

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 19-1878
Osceola County No. FECR006380

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KURT ALLEN KRAAI,
Defendant-Appellant.

On Appeal from the Iowa District Court for Osceola County
The Honorable Don E. Courtney, District Judge

FINAL BRIEF FOR THE APPELLANT

Pamela Wingert
1212 18th Street
Spirit Lake, IA 51360
(712) 336-3911 Phone
(712) 336-4112 Fax
pawingert@iabar.org
APPELLANT'S ATTORNEY

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 28th day of May, 2020 I electronically filed the foregoing with the Clerk of the Supreme Court using electronic filing system (EDMS) and sent notification of such filing to Kurt Allen Kraai, Defendant-Appellant, via U.S. Mail at the address listed below.

Kurt Allen Kraai
No. 6228952
Anamosa State Penitentiary
406 North High Street
Anamosa, IA 52205

/s/ Pamela Wingert
Pamela Wingert
Wingert Law Office
1212 18th Street
Spirit Lake, IA 51360
(712) 336-3911 Phone
(712) 336-4112 Fax
pawingert@iabar.org
ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. DISTRICT COURT ERRED IN INCLUDING AN INSTRUCTION TO BOLSTER THE TESTIMONY OF THE COMPLAINANT WHILE DENYING DEFENDANT'S REQUEST FOR AN EQUIVALENT STANDARD FOR HIS OWN TESTIMONY

Authorities:

State v. Altmayer, 18-0314, 2019 WL 476488, *5 (Iowa Ct. App. Feb. 6, 2019).

State v. Barnhardt, 17-0496, 2018 WL 2230938 (Iowa Ct. App. May 16, 2018).

State v. Milliken, 204 N.W.2d 594 (Iowa 1973).

ROUTING STATEMENT

This case involves an issue of first impression: whether the district court erred in including an instruction to bolster the testimony of a complainant while denying defendant's request for an equivalent standard for his own testimony. The Iowa Court of Appeals has considered two cases involving similar jury instructions regarding noncorroboration of an alleged victim of sexual abuse. Retention by the Iowa Supreme Court is appropriate. Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from the conviction at jury trial of Defendant Kurt Allen Kraai.

Course of Proceedings and Disposition in the District Court:

Kraai was charged by Trial Information on September 27, 2018 with Sexual Abuse in the Second Degree in violation of Iowa Code §§ 702.17(3), 709.1(3), and 709.3(1)(b), a Class B Felony; and Incest in violation of Iowa Code § 726.2, a Class D Felony. (Trial Information) (App. I 6). Kraai entered a plea of not guilty and waived his right to a speedy trial. (Written Arraignment)(Conf. App. 36)

On May 29, 2019, the Trial Information was amended, and the charge of Incest was not included. (Amended Trial Information 5/29) (App. I 12). A second amended information was filed on August 29, 2019, again with only one count of Sexual Abuse in the Second Degree. (Amended Trial Information 8/29) (App. II 8).

On August 26, 2019, Kraai appeared in open court for his jury trial. (Transcript I. p. 2). He was convicted of Sexual Abuse in the Second Degree. (Criminal Verdict) (App. II 58).

Sentencing was held on November 4, 2019. (Sentencing Transcript). On the sole count charged, Kraai was sentenced to twenty-five years in

prison for the crime of Sexual Abuse in the Second Degree, a forcible felony. (Judgment and Sentence p. 2) (App. II 72). He must serve a mandatory minimum sentence of incarceration of 70 percent of the total sentence. (Sentencing Transcript p. 8). He was ordered to comply with the Sex Offender Registry pursuant to Iowa Code Chapter 692. (*Id.* at 10). Kraai was placed under supervision as if on parole for the remainder of his life pursuant to Iowa Code Section 903B.1. (Sentencing Transcript p. 9). Timely Notice of Appeal was filed on November 8, 2019. (Notice of Appeal) (App. II 36).

STATEMENT OF THE FACTS

Kurt Allen Kraai was charged with Sexual Abuse in the Second Degree and Incest for acts alleged to have occurred in February, 2017. (Trial Information) (App. I 6). The case proceeded to jury trial in August, 2019. Thirteen-year-old N.F. testified on behalf of the State. (Trial Transcript II p. 15). She generally visited Kraai every other weekend. (*Id.* at 69). In the past, she had visited her father at her paternal grandmother's house. (*Id.* at 19). Her father, her two uncles and her grandmother were all living at her grandmother's home when she visited there. (*Id.* at p. 20). N.F. testified that Kraai would make her touch his "private parts." (*Id.* at 24). She testified that this happened to her in Uncle Kory's old room at her grandmother's home. (*Id.* at 23). Uncle Kory's room had a big hole in the door. (*Id.* at 22). Her brother was often present when she visited her father. (*Id.* at 71).

