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IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,)
Plaintiff-Appellee,) Filed September 25, 1984
vs.)
WINSTON CARL HALSTEAD,) 4-183
Defendant-Appellant.) 83-569

Appeal from the Iowa District Court for Linn County - Paul J. Kilburg, Judge.

The defendant appeals from his conviction and sentence, following a jury trial, for the crime of sexual abuse in the second degree. He contends: (1) the trial court abused its discretion by finding that the six-year-old victim was competent to testify; (2) the trial court erred by refusing to let him impeach the victim's credibility with testimony by a psychiatrist who had examined the victim; (3) the trial court erred by admitting testimony of the victim's complaints by his mother, the police detective and his babysitter regarding the sexual abuse because these complaints were remote in time; and (4) his trial attorney rendered ineffective assistance by failing to raise adequate objections to the testimony of the mother, the police detective, and the babysitter of the victim's complaints. REVERSED AND REMANDED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Marcia Mason, Assistant Attorney General, for plaintiff-appellee.

Heard by Snell, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

The defendant, Winston Carl Halstead, is charged with sexually abusing a six-year-old boy while he lived with the boy's mother. Halstead lived with the victim's mother from early May until late July of 1982 when he moved in with another woman in the same apartment complex. Although the exact date of the abuse is unknown, all parties agree that it was some time in June. The victim first told his babysitter of the incident on August 2. The babysitter told the boy's mother who in turn reported the incident to the police.

Halstead was found guilty of second-degree sexual abuse. On appeal he raises the following issues: (1) whether the trial court abused its discretion by finding that the six-year-old victim was competent to testify; (2) whether the trial court erred in refusing to allow him to impeach the victim's credibility with testimony of a psychiatrist who had examined the victim; (3) whether the trial court erred in admitting testimony of the victim's complaints to his mother, his babysitter and a police detective; and (4) whether he received ineffective assistance of counsel.

I. **Competency.** Any person with sufficient capacity to understand the oath is competent. Iowa Code § 622.1 (1983). The competency of a witness under this statute is determined by his: (1) mental capacity to understand the nature of the questions put and to form and communicate intelligent answers thereto; and (2) the moral responsibility to speak the truth, which is the essence of the nature and obligation of the oath. State v. Harvey, 242 N.W.2d 330, 336 (Iowa 1976).

"The trial court has a wide latitude of discretion in determining the competency of witnesses and its determination . . . will be reversed . . ., only on a showing of abuse of discretion." State v. Paulson, 265 N.W.2d 581, 586 (Iowa 1978).

In this case the trial court and both attorneys carefully questioned the child outside the presence of the jury. Although he sometimes gave inconsistent or unresponsive answers, these were generally in response to questions dealing with

time and space, areas in which he concedely has conceptual problems. However, his descriptions of items or events were specific and accurate for the most part. A witness is not incompetent merely because he gives inconsistent answers. State v. Cartee, 202 N.W.2d 93, 96 (Iowa 1972). The child did say that he knew the difference between truth and lies, and that he would tell the truth. The trial court did not abuse its discretion in allowing the child to testify.

II. Psychiatric Testimony for Impeachment Purposes. Iowa is committed to a liberal rule which allows opinion testimony if it is of a nature which will aid the jury and is based on special training, experience, or knowledge with respect to the issue in question. Haumersen v. Ford Motor Co., 257 N.W.2d 7, 11 (Iowa 1977). The facts upon which the expert bases his opinion must be sufficient to enable the witness to express an opinion which is more than mere conjecture. Id. It is within the trial court's discretion to determine if opinion testimony will be received, and the trial court's determination will stand unless an abuse of discretion is shown. Id. We find that the trial court abused its discretion by excluding the testimony of Dr. Tsai, the psychiatrist, which was offered for impeachment purposes.

A witness's credibility may be impeached by various methods including a showing of a defect in his capacity to observe, remember, or recount matters testified about. State v. Harvey, 242 N.W.2d 330, 336 (Iowa 1976). We find Dr. Tsai's testimony should have been admitted because it shows a defect in the child's capacity to observe, remember, or recount the events to which he testified and because Dr. Tsai's testimony is based on facts allowing him to express an opinion which is more than mere conjecture.

Dr. Tsai, a doctor of medicine, is a child psychiatrist and an assistant professor at the University of Iowa, Department of Psychiatry. He evaluated the child after a referral from a school social worker. The doctor determined the child had an attention deficit disorder, which is hyperactivity. He also suffered from a behavior problem called an aggressive conduct disorder. In addition, the

child had a delay in comprehension or receptive language development. His abilities were a year behind his chronological age and his IQ classified him as a borderline mental retard.

The doctor indicated that for the child to understand questions they needed to be presented in simple sentences with a simple vocabulary. The doctor determined that while the truth to the child may be what he thinks it is and the child even may believe what he says is true, it may not actually be true. For example, during the interview the child related to the doctor that he did not like school because the teacher beat him up and also beat up every child in the classroom.

The doctor was asked on cross examination:

> Q....., is it your testimony that you do not have an opinion that he is not capable of telling the truth, or understanding the nature of questions? A. I cannot totally agree with that. Again number one, it depends on what type of question you ask him. Number two, even he may believe what he says is true, but which may not be totally truth.

The record supports a genuine concern on the doctor's part that the child will not be truthful. The doctor also indicated that the child has a very low self-esteem, that he can not compete with other children for attention, that he uses all types of behavior to get attention, and that he has used this situation to get attention.

