courtney's father. The next day, Theresa asked Courtney if anything had happened to her. Courtney told her mother Ford had touched and licked her privates when she and Ashley were playing Nintendo in the living room. Theresa testified her husband, Dennis, approached Courtney later and asked her the same question. Courtney told her father Ford had touched her and licked her approximately twenty times in the living room when she and Ashley were playing Nintendo.

Dennis testified he asked Courtney if anybody had ever touched her or done anything inappropriate. She told him Ford had them get naked, then licked and fondled Courtney and Ashley while they played Nintendo. Courtney did not tell her father about Ford taking her to her bedroom and licking her while laying on the floor. She did not tell her father about laying on Ford's back while he reached around and molested her.

Patti, Courtney's day care provider, testified she learned of the allegations against Ford directly from him. After speaking with Ford, Patti asked Courtney about the allegations. Courtney previously had not volunteered any information to Patti about sexual abuse. Courtney told Patti she and Ashley were naked in the house when Ford was there, and Ford had touched her privates and licked her vagina.

Susan, an interviewer at the Child Protection Center, testified Courtney told her Ford had her lay on top of him on her stomach. He would reach around

with one hand and touch her in her crotch area under her clothing. Courtney told Susan that Ford would be in her bedroom with her and ask her to lay on the floor, then lick her private area.

Kathleen, a pediatrician, examined Courtney on February 26, 1999. She found an abrasion and a scab in Courtney's genital area, but labeled her findings "nonspecific," and not diagnostic of sexual abuse. Kathleen testified it is uncommon to find physical findings of abuse in sexually abused children.

Ashley testified Ford never did anything to her when he babysat the two girls. She never saw Ford touching Courtney. She testified Ford was on the couch when she and Courtney played Nintendo on the floor. Ashley denied having told Amanda that Ford had touched and licked her, or peed in her mouth.

Trina, Ashley's mother, testified she heard Ford ask Courtney if anything happened to her. Courtney responded "no." Courtney's mother was present during this conversation. Ashley never told Trina that Ford had touched or licked her.

Ford testified. He explained he has had rheumatoid arthritis since 1988, and broke his pelvic bone in seven pieces and his hip in two places in 1995. Therefore, he cannot lie down on the floor without pain. He testified it would have been painful for him to lie on the floor with Courtney on his back. He denied any wrongful contact with Courtney.

Amanda took the stand as a rebuttal witness for the State. She testified Ashley told her Ford pulled down Courtney's pants and licked her "private."

Ashley told Amanda she had been afraid of Ford when she denied this statement previously.

Ford was charged with sexual abuse in the second degree, in violation of Iowa Code section 709.3 (1997). A jury found him guilty, and the court sentenced him to an indeterminate twenty-five year term of imprisonment. Ford appeals.

Admission of Evidence. The admission of hearsay evidence is prejudicial to the nonoffering party unless the contrary is shown. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). Therefore, our review of hearsay rulings is for errors at law. *State v. Tornquist*, 600 N.W.2d 301, 303 (Iowa 1999).

Ford contends the court erred in admitting five instances of hearsay during the testimony of Courtney's mother: (1) Theresa testifying about what Ford told her about certain statements made by Amanda; (2) Theresa testifying about what Ford told her; (3 and 4) Theresa testifying about what Courtney told her; and (5) Theresa testifying about what Dennis told her Courtney told him. Ford argues none of the statements fall within any exception to the hearsay rule.

Statements (3), (4), and (5). As a preliminary matter, we address the State's contention Ford failed to preserve error as to statements (3), (4), and (5). As a general rule, objections to evidence must be raised at the earliest opportunity after the grounds for objection become apparent. *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991). Making objections at the earliest possible opportunity gives a trial court the opportunity to take any necessary corrective action at a time when correction is still possible. *Id.* at 334. Failure to make

timely objection or motion to strike showing reason for delayed objection will preclude a party from later claiming error in admission of testimony. *State v. Binkley*, 201 N.W.2d 917, 919 (Iowa 1972).

Ford's counsel objected to statement (1) twice at trial, but lodged no further objections. Once a proper objection has been made and overruled, an objector is not required to make further objections to preserve his right on appeal when a subsequent question is asked raising the same issue. *State v. Kidd*, 239 N.W.2d 860, 863 (Iowa 1976). Repeated objections need not be made to the same class of evidence. *Id.* The testimony objected to in this case, however, did not relate to the "same class of evidence." Statements (1) and (2) addressed conversations between Theresa and Ford. Statements (3), (4), and (5) addressed conversations between Courtney and her parents. While related, these conversations addressed separate concerns and assertions. Therefore, Ford failed to preserve error as to statements (3), (4), and (5).

Even if Ford had preserved error as to statements (3), (4), and (5), we conclude no prejudice resulted from their admission. Erroneous admission of hearsay is presumed to be prejudicial unless the contrary is established affirmatively. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998). However, we will not find prejudice if the admitted hearsay is merely cumulative. *Id.* Substantially similar testimony to that of Theresa regarding her conversations with Courtney and Dennis appears elsewhere in the record. Therefore, the challenged testimony is merely cumulative.

Statements (1) and (2). Hearsay is defined 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." Iowa R. Evid. 801(c). We will affirm a ruling which admits evidence over a hearsay objection on any proper ground appearing in the record, even if it was not raised below. *State v. Weaver*, 608 N.W.2d 797, 805 (Iowa 2000). The testimony about Ford's statements was not offered for the truth of the matter asserted, namely Ford abused Ashley. Rather, the State offered the testimony to explain Theresa's subsequent conduct in approaching Courtney. The trial court did not err in admitting the nonhearsay evidence.

Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective assistance of counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

Ford argues his counsel provided ineffective assistance when he failed to preserve error by objecting to the admission of hearsay testimony. We conclude the admission of statements (3), (4), and (5) did not prejudice Ford. Therefore, Ford's trial counsel was not ineffective for failing to object to the admission of Theresa's testimony.

Sufficiency of the Evidence. We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4. The standards governing a challenge to the sufficiency of the evidence are well established:

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder [sic] that the defendant is guilty beyond a reasonable doubt.

State v. Mills, 458 N.W.2d 395, 397 (Iowa App. 1990) (quoting *State v. Wheeler*, 403 N.W.2d 58, 60 (Iowa App. 1987)). The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The very function of the jury is to sort out the evidence and "place credibility where it belongs." *Id.*

Ford contends insufficient evidence existed to support the verdict. He points to Courtney's responsive, rather than voluntary, statements to her parents; a day care worker's testimony Courtney never volunteered information about

abuse to her; the pediatrician's failure to find evidence of abuse; Ashley's contradiction of Courtney's allegations; and Courtney's impeachment of herself. We disagree with Ford's assertion.

Courtney demonstrated her ability to understand the truth. The events were relayed consistently to her parents and Susan, a counselor with the Child Protection Center. While small discrepancies existed in the testimony of several witnesses, we do not find the testimony in this case "so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *See State v. Smith*, 508 N.W.2d 101, 103 (Iowa App. 1993). Sufficient evidence existed to support the jury's verdict.

AFFIRMED.