IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. TIMOTHY M. FONTENOT, Defendant-Appellant.	)))))))))	S.CT. NO. 19-0295

APPEAL FROM THE IOWA DISTRICT COURT
FOR LINN COUNTY
HONORABLE PATRICK GRADY, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED JUNE 3, 2020

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CERTIFICATE OF SERVICE

On June 22, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Timothy Fontenot, 6521 330TH Street, Hartley, Iowa 51346.

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QUESTION PRESENTED FOR REVIEW

I. Whether the court erroneously determined that H.N.'s inadmissible child protection center video was non-hearsay under Iowa rule of evidence 5.801(d)(1)?

A. Whether, by finding the video was non-hearsay, the district court allowed inadmissible hearsay into evidence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Court Rules:

Other Authorities:

STATEMENT IN SUPPORT OF FURTHER REVIEW

Fontenot requests that the Iowa Supreme Court grant further review and determine that the CPC video allowed into evidence did not meet the residual hearsay exception and thus was inadmissible hearsay that was improperly allowed into evidence. Fontenot contends that that the CPC video did not meet the residual exception because it did not rise to the level of necessity needed to admit the video into evidence. The as part of the residual hearsay exception, the video should be submitted as prior inconsistent statement, however, in this case, the CPC video was used to bolster and credit, the witness' version of events relied to the nurse and later her court room testimony. Fontenot argues that the Court of Appeals erroneously determined that the evidence was inadmissible.

STATEMENT OF THE CASE

Nature of Case

Defendant-Appellant Timothy Fontenot appeals his conviction, sentence and judgment following a jury trial resulting in a guilty verdict for two counts of Indecent Contact with a Child, an aggravated misdemeanor, in violation of Iowa Code §§ 709.12(1) and 903B.2 (2017).

Course of Proceedings and Disposition in District Court

On June 28, 2017, a trial information was filed in Linn County charging Fontenot with two counts of sexual abuse in the second degree, a class B felony, in violation of Iowa Code § 709.1, § 709.3(1)(b) and § 903.B.1 and two counts of Indecent Contact with a Child, an aggravated misdemeanor, in violation of Iowa Code § 709.12(1) and § 903B.2. (Trial Information) (App. pp. 5-8). A written arraignment and plea of not guilty was entered on July 5, 2017. (Written Arraign. and Not Guilty Plea)(App. p. 9). Fontenot filed a motion to sever the counts on August 11, 2017. (08/11/17 M. Sever)(App. pp.

10-11). The State filed a resistance. (08/17/2017 Resistance)(App. pp. 12-13). On August 17, 2017, Fontenot waived his right to a speedy trial. (Waiver)(App. p. 14). On September 13, 2017, the Court ruled against Fontenot's request to sever the counts. (09/13/17 Other Order)(App. pp. 15-19).

On February 28, 2018, the State filed its notice of intent to present victim's video statement. (Notice of Intent)(App. pp. 20-22). Fontenot filed a motion to suppress evidence seized from Facebook on March 22, 2018. (Suppress)(App. p. 23). Also on March 22, 2018, Fontenot filed an updated waiver of speedy trial. (03/22/2018 Waiver)(App. p. 24). On August 8, 2018, the Court ruled against the motion to suppress. (08/08/2018 Other Order)(App. pp. 25-31).

On December 17, 2018, the State filed a motion to amend trial information to include two additional charges of Indecent Contact with a Child, an aggravated misdemeanor, in violation of Iowa Code § 709.12(1) and § 903B.2. (Motion Amend.)(App.

pp. 32-33). The Court approved the amended trial information on December 17, 2018. (Amended Trial Information)(App. pp. 34-39).

Fontenot's trial began on December 17, 2018. (Tr. Vol I, p. 1). Fontenot was found guilty of counts five and six of the trial information: indecent Contact with a Child, an aggravated misdemeanor, in violation of Iowa Code § 709.12(1) and § 903B.2. (Verdict)(App. pp. 40-43). Fontenot was found not guilty of count three and four and the jury could not reach a verdict on counts one and two. (Verdict)(App. pp. 40-43). The State filed a motion to dismiss counts one and two. (02/18/2019 Motion to Dismiss)(App. p. 48). By Court order both counts were dismissed. (02/18/2019 Dismissal) (App. pp. 49-50).

