IN THE COURT OF APPEALS OF IOWA

No. 9-1036 / 08-1657
Filed April 21, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES HOWARD BENTLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Benton County, Denver D. Dillard, Judge.

A defendant appeals his judgment and sentence for second-degree sexual abuse. He challenges (1) the admission of hearsay statements, (2) the sufficiency of the evidence supporting the jury's finding of guilt, and (3) the district court's imposition of a special sentence. **JUDGMENT AFFIRMED, SENTENCE AFFIRMED IN PART AND VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, and David C. Thompson, County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

James Bentley appeals his judgment and sentence for second-degree sexual abuse. He challenges (1) the admission of hearsay statements, (2) the sufficiency of the evidence supporting the jury's finding of guilt, and (3) the district court's imposition of a special sentence.

I. Background Facts and Proceedings

J.G., born in 1994, was the daughter of a woman with whom Bentley had a short relationship. Several years after the relationship ended, Bentley had a chance encounter with J.G.'s mother and it was agreed that J.G. would periodically visit Bentley and his family in Benton and Linn County. The Cedar Rapids Police Department was subsequently asked to investigate a report that Bentley sexually abused J.G. As a result of the investigation, Bentley was arrested and charged with second-degree sexual abuse.

Meanwhile, a licensed social worker named Laura Sundell began treating J.G. for behavioral issues. In the course of treatment, J.G. told Sundell that Bentley sexually abused her. J.G.'s grandmother, who attended the therapy sessions with J.G., confirmed that J.G. told her the same thing.

In a pretrial ruling, the district court concluded that J.G.'s statements to Sundell were admissible under the "medical diagnosis or treatment" and the "residual hearsay" exceptions to the hearsay rule. During trial, the court ruled that the statements of J.G.'s grandmother to Sundell were also admissible under the "[s]ame exception for the hearsay rule."

A jury found Bentley guilty as charged and the district court imposed sentence, including a special sentence of lifetime parole pursuant to Iowa Code section 903B.1 (Supp. 2005). Bentley appealed.

II. Hearsay

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). "Hearsay is not admissible except as provided by the Constitution of the State of Iowa, by statute, by the rules of evidence, or by other rules of the Iowa Supreme Court." Iowa R. Evid. 5.802. One of the exceptions is for

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Iowa R. Evid. 5.803(4).

The Iowa Supreme Court has adopted the following two-part test for determining admissibility under this exception:

> [F]irst the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.[1]

State v. Tracy, 482 N.W.2d 675, 681 (Iowa 1992) (quoting *United States v. Renville*, 779 F.2d 430, 436 (8th Cir. 1985)). The court has also extended the exception to statements made to social workers "in connection with diagnosis or

[1] One federal circuit court has noted that the second prong of the *Renville* test is unnecessary because it essentially duplicates the language of the rule of evidence. *United States v. Joe*, 8 F.3d 1488, 1494 n.5 (10th Cir.1993).

treatment of emotional trauma . . . if the social worker is sufficiently qualified by training and experience to provide that diagnosis and treatment." *State v. Hildreth*, 582 N.W.2d 167, 169 (Iowa 1998).

A. J.G.'s Statements to Sundell

Bentley first argues that, in treating J.G., Sundell could not have reasonably relied on J.G.'s statements about her abuser's identity because his identity "was known before any medical diagnosis or treatment occurred and steps were taken that would protect J.G. from further abuse." This assertion implicates the second prong of the test adopted in *Tracy*.

We begin by noting that "[t]he exact nature and extent of the psychological problems which ensue from child abuse often depend on the identity of the abuser." *Renville*, 779 F.2d at 437. That is the case here. Sundell stated that she spent the majority of her sessions addressing J.G.'s fear, which she characterized as "all consuming." According to Sundell, J.G. raised the subject at "[e]very session," including ones after Bentley's arrest. When Sundell asked J.G. what she could do to help J.G. feel safe, J.G. asked Sundell to help her construct cardboard "dream-catchers" to hang in her room and home. According to Sundell, these "would stop—she referred to him as Jim—from getting to her, that it would help keep her safe."

Because Sundell reasonably relied on J.G.'s statements about Bentley's abuse in her treatment of J.G., we conclude the district court did not err in admitting these statements under the "medical diagnosis and treatment" exception to the hearsay rule. *See State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998) (reviewing hearsay rulings for errors of law). In light of our conclusion that

J.G.'s statements were admissible under this exception, we need not address the district court's alternate conclusion that the statements were also admissible under the residual hearsay exception.

