IN THE COURT OF APPEALS OF IOWA

No. 7-216 / 96-0678

000381

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JACK RAY STEINSPRING,

Defendant-Appellant.

FILED
AUG 22 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Pottawattamie County, James Richardson, Judge.

Defendant appeals the judgment and sentence entered upon his conviction of second-degree sexual abuse in violation of Iowa Code section 709.3(2) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, Richard Crowl, County Attorney, and Erin K. Burke, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ.

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PER CURIAM.

Defendant-appellant Jack Ray Steinspring, who was charged with sexually abusing the five-year-old daughter of Tina Moore, appeals the judgment and sentence entered following his conviction in a jury trial of second-degree sexual abuse in violation of Iowa Code section 709.3(2) (1995). He advances the trial court erred in (1) admitting hearsay evidence of statements made by the alleged victim and her friend, and (2) admitting evidence he had been convicted of burglary. We affirm.

Defendant lived in a motel unit with Tina Parker and her five-year-old daughter, Christina. Tina Moore lives in the same motel with her five-year-old daughter, B.S. B.S. was playing in defendant's unit. She returned home with her slacks unsnapped and unzipped. Her mother asked what happened and B.S. replied, "Christina's daddy was tickling my monkey." Tina Moore testified to the child's reply over defendant's objection. She further testified "monkey" is the word her daughter uses to describe her private parts.

B.S. testified and related she was playing at Christina's home when defendant unsnapped her slacks, unzipped them, and stuck his hand down there.

Tina Parker, Christina's mother, testified over defendant's objection that the alleged victim left and the defendant left, and Christina told her that her daddy was tickling B.S. When asked where, Christina pointed to her private area.

Defendant's objection to this testimony was overruled. Defendant testified in his own defense and denied any touching.

Defendant contends it was error for the district court to admit what the daughters of Tina Moore and Tina Parker told their mothers. He contends it was hearsay and not subject to any exception to the hearsay rule. The State advances the testimony was admitted as excited utterances and came under an exception to the hearsay rule.

Iowa Rule of Evidence 803(2) provides an exception to the hearsay rule for:

> 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.

Iowa R. Evid. 803(2). The statement must be made while the declarant is under the influence of the excitement of an incident. *State v. Mateer*, 383 N.W.2d 533, 535 (Iowa 1986).

The statements were made shortly after the incident and were spontaneous responses to defendant's alleged conduct. B.S. told her mother on arriving home. Christina told her mother as soon as defendant left the motel room. The trial court did not abuse its discretion in admitting the statements. *See State v. Hy*, 458 N.W.2d 609, 611 (Iowa App. 1990).

Defendant next contends the trial court abused its discretion in admitting evidence of his burglary conviction in violation of Iowa Rule of Evidence 404(b). The error, if any, is harmless, there being overwhelming evidence of defendant's guilt.

AFFIRMED.