On February 15, 2019, Fontenot was sentenced to: confinement to the Linn County jail for a period of 300 days, with all but 120 days suspended (Count 5) and confinement to the Linn County jail for a period of 300 days, with all but 120

days suspended (Count 6). The sentence was ordered to run concurrently. Fontenot was also fined $625.00 plus applicable surcharges on both counts. Fontenot was also required to register as a sex offender under section 901A. Fontenot was also placed on special probation under Iowa Code § 903A for a period of 10 years. (Order of Disposition)(App. pp. 44-47).

Fontenot filed a timely notice of appeal on February 20, 2019. (Notice)(App. p. 51).

Facts

In July of 2016, eleven year old H.N.'s younger sister, K.F. told their mother that she had a secret to tell her. K.F. told their mother that she had a "secret from sissy" [H.N.] that she was not supposed to tell. H.N. and K.F.'s mother asked what the secret was. (Tr. Vol. III, p. 39, L21-25). K.F. told her mother that Fontenot had been "touching" H.N. (Tr. Vol. II, p. 139, L1; Vol. III. p. 39, L21-25). H.N.'s mother spoke with her and after first denying the allegation H.N. told her mother

that Fontenot was touching her inappropriately. (Tr. Vol. II, p. 139, L7-8; Vol. III. p. 40, L2-7).

The following day, H.N.'s stepfather went to the Marion Police Department and the police instructed him to take H.N to a local hospital. (Tr. Vol. III, p. 43, L8-10). H.N's parents then took her to Child Protection Services. (Tr. Vol. III, p. 43, L10-14).

H.N. and her parents were interviewed by staff at the St. Luke's Child Protection Center (CPC). (Tr. Vol. III, p. 43, L13-22). H.N. underwent a medical evaluation by a physician at St. Luke's Child Protection Center. (Tr. Vol. III, p. 80, L8-13). No residual physical diagnostic sign of sexual abuse during H.N's examination. (Tr. Vol. III, p. 87, L8-11).
H.N. also underwent a forensic interview at CPC by interview Rachel Haskin, which was recorded. (Tr. Vol. IV p. 7, L6-11; Ex. 1).

During the trial, H.N. testified that she was six or seven years old when Fontenot first began "doing something bad" to

her; they were camping in Minnesota when it first started. (Tr. Vol. II p. 122, L22-25). H.N. stated that during that trip Fontenot rubbed up and down her leg and it made her feel uncomfortable. (Tr. Vol. II p. 123, L4-6).

H.N. testified the next time Fontenot touched her was in her home in Marion, Iowa. (Tr. Vol. II p. 124, L15-19). H.N. remembered Fontenot touching her vagina while she was in her bedroom when she was six or seven years old. (Tr. Vol. II p. 125, L12-17). She stated that Fontenot rubbed her vagina above her pants and that sometimes he would rub her under her pants, above her underwear. (Tr. Vol. II p. 125, L17-23; p. 126, L1-3). H.N. testified that Fontenot referred to this inappropriate touching as "tickle time". (Tr. Vol. II p. 130, L3-4).

H.N. testified that the last time Fontenot touched her, was in her brother's room, while she was sitting on a couch. (Tr. Vol. II p. 128, L2-9). H.N. testified she was 11 years old and he touched her under her underwear with his hand,

rubbed her vagina and put his finger in her vagina. (Tr. Vol. II p. 127, L2-19).

Fontenot testified in his own defense. (Tr. Vol. V. p. 61, L1-p.98, L16). Fontenot denied sexually abusing H.N.; he specifically testified that he never touched H.N. inappropriately. (Tr. Vol. V. p. 72, L2-3). Fontenot also denied ever rubbing H.N.'s pubic region when he flipped her. (Tr. Vol. V. p. 72, L18-24). Fontenot denied ever touching H.N's private region when he was tickling her. (Tr. Vol. V. p. 73, L12-14). Fontenot denied that he ever used "tickle time" to touch H.N. inappropriately. (Tr. Vol. V. p. 79, L15-24). Fontenot also denied ever going to a camping trip to Minnesota with H.N. (Tr. Vol. V. p. 84, L22-24).