B. The Statements of J.G.'s Grandmother to Sundell

Bentley also contends that the district court improperly admitted Sundell's testimony concerning statements J.G. made to her grandmother. While these statements clearly constitute hearsay within hearsay (J.G.'s out-of-court statements to her grandmother which her grandmother then relayed to Sundell), this type of double hearsay is not excluded if each hearsay statement falls within an exception to the hearsay rule. Iowa R. Evid. 5.805. If each statement does not fall within an exception, the erroneous admission is presumed to be prejudicial "unless the contrary is established affirmatively." *Hildreth*, 582 N.W.2d at 170. We will not find prejudice "if the admitted hearsay is merely cumulative." *Id.*

We agree with the State that the grandmother's statements to Sundell—even if we were to consider them inadmissible hearsay—were cumulative of J.G.'s own statements to Sundell as well as statements J.G. made to other health professionals. As the information J.G.'s grandmother reported to Sundell was in the record through other sources, we conclude the admission of her statements was non-prejudicial.

III. Sufficiency of the Evidence

Bentley contends there was insufficient evidence to establish that he engaged in sex acts with J.G. We will uphold a finding of guilt if there is

substantial evidence to support it. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

The jury was instructed that, to prove sex abuse in the second degree, the State would have to prove the following:

> 1. During the spring of 2003 through November 2004, in Benton County, Iowa, the defendant performed a sex act with J.G.
> 2. The defendant performed the sex act while J.G. was under the age of 12 years.

The jury was also instructed that a sex act means any sexual contact:

> 1. By penetration of the penis into the vagina or anus.
> 2. Between the mouth of one person and the genitals of another.
> 3. Between the genitals of one person and the genitals or anus of another.
> 4. Between the finger or hand of one person and the genitals or anus of another person.
> 5. By a person's use of an artificial sex organ or a substitute for a sexual organ in contact with the genitals or anus of another.

In assessing J.G.'s statements concerning the nature of the abuse, we find the following language instructive:

> "[T]he child may lack the technical knowledge to accurately describe parts of his or her body. Where the child has sufficiently communicated to the trier of fact that the touching occurred to a part of the body within the definition of [the Texas statute], the evidence will be sufficient to support a conviction regardless of the unsophisticated language that the child uses."

State v. Martens, 569 N.W.2d 482, 487 (Iowa 1997) (quoting *Clark v. State*, 558 S.W.2d 887, 889 (Tex. Crim. App. 1977)).

J.G. told Sundell that Bentley touched her in her "private areas." J.G. defined "private areas" as those "that would be covered by her bathing suit that nobody should touch . . . ." She mentioned her chest area and the area covered by her underwear. She also indicated Bentley touched her "in her crotch area,

her privates." Finally, she told another health care professional that "Daddy Jim had put his you know what on her bottom." Sundell had access to the report of this health care professional and read from it. This evidence amounts to substantial evidence in support of a finding that Bentley engaged in a sex act with J.G.

Bentley next contends there was insufficient evidence he engaged in sex acts in Benton County. The State counters that error was waived. We agree.

Venue is a nonjurisdictional issue. *State v. Liggins*, 524 N.W.2d 181, 185 (Iowa 1994). "A defendant must secure a ruling by the trial court before trial or the venue issue is waived." *Id.*; *accord* Iowa Code § 803.2(3) (2003).[2]

While Bentley filed a motion for change of venue which was granted, his motion was based on pre-trial publicity. He did not assert, as he does now, that the acts did not occur in Benton County. Therefore, his present assertion is waived. *See State v. Dicks*, 473 N.W.2d 210, 213 (Iowa Ct. App. 1991).

IV. Legality of Special Sentence

Finally, Bentley argues that the district court illegally imposed a special term of lifetime parole pursuant to Iowa Code section 903B.1 (Supp. 2005). He asserts that because the acts occurred between the spring of 2003 and

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[2] This provision states:

> All objections to venue are waived by a defendant unless the defendant objects thereto and secures a ruling by the trial court on a pretrial motion for change of venue. However, if venue is changed pursuant to subsection 2, all objections to venue in the county to which the action is transferred are waived by a defendant unless the defendant objects by a motion for change of venue filed within five days after entry of the order transferring the action and secures a ruling by the trial court on the motion before a jury has been impaneled and sworn.

November of 2004, section 903B.1—which became effective July 1, 2005—cannot be applied to him. *See* 2005 Iowa Acts ch. 158, § 39. The State agrees. Accordingly, we vacate that portion of Bentley's sentence imposing lifetime parole pursuant to section 903B.1.

JUDGMENT AFFIRMED, SENTENCE AFFIRMED IN PART AND VACATED IN PART.

Danilson, J. concurs. Sackett, C.J. concurs specially without opinion.