IN THE COURT OF APPEALS OF IOWA

No. 6-540 / 05-1306
Filed November 16, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CARLOS RAFAEL DAVIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Carlos Davis appeals his judgment and sentence for second and third-degree sexual abuse, and alleges ineffective assistance of trial counsel. **AFFIRMED.**

Alfredo Parrish and Andrew Dunn of Parrish, Kruidenier, Moss, Dunn, Boles, Gribble & Cook, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, John P. Sarcone, County Attorney, and Nan Horvat, Assistant County Attorney, for appellee.

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

VAITHESWARAN, J.

Carlos Davis adopted M.D. when she was approximately eight years old. Several years later, M.D. told her friend Cheri that Davis was having sex with her. After authorities were notified, the Department of Human Services interviewed M.D. Following the interview and investigation, Davis was arrested and charged with one count of second-degree sexual abuse and one count of third-degree sexual abuse. Iowa Code §§ 709.1, 709.3, 709.4(2)(b) (2003).

At trial, M.D. testified about the abuse, stating it probably began when she was ten years old. Her testimony was corroborated by her half-sister, K.K., who stated that M.D. told her about the abuse, and by M.D.'s friend, Cheri, who testified about M.D.'s disclosure to her. The State also presented evidence from which a jury could have inferred that Davis transmitted genital warts to M.D. Additionally, the State elicited testimony from M.D.'s mother that Davis "was pretty adamant" about having M.D. keep track of her menstrual period, once it started. And, the State presented evidence that Davis received a stipend for his adopted children. A jury found Davis guilty as charged.

On appeal, Davis takes issue with the district court's admission of the following evidence: (A) K.K.'s and Cheri's testimony recounting conversations with M.D. about the sexual abuse; (B) the genital warts testimony; (C) the menstrual cycle testimony; and (D) the stipend testimony. He also challenges the sufficiency of the evidence supporting the findings of guilt. Finally, Davis contends trial counsel was ineffective in several respects.

I. Evidentiary Issues

A. K.K.'s and Cheri's Testimony

Davis contends the testimony of K.K. and Cheri concerning statements M.D. made to them was inadmissible hearsay evidence. We will address each child's testimony separately, reviewing the issue for prejudicial error. *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006).

1. K.K.'s Testimony About Sexual Abuse. K.K. testified that she was "sharing secrets" with M.D. one day when M.D. said Davis abused her. K.K. asked what kind of abuse took place. According to K.K., M.D. responded, "He raped me."

The State preliminarily argues that Davis "did not preserve the claimed hearsay challenge" to M.D.'s testimony. We disagree. When the prosecutor began questioning K.K. about the conversation, defense counsel intervened, stating, "Objection, hearsay." The district court summarily overruled the objection and the prosecutor proceeded to question K.K. about the conversation. We are convinced counsel's objection was sufficient to preserve error. *See State v. Johnson*, 539 N.W.2d 160, 162 n.2 (Iowa 1995) (noting counsel's objection "alerted the trial court to his contentions on appeal"); *State v. Kidd*, 239 N.W.2d 860, 863 (Iowa 1976) ("Once a proper objection has been made and overruled, an objector is not required to make further objections to preserve his right on appeal when a subsequent question is asked raising the same issue. Repeated objections need not be made to the same class of evidence.").

Turning to the merits, the State argues K.K.'s recounting of the conversation she had with M.D. was not hearsay. *See* Iowa R. Evid. 5.801(*c*)

(defining "hearsay" 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"). The State cites a single ground for upholding the court's evidentiary ruling: rule 5.801(*d*)(1)(*B*).[1] The rule states the following is 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 . . . (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.

It is undisputed that the first several prerequisites of the rule are satisfied. Specifically, the "declarant" (M.D.) testified at trial, was subject to cross-examination, and the prior statement attributed to her by K.K. ("[h]e raped me") was consistent with her trial testimony that Davis sexually abused her. The fighting issue is whether this prior consistent statement was "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." *Id*.