Any additional relevant facts will be discussed below.

Argument

I. THE COURT ERRONEOUSLY DETERMINED THAT H.N.'S INADMISSIBLE CHILD PROTECTION CENTER VIDEO WAS NON-HEARSAY UNDER IOWA RULE OF EVIDENCE 5.801(D)(1).

Standard of Review: The court reviews hearsay claims

as errors of law. State v. Buenaventura, 660 N.W.2d 38, 50 (Iowa 2003). 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. Dullard, 668 N.W.2d 585, 589 (Iowa 2003).

Preservation of Error: The State filed notice of its intent to present the video of H.N.'s forensic interview with Rachel Haskin, a forensic interviewer with Child Process Center at St. Luke's Hospital. (Notice of Intent)(App.pp. 20-22). During the trial, the State argued for the inclusion of the video under the residual hearsay exception. Iowa R. Evid. 5.801(d)(1) and Iowa R. Evid. 5.801(d)(1)(B). The State stated the exception "…would allow such a video to be entered" based on "… requirements of trustworthiness, materiality, necessity, service in interest of justice, and notice." (Tr. Vol. III, 185, L13-188, L13; p. 190, L2-7; p. 192, L2-25). The State further argued that the CPC video should be admitted because "the cross-examination… to H.N. challenges her credibility and also

challenges that her testimony was not consistent or that she had recently fabricated it or recanted or by an improper influence or motive when she was testifying." (Tr. Vol. III, p. 186, L7-13).

Defense counsel objected on the grounds that the State's request to play the CPC video did not meet the residual exception because it: did not rise to the level of necessity needed to admit the video in evidence. (Tr. Vol. III, p. 188, L15-p. 189, L17, p. 193, L2-8; p.194, L5-10). The Court ruled that the video was admissible based on the video not being submitted for the truth of the matter asserted. (Tr. Vol. III, p. L13-24). Therefore, error was preserved. State v. Allen, 304 N.W.2d 208 (Iowa 1983).

Discussion: Rule 5.801(d)(1)(B) provides that a prior consistent statement of a declarant–witness is admissible if the declarant has testified, was subjected to cross-examination regarding the statement, and the prior statement "is offered to rebut an express or implied charge that the declarant recently

fabricated it or acted from a recent improper influence or motive in so testifying." See Iowa R. Evid. 5.801(d)(1)(B) (2015). This exception requires that the prior statement must be offered to rebut the charge that the declarant recently fabricated.

In State v. Johnson, the State introduced, and the district court admitted, the forensic interview of a child alleging sexual abuse against the defendant under Rule 5.801(d)(1)(B). See State v. Johnson, 539 N.W.2d 160, 161-62 (Iowa 1995). The Supreme Court reversed, finding that "a witness's prior consistent statement is admissible as non-hearsay to rebut a charge of improper motive under Iowa rule of evidence 801(d)(1)(B) *only if* the statement was made before the alleged improper motive to fabricate arose." Id. at 165 (emphasis in original). Therefore, the Court found the prior consistent statement was inadmissible under the Rule because it was made after the accusations of sexual abuse. Id.

This case is indistinguishable from Johnson. As in Johnson, the challenged statements were made during a forensic interview at a child protection center. See id. at 161. Exhibit 1, the videotape of the forensic interview was clearly made *after* H.N. accused Fontenot of sexual abuse; in fact, the whole reason the forensic interview was conducted was to gather more information for the police investigation.

Because the prior consistent statement was made only after H.N. had already accused Fontenot of sexual abuse, it is clearly not admissible as a non-hearsay prior consistent statement under Rule of Evidence 5.801(d)(1)(B). See id. at 165.

A. By finding the video was non-hearsay, the district court allowed inadmissible hearsay into evidence.

The Iowa Rules of Evidence define hearsay as an out-of-court statement offered into evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801(c) (2017). The Court determines whether a statement is hearsay by examining the purpose of the offered testimony. State v. Horn, 282 N.W.2d

717, 724 (Iowa 1979) (citing State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978)). The State, as the proponent of the hearsay, has the burden of proving it falls within an exception to the hearsay rule. State v. Cagley, 638 N.W.2d 678, 681 (Iowa 2001).

