

**IN THE COURT OF APPEALS OF IOWA**

No. 8-221 / 07-0491  
Filed June 25, 2008

**STATE OF IOWA,**  
Plaintiff-Appellant,

**vs.**

**JOSH ADAM LUSCH,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Pottawattamie County, James S. Heckerman, Judge.

Defendant appeals his judgment and sentence for second-degree sexual abuse. **AFFIRMED.**

Paul Rosenberg of Paul Rosenberg & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Daniel McGinn and Shelly Sedlak, Assistant County Attorneys, for appellee.

Heard by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

**EISENHAUER, J.**

After a jury trial, Josh Lusch was found guilty of second-degree sexual abuse in violation of Iowa Code sections 709.1(3) and 709.3(2) (2005). On appeal he argues the six-year-old victim was not a competent witness and argues his counsel was ineffective. We affirm.

**I. Background Facts and Proceedings.**

Due to a family illness, the victim slept at Lusch's house one evening. While everyone else slept, Lusch and a friend stayed up all night playing video games. When his friend left early in the morning, Lusch looked at pornography on the computer. The State's computer expert testified the computer's hard drive contained pornographic pictures, including child pornography.

The victim woke up and was alone with Lusch. Lusch testified she was playing a video game while he continued to look at pornography. The video game and the computer are in the same room. Lusch stated he did not notice she had stopped playing and was looking at his computer screen. Lusch claimed he told her to stop looking and go back to her video game. In contrast, the victim testified Lusch showed her the pornography. The victim further testified Lusch abused her.

The victim told her daycare provider about the abuse and the police became involved. The police arranged for the victim to meet with a forensic interviewer and the victim told the interviewer about the abuse. The victim also met with a play therapist for numerous sessions. The therapist testified "the kids kind of act out what's going on in their lives and we kind of process it through the

toys.” Although the victim was originally very shy with the therapist, after numerous sessions she eventually played with the toys. The therapist testified:

She would play with the toy jail and put the bad guy named Josh in jail and yell at him saying you bad, you hurt my pee-pee and put him in jail. That was always a very common theme. Or she would draw a picture of Josh being in jail.

The victim was examined by two doctors. The emergency room doctor found no physical signs of abuse. The second doctor, using magnifying equipment not utilized in emergency rooms, testified to finding a scar consistent with abuse.

At trial Lusch denied abusing the victim and now appeals the jury’s guilty verdict. Lusch argues the six-year-old victim was not a competent witness and argues his counsel was ineffective.

## **II. Witness Competency.**

After the victim testified to being abused on direct examination, Lusch’s attorney objected and the court excused the victim and the jury. Lusch’s attorney argued:

[M]y concern that what is going to happen when I get my chance to cross-examine her is a total collapse to which we’re babbling nonsense. This allows the State to make a direct without allowing me a cross-examination. I don’t believe this child is competent to testify in a trial and I don’t believe she understands what she’s being asked to do when she swears an oath.

In overruling Lusch’s objection, the court noted the victim had only testified for about five minutes and “there’s nothing I have seen in the courtroom so far that automatically disqualifies her as a witness.” However, the court “put everybody on notice” if she completed direct “but then is unable because of her emotional state or whatever to complete [Lusch’s attorney’s] cross-examination, I

will have no choice but to disqualify her as a witness.” Noting the defense concerns were legitimate, the court concluded:

I’ll see how she stands up and if at some point it becomes apparent to me she does not qualify as a witness or that somehow the manner in which she’s being examined or her ability to answer those questions somehow violates [Lusch’s] right to be confronted by the witnesses against him or [defense counsel’s] right to cross-examine the witnesses presented by the State, then I’ll make an appropriate ruling at that time.

The victim completed direct and answered questions on cross-examination. After the State rested its case, Lusch’s attorney made a motion for judgment of acquittal and again argued the victim wasn’t competent to testify. The court denied the motion. Lusch’s motion for a new trial based on the verdict being against the weight of the evidence was also denied.

On appeal, Lusch argues the victim was not competent to testify because: (1) the victim’s play therapy improperly influenced her testimony; (2) she could not demonstrate an understanding of the concepts of time; and (3) her testimony on cross-examination was inconsistent with her answers on direct examination.

