FILED
AUG 26 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 26, 1987
vs.	)	317
PAUL EARL PAGEL,	)	7-224 86-1229
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County (D7X006158), L.D. Lybbert, Judge.

The defendant appeals the judgment and sentence entered upon his conviction of sexual abuse in the second degree following a trial to the court. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender; Dory A. Sutker and James F. Whalen, Assistant Appellate Defenders; for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bradley V. Black, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

PER CURIAM

The defendant appeals the judgment and sentence entered upon his conviction of sexual abuse in the second degree following a trial to the court. We affirm.

Defendant Paul Pagel was charged with second-degree sexual abuse of his eight-year-old stepdaughter (C.P.) in violation of Iowa Code section 709.3 (1985). At trial, the State called a child protection investigator, Patty Burke, as a witness. She testified about a discussion she had with C.P. regarding the allegations of sexual abuse. The defendant contends that the testimony of Patty Burke regarding her conversations with C.P. was inadmissible hearsay. The State responds that Patty Burke's testimony was properly admitted as a prior consistent statement of the victim that was offered to refute implied charges of fabrication and improper influence against C.P. Our review of actions at law is on assigned error only. Iowa R. App. P. 4.

Iowa Rule of Evidence 801(d)(1)(B) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> (1) Prior statement by witness. The declarant testified 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, ...

Patty Burke testified as to conversations with C.P. relating to the geographic location of the alleged incidents and the details of the alleged sexual acts. The defendant contends that there was no charge of recent fabrication and no evidence of improper influence; therefore, the testimony of Patty Burke was introduced solely to bolster the testimony and credibility of C.P. We cannot agree. C.P. was cross-examined as to her truthfulness and about her mother's coercing C.P. to do dishonest acts. A number of witnesses were called by the

defendant in an attempt to convince the court that C.P. had difficulty in the past with lying and stealing. The implication the defendant sought to develop was that C.P. was fabricating her present testimony in court or she was being improperly influenced by her mother. As our supreme court concluded in State v. Brotherton, 384 N.W.2d 375, 380 (Iowa 1986), where the record shows charges of recent fabrication, improper motive, or influence, the testimony of a social worker relating a child's conversation about sexual abuse perpetrated by a defendant falls within the definition of statements which are not hearsay as defined in rule 801(d)(1)(B). We believe in the instant case, the record clearly bears out that defendant was making charges of recent fabrication or improper influence and therefore the child's investigator's testimony falls squarely within the definition of rule 801(d)(1)(B).

The defendant further argues that since Patty Burke testified as the second witness in the State's case-in-chief and even before C.P. testified, such testimony cannot be viewed as rebuttal testimony. See State v. Cornell, 266 N.W.2d 15, 20 (Iowa 1978). Such a claim would seem to be further supported by the facts of Brotherton, wherein the complaining witness had been cross-examined prior to the testimony of the social worker. There, the court noted that the consistent statements were offered to rebut the partially successful cross-examination of the complainant. Brotherton, 384 N.W.2d at 380. In the present case, the court said that it was impossible, due to the point in the trial at which the testimony was offered, to rule on the hearsay objection. The court allowed the testimony subject to hearing the rest of the evidence. Prior to the close of defendant's evidence, the court confirmed its provisional ruling on the basis that the testimony demonstrated a sufficient attack upon the credibility of the victim so as to make the testimony of Patty Burke admissible. The court wisely waited to rule on the objection and later properly overruled it. Rule 801(d)(1)(B) and State v. Brotherton, 384 N.W.2d 375 (Iowa 1986) so required.

AFFIRMED.