FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed May 31, 1983
vs.	)	
ROBERT L. KENNEDY,	)	3-68 / 67540
Defendant-Appellant.	)	

Appeal from Scott District Court - James E. Kelley, Judge.

Defendant appeals his conviction of pimping in violation of Iowa Code section 725.2. REVERSED AND REMANDED.

Francis Hoyt, Appellate Defender, and Charles L. Harrington, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell and Schlegel, JJ. Hayden, J., takes no part.

PER CURIAM

Defendant appeals his conviction of pimping in violation of Iowa Code section 725.2. He asserts the trial court erred in admitting into evidence certain allegedly hearsay testimony. We reverse and remand for a new trial.

Defendant paid for and was a frequent visitor to a trailer where Karla Kosgard, who did not testify at trial, was arrested on prostitution charges. At trial a police officer testified concerning a conversation with Kosgard one or two weeks prior to her arrest and defendant's hearsay objection was overruled as follows:

> Q. Were you parked or what: A. No. I was driving down the street, and I seen her, and I pulled up and asked her what the problem was. She said that she had just broken up with Robert Kennedy.
>
> Mr. Gomez: Objection. Your Honor, I object and ask that my objection precede the answer, and my objection is one as to hearsay.
>
> The Court: The objection precedes the answer, but it will be overruled.
>
> A. She stated that she broke up with Robert Kennedy. "Is that why you're upset?" She said, "I broke up with him." She said, "I'm tired of him trying to pimp me up all the time."

Trial was to the court. In its findings and conclusions it found beyond a reasonable doubt that defendant knew the trailer was to be used for a sex act due to Kosgard's reputation as a prostitute and Kosgard's "admission against interest" regarding defendant's pimping. He was sentenced to a term not to exceed five years. This appeal followed.

I. The State first claims that defendant did not preserve error on his contention regarding the hearsay nature of Kosgard's statement "I'm tired of him trying to pimp me up all the time" as testified to by the police officer. Specifically, the State argues that defendant waived his objection by not renewing it after the officer completed his answer. We disagree. Defendant objected when the officer began relating Kosgard's statements and requested that his objection

precede the answer. This request was granted but the court overruled the objection. At that point, it was not necessary for defendant to make further objections to preserve error for review when the officer proceeded to relate more of Kosgard's statements made during that same conversation; specifically, the statement challenged here regarding defendant trying to "pimp her up." "Repeated objections need not be made to the same class of evidence." State v. Kidd, 239 N.W.2d 860, 863 (Iowa 1976). Defendant's hearsay objection was properly preserved.

II. The trial court relied heavily on Kosgard's statement to the police officer regarding defendant's "pimping her up" in finding defendant guilty. There is no question that the challenged statement was hearsay. The court apparently felt that the challenged testimony was admissible under the admission-against-interest exception to the hearsay rule. We disagree. Although the supreme court has recognized the declaration against pecuniary or proprietary interest exception to the hearsay rule, Bailey v. Chicago, Burlington & Quincy Railroad Co., 179 N.W.2d 560, 565 (Iowa 1970), it has not adopted an exception based on declarations against penal interests. See State v. Hamilton, 236 N.W.2d 325 (Iowa 1975). Even if Iowa courts recognized the penal interest exception, the State concedes it would not apply here because there was no showing of the declarant's (Kosgard) unavailability as a witness at trial. See Fed. R. Evid. 804(b)(3).

Rather, the State argues that the statement was admissible under an alternative exception to the hearsay rule. It is clear that no reversible error occurs if an erroneous evidentiary ruling may be sustained on other grounds. State v. Nowlin, 244 N.W.2d 596, 600 (Iowa 1976). Specifically, the State contends that the statement falls within the "excited utterance" exception. In State v. Ogilvie, 310 N.W.2d 192, 196 (Iowa 1981), the supreme court adopted the "excited utterance" definition found in Fed. R. Evid. 803(2): "[a] statement relating to a startling

event or condition made while the declarant was under the stress of excitement caused by the event or condition."

> These statements must meet a requirement of spontaneity in order to possess a circumstantial guarantee of trustworthiness for admissiblity. This exception to the hearsay rule applies generally in criminal prosecutions when the statement is made under the influence of the excitement of the incident rather than on reflection or deliberation.

State v. Stevens, 289 N.W.2d 592, 596 (Iowa 1980) (citations omitted).

We do not believe Kosgard's statement can be properly considered an excited utterance. The fact that she was explaining to the police officer why she broke up with defendant indicates reflection on her part rather than a state of excitement. The officer described her mood as "carefree" at the time of their conversation. Although not conclusive, the fact that Kosgard's statement was in response to the officer's question tends to negate spontaneity. Ogilvie, 310 N.W.2d at 196.

Because this testimony does not fall within the excited utterance exception, the trial court erred in allowing it into evidence. Defendant was clearly prejudiced by this evidence because, as already noted, the court relied heavily on it to find defendant guilty. We therefore reverse defendant's conviction and remand for a new trial.

REVERSED AND REMANDED.