IN THE COURT OF APPEALS OF IOWA

No. 6-660 / 05-0835
Filed November 16, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GERRY THOMAS JACOBSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

The defendant appeals from his convictions for second-degree sexual abuse and indecent contact with a minor. **AFFIRMED.**

Clemens Erdahl of Nidey, Peterson, Erdahl & Tindal, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

Gerry Jacobsen appeals from his convictions for second-degree sexual abuse and indecent contact with a minor, in violation of Iowa Code sections 709.3 and 709.12 (2001). We affirm.

Background Facts and Proceedings.

On January 19, 2004, eleven-year old M.J. was at school engaged in a conversation with some friends, when she mentioned that her adoptive father, Gerry Jacobsen, had been peeking at her through a crack in the bathroom door and that she hated him. M.J. then called her mother, Wendy, seeking permission to stay late to watch a basketball practice. Wendy told M.J. to call Jacobsen and ask his permission. At that time, M.J. burst into tears and told her mother that Jacobsen had been touching her "butt" since she had known him. Upon further questioning from her mother, M.J. stated that Jacobsen had put his finger in her vagina. Shortly after the phone call ended, Wendy sent M.J.'s grandmother to pick her up and M.J. spent the night at her house.

The following day Jacobsen, Wendy, M.J.'s thirteen-year old brother Billy, and Jacobsen's mother Judy went to Wendy's mother's house to further question M.J. With Judy and Billy doing most of the talking, they questioned M.J. aggressively for nearly two hours. Toward the end of the conversation, she recanted her allegations and said she had lied about the touching. However, the following day M.J. told her mother that she had told the truth with her original accusations. Also, M.J. had a further discussion with Billy, who came to believe her story. Wendy then took the children with her and left the family home. M.J.

was eventually taken to a doctor who contacted the Department of Human Services. Law enforcement was thereafter notified and an investigation began.

The charges for which Jacobsen was later convicted sprang from these allegations. Jacobsen appeals, contending the court abused its discretion in denying his motion for new trial, committed legal error by excluding testimony which he claims was proper impeachment, and erred in failing to find that the jury's verdict was "not a fair expression of opinion on the part of all jurors."

Motion for New Trial.

A district court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *State v. Ellis*, 578 N .W.2d 655, 658-59 (Iowa 1998). The court must determine whether the jury's verdict is contrary to the clear weight of the evidence, which requires the court to make a determination of whether "a greater amount of credible evidence supports one side of an issue or cause than the other." *Id*. Credibility of witnesses, determinations of which are in most instances left for the trier of fact, is key in a weight-of-the-evidence determination. *State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003).

Trial courts must exercise their discretion in ruling on motions for new trial "carefully and sparingly" and should grant a new trial only in exceptional cases where the evidence preponderates heavily against the verdict so that they do not diminish the jury's role as the principal trier of facts. *Ellis*, 578 N.W.2d at 659.

> The granting of a new trial based on the conclusion that a verdict is against the weight of the evidence is reserved for those situations in which there is reason to believe that critical evidence has been ignored in the fact-finding process.

State v. Grant, __ N.W.2d __, __ (Iowa 2006).

While Jacobsen argues that the district court failed to make factual findings to support its decision to deny the motion for new trial, he failed to request the court expand its ruling to include such findings. *See State v. Miles*, 346 N.W.2d 517, 518 (Iowa 1984). Further, there is no evidence the jury failed to consider all of the relevant facts. Rather, based on the evidence with which it was presented, the jury made a decision that was not later interfered with by the trial court. M.J. detailed a long history of inappropriate touching by Jacobsen. While Jacobsen stresses certain inconsistencies that arose in M.J.'s story over time, those inconsistencies are minor and reasonably explained by M.J.'s youth and the seriousness of the alleged abuse. While at one point M.J. did recant her story, she quickly reasserted the truth of her claims. Moreover, that recantation occurred toward the end of a protracted interrogation session in which her family aggressively questioned her. The jury had all this information, and chose to accept M.J.'s version of events over that of Jacobsen's. The trial court acted appropriately in refusing to interfere with the jury's verdict.