In addressing this issue, the first question is whether the statement was "offered to rebut an express or implied charge against the declarant." *Id*. Davis

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[1] This ground was not cited or discussed in the district court. While this omission would normally preclude the State from using the ground as a basis for affirmance, that error preservation rule does not apply to evidentiary rulings, which may be sustained on any ground. *DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002).

On a related note, our rules of appellate procedure do not require us to search for grounds to uphold the ruling. Instead, we look to what the parties argued and the authority they cited for those arguments. Iowa R. App. P. 6.14 (*c*), (*f*). *See also State v. Stoen*, 596 N.W.2d 504, 507 (1999) (citing *Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) (stating "to reach the merits of this case would require us to assume a partisan role and undertake the appellant's research and advocacy," which the court was not willing to do)). For this reason, we need not address any other bases that may exist for upholding the ruling.

argues the testimony was not admissible "because during the cross-examination of [M.D.] the defense never implied that her testimony was false." The State responds that the statement was admissible to counter defense counsel's attempt "to portray [M.D.'s] complaints as untrue and based on improper motives." On this question, we agree with the State.

"Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party." *Johnson*, 539 N.W.2d at 162. After M.D. testified for the State, defense counsel cross-examined her. He elicited several admissions from M.D. that could have allowed the jury to infer she fabricated her testimony or had an improper motive to testify as she did. In particular, defense counsel asked M.D. about a note authored by her and found by her mother, which stated someone was "messing with" her. M.D. admitted that when her mother asked her about the note, she replied she was not referring to Davis, but was referring to her biological father. M.D. also conceded that she denied Davis was the perpetrator of the abuse when asked by a friend's mother. Finally, M.D. admitted she thought Davis was sometimes too strict with her, raising the implication that she might have fabricated the story to have him removed from the home. In the face of these admissions, we conclude K.K.'s testimony was rebuttal evidence. *Id*. at 163 (concluding State was entitled to rebut cross-examination testimony offered "to bolster [the defendant's] claim that, due to the faltering relationship between himself and his daughter, a motive existed for her to lie").

The second question under rule 5.801(*d*)(1)(*B*) relates to the timing of the prior consistent statement, "[h]e raped me." In *Johnson*, our highest court held

that "a witness's prior consistent statement is admissible as nonhearsay to rebut a charge of recent improper motive under Iowa Rule of Evidence [5.801(*d*)(1)(*B*)] *only if* the statement was made before the alleged improper motive to fabricate arose." *Id*. at 165 (citing *Tome v. United States*, 513 U.S. 150, 167, 115 S. Ct. 696, 705, 130 L. Ed. 2d. 574, 588 (1995) (reading this time limitation into identical federal rule)) (emphasis in original). The *Johnson* court characterized this holding as a "bright-line rule" based on "sound" rationale. *Id*. That rationale was explicated in *Tome* as follows:

> If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones.

Tome, 513 U.S. at 165, 115 S. Ct. at 705, 130 L. Ed. 2d at 587. The Court in *Tome* acknowledged that "in some cases it may be difficult to ascertain when a particular fabrication, influence, or motive arose." *Id*. at 165-66, 115 S. Ct. at 705, 130 L. Ed. 2d at 587. The Court noted, however, that courts had been performing this task under the common law for "well over a century" and the government presented no evidence that they were "unable to make the determination." *Id*. at 166, 115 S. Ct. at 705, 130 L. Ed. 2d at 587.

Applying *Johnson*, we must decide whether M.D.'s statement to K.K. that "[h]e raped me" was made before M.D.'s claimed fabrication or improper influence or motive arose. If it was, then the statement was admissible as non-hearsay evidence.

K.K. did not specify when M.D. discussed the sexual abuse with her, but did indicate the statement was made after she moved in with Davis and her

mother. This move took place when K.K. was in fourth grade, which, we deduce, was in the 2002-2003 academic year. Davis was arrested in September 2004. Therefore, the most that we can discern from the record is that M.D.'s statement to K.K. was made sometime between the fall of 2002 and the fall of 2004.

