

**IN THE COURT OF APPEALS OF IOWA**

No. 0-839 / 09-1528  
Filed January 20, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**JAMIE VERNON CASPER,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Cedar County, Paul L. Macek,  
Judge.

Jamie Vernon Casper appeals following a jury trial from a conviction of  
indecent exposure in violation of Iowa Code section 709.9 (2007). **CONVICTION**  
**AFFIRMED; SENTENCE VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant  
State Appellate Defender, for appellant.

Jamie Casper, Anamosa, appellant pro se.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney  
General, Sterling L. Benz, County Attorney, and Jeff Renander, Assistant County  
Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J.,  
takes no part.

**SACKETT, C.J.**

Jamie Vernon Casper appeals following a jury trial from a conviction of indecent exposure in violation of Iowa Code section 709.9 (2007). He contends (1) the district court erred in admitting hearsay evidence and (2) the district court exceeded its authority in entering an order prohibiting him from having any contact with minors for a period of five years. We affirm his conviction and vacate part of his sentence.

**BACKGROUND AND PROCEEDINGS.** Kristin Merrick, then twenty-one years old, was driving home from school about 4:30 in the afternoon on September 16, 2008. She called 911 to report that she had observed an incident just outside of the City of Clarence. She reported that a man who had been driving a white pickup had stopped and was standing on the side of the road with his pants around his ankles holding his penis in his hand and moving it in a circular motion.

A radio broadcast was put out by the Cedar County Sheriff's office. Before 5:00 that afternoon the Mechanicsville, Iowa, police chief James Barber, who had heard the call to watch for a younger white male driving a full-sized white pickup, stopped a white Chevrolet pickup driven by Casper. Barber told Casper a woman might come to see if she could identify him, and if not, then he would be free to go. Casper called his mother and told her, among other things, that he was going to jail that night. Merrick came to the location. Law enforcement vehicles were staggered to block Merrick's view of the pickup and Casper. Cedar County Deputy Jeff Smith, who had arrived there earlier, went to Merrick's car.

He asked Merrick to explain what happened and to describe the man who had exposed himself and the vehicle he had been driving.

Smith then took Merrick to the pickup and she identified it as the pickup she had seen. Casper was asked to turn around and Merrick identified him as the man she had seen exposing himself earlier.

At trial Smith was asked:

Q. What did she (referring to Merrick) indicate was the description for the person who had exposed himself?

Casper's attorney: I'm going to object it calls for hearsay, and that witness has already testified here today.

Prosecutor: There is a rule of evidence that specifically addresses this, Iowa Rule of Evidence 5.801(d)(1)(C). That witness has been subject to cross-examination, and under that rule this witness can testify as to the description that she gave of the person that exposed himself and of the truck.

The court: Overruled.

A. She stated that he was short, had a small amount of facial hair, wearing a black shirt, and younger looking.

Q. And what did she—how did she describe the vehicle the person was driving? A. It was rough-looking, kind of beat up, and she believed it was a Chevy truck, white in color, and she said there was something on the back of it that was blue, she didn't know whether it was a tarp strap or a rope.

In closing argument the prosecutor argued that Deputy Smith's testimony corroborated Merrick's identification, that Smith allowed Merrick some time before he allowed her to see Casper, that he testified she said the person who exposed himself was wearing a black shirt, and Casper was wearing a black shirt and had a small amount of facial hair and his hair was black, and that she described the truck before she saw it as beat up, a white extended cab Chevy with something blue around the tailgate.

**HEARSAY.** Casper contends Smith's testimony reporting Merrick's identification of Casper and the pickup was hearsay and it was inadmissible. Casper contends his attorney's objection preserved error and if it did not his trial attorney was ineffective in not making a proper objection. He appears to contend it was error to allow Smith to repeat Merrick's out-of-court description of Casper and the pickup. He contends the testimony was not permitted under Iowa Rule of Evidence 5.801(d)(1)(C).

The State agrees Casper preserved his hearsay challenge to the testimony of Smith as to the description of Casper but that error was not preserved as to the description of the pickup. The State argues that the challenged evidence was admissible pursuant to Iowa Rule of Evidence 5.801(d)(1) is not hearsay, and the testimony was admissible under that rule as prior statements of identification and/or prior consistent statements to rebut charges of recent fabrication or improper influence or motive. The State further argues the testimony was admissible as non-hearsay as it explained why Casper became the focus of the officers' investigation and why the officers conducted a show-up identification procedure. The State also argues that the testimony was harmless as there was overwhelming evidence of Casper's guilt.

**SCOPE OF REVIEW.** We review rulings on the admission of evidence for an abuse of discretion. *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003). In making hearsay rulings, trial courts have discretion to admit evidence under a rule of evidence. See *id.* Hearsay must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other

provision. See Iowa R. Evid. 5.802. A trial court has no discretion to deny the admission of hearsay if the statement falls within an enumerated exception, subject to the rule of relevance under rule 5.403, and has no discretion to admit hearsay in the absence of a provision providing for it. *Id.* The question whether a statement constitutes hearsay presents a legal issue. See *United States v. McGlory*, 968 F.2d 309, 332 (3d Cir. 1992). It is within this framework that we review hearsay rulings for correction of errors at law. See *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998). Hearsay inadmissible under the rule is considered to be prejudicial to the nonoffering party unless otherwise established. See *State v. Dullard*, 668 N.W.2d 585, 590 (Iowa 2003).

We agree with the State that the descriptions were non-hearsay under Iowa Rule of Evidence 5.801(d)(1)(B) and (C).

Iowa Rule of Evidence 5.801(d)(1) provides:

Statements which are not hearsay. The following statements are not hearsay.

1. Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at trial, hearing or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.

The challenged testimony of the description of Casper can be admitted as non-hearsay under either the (B) or (C) exceptions. Evidence of prior out-of-court identification of the accused has long-standing case law support and is usually permitted. See 2 *McCormick on Evidence* § 251 at 154 (6th ed. 2006).

The testimony as to the description of Casper and of the truck is admissible under (C). Merrick testified before Smith. As to (B), a review of Casper's cross-examination of Merrick indicates there was an implied suggestion that her identification of Casper and his truck were the result of improper influence or motive or her memory was not clear.

We affirm on this issue.

**SENTENCING.** Casper was sentenced to serve one year in the Cedar County Jail and upon completion of this sentence Casper was committed to the custody of the Department of Corrections for a period of ten years, as the special statute applies to this case. The court then further ordered, without reference to any statute supporting it that, "For a period of five years after completion of his sentence of incarceration, defendant is prohibited from having contact with minors and the victim in this case, Kristin Merrick."

Casper contends the district court exceeded its authority in imposing a five-year no-contact order prohibiting him from contact with minors. He contends there is no authorization statutorily to support it and that it is unconstitutionally excessive.

The State, as do we, agrees with the second argument. That portion of the sentence imposing a five-year no-contact order is vacated. In all other respects we affirm.

**CONVICTION AFFIRMED; SENTENCE VACATED IN PART.**