N.F. testified she had been close to her grandmother. (*Id.* at 21). She did not disclose any abuse to her grandmother. (*Id.* at 27). She testified her father said something would happen to her if she told but he did not say what would happen. (*Id.* at 27-28). She never told her mother she was subject to any abuse by her father. (*Id.* at 51). N.F. testified that she did not remember

the last time that the touching had happened. (*Id.* at 52). She told a friend at school and then her teacher about the touching. (*Id.* at 60).

Kraai moved out of his mother's home to work at a hog farm and N.F. began to visit him at his new residence. (*Id.* at 33). N.F. enjoyed the visits at her grandmother's house but did not want to go to her dad's house. (*Id.* at 76). She didn't have any friends there and it smelled bad at the hog farm. (*Id.* at 72). N.F. testified that the touching continued after her father's move. (*Id.* at 35).

Kraai testified and denied the sexual abuse described by N.F. (*Id.* at 190). He testified that the house he moved to on the hog farm did not have heat or air-conditioning. (*Id.* at 182). He would work long hours, even on the weekends when the children visited. (*Id.* at 183). Kraai would yell at his children and he spanked them. (*Id.* at 179).

The State also called Amy Scarmon, a manager at the Child Advocacy Center as an expert. (*Id.* at 119). Over Kraai's objection, Scarmon testified regarding "myths" about child sexual abuse. (*Id.* at 128-43). In closing, the State emphasized the expert testimony of Scarmon. (*Id.* at 233, 234). The State also emphasized that the jury did not need more evidence than "what N. told you." *Id.* at 237, 238, 244, 273). The State's closing argument also included a detailed description of an unrelated case of an unrelated child's

anal penetration. (*Id.* at 268-69). Kraai’s counsel objected but the objection was overruled. (*Id.* at 269).

The jury was instructed that “There is no requirement that the testimony of a complainant of sexual offenses be corroborated.” (Jury Instructions p. 7) (App. II 56). Counsel for Kraai objected to the instruction. (Trial Transcript II p. 218). Counsel for Kraai argued for the inclusion of language that would provide the same standard should likewise be applied to the testimony of the Defendant. (*Id.* at 219). The trial court denied the requested language. (*Id.* at 222).

Kraai was convicted of Sexual Abuse in the Second Degree. (Verdict) (App. II 19). On the sole count charged, Kraai was sentenced to twenty-five years imprisonment and a lifetime parole. (Judgment and Sentence) (App. II 33). This timely appeal followed on November 8, 2019. (Notice of Appeal) (App. II 36).

ARGUMENT

I. DISTRICT COURT ERRED IN INCLUDING AN INSTRUCTION TO BOLSTER THE TESTIMONY OF THE COMPLAINANT WHILE DENYING DEFENDANT'S REQUEST FOR AN EQUIVALENT STANDARD FOR HIS OWN TESTIMONY

A. Preservation of Error.

Kraai preserved error by raising the issue with the trial court and proposing the requested language be inserted in the jury instructions and objecting to the refusal to include the additional language proposed by Kraai in the court's instructions to the jury. (Trial Transcript II p. 219, 224-29). Timely objections to jury instructions are necessary to preserve error for appellate review. *State v. Ondayog*, 722 N.W.2d 778, 785 (Iowa 2006)(citing *State v. Jeffries*, 430 N.W.2d 728, 737 (Iowa 1988)).

B. Standard of Review.

A court's refusal to give an instruction is reviewed for correction of errors at law. *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699, 707-08 (Iowa 2016). "Iowa law requires a court to give a requested jury instruction if it correctly states the applicable law and is not embodied in other instructions." *Id.* at 707 (quoting *Sonnek v. Warren*, 522 N.W.2d 45, 47 (Iowa 1994)). "We do not consider an erroneous jury instruction in isolation, but look at the jury instructions as a whole." *State v. Coleman*,

907 N.W.2d 124, 134 (Iowa 2018)(quoting *State v. Murray*, 796 N.W.2d 907, 908 (Iowa 2011)). “Error in jury instructions is reversible only if the error is prejudicial.” *State v. Ambrose*, 861 N.W.2d 550, 554 (Iowa 2015)(quoting *Condon Auto Sales v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999)). “Errors in jury instructions are presumed prejudicial unless ‘the record affirmatively establishes that there was no prejudice.’” *State v. Murray* 796 N.W.2d 907, 908 (Iowa 2011)(quoting *State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)).