Turning to the evidence of M.D.'s fabrication or improper influence or motive, M.D.'s mother testified she found M.D.'s note concerning sexual abuse in 2003. She confronted M.D. about the note, specifically asking her whether Davis sexually abused her. According to the mother, M.D. responded, "No, no." This response is inconsistent with M.D.'s trial testimony and would constitute the first instance of such an inconsistency. Under *Johnson*, M.D.'s consistent statement to K.K. would be admissible as nonhearsay evidence only if the statement was made before M.D.'s inconsistent statement. There is no indication that M.D.'s consistent statement was made before this inconsistent statement.

M.D. also denied to a friend's mother that Davis sexually abused her. According to M.D., this second inconsistent statement was made approximately a year before trial, which we calculate as being in June 2004. Again, there is no indication that M.D.'s consistent statement to K.K. was made before June 2004.

We are left with Davis's suggestion that M.D. accused him of sexual abuse to remove him from the home. The State argues, "The time at which any improper motive could arguably have manifested itself could only relate to the time of the report to [the Department of Human Services], which was not even initiated by [M.D.] but to which she responded." The report referred to by the State was made in August 2004. Assuming that an improper motive manifested itself in this report, there is no indication that M.D.'s statement to K.K. was made

before this time-frame. More importantly, there is scant evidence that M.D. alluded to an improper motive during the Department interview. The interviewer testified that M.D. confirmed she was abused by Davis, which is entirely consistent with her trial testimony. While M.D. also said her relationship with Davis "was not good," there was nothing to indicate that the ill-will she felt towards her adoptive father was based on anything but the abuse she claimed he inflicted. The State concedes this fact, noting that M.D.

> did not act on an improper motive to attempt an escape from a family situation. She was trying to keep the family together. This child wanted to stay with her mother; defendant threatened that if she told anyone he was abusing her she would not get to see her mother anymore, and [M.D.] did everything she could to keep her family together.

Additionally, M.D. explicitly refuted the assertion that she concocted the abuse story to retaliate against Davis. On redirect examination, she was asked, "Were you making this up because you didn't like that he was too strict or he punished you too much?" M.D. answered, "No."[2] Absent an improper motive asserted by M.D. during the August 2004 interview, that time frame cannot serve as the basis for the introduction of K.K.'s rebuttal evidence. *See Tome*, 513 U.S. at 157-58, 166, 115 S. Ct. at 701, 705, 130 L. Ed. 2d at 582, 588 (stating "[t]he Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told," and stating "the thing to be rebutted must be identified").

[2] This testimony as well as M.D.'s explanation of why she denied the abuse when questioned by her mother and her friend's mother arguably raises doubts about the necessity of introducing rebuttal evidence through K.K. However, given the broad definition of rebuttal evidence set forth above, we are persuaded that the State's attempt to introduce M.D.'s prior consistent statement through K.K. was proper rebuttal evidence, even if the timing of the statement foreclosed its admissibility.

In sum, we cannot conclude that M.D.'s prior consistent statement to K.K. was made before her fabrication or improper influence or motive arose. Therefore, the State did not establish that K.K.'s testimony was admissible under rule 5.801(*d*)(1)(*B*). *Cf*. *State v. Capper*, 539 N.W.2d 361, 366 (Iowa 1995) (finding no error in admission of prior consistent statements made prior to inconsistent statements), *overruled on other grounds by State v. Hawk*, 616 N.W.2d 527, 530 (Iowa 2000).

This brings us to the State's fall-back position that the admission of the evidence, even if erroneous, was harmless. A harmless error analysis in this context requires us to presume prejudice and reverse unless the record affirmatively establishes otherwise. *State v. Sullivan*, 679 N.W.2d 19, 30 (Iowa 2004); s*ee also Musser*, 721 N.W.2d at 751 ("Inadmissible hearsay is considered to be prejudicial to the nonoffering party unless otherwise established."). Notwithstanding this presumption of prejudice, we will not consider the evidence prejudicial if "substantially the same evidence is properly in the record." *State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) (citing *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998)).