We review for correction of errors at law. Iowa R. App. P. 6.4. Our review of the trial court’s determination of witness competency is “strictly circumscribed.” *State v. Andrews*, 447 N.W.2d 118, 120 (Iowa 1989). We will not reverse unless the court abused its discretion by making a “clearly untenable” ruling “without reason.” *Id.* The trial court has the “authority to make necessary competency determinations whenever and as often as may be required by the particular circumstances of a case.” *Id.*

There is a presumption children are competent to testify. *Id.* Once a child’s competency is challenged, the court must consider three factors: (1)

whether the child is mentally capable of understanding the questions; (2) whether the child is able to formulate intelligent answers and communicate impressions and recollections regarding the incident; and (3) whether the child can understand the responsibility to tell the truth. *Id.* In prior cases courts have upheld a trial court's determination a young victim was competent to testify to sexual abuse. See *State v. Brotherton*, 384 N.W.2d 375, 378 (Iowa 1986) (ruling four-year-old victim competent); *State v. Dodson*, 452 N.W.2d 610, 611 (Iowa Ct. App. 1989) (ruling five-year-old victim competent).

The victim was in preschool and age five at the time of the alleged abuse. She was a six-year-old kindergartener at trial. She was questioned about her age, her birth month, and her teacher's name. She talked about studying the letter "O" currently in school. Additionally, she demonstrated she knew the difference between "the truth" and "not the truth." In her testimony she demonstrated an ability to formulate answers and communicate her impressions and recollections regarding the abuse. She verbalized an independent recollection of the incident in answers to open-ended questions:

Q. Did you ever stay the night at Josh's house?

A. Yeah.

Q. Did something happen at Josh's house?

A. Yeah.

Q. What happened?

A. He hurted my pee-pee.

Q. How did he hurt your pee-pee?

A. By stickin' his finger in it.

Q. When he did that, how did it feel?

A. It hurted.

...

Q. And what else happened when you were at Josh's house?

A. He showed me pictures on the computer.

Q. What kind of pictures?

A. With the butt and pee-pees and boobies.

Q. Were they – what were they pictures of?

A. Girls.

Q. Did you want to look at those pictures?

A. No.

First, we are unconvinced the record as a whole demonstrates the victim's play therapy improperly influenced her testimony. Second, we agree the record shows the victim did not understand the concept of time. However, she demonstrated knowledge in other school-related areas and the judge could reasonably conclude her lack of understanding of time was not unusual for a six-year-old. Third, we agree her testimony contained some inconsistencies. However, testimonial inconsistency does not make it unreasonable for a trial court to conclude a child is a competent witness because such inconsistencies are "a matter directed to the weight to be afforded the witness' testimony by the jury." *Brotherton*, 384 N.W.2d at 378.

We conclude no abuse of the trial court's broad discretion in determining the victim's competency has been shown. "The trial court is in a position from which it can asses these issues." *Dodson*, 452 N.W.2d at 611. Lusch has not established the trial court's determination of the victim's competency is a "clearly untenable" ruling "without reason" and we affirm the trial court on this issue.

### **III. Ineffective Assistance of Counsel.**

Lusch also argues his trial counsel was ineffective because he did not move to strike the victim's testimony in order "to preserve this vital issue for review." We normally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings, however, direct appeal is appropriate when the record is adequate to determine as a matter of law the defendant will be unable to establish one or both of the elements of his ineffective-assistance claim. *State*

*v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). We review ineffective-assistance claims de novo. *Id.* at 414. Here the record is adequate to resolve this issue on direct appeal.

In order to prevail, Lusch must show (1) counsel failed to perform an essential duty and (2) prejudice resulted. See *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We conclude Lusch has not proven his counsel failed to perform an essential duty. As our prior discussion demonstrates, Lusch's attorney raised the issue of the victim's competence as a witness numerous times and adequately preserved the competency issue for our review. Additionally, any motion to strike would not have been successful; therefore, counsel did not render ineffective assistance in failing to make such a motion. See *State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (noting trial counsel is not ineffective for failing to raise a meritless issue).

**AFFIRMED.**