C. Merits

To corroborate means “[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence.” Black’s Law Dictionary 344 (6th ed. 1990). “The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witnesses, or to comport with some facts otherwise know or established.” *Id.* The trial court’s instructions in this case would suggest that while the complainant’s testimony did not require anything to strengthen or add credibility to it, testimony of the Defendant was to be treated differently.

The jury was provided with the following instruction:

There is no requirement that the testimony of a complainant of sexual offenses be corroborated.

(Jury Instruction #16) (App. II 17). Kraai objected and argued that the instruction unfairly highlighted the testimony of the complainant over his own testimony. (Trial Transcript II p. 218, Motion for New Trial)(App. II 20). Trial counsel pointed out that Defendant's testimony also did not require corroboration to be believed by the jury. "[I]f they believe the defendant's testimony standing alone, that should be sufficient for a not guilty verdict. So then we should have an instruction that says that." (Trial Transcript II p. 225). The trial court refused to include the additional language requested by Kraai. (Trial Transcript II p. 229-230). The trial court clearly favored the testimony of the complainant over the testimony of the Defendant in its instructions to the jury.

"Iowa law allows a jury to convict a defendant of sexual abuse based solely on the uncorroborated testimony of the complaining witness." *State v. Jarrett*, No. 17-0091, 2018 WL 1099268, (Iowa Ct. App. Feb. 21, 2018). As argued by Kraai in the motion for a new trial, Instruction 16 may have been an accurate statement of the law, but it is a legal statement of the reviewing court's standard of review of such evidence and it is not relevant to the jury's function. (Motion for a New Trial) (App. II 22-23).

In opposing the motion for a new trial, the State referenced the instruction approved in *State v. Altmayer*, 18-0314, 2019 WL 476488, *5

(Iowa Ct. App. Feb. 6, 2019). (Resistance to Motion for New Trial) (App. II 25-26). The instruction given there was as follows:

You should evaluate the testimony of N.D. the same way you evaluate the testimony of any other witness. The law does not require that the testimony of N.D. be corroborated in order to prove that she was sexually abused. You may find the Defendant guilty of Sexual Abuse if N.D.'s testimony convinces you of guilt beyond a reasonable doubt. 2019 WL 476488 (Iowa App.) The noncorroboration instruction in

Altmayer provided exactly the equivalency between the testimony of the complainant and other witnesses that Kraai requested. It did not emphasize the complainant's testimony and more accurately reflected Iowa Code 709.6 which provides as follows:

No instruction shall be given in a trial for sexual abuse cautioning the jury to use a different standard relating to a victim's testimony than that of any other witness to that offense or any other offense. Thus, the instruction approved in *Altmayer* did not suffer the same fatal flaws as Instruction 16 in this case which did unfairly highlight particular testimony. The instruction offered against Kraai was less understandable and less fair than the instruction approved in *Altmayer*. The State also referenced *State v. Barnhardt*, where no error was found in the inclusion of the following instruction:

The law does not require that the testimony of the alleged victim be corroborated. 17-0496, 2018 WL 2230938 (Iowa Ct. App. May 16, 2018).

The State's view of the noncorroboration instruction was advanced by Tyler J. Buller in *Fighting Rape Culture with Noncorroboration Instructions*, 53 Tulsa L.Rev. 1 (2017)¹. Buller proposed the following as a model instruction on noncorroboration:

You should evaluate the testimony of the alleged victim in the same way you evaluate the testimony of any other witness. The law does not require that the testimony of the alleged victim be corroborated. You may find the defendant guilty if the alleged victim's testimony convinces you of guilt beyond a reasonable doubt.

Id. at 27. Again, this model version proposed in 2017 lacked several of the flaws in the instruction provided in this case.

Other states have held that similar jury instructions regarding corroboration in a sexual abuse case are improper. *See, e.g., State v. Stukes*, 787 S.E.2d 480, 483 (S.C. 2016); *Guitierrez v. State*, 177 So.3d 226, 229-30 (Fla. 2015); *Veteto v. State*, 8 W.W.3d 805, 816 (Tex. Crim. App. 2000)(abrogated on other grounds by *State v. Crook*, 248 S.W.3d 172(Tex. Crim. App. 2013)); and *Ludy v. State*, 784 N.W.2d 459, 461 (Ind. 2003). As the Indiana court noted:

In performing this fact-finding function, the jury must consider *all* the evidence presented at trial. To expressly direct a jury that it may find guilt based on the uncorroborated testimony of a single person is to invite it to violate its obligation to consider all the evidence. . . .

¹ The author offered his thanks for draft review to Assistant Attorney General Susan Krisko who served as trial counsel for the State in this matter.