In *Hildreth*, the Iowa Supreme Court was faced with a virtually identical factual scenario as is presented here. There, the district court admitted parents' testimony regarding their child's statements of sexual abuse by the defendant. *Hildreth*, 582 N.W.2d at 169. The Iowa Supreme Court concluded the ruling was harmless error because the parents' testimony was "repeated either by social workers or in the testimony of [the child] herself." *Id*. The same type of repetition is present in this record.

M.D. offered detailed and descriptive testimony of sexual abuse by Davis. She also stated that she told her half-sister K.K., her friend Cheri, and an abuse investigator about the abuse. M.D. testified that she did not have sexual contact with anyone other than Davis.

One of the investigators corroborated key aspects of M.D.'s testimony, as did a physician who examined her for signs of sexual abuse. The physician testified without objection that M.D. named Davis as "the person who engaged in those sex acts with her." The physician also found a tear in M.D.'s hymen and opined that "these kinds of injuries are rarely self-inflicted." While the physician could not testify to a reasonable degree of certainty that the injuries were caused by sexual intercourse, we cite her testimony simply to show that the *Hildreth* test of cumulative evidence was satisfied.

We conclude it was harmless error to admit K.K.'s testimony regarding her conversation with M.D. about the abuse.

2. K.K.'s Additional Testimony. Davis also challenges K.K.'s testimony about M.D.'s decision not to disclose the abuse to her mother. K.K. stated M.D. did not want to tell their mother "[b]ecause [Davis] said if I told anybody that I wouldn't be able to see Mom or something bad would happen to us or me." Assuming this was inadmissible hearsay evidence, the erroneous admission of the evidence was harmless because there was similar admissible testimony from M.D. about the reason she did not immediately disclose the abuse to her mother. *See Hildreth*, 582 N.W.2d at 170.

3. Cheri's Testimony. Davis next objects to Cheri's testimony concerning the conversation she had with M.D. According to Cheri, M.D. told her

"Carlos did it again" and M.D. said she thought she was pregnant. We again conclude the admission of this evidence was harmless under the *Hildreth* cumulative evidence standard. *Id*.

B. Genital Warts Testimony

Davis argues that testimony about genital warts elicited from M.D.'s mother and a physician "was not relevant." *See* Iowa R. Evid. 5.401 (defining relevant evidence as evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). We disagree.

The central question at trial was whether Davis sexually abused M.D. M.D.'s mother testified she had "vaginal warts" and had unprotected sex with Davis. As noted, M.D. testified she also had sex with Davis. This evidence could have led to the inference that Davis contracted vaginal warts from M.D.'s mother and passed it on to M.D. The evidence, therefore, fell within the definition of relevance.

The physician who examined M.D. testified M.D. had papules that were consistent with the genital warts virus and opined that a person could transmit the virus through sexual contact, even if the person had no visible genital warts. While we agree with Davis that the physician "could not say to a reasonable degree of certainty" whether Davis gave M.D. the virus, this fact does not diminish the relevance of the testimony or render her testimony inadmissible. *See State v. Stribley*, 532 N.W.2d 170, 172 (Iowa Ct. App. 1995) (stating qualified expert should be allowed to state even equivocal opinion). [We conclude this testimony also satisfied the definition of relevance set forth above.]

