IN THE COURT OF APPEALS OF IOWA

No. 0-438 / 89-1474

FILED
DEC 27 1990
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

KENNETH DUANE BARK

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Appellant.

Appeal from the Iowa District Court for Clinton County, C.H. Pelton, Judge.

Defendant appeals his conviction, following a jury trial, for second-degree sexual abuse. **REVERSED AND REMANDED.**

Linda Del Gallo, Acting State Appellate Defender, Brian K. Sissel, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Lawrence H. Schultz, Clinton County Attorney, Bruce A. Ingram and Catherine Cartee, Assistant County Attorneys, for appellee.

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

OXBERGER, C.J.

Kenneth Bark was accused of sexually abusing his daughter over a period of about three years. The girl was approximately nine years old when the alleged abuse began.

A jury found Bark guilty of sexual abuse in the second degree. Bark appeals the conviction.

Bark contends the district court erred by admitting into evidence notes written by the victim concerning the alleged sexual activity. He asserts these notes constitute inadmissible hearsay and the district court erred by admitting them into evidence under Iowa Rule of Evidence 803(5)the "recorded recollection" exception to the hearsay rule.

Bark also challenges the sufficiency of the evidence to prove his guilt. He notes that the primary evidence against him was the testimony of his daughter. He asserts his daughter has a history of lying, she previously made a false accusation of sexual abuse against another person, and her disciplinary problems and possible punishments gave her a motive to accuse him falsely. He also notes various factual discrepancies in her testimony.

We review this case for correction of errors at law. Iowa R. App. P. 4.

The State does not argue that the admitted notes were not hearsay, therefore we need only address the issue of the notes' admissibility under an exception to the general

rule that hearsay is inadmissible. Iowa R. Evid. 803(5) states that memorandum or records are not excluded by the hearsay rule, even though the declarant is available as a witness when:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

"A witness must be shown to have an incomplete recollection in order to invoke rule 803(5)." State v. Thompson, 397 N.W.2d 679,682 (Iowa 1986). Rule 803(5):

> seeks to assure that there has been an accurate recordation of a past recollection, reasonable contemporaneous with the event, to use as a substitute for the nonexistent present recollection of the event. It does this by requiring a satisfactory showing of (1) the "freshness" of the witness's recollection of the event at the time the recording process takes place, and (2) the accuracy of the process utilized to record that recollection.
>
> The authorities appear to agree that the "freshness" requirement, although certainly not inflexible, has some absolute limits and may not be satisfied merely by showing that the recollection at the time the memorandum or record was made was better than the witness's recollection at the time of trial.

Id. at 683 (authorities omitted).

We find the notes were inadmissible hearsay and not admissible exhibits under rule 803(5). The notes were not read into evidence, but were received as an exhibit, even though not offered by the defendant (the adverse party).

This receipt was clearly contrary to the language of rule 803(5).

Additionally, the State failed to show the notes were sufficiently "fresh." The child apparently created the notes approximately two months before the trial. The claimed abuse occurred over a three year period before the trial. The notes make no reference to when the abuse described in them occurred. The notes simply outline abusive conduct without relating any specific instances of abuse. The State did not show the notes depicted accurate recollections.

The State also failed to lay the foundation that the child lacked sufficient recollection to enable her to testify fully and accurately. At one point prior to the offer of the notes the child answered she could not "remember right now" what happened when her father came into her bedroom when her mother was not home. The child then went on to answer very specific questions about what conduct happened on the occasions when her father came into her room and allegedly abused her. It does not appear the child could not remember what happened so much as the State was not eliciting the same responses as the child had given in the past and the notes were more similar to past responses. We find this especially significant in the face of much testimony from various witnesses about the child's reputation for telling untruths.

"The admission of hearsay is presumed prejudicial error unless the contrary is affirmatively established." State v. Brown, 341 N.W.2d 10, 15 (Iowa 1983)(citations omitted). Some information in the notes was not presented in the testimony at trial. Additionally, because the child tended to tell conflicting stories about what happened and when the abuse occurred, the child's veracity was an important aspect of this case. We find the admission of the notes reversible error and remand this case for a new trial in accordance with this opinion.

The defendant also contends that insufficient evidence existed in the record to support his conviction.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence supporting the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

We find sufficient evidence did exist to prove the elements of the crime of second-degree sexual abuse if the trier of fact believed all the statements of the victim. In light of our prior decision in this opinion, we find this case must be remanded for a new trial.

REVERSED AND REMANDED.