In addition, the meaning of the legal term “uncorroborated” in this instruction is likely not self-evident to the lay juror. Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness’s testimony, and ignore evidence that conflicts with the witness’s version of events. Use of the word “uncorroborated” without a definition renders this instruction confusing, misleading, and of dubious efficacy. *Ludy*, 784 N.E.2d at 461-62.

The flaws in the instruction given are shown through the contrast between the language of Instruction 16 and the language used in other Iowa stock instructions relating to corroboration. Other Iowa jury instructions relating to corroboration of witness testimony include further explanation of the nature of the testimony to be given special consideration. For example, Iowa Model Criminal Jury Instruction 200.4 regarding corroboration of the testimony of an accomplice provides as follows:

An "accomplice" is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.
A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.
If you find (name of witness) is an accomplice, the defendant cannot be convicted only by that testimony. There must be other evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.
The instruction which requires the corroboration of a “solicited person” is similar in describing the kind of evidence necessary. Iowa Model Criminal Jury Instruction 200.5.

The South Carolina case of *State v. Stukes* illustrates that juror confusion is one of the problems with this type of noncorroboration instruction. 787 S.E.2d 480 (S.C. 2016). The instruction there provided:

The testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence. *Id.* The instruction caused the jurors to question whether this instruction meant that they had to believe the victim's testimony. *Id.* at 500.

“Specifying this qualification applies to one witness creates the inference the same is not true for the others.” *Id.* Yet the *Stukes* instruction did provide one concept that the instruction to Kraai's jury did not and that was the explanation that the corroboration would be “by other testimony or evidence.”

The State argued below that Instruction 16 was a correct statement of the law. (Trial Transcript II p. 219). The Florida court addressed the same issue in *Guitierrez*:

[T]he “no corroboration” instruction at issue in this case, although it correctly states the law, is improper because it constitutes a comment on the testimony presented by the alleged victim and presents an impermissible risk that the jury will conclude it need not subject the victim's testimony to the same tests for credibility and weight applicable to other witnesses. Moreover, the standard instruction on weighing the evidence—without reference to a “no corroboration” instruction—adequately gives guidance to the jury without impermissibly singling out the victim's testimony or commenting on the weight to be given the evidence or the credibility of any witness. 177 So. 3d at 229–30.

In *State v. Milliken*, the court considered whether jury instructions unfairly emphasized some evidence over other evidence for the jury's consideration in the record. 204 N.W.2d 594 (Iowa 1973). "The court should not emphasize or give undue prominence to evidentiary facts, the existence or nonexistence of which must be settled by the jury." *Id.* at 596 (quoting *State v. Proost*, 225 Iowa 628, 281 N.W. 167 (1938)). The instruction given in this case bolstered the credibility of a single witness over other testimony in the record, including that of the Defendant. The Defendant was prejudiced by the favoritism shown by the trial court to the complainant in Instruction 16.

Instruction 16 also contradicted other instructions given by the trial court which acknowledged the juror's duty to consider all of the evidence. "But if, after a full and fair consideration of all the evidence or **lack of evidence** produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty." (Instruction 11) (emphasis added) (App. II 15). Instruction 9 required the jury to "[g]ive **all** the evidence the weight and value you think it is entitled to receive." (emphasis added) (App. II 14). Instruction 10 informed the jury that they "may believe **all, part or none** of any witness's testimony." (emphasis added) (App. II 14). All of the

instructions were to be considered together and no one instruction included all of the law. (Instruction 5) (App. II 12). Yet in Instruction 16 the trial court singled out the testimony of one witness for preferential treatment by the jury.

If it is appropriate to provide a noncorroboration instruction to a jury deciding a sexual abuse trial in Iowa, then the instruction should have explained that the complainant's testimony should be considered in the same manner as other witnesses, including the Defendant. As Kraai argued below, his accuser's testimony should not have been promoted by the trial court through its instructions over that of the other witnesses. This problem was particularly acute in this case as guilt or innocence turned on the conflict in the testimony of Kraai versus the testimony of the complainant. Kraai was entitled to exercise his right to testify and to have his testimony heard and fairly considered by the jury. The use of this instruction prejudiced his right to a fair consideration of his evidence.

CONCLUSION

For all of the reasons discussed above, Defendant-Appellant Kurt Allen Kraai respectfully requests that the conviction be vacated, and the case remanded for a new trial of this case to a properly instructed jury.

NOTICE FOR ORAL AGRUMENT

The Appellant requests Oral Argument.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ Pamela Wingert
Pamela Wingert
Attorney for Appellant

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/s/ Pamela Wingert
Pamela Wingert
Attorney for Appellant