"The crucial determination that a trial judge must make in ruling on the admissibility of evidence of a witness's mental instability is. . . whether it affects the testimonial ability of the witness so as to impeach him. The evidence can be said to affect the credibility of a witness when it shows that his mental disorganization in some way impaired his capacity to communicate his observations accurately and truthfully at trial, or to maintain a clear recollection in the meantime." State v. Harvey, 242 N.W.2d 330, 337-338 (Iowa 1976) (quoting a statement from Commonwealth v. Butler, 232 Pa. Super. 283, 287, 331 A2d 678, 680 (1978)(emphasis in original).

The testimony of the psychiatrist would have demonstrated a defect in the child's capacity to remember and his ability to communicate his observations. It should have been admitted.

We also reject the argument that the doctor's testimony should have been excluded because his opinion was based on a 20 to 30 minute examination. Dr. Tsai is a medical doctor and child psychiatrist with credentials sufficient to be an associate professor at one of the nation's leading medical schools, The University of Iowa. To assume that he cannot determine a problem after a 30-minute interview is without basis. Furthermore, the doctor was testifying from more than his interview with the child. While Dr. Tsai's actual time with the child was not long, his evaluation came on a referral from the area education agency. It is apparent from the doctor's testimony that his evaluation was in conjunction with a team effort by the Grant Area Education Agency personnel and included a social worker, and speech clinician. In addition thereto, he had the benefit of IQ and other testings made by the agency in his evaluation. The testimony should therefore not be excluded based on the length of the examination.

III. Testimony of Mother, Babysitter, and Police Detective. Halstead asserts that the trial court acted improperly in allowing the child's mother, his babysitter, and the police detective to testify, as corroborative witnesses, that the boy told them of Halstead's actions. Before trial, a hearing was held at which the defendant made a motion in limini to limit the testimony of these three witnesses.

The first question presented is whether the defendant preserved error on this issue. At the hearing the court discussed the various cases dealing with corroborative testimony and stated that the testimony of the mother, the babysitter, and the detective would be limited to whether the child made the complaint, when the complaint was made, and to whom unless the State could show other cases justifying a different result. Later, an order was issued

sustaining the motion in limini as was discussed at the hearing. At the trial, the defense counsel made no objection to this testimony. When there is a hearing on the motion in limini and the trial court's ruling is conclusive, then there is no need to raise the issue at trial. State v. Miller, 229 N.W.2d 762, 767-68 (Iowa 1975). We find that the trial court's ruling limiting the testimony of the three witnesses to whether the complaint was made, when, and to whom, was conclusive and there was no need to voice an objection at trial.

Testimony of other witnesses of whether a victim made a complaint is admissible to corroborate the victim's testimony. State v. Grady, 183 N.W.2d 707, 713 (Iowa 1971). In this case the court properly limited the testimony of the mother, the babysitter, and the detective to whether the complaint was made, when, and to whom. See, State v. Rounds, 216 Iowa 131, 137, 248 N.W. 500, 503 (1933).

The defendant argues that the complaint by the victim to the babysitter, his mother, and the detective was so remote in time from the occurrence of the event that it should not have been admitted. The case cited by the defendant in support of this claim does not set any specific time limits on when complaint becomes too remote to be effective. Rather, it says generally that the complaint can't be "so long delayed as to rob it of all its force." State v. Grady, 183 N.W.2d 707, 714 (Iowa 1971). "Ordinarily the fact of delay goes to the weight of the evidence, only and is, therefore, a subject of consideration for the jury." State v. Bebb, 125 Iowa 494, 495-96, 101 N.W. 189, 189 (1904). In Bebb, the court allowed the rape victim's aunt to testify, for corroborative purposes, that the victim told her of the rape almost four months after it occurred. Id. at 495-97, 101 N.W. at 189-90. In this case, Halstead lived with the victim's mother from May until July, and then moved into another apartment in the same complex where he stayed until late July. The victim reported the incident to his babysitter approximately one week after Halstead left the complex. Considering the child's age and Halstead's presence

during the time between the assault and the time the incident was reported, it is understandable that the child might remain silent. The court acted properly in allowing testimony for corroborative purposes.

The defendant also argues that, even if the babysitter's testimony was admissible for corroborative purposes, the testimony of the mother and the detective was not. He claims that the complaint that the victim made to the mother and the police detective was in response to specific questions and therefore not admissible for corroborative purposes. See, State v. Grady, 183 N.W.2d 707, 714 (Iowa 1971). Even if the testimony of the mother and the detective was improperly admitted, we find that it was not reversible error. It was limited in scope (whether the complaint was made, when, and to whom), and it was cumulative to the babysitter's testimony. See State v. Smith, 309 N.W.2d 454, 456 (Iowa 1981) (hearsay evidence was cumulative and therefore, non-prejudicial).

IV. **Ineffective Assistance of Counsel.** Under Iowa law, when a witness's testimony is offered for corroborative purposes, the witness cannot testify on direct examination as to who the alleged assailant is. State v. Grady, 183 N.W.2d 707, 718 (Iowa 1971). Halstead claims he received ineffective assistance because his attorney failed to object when the prosecutor elicited Halstead's name from both the mother and the babysitter during their corroborative testimony.

The failure of counsel to object to certain testimony does not, in and of itself, constitute ineffective assistance of counsel. Rather, the counsel's omission must impair "substantial rights" of his client. State v. Williams, 334 N.W.2d 742, 745 (Iowa 1983). In this case, the record on appeal is inadequate to deal with the issue of ineffective assistance.

On the basis that the testimony of the psychiatrist should have been admitted, the trial court judgment is reversed and this case is remanded.

REVERSED AND REMANDED.