IN THE COURT OF APPEALS OF IOWA

No. 1-346 / 10-0928
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DYLAN BURLE McKEEVER,
Defendant-Appellant.

Appeal from the Iowa District Court for Buena Vista County, Nancy L. Whittenburg, Judge.

Defendant appeals his convictions and sentences for second and third-degree sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Dylan Burle McKeever, Coralville, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, David Patton, County Attorney, and James McHugh and John Stevens, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DOYLE, J.

Dylan McKeever appeals his convictions and sentences for second and third-degree sexual abuse. He primarily challenges the admission of certain items of evidence and testimony as hearsay. We affirm.

I. Background Facts and Proceedings.

A few days before her fourteenth birthday in December 2009, A.L. went to the office of her school guidance counselor. She told the counselor she needed to tell him something but had trouble telling him what was wrong. Sensing she was uncomfortable, the counselor asked A.L. if she could write down what she wanted to tell him. A.L. wrote the following:

> Dylan McKeever raped me!
> He has been abusing [me since] I was 4 years old. He started with touching me. He made me touch him. As I got older and older he got [more] physical with me. He would do this when no one else was around. I didn't know when it was going to happen but the clue [was] that no one [was] in the house. The last time this happened was about a month ago.

McKeever is A.L.'s stepfather. He has lived with A.L. since she was a few months old and has two younger children with her mother.

A.L.'s complaint was reported to the Iowa Department of Human Services (DHS) and the police. Deputy Douglas Simons led the investigation. He sent an officer to assist a caseworker from DHS in interviewing A.L. After that interview, Simons secured a search warrant for A.L.'s home. Two officers arrived at the house, along with two DHS caseworkers. McKeever answered the door. He was informed of A.L.'s allegations, which he denied. McKeever was placed under arrest, and several items were seized from the home, including a pink and white blanket, comforter, sheet, and pillows from A.L.'s bed.

The items taken from the home were tested for McKeever's DNA. Seminal fluid that matched McKeever's profile was found on the pink and white blanket. But seminal fluid that was not consistent with McKeever was found on the comforter and one of the pillows.

McKeever was charged by trial information with second-degree sexual abuse for acts committed between July 29, 2006, and December 18, 2007, and third-degree sexual abuse for acts committed between November 1 and November 30, 2009. A jury trial began on March 23, 2010.

A.L. testified at trial that McKeever started sexually abusing her when she was four or five years old. A complaint was made to the authorities in 2001. During a videotaped interview at St. Luke's Child Protection Center that year, A.L. said McKeever made her put her mouth on his penis, among other things. A videotape of that interview was played for the jury.

The jury also heard from Deputy Burt Tecklenburg about his investigation of the 2001 allegations. Tecklenburg testified that he questioned McKeever in January 2001. McKeever told him that he was unemployed at that time. He stayed at home alone with A.L. while her mother worked. McKeever initially denied any abuse, though he later admitted

> there had been oral contact by [A.L.] on his . . . penis; did cause him to ejaculate. He made admissions they were both unclothed at the time . . . that it took place at the home, in the living room, on the couch. He admitted there was at least a couple of times in December of 2000 when this occurred.

McKeever was arrested, but the charges against him were eventually dismissed because A.L.'s family moved to Colorado.

The family returned to Iowa in the summer of 2006. A.L. said that one night when she was about eleven years old she was taking a shower in their new home in Iowa. She reached for the soap, and when she turned around, McKeever was standing in the shower, naked. He asked her if she wanted to wash him. She said no. He then asked her if she "wanted it down there." She said no, but McKeever had sexual intercourse with her anyway.

A.L. testified that on another occasion in November 2009, when she was thirteen years old, McKeever came into her room early in the morning when she was still sleeping. A.L. woke up to find him standing next to her bed. He got into bed with her and took off his pajamas. Like the previous occasion, he asked her if she "wanted it down there" and had sexual intercourse with her despite her protests.

The jury found McKeever guilty as charged. McKeever appeals. He claims the district court erred in admitting A.L.'s note to the guidance counselor into evidence and allowing Deputy Simons to testify about what another officer told him A.L. had reported. He further claims trial counsel was ineffective for failing to object to Simons's testimony about an interview with A.L. during which she described two separate incidents of sexual abuse and the admission of the videotaped interview with A.L. in 2001. He argues these items of evidence and testimony were inadmissible hearsay. Finally, McKeever raises a speedy-trial issue in a pro se brief.