This does not end our inquiry because relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. Davis argues "the existence of a venereal disease is highly inflammatory and outweighs any probative value." We agree with Davis that our highest court has made this statement on several occasions. *See State v. Williams*, 574 N.W.2d 293, 299 (Iowa 1998); *State v. Mitchell*, 568 N.W.2d 493, 499 (Iowa 1997); *State v. Knox*, 536 N.W.2d 735, 739 (Iowa 1995). However, the statement was made in the context of our rape shield rule, which restricts evidence of "a *victim's* past sexual behavior." Iowa R. Evid. 5.412(*b*) (emphasis added). Here, the evidence was proffered by the State to suggest that Davis transmitted the genital warts virus to M.D. in the course of sexual contact with her. While we acknowledge the inflammatory nature of the evidence even in this context, we note that the probative value of the evidence is greater here than it was in *Williams*, *Mitchell*, or *Knox*. *Cf*. *Ceasar v. State*, 521 S.E.2d 866, 867 (Ga. Ct. App. 1999) (stating evidence showing child and mother had a sexually transmitted disease was sufficient to find defendant guilty of aggravated child molestation, notwithstanding absence of evidence that defendant was infected with disease). On balance, given the highly-charged nature of much of the trial testimony, we believe that the probative value of this testimony was not outweighed by the danger of unfair prejudice. Accordingly, we conclude the district court did not abuse its discretion in admitting this evidence. *See State v. Belken*, 633 N.W.2d 786, 793 (Iowa 2001) (reviewing evidentiary rulings for an abuse of discretion).

C. Menstrual Cycle Testimony

Davis filed a motion in limine asking the district court to prohibit M.D.'s mother from testifying about M.D.'s menstrual cycle. The district court overruled the motion and M.D.'s mother testified as follows:

> After M.D. started her period, Carlos was pretty adamant about her keeping track of when her period was, when she started, when she stopped. I could never understand why. I tried to tell him I don't even keep track of my own period, you know. She's 12, 13 years old; and when you're starting your period, it's never regular anyway.

Davis argues that this testimony was subject to the statutory marital privilege. *See* Iowa Code § 622.9.[3] While he acknowledges the existence of an exception to this privilege,[4] he contends the evidence does not fall within this exception.

In our view, the testimony falls squarely within the statutory exception set forth in Iowa Code section 232.74. *Cf*. *State v. Anderson*, 636 N.W.2d 26, 32 (Iowa 2001) (holding exception limited to cases of child abuse that result from acts or omissions of care provider). Specifically, there was evidence from a physician who examined M.D. that her hymen was torn, the evidence was presented in a criminal judicial proceeding, and the criminal proceeding resulted

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[3] This provision states:
Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

[4] Iowa Code section 232.74 states:
Sections 622.9 and 622.10 and any other statute or rule of evidence which excludes or makes privileged the testimony of a husband or wife against the other or the testimony of a health practitioner or mental health professional as to confidential communications, do not apply to evidence regarding a child's injuries or the cause of the injuries in any judicial proceeding, civil or criminal, resulting from a report pursuant to this chapter or relating to the subject matter of such a report.

from a report to the Department of Human Services. *Id*. Accordingly, we reject this ground for reversal.

D. The Stipend Testimony

Davis contends the district court should not have admitted evidence that he received a stipend for the care of his adopted children. He claims the evidence was irrelevant and unduly prejudicial. The State responds that the evidence was relevant to rebut Davis's suggestion that M.D. wanted him removed from the home. However, the prosecutor introduced the stipend evidence on direct examination of the first witness for the State. At this juncture, there was no evidence in the record for the State to rebut and nothing in defense counsel's opening statement that would have led the prosecution to believe M.D.'s testimony would be impugned in this fashion. *See Johnson*, 539 N.W.2d at 162 (stating rebuttal evidence explains, repels, controverts, or disproves evidence produced by the opposing party). For this reason, we find the evidence irrelevant. *See* Iowa R. of Evid. 5.401. In light of our conclusion, we need not reach the question of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *See* Iowa R. Evid. 5.403.[5]

We turn to whether the admission of this evidence was harmless error. *See Sullivan*, 679 N.W.2d at 29-30. One of the tests for whether a nonconstitutional error is harmless is whether the remaining evidence was "so overwhelming that the State would have prevailed even in the absence of the

[5] We have doubts as to whether error was preserved on this question, notwithstanding the State's concession that there was no error preservation problem.

boost it received" from the erroneously admitted evidence. *Id*. at 31. In the face of the evidence summarized above, we conclude this standard was satisfied and the admission of the stipend testimony was harmless.

