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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,
vs.
BRADLEY GARRISON,
Defendant-Appellant.

Filed November 24, 1981

1-376
66144

Appeal from Union District Court, James W. Brown, Judge.

Defendant appeals his conviction of sexual abuse in the second degree in violation of Sections 709.1 and 709.3, The Code 1979. AFFIRMED.

Paul J. Boysen of Camp, Harsh & Boysen, Creston, for defendant-appellant.

Thomas J. Miller, Attorney General, and Teresa Baustian, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Defendant appeals his conviction of sexual abuse in the second degree in violation of sections 709.1 and 709.3, The Code 1979. We affirm.

I. Defendant asserts that the trial court abused its discretion by finding that the five-year-old victim was competent to testify despite her age and limited capability to understand and answer questions. The record discloses that the victim had difficulty saying yes or no in answer to some questions asked by the court and the attorneys, but she responded by either shaking her head no or nodding her head yes. The victim did answer many other questions with yes or no. She knew the difference between telling the truth and lying. We will reverse a determination of competency only on a showing of abuse of discretion. State v. Paulsen, 265 N.W.2d 581, 586 (Iowa 1978). We find no abuse of discretion on the part of the trial court in its determination that the victim was competent to testify.

II. Additionally, defendant asserts the trial court erred by admitting the statements of Teresa Turner, Jacqueline Cannon and Donna Eblen, the victim's sister, mother, and her mother's friend, respectively. Defendant characterizes their testimony as hearsay and says the testimony does not fall within the "res gestae" exception to the hearsay rule.

The State defends against the objection by first asserting that the testimony is not hearsay. "Hearsay is a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." State v. Leonard, 243 N.W.2d 887, 890 (Iowa 1976). We look to the purpose of a statement in deciding whether it is hearsay. State v. Horn, 282 N.W.2d 717, 724 (Iowa 1979).

The State argues that the purpose of the testimony from the victim's sister, mother, and Donna Eblen was to corroborate the victim's testimony and to show that she had made complaints about the assault. The State further argues that their testimony proved the victim's state of mind and explained her delay in reporting the incident to her family. We agree. This testimony was not admitted to prove the truth of the declarant's statements, but rather to corroborate the victim's testimony by showing she was upset and that she talked about it. "When witnesses testify to the victim's complaint of the act, the testimony is not hearsay. The fact of the complaint is admissible as corroboration of the complainant's testimony." State v. Ogilvie, 310 N.W.2d 192, 195 (Iowa 1981).

The parties also argue about whether the statements fall under the "res gestae" exception to the hearsay rule. Since we decided the disputed testimony was not hearsay, we do not have to reach the question of whether or not it is an exception to the hearsay rule. We should note, however, that the Supreme Court of Iowa recently rejected use of the "res gestae" terminology and adopted the "excited utterance" definition in the Federal Rules of Evidence. State v. Ogilvie, 310 N.W.2d at 196. Id.

AFFIRMED.