Hearsay statements are not admissible unless they fall within a recognized exception as permitted by the Iowa Constitution, a statute, or a rule. Iowa R. Evid. 5.802 (2017). Subject to the condition of relevance, "[t]he district court has no discretion to deny the admission of hearsay if it falls within an exception, or to admit it in the absence of a provision providing for admission." State v. Newell, 710 N.W.2d 6, 18 (Iowa 2006). Inadmissible hearsay is "considered to be prejudicial to the non-offering party unless otherwise established." State v. Dullard, 668 N.W.2d 585, 589 (Iowa 2003) (citing State v. Ross, 573 N.W.2d 906, 910 (Iowa 1998)).

Exhibit 1, the video of H.N.'s forensic interview with Haskin, includes inadmissible hearsay. Its contents are

clearly out-of-court statements, and it was entered into evidence by the State to prove the truth of the matter asserted—that Fontenot engaged in inappropriate sexual contact with H.N. See Iowa R. Evid. 5.801(c). See also State v. McKeever, 804 N.W.2d 314, 2011 WL 3115470, at *5 (Iowa Ct. App. 2011) (unpublished table decision) ("[T]he videotape [of the child's interview at the child protection center] clearly constitutes hearsay . . . ."). No exception to the rule of hearsay applies to the exhibit that would render its contents admissible.

Notably, the statements do not fall under the medical diagnosis or treatment exception to hearsay. Iowa Rule of Evidence 5.803(4) provides "[s]tatements for purposes of medical diagnosis or treatment" are "not excluded by the hearsay rule, even though the declarant is available as a witness." Iowa R. Evid. 5.803(4) (2017). It states:

> Statements made for purposes of medical 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.

Id.

The Iowa Supreme Court has adopted a two-part test for determining whether statements may be properly characterized as statements for the purposes of medical diagnosis and treatment under Rule 5.803(4). State v. Long, 628 N.W.2d 440, 443 (Iowa 2001). "'[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.'" Id. (quoting United States v. Renville, 779 F.2d 430, 436 (8th Cir. 1985)).

The record reveals Haskins's interview with H.N. was a "forensic interview." (Tr. Vol. IV, p. 7, L6-11). "Forensic" is defined as "belonging to courts of justice." Black's Law Dictionary 648 (6th ed. 1990). It is also defined as "[u]sed in or suitable to courts of law or public debate" and "[o]f, relating to, or involving the scientific methods used for investigating

crimes." Black's Law Dictionary (10th ed. 2014). The forensic interview was done not for the purpose of medical treatment or diagnosis, but to assist law enforcement with the investigation of a sexual abuse case. See State v. Bentley, 739 N.W.2d 296, 299–00 (Iowa 2007) (considering characterization of interview as "forensic interview," among other factors, in determining purpose of Child Protection Center interview of child sexual abuse victim was to make record of past criminal events); State v. Moore, 808 N.W.2d 449, 2011 WL 4950180, at *6 (Iowa Ct. App. 2011) (unpublished table decision) ("We question [whether the testimony was admissible under the medical diagnosis exception], especially with respect to the forensic interviewer and the child protective worker, as there was minimal evidence showing the children's statements to these witnesses satisfied the two-part test for admissibility detailed in State v. Tracy, 482 N.W.2d 675, 681 (Iowa 1993)); State v. Tyson, 851 N.W.2d 854, 2014 WL 2346237, at *7–8 (Iowa Ct. App. 2014)

(unpublished table decision) (finding a child victim's statements to a forensic examiner were not admissible under the statements made for purposes of medical diagnosis or treatment exception).

In explaining why the forensic interview was conducted, the lead detective, Andrea Wilson, in the case testified she calls the Child Protection Center if she feels it is necessary. Wilson also testified that she does not talk to the children [who make the allegations]. (Tr. Vol. III, p.148, L4-9). It is clear that the forensic interview is utilized to gather additional information for law enforcement to determine if the allegations should be pursued in a criminal investigation.