II. Sufficiency of the Evidence

Davis next asserts the State "did not establish beyond a reasonable doubt that [he] performed a 'sex act' with M.D." Our review of fact findings is for substantial evidence. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006).

"Sex act" was defined for the jury as 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.

A jury could have found from M.D.'s testimony that Davis performed some of the sex acts defined above. While defense counsel elicited prior inconsistent statements from M.D. in an effort to impugn her credibility, a jury reasonably could have accepted her explanation of those inconsistencies. *See State v. Laffey*, 600 N.W.2d 57, 60 (Iowa 1999) (stating victim's credibility is for the jury to decide). In addition, as noted, there was testimony from several other witnesses corroborating key aspects of M.D.'s testimony. We conclude the record contains substantial evidence supporting the finding that Davis committed sex acts with M.D.

III Ineffective Assistance of Counsel Claims

Davis claims trial counsel was ineffective in failing to: (1) object to the genital warts testimony; (2) object to prosecutorial misconduct; (3) properly object to certain hearsay statements made by K.K.; and (4) object to the admission of evidence on due process grounds.

With respect to the first claim, the State concedes that trial counsel objected to this testimony on all the grounds raised on appeal except Davis's contention that the admission of this evidence violated Iowa Rule of Evidence 5.404(*b*). With respect to rule 5.404(*b*), the State argues trial counsel was under no duty to raise it because it simply did not apply. We agree with the State.

Rule 5.404(*b*) relates to the admissibility of "prior bad acts" evidence. *Id*; *Sullivan*, 679 N.W.2d at 23. We cannot determine how evidence relating to M.D.'s contraction of the genital warts virus falls within the purview of rule 5.404(*b*). Davis concedes the application of this rule is questionable, stating "the evidence and inference that [M.D.] acquired genital warts from Davis may, or may not, be considered other crimes, wrongs, or acts evidence under Iowa Rule of Evidence 5.404(*b*). . . ." Because this rule has no bearing on the challenged evidence, we conclude trial counsel was not ineffective in failing to raise it.

Turning to the second claim, based on prosecutorial misconduct, our highest court recently reaffirmed its preference for preserving ineffective assistance of counsel claims rather than deciding them on direct appeal. *See State v. Ondayog*, __ N.W.2d __, __ (Iowa 2006). We believe the second claim must be preserved for postconviction relief proceedings to give trial counsel an opportunity to address it.

The third claim relates to K.K.'s testimony regarding portions of her conversation with M.D. The State conceded trial counsel timely objected to this evidence and we, accordingly, have analyzed and rejected this evidentiary issue on the merits. Therefore, we need not address it under an ineffective-assistance-of-counsel rubric.

The final claim relates to counsel's failure to object to the admission of evidence on due process grounds. We have addressed and resolved the evidentiary issues based on the objections trial counsel did make, rendering it unnecessary to also address this ground. Additionally, we are not persuaded that the authority cited by Davis supports his contention that trial counsel had a duty to object to evidentiary issues on due process grounds. *See Clark v. Groose*, 16 F.3d 960, 963 (8th Cir. 1994) (concluding defendant was not entitled to habeas corpus relief on the ground that a state court's evidentiary ruling "infringed upon a specific constitutional protection or amounted to a denial of due process"). Accordingly, we reject this ineffective assistance of counsel claim.

IV. Cumulative Error

Davis finally contends that "the cumulative effect of errors committed during trial can deny a defendant a fair trial and a new trial must be granted." Having found no error that requires reversal, we reject this final contention.

V. Disposition

We affirm Davis's judgment and sentence for second and third-degree sexual abuse. We preserve for postconviction relief proceedings his ineffective assistance of counsel claim alleging prosecutorial misconduct.

AFFIRMED.