IN THE COURT OF APPEALS OF IOWA

No. 8-516 / 96-0633

STATE OF IOWA,

Plaintiff-Appellee,

vs.

GERALD DUANE BROWN a/k/a GARY LEE PARKER,

Defendant-Appellant.

FILED
NOV 30 1998
CLERK SUPREME COURT

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

Defendant appeals from judgment and sentence entered for third-degree sexual abuse. **AFFIRMED.**

John Billings Boeye of Stamets Law Office, Red Oak, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Verd R. Bailey, County Attorney, and Richard H. Davidson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

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SACKETT, C.J.

Defendant-appellant Gerald Duane Brown a/k/a Gary Lee Parker appeals from the district court's refusal to grant him a new trial following his conviction of third-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.4 (1993). Defendant contends the district court (1) violated his constitutional right to confrontation by allowing the admission of the victim's deposition at a post-trial hearing; (2) erred in admitting the victim's deposition because it constituted hearsay; and (3) erred in denying his motion for new trial based upon newly-discovered evidence. We affirm.

Defendant was charged after allegedly forcing his fifteen-year-old niece, M.B., to have sexual intercourse with him. At trial, the primary evidence against defendant came from M.B. After a jury returned a guilty verdict, the district court overruled defendant's post-trial motions and sentenced him to an indeterminate ten-year prison term on August 31, 1994.

On September 10, 1995, M.B. submitted the following written statement to police officers:

> I, [M.B.] am volantarily [sic] making this statement on my own free will. No one is forcing or telling me what to write or say. No one from my family is cohersing [sic] me in any way.
>
> The statement I made last year against Gerald D. [Gary] Brown was false, he did in no way molest me nor did we have sex, the reson [sic] I said these things is becouse [sic] my mother Jane Repausky forsted [sic] me to say them, becouse [sic] he was living with us & he decided to leave & she said that if she couldn't have him no one could. Gary was falsly [sic] imprisoned becouse [sic] of my mom's vengence [sic].

On the basis of the statement, defendant filed a second motion for new trial and correction of sentence.

On February 9, 1996, the State took M.B.'s deposition. Defense counsel was present and cross-examined M.B. Defendant was not present at the deposition.

As a part of the deposition, M.B. testified on Labor Day weekend in 1995 M.B. found her paternal grandmother's house and paid her a surprise visit. M.B.'s paternal grandmother is defendant's mother. M.B. had not seen her grandmother since defendant's trial. M.B. denied telling her grandmother that her mother was mad at defendant and what M.B. said at trial was not true and she was scared of her mother.

M.B. said she then went to her father's house for the weekend. She said defendant called her there and told her to write this letter[1] or else she was going to be dead, so M.B. said she did it. She also said she hung up and threw the telephone and said she wanted to be taken home. M.B. said her father and Kim, her stepmother, then requested she write the letter. M.B. said her father said if she did not, he was never going to talk to her again. M.B. said she copied words from a letter Kim wrote.

At the hearing on the motion for new trial, defendant testified, M.B.'s father testified, and Kim testified. Kim said M.B. wanted to talk to defendant because she felt bad she lied and put him in jail and she wanted to make it right. Kim said M.B. then went to the sheriff's department and wrote out a statement in front of the sheriff

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[1] The letter appears to be the statement M.B. gave on September 10, 1995.

and signed it. Kim also testified M.B. was afraid to go to her mother because her mother threatened her. Kim said on the weekend in question she did not threaten M.B. nor did she write a sample for M.B. Kim said she gave M.B. a pencil and paper and took M.B. to the sheriff's department after she completed her statement, but M.B.'s sister drove.

M.B.'s paternal grandmother testified M.B. came to her home and told her she lied and wanted to make it right. The grandmother said she told M.B. to leave it alone because she knew M.B.'s mother. The grandmother said she did not want to give defendant hope and then have it drawn back. The grandmother said M.B. said her mother and the prosecuting attorney had told M.B. if she changed her story she would go to jail. The grandmother said M.B. asked where her dad lived. M.B. thought her dad was in Arkansas, but he was in Bedford, Iowa. The grandmother gave M.B. her father's address. The grandmother said she had not seen M.B. for ten or eleven years before the trial.

The district court found M.B.'s written statement of September 10, 1995, false and denied defendant's motion for new trial.

Defendant first contends the district court violated his constitutional right to confrontation in admitting M.B.'s deposition. We review constitutional claims de novo. *State v. Niehaus*, 452 N.W.2d 184, 187 (Iowa 1990).

The State contends defendant has not preserved error on this issue. The State further contends the right to confront and cross-examine a witness is not absolute.

The State contends this is a case where M.B. was cross-examined by defendant's attorney and, thus, no prejudice can be shown.

Defendant's attorney sought to call M.B. as a witness. The State resisted the attempt contending M.B. had been deposed and, in place of her testimony, the State moved for admission of her deposition. Defendant's attorney objected saying three of defendant's witnesses testified to matters that substantially impeached M.B.'s deposition statements. Defendant's attorney further advanced since a large part of the motion for new trial was based on M.B.'s veracity, it was essential for defendant's case that M.B. be given the opportunity to respond to the impeachment. The district court allowed defendant to question M.B. on new matters not addressed in the deposition. There were further objections to questions defendant's attorney asked M.B. When the objections were sustained, there were no offers of proof. We must agree with the State error on this issue was not preserved.

To preserve error, a party must so inform the trial court of the grounds for the challenge so the trial court can rule on it. *See Lawrence v. Grinde*, 534 N.W.2d 414, 417 (Iowa 1995). Error not being preserved, we must affirm on this issue.

Defendant next claims the district court, in admitting the deposition, violated Iowa Rule of Evidence 804(b)(1), which provides:

> (b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony.* Testimony given as a witness at another trial or hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or,

> in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Iowa R. Evid. 804(b)(1).

Again, the State advances, while defense counsel's objection was perhaps akin to a due process or fundamental fairness claim, a hearsay objection was not preserved. The State, while admitting it does appear admission of the deposition is in violation of Iowa Rule of Evidence 804(b) because M.B. was available, next contends defendant cannot show prejudice and was given the opportunity to cross-examine M.B. Constitutional questions must be preserved in the same manner as any other issue. *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987); *State v. Johnson*, 272 N.W.2d 480, 484 (Iowa 1978). Error was not preserved on this issue. We therefore affirm.

AFFIRMED.