The interview was recorded and there was an observation room, where law enforcement officers can sit and watch the interview live. (Tr. Vol. III, p.150, L11-15). Also, there are phones of the walls of the observation and the interview room, and Wilson could "pick up the phone to talk to the interviewer". The police officer could get the interviewer to

ask other questions. (Tr. Vol. III, p. 150, L18-25). Additionally, during the interview, Haskin, steps out of the room to speak with Wilson, and once Haskin re-enters the room, after speaking with Wilson, she asks H.N. additional questions. (Ex.1 12:42:58). The additional questions that Haskin asked were "investigative" questions including: how H.N. and Fontenot would communicate, what type of phone H.N. used to talk to Fontenot, and if H.N. still had any text messages or Facebook messages from Fontenot saved. (Ex.1 12:44:19). All of this information was later used by Wilson to request the Facebook messenger records between Fontenot and H.N. (Tr. Vol. III, p. 153, L3-6).

There is no information that supports H.N. made these statements with the purposes of promoting her treatment; rather, it appears the interview was done with the sole purpose to assist law enforcement with their investigation of Fontenot. Additionally, there is no indication from the record that the statement was relied on by a physician or medical

personnel for H.N.'s treatment or diagnosis. Thus, the exhibit's contents are not admissible under Rule 5.803(4). See Long, 628 N.W.2d at 443; Tyson, 2014 WL 2346237, at *7–8 (finding child's statements to forensic interview did not meet the exception).

The district court abused its discretion to allow the inadmissible hearsay, without an exception. By allowing the CPC video, the court allowed the jury to hear H.N's prior consistent statement, additional damaging evidence and details that were not contained in H.N.'s in person trial testimony.

For example, at trial, H.N. never mentioned that Fontenot touched her breasts while simultaneously touching her vagina, however in Exhibit 1, H.N. stated that Fontenot touched her breast under her sports bra. (Ex.1 12:11: 01). At trial, H.N. never testified that Fontenot touched his penis while touching her vagina, however, in Exhibit 1, H.N. testified he touched his penis when he touches her. (Ex. 1 12:28: 15).

Also in Exhibit 1, H.N. provided details about a conversation she had with Fontenot telling him that he "should not be doing this to me" and Fontenot responded that "he is going to keep doing it to you until someone finds out." (Ex. 1 12:39:18). This is information H.N. did not testify about during her trial testimony.

In contrast to her trial testimony, on Exhibit 1, H.N. also stated that she told Fontenot that she and E.M. discussed "tickle time" and that Fontenot responded by stating "she does not need to know my business…" and that Fontenot threatened to "stop buying her stuff and take away her phone" if she told somebody. (Ex. 1 12:40:13). This extra information was not cumulative and it was prejudicial to Fontenot.

The admission of the video allowed the State to improperly bolster H.N.'s credibility and corroborate her prior statements.

Even if the record contains cumulative evidence in the form of

testimony, the hearsay testimony's trustworthiness must overcome the presumption of prejudice. Horn, 282 N.W.2d at 724. The Court measures the trustworthiness of the hearsay testimony based on the trustworthiness of the corroborating testimony. State v. Elliott, 806 N.W.2d 660, 669 (Iowa 2011) (citations omitted). The record shows that there is little corroborating evidence of H.N.'s allegations. There was no physical evidence.

Even if this Court finds the hearsay evidence was trustworthy to the point it overcame the presumption of prejudice, the admission of the hearsay prejudiced Fontenot. As noted in Elliott, all erroneously admitted hearsay is not harmless merely because it is cumulative. Elliott, 806 N.W.2d at 670. The Court recognized:

> There could be circumstances . . . where that extra helping of evidence can be so prejudicial as to warrant a new trial. . . . One such circumstance occurs when a witness's credibility is central to the case and the only real purpose for admitting the hearsay evidence is to bolster the witness's credibility.

Id. (internal quotation marks omitted)(citations omitted).

The outcome of the case depended almost entirely on the credibility of H.N. The only reason to introduce the hearsay evidence contained in Exhibit 1 was to bolster H.N.'s testimony. The hearsay testimony unfairly tipped the scales toward Fontenot's guilt.

CONCLUSION

For all the above reasons, the defendant requests this court vacate his conviction, sentence, and judgment and remand the case.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $2.24, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 3,505 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

_____ Dated: 06/22/20

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