Leigh Sides' Testimony.

During Jacobsen's first trial which ended in a mistrial, he called his sister Leigh Sides to testify on his behalf. Upon cross-examination by the State, Leigh stated:

> What I was aware of Wendy asking if [Jacobsen] had ever touched [M.J.] in the crotch area and [M.J.'s] response was yes. Wendy then asked her has he ever put anything in there and [M.J.'s] response was no.

Prior to the second trial, the State filed a motion in limine requesting that the court exclude any testimony from Leigh Sides regarding statements made to

her by Wendy that included Wendy's discussions with M.J. The State claimed these statements constituted double hearsay. The court sustained the motion and excluded the testimony. Jacobsen challenges this ruling on appeal. We review for correction of errors at law. *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

The statements in question here were double hearsay. *See State v. Sowder*, 394 N.W.2d 368, 371 (Iowa 1986). Generally, a prior, inconsistent, out-of-court statement offered for impeachment purposes falls outside the definition of hearsay. *State v. Hill*, 243 N.W.2d 567, 570 (Iowa 1976). Evidence that would otherwise be double hearsay cannot be stripped of its hearsay nature, however, by being offered for impeachment purposes. *Sowder*, 394 N.W.2d at 371. To determine if the statement is admissible, we must consider the purposes for which the alleged hearsay was offered. *State v. Horn*, 282 N.W.2d 717, 724 (Iowa 1979). A statement is inadmissible hearsay if it is offered for the truth of the matter asserted. *Id*.

We conclude the court properly excluded this testimony as constituting inadmissible double hearsay. The first hearsay statement was what M.J. allegedly told her mother, while the second was what Wendy said to Leigh Sides about Wendy's conversation with M.J. We agree with the State there is no exception to the hearsay rule that would permit Leigh Sides to testify about a conversation between herself and Wendy as to what M.J. said to Wendy. While Jacobsen contends the testimony would be offered to impeach Wendy's credibility rather than for the truth of the matters asserted therein, we conclude

they were really offered for the truth of the matter, that is, that Jacobsen never placed anything in M.J.'s vagina.

Jury Verdict.

In his motion for new trial, Jacobsen's counsel described a phone conversation with juror Erin Broten in which Broten suggested she intended to vote not guilty on the sexual abuse charge but that she was pressured to enter a guilty verdict. Counsel also submitted an affidavit from juror Darcie Trevino who claimed that she does not believe Jacobsen touched M.J.'s vagina, and that she, along with Broten and a third juror, did not intend to find him guilty but that they were coerced into finding him guilty. Trevino additionally stated that when polled individually following the rendition of the guilty verdict, she wrongly stated that it had been her intention to vote guilty. Citing Iowa Rule of Criminal Procedure 2.24(2)(*b*)(4), Jacobsen thus argued a new trial was warranted because the jury's verdict was decided "by means other than a fair expression of opinion on the part of all jurors."

In rejecting this argument, the district court found no evidence that indicated an "external pressure" on the jury and that two jurors had simply come forward after the fact with "some regrets and remorse." On appeal, Jacobsen characterizes the situation as a "mistake" in the recording of the verdict and coercion within the jury room.

We conclude the court correctly rejected a new trial on this claim. Iowa Rule of Evidence 5.606(*b*) provides that

> [u]pon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon

> that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

We believe the type of evidence offered by Jacobsen is the very type rendered by this rule as inadmissible as an attempt to impeach a verdict. Because Jacobsen seeks to impeach the verdict with *internal* jury matters, the evidence is incompetent. The juror statements offered by Jacobsen do not relate to any external pressure bearing on the decision-making process, "but relate directly to internal deliberations, discussions, and mental and emotional reactions that the rule is meant to insulate." *Lund v. McEnerney*, 495 N.W.2d 730, 734 (Iowa 1993).

AFFIRMED.