IN THE COURT OF APPEALS OF IOWA

FILED
JAN 27 1988
CLERK SUPREME COURT

STATE OF IOWA)

Plaintiff-Appellee,)

vs.)

TERRY LEE STRUVE,)

Defendant-Appellant,)

Filed January 27, 1988

7-542
87-121

355

Appeal from the Iowa District Court for Clinton County (No. CS008276) - Margaret S. Briles, Judge.

Defendant appeals from his conviction of sexual abuse in the second degree, in violation of Iowa Code section 709.3(2). **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Raymond E. Rogers, Assistant Appellate Defender, for defedant-appellant.

Thomas J. Miller, Attorney General; Lona Hansen, Pamela Greenman Dahl, and James Kivi, Assistant Attorneys General, for plaintiff-appellee.

Heard by Hayden, P.J., and Sackett, and Habhab, JJ. Schlegel, J., takes no part.

SACKETT, J.

Defendant appeals the judgment entered following his conviction of sexual abuse in the second degree. He contends the trial court erred in (1) overruling objection to leading questions of the victim, and (2) overruling defendant's hearsay objection to testimony of a witness regarding statements made to her by the victim following the incident. We affirm.

Defendant was charged with sexual abuse of an eleven-year-old female. The defendant allegedly placed his penis in her rectum while both parties were in a swimming pool. At trial the county attorney sought on direct examination to elicit testimony from the victim and the following exchange occurred:

> STATE ATTORNEY: Q. Okay. What happened when you went over to Terry?
> VICTIM: A. (Witness does not respond.)
> Q. Did you rub his back? A. Yeah.
> Q. Okay. Now, were both of you inside the pool? A. Yes.
> ***
> Q. What happened then? A. (Witness does not respond.)
> Q. [A.H.], did something happen other than you rubbing his back? A. Yes.
> ***
> Q. Did he do something you didn't like? A. Yes.
> MR. FREY [the defense attorney]: Objection, it's leading and suggestive.
> THE COURT: Overruled.
> THE WITNESS: Yes.
> BY MR. KIVI [the prosecutor]:
> Q. Did he try to kiss you? A. Yes.
> MR. FREY: Objection, it's leading.
> THE COURT: I'm going to sustain that.
> BY MR. KIVI:
> Q. Okay, something happened other than you rubbing his back, right? A. Yes.
> Q. Okay, what happened; can you tell us? A. (Witness does not respond.)
> Q. Did he touch you, [A.H.]? A. Yes.
> Q. Did he touch you with his hands?
> MR. FREY: Objection, it's leading.
> THE COURT: I'm going to overrule that.
> THE WITNESS: No.
> BY MR. KIVI:
> Q. Did he touch you with his mouth?
> MR. FREY: Objection, it's leading.

THE COURT: I'm going to sustain that.
BY MR. KIVI:
Q. Okay, [A.H.], you have told us that he touched you, is that correct? A. Yes.
Q. What did he touch you with? A. (Witness does not respond.)
Q. Can you tell us what he touched you with? A. (Witness does not respond.)
Q. Did he touch you with his hand, [A.H.]? A. No.

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Q. What did he touch you with then? A. (Witness does not respond.) Q. Did he touch you with something other than his hand, [A.H.]? A. Yes.
Q. [A.H.], do you know what the word "penis" means? A. Yes.

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Q. Is that what he touched you with?
MR FREY: Objection, it's leading and suggestive.
THE COURT: I'm going to overrule it; the witness may answer.
THE WITNESS: Yes.
BY MR. KIVI:
Q. Where did he touch you with that? A. (Witness does not respond.)
Q. Can you — where did he touch you with his penis? A. (Witness does not respond.)

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Q. [A.H.], where did he touch you with his penis? A. (Witness does not respond.)
Q. Can you tell us where he touched you? A. (Witness does not respond.)

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Q. Okay. [A.H.], where did he touch you with his penis? A. (Witness does not respond.)
Q. [A.H.], when he touched you with his penis, was it in the front part of your body or the back part of your body?
MR. FREY: Objection, it's leading and suggestive.
THE COURT: Overruled.
THE WITNESS: Back.
BY MR. KIVI:
Q. Where exactly in the back did he touch you with it? A. on my bottom.
Q. Did he just touch it, touch your bottom, or did he do something else? A. He did something else.
Q. What else did he do? A. (Witness does not respond.)
Q. [A.H.], did he do something else with his penis other than just touch your bottom? A. Yes.
Q. Now, what was it he did? A. (Witness does not respond.)
Q. [A.H.], did he touch you some place other than your bottom? A. No.
Q. What was it he did? A. (Witness does not respond.)
Q. Did he put his penis in your bottom?
MR. FREY: Objection, it's leading and suggestive.
THE COURT: Well, it is that, but I'm going to allow it; overruled.
THE WITNESS: Yes.

I.

The defendant contends the State should not have been allowed to lead the witness and that the trial court abused its discretion in allowing the county attorney to do so. The trial court has considerable discretion in admitting or excluding answers to leading questions, and there must be a clear abuse of discretion to justify reversal. Giltner v. Stark, 219 N.W.2d 700, 706 (Iowa 1974). Leading questions may be proper and necessary where the witness is of tender age, State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978), and where the witness is testifying as to some form of sexual abuse. State v. Torrence, 257 Iowa 182, 131 N.W.2d 812, 813 (1964). The witness is only eleven years old, she was testifying as to acts of sexual abuse committed by a family friend. We find no abuse of discretion. See State v. Mueller, 344 N.W.2d 262, 267 (Iowa 1983).

II.

Defendant next contends the trial court erred in admitting the testimony of two witnesses regarding statements made by the victim after the incident. The testimony was the victim was very upset following the incident and it took her ten to fifteen minutes to calm down before she could explain what happened. Defendant contends the statements were inadmissible hearsay. The State contends they were admissible as excited utterances under Iowa Rule of Evidence 803(2). The record shows the victim was still under stress from the incident when the statements were made, and while the victim was asked some questions about the incident we do not find they lack spontaneity. When a questioner merely anticipates a statement the claimant is about to make, it is not rendered inadmissible because the questioner happened to speak first. State v. Mateer, 383 N.W.2d 533, 535 (Iowa 1986). We have considered the time lapse, the extent to which the questioning elicited the responses, the age and condition of the

declarant and the event being described. Id. at 535. The admission of hearsay under the exception rests within the discretion of the trial court. Id. We find no abuse of discretion. See State v. Watson, 242 N.W.2d 702, 704 (Iowa 1976).

AFFIRMED.