II. Scope and Standards of Review.

Although generally we review a trial court's decision to admit or exclude evidence for an abuse of discretion, we review hearsay claims for correction of

errors at law. *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). "Even though these claims are generally preserved for post-conviction relief, when presented with a sufficient record this court will address such a claim." *Id.*

III. Discussion.

A. Hearsay.

Under our rules of evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at . . . trial . . . offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). Hearsay must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). Inadmissible hearsay is presumed to be prejudicial to the nonoffering party unless otherwise established. *Id.*

1. Note to Guidance Counselor. McKeever argues the note A.L. gave her counselor in December 2009 when she reported the abuse was inadmissible hearsay. Defense counsel's objection to the admission of this note as hearsay was overruled. The State concedes the note was hearsay, with no applicable exception allowing its admission at trial, but argues McKeever was not prejudiced because substantially the same evidence was properly in the record. We agree.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Iowa R. Evid. 5.103(*a*). This rule requires a harmless error analysis where a nonconstitutional error is claimed. *Newell*, 710 N.W.2d at 19. To determine whether the error is

harmless, we ask whether it sufficiently appears "'that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice?'" *Id.* (citation omitted). In considering whether the admission of hearsay is reversible error, our supreme court has held "that notwithstanding the presumption of prejudice from the admission of such evidence, the erroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record." *Id.*; *see also State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) ("[W]e will not find prejudice if the admitted hearsay is merely cumulative.").

A.L. testified McKeever began abusing her when she was four or five years old. She described the abuse in detail and said that it would occur when her mother was at work. The note contained this same information, only in more general terms. We accordingly find it was merely cumulative to A.L.'s more detailed testimony and therefore not prejudicial. *Hildreth*, 582 N.W.2d at 170.

2. Testimony of Deputy. The State called Deputy Simons to testify about the investigation of A.L.'s allegations of abuse. Simons testified that he was notified about the allegations in December 2009. He sent an officer with a DHS caseworker to interview A.L. When Simons was asked what the officer told him after the interview, defense counsel interposed a hearsay objection. The State argued the out-of-court statement was not being offered to prove the truth of the matter asserted but was instead being offered to explain the deputy's responsive conduct. The trial court overruled the objection and allowed Simons to answer. He testified:

> Deputy Spears at the conclusion of the interview told me that it was a 13-year-old victim that they had spoken to at [the] school and that there was allegations that sexual abuse had occurred at the residence . . . approximately a few weeks prior to this initial complaint.

The State is correct that when "an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay." *See State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990); *see also State v. Griffin*, 386 N.W.2d 529, 535 (Iowa Ct. App. 1986) ("One kind of extra-judicial statement which is not hearsay at all is a victim's complaint to appropriate authorities."). Thus, an investigating officer usually "may explain his actions by testifying as to what information he had and its source regarding the crime and the criminal." *State v. Reynolds*, 250 N.W.2d 434, 440 (Iowa 1977); *see also State v. Doughty*, 359 N.W.2d 439, 442 (1984) ("The fact of a complaint is admissible to explain a third party's actions taken in response."). We believe Simons's testimony fits within this rule, as he refrained from testifying about the specifics of A.L.'s complaint and went on to relate his next step in the investigation. *Cf. Doughty*, 359 N.W.2d at 442 (noting if an investigating officer "'becomes more specific by repeating definite complaints of a particular crime by the accused, this is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay'" (citation omitted)).

In any event, we conclude the testimony was cumulative to A.L.'s more detailed testimony about the sexual abuse. *See Hildreth*, 582 N.W.2d at 170. It was also cumulative to the testimony of the guidance counselor, other officers, and sexual assault nurse examiner who all testified about A.L.'s report of sexual abuse at the hands of McKeever.

The same is true as to the next portion of Simons's testimony challenged by McKeever on appeal. Simons testified that he participated in a second interview of A.L. He said that during this interview,

> [t]here were two separate incidents that I personally recall that we covered during that time. There was one that had happened a few months earlier that she could not recall specific details on. The second incident that she recalled was back approximately two to three years prior. This incident occurred in the bathroom of the residence. And for that one, she did give some specific details, which we documented in a report form.

McKeever argues defense counsel was ineffective for failing to object to this testimony as hearsay. In order to succeed on this claim, McKeever must prove (1) breach of an essential duty and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A reviewing court need not engage in both prongs of the analysis if one is lacking. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992) ("[A] reviewing court can affirm a conviction on direct appeal if the defendant has failed to prove prejudice, without deciding whether counsel's representation was incompetent."). We think the claim may be resolved on the prejudice prong, which requires McKeever to show a reasonable probability that without counsel's errors, the result would have been different. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

A.L. testified in detail about two sexual assaults by McKeever—one that occurred in the bathroom when she was around eleven years old and another that occurred about one month before she reported the abuse. Simons's testimony was cumulative to that more detailed evidence. *See Hildreth*, 582 N.W.2d at 170. It is not reasonably likely the result of McKeever's trial would

have been different had that portion of Simons's testimony been excluded. *See Strickland*, 466 U.S. at 695-96, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699 ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect."). This brings us to the final item of evidence challenged by McKeever.

3. 2001 Videotaped Interview of the Victim. Over defense counsel's objections, the trial court allowed the State to offer evidence about the 2001 investigation of McKeever for sexually assaulting A.L. Among that evidence was a videotape of A.L.'s interview in 2001 at St. Luke's Child Protection Center. Defense counsel argued the videotape was unreliable, not supported by clear proof of the commission of the prior act of sexual abuse, and unduly prejudicial. Those objections were overruled, and the videotape was played for the jury during the trial.

McKeever now claims defense counsel should have objected to the videotape as inadmissible hearsay. Although the videotape clearly constitutes hearsay, the State argues it was properly admitted by the district court pursuant to the medical diagnosis or treatment exception to the hearsay rule found in Iowa Rule of Evidence 5.803(4). We need not decide this question, however, because McKeever's claim is raised under an ineffective-assistance-of-counsel rubric. Like the preceding claim, we conclude McKeever has failed to show he was prejudiced by the admission of the videotape.

The evidence of McKeever's guilt, even without the videotape, was overwhelming. *See Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d

at 699 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). A.L. specifically described the two instances of abuse that occurred when she was eleven and thirteen years old and testified generally about the ongoing abuse she suffered throughout her life at the hands of McKeever. Her testimony was corroborated by physical evidence, though such corroboration is not necessary in sexual abuse cases. *See Hildreth*, 582 N.W.2d at 170 (finding an "alleged victim's testimony is by itself sufficient to constitute substantial evidence of defendant's guilt"). A sexual assault nurse examiner testified A.L.'s hymen was torn, which she stated was consistent with the sexual abuse reported by A.L. And DNA testing of A.L.'s blanket revealed the presence of seminal fluid from McKeever.

Based on this evidence, we conclude McKeever cannot establish the prejudice required for his ineffective-assistance claim. We accordingly reject this claim and move on to McKeever's final claim on appeal.

B. Speedy Trial.

In a pro se brief filed with this court, McKeever argues his ninety-day right to a speedy trial was violated. Iowa Rule of Criminal Procedure 2.33(2)(*b*) provides:

> If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days *after indictment is found* or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

(Emphasis added.) McKeever asserts this rule was violated because he was not brought to trial within ninety days *after his arrest* on December 16, 2009.

We agree with the State that the date of McKeever's arrest is only relevant for a speedy indictment claim, which requires the State to charge a defendant within forty-five days of the defendant's arrest. *See* Iowa R. Crim. P. 2.33(2)(*a*).[1] Rules 2.33(2)(*a*) and (*b*) are not read together to require a defendant to be brought to trial within ninety days of his arrest, contrary to McKeever's arguments otherwise. Such an interpretation would be contrary to the plain language of the rules.

A trial information charging McKeever with second and third-degree sexual abuse was filed on December 28, 2009. *See* Iowa R. Crim. P. 2.5(5) ("The term indictment embraces the trial information. . . ."). His jury trial began on March 23, 2010, eighty-five days after the trial information was filed. McKeever was therefore brought to trial within ninety days after the indictment was found, as required by rule 2.33(2)(*b*).

IV. Conclusion.

In conclusion, we find no error prejudicial to McKeever in the admission of certain evidence and testimony. Nor do we find any merit to McKeever's pro se speedy-trial claim. We accordingly affirm his convictions and sentences for second and third-degree sexual abuse.

AFFIRMED.

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[1] This rule provides that when

> an adult is arrested for the commission of a public offense . . . and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives the defendant's right thereto.

Iowa R. Crim. P. 2.33(2)(*a*).