IN THE COURT OF APPEALS OF IOWA

No. 4-101 / 93-0380

FILED
MAY 26 1994
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RENE ROJAS,

Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie Gaul, Judge.

The defendant challenges his convictions of seven counts of second-degree sexual abuse and one count of indecent contact with a child. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Carol J. Chase, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Cady and Huitink, JJ.

CADY, J.

Rene Rojas appeals his convictions of seven counts of second-degree sexual abuse and one count of indecent contact with a child. He claims the trial court erred in admitting videotaped testimony of one of the child victims. He also claims he received ineffective assistance of counsel.

Rene Rojas was charged with four counts of second-degree sexual abuse against an eight-year-old female. He was also charged with three counts of second-degree sexual abuse and one count of indecent contact against B.R., his ten-year-old daughter. The district court joined the two matters for one bench trial.

Prior to trial, the State filed a notice of intent to use hearsay statements and videotape pursuant to Iowa Code section 910A.14(3) (1993)and Iowa Rule of Evidence 803(24). The State intended to introduce videotaped interviews of the victims. On this videotape, B.R. gave detailed accounts of her father sexually abusing her.

During trial, B.R. recanted and testified her father had not sexually abused her. She testified she was sexually abused by a male cousin. The State then sought to introduce the videotaped interview with B.R. The court admitted the videotaped interview.

The court found Rojas guilty as charged. Rojas appeals.

I. Admissibility of Videotaped Testimony

Rojas challenges the admissibility of his daughter's videotaped testimony. He claims the videotape is inadmissible hearsay under Iowa Rule of Evidence 802 and is not subject to Iowa Rule of Evidence 803(24), which is the grounds under which the trial court admitted the tape. He also claims his Sixth Amendment confrontation rights are implicated by the admission of the videotape.

Generally, we review questions regarding the admissibility of evidence for an abuse of discretion. State v. Andrews, 447 N.W.2d 118, 120 (Iowa 1989). However, because Rojas's Sixth Amendment rights of confrontation are at issue, we make our evaluation based on a totality of the circumstances. See State v. Gregg, 464 N.W.2d 431, 432 (Iowa 1990). This is equivalent to a de novo review. Id.

The confrontation clause and the hearsay rule are not coextensive. Swan v. Peterson, 6 F.3d 1373, 1379 (9th Cir. 1993). While both protect and preserve similar values, each establish independent prohibitions on admissibility. Id. However, when evaluating for admissibility, similar standards may be applied. See United States v. Cree, 778 F.2d 474, 503 (8th Cir. 1985) (Oliver, J., dissenting).

Most evidence which falls under a recognized hearsay exception may be admitted without confrontation because of its presumed trustworthiness. Swan, 6 F.3d at 1379. However, the confrontation clause may prohibit admission of

some evidence otherwise admissible under a hearsay exception. Idaho v. Wright, 497 U.S. 805, 813-14, 110 S. Ct. 3139, 3145-46, 111 L. Ed. 2d 638, 650-51 (1990). In order to comply with the Sixth Amendment, hearsay statements offered into evidence must bear "adequate 'indicia of reliability'" Id. at 815, 110 S. Ct. at 3146, 111 L. Ed. 2d at 652. The residual exception is not a firmly rooted hearsay exception for confrontation clause purposes. United States v. Barrett, 8 F.3d 1296, 1300 (8th Cir. 1993). Statements admitted under this exception must be "analyzed for particularized guarantees of trustworthiness." Id. Some of the factors appropriate for the court to consider when evaluating the hearsay testimony of a child for admissibility include the spontaneity of the statement, the consistent repetition, the child's lack of motivation to fabricate, and the child's use of terminology unexpected of a child of similar age. Id.; Swan, 6 F.3d at 1379. However, the Court noted these factors were not exclusive and emphasized that any test used should be designed to determine "whether the child declarant was particularly likely to be telling the truth when the statement was made." Wright, 497 U.S. at 822, 110 S. Ct. at 3150, 111 L. Ed. 2d at 656; see also State v. Scott, 501 N.W.2d 608, 617 (Minn. 1993).

Likewise, hearsay testimony of a child may be admitted pursuant to statute, if it conforms to similar indicia of reliability. Iowa Code section 910A.14(3) (1991), in pertinent part, provides:

> The court may upon motion of a party admit into evidence the recorded statements of a child . . . describing sexual contact performed with or on the child, not otherwise admissible in evidence by statute or court rule if the court determines that the recorded statements substantially comport with the requirements for admission under Iowa rules of evidence 803(24) or 804(5).

The trial court admitted the child's videotaped interview under Iowa Rule of Evidence 803(24), the "residual" hearsay exception.

Iowa Rule of Evidence 803(24) is one of the exceptions to the general rule prohibiting the admission of hearsay testimony. The exception, in pertinent part, provides:

> [A] statement not specifically covered by any of the foregoing exceptions but having the equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

Iowa R. Evid. 803(24).

Generally, hearsay evidence must satisfy five criteria to be admissible under 803(24):

> (1) The statement must have circumstantial guarantees of trustworthiness equivalent to the other specified exceptions to rule 803;
> (2) The statement must be offered as evidence of a material fact;
> (3) The statement must be more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts;
> (4) The interests of justice must be served by admission of the statement; and
> (5) The notice requirement as specified in the rule must be satisfied.

See State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983); United States v. Renville, 779 F.2d 430, 439 (8th Cir. 1985).

The trial court found, in each instance, the videotaped testimony satisfied the requirements of trustworthiness. The victim's statements were in answer to questions posed by social worker Katie Boley. However, Boley's questions were general and open-ended. When the questions were rephrased, the victim's answers remained consistent. Specific details were revealed, especially when discussing the various sex acts. Some of the statements were spontaneous or volunteered during the interview. No issue has been raised regarding the victim's mental state and evidence of a motive to fabricate was minimal and convoluted. Finally, the victim was testifying to matters beyond the realm of her experience. She explained a wide variety of sex acts which would otherwise simply be unknown and unthinkable to a child of her age. See State v. Sorenson, 421 N.W.2d 77, 85 (Wis. 1988).

The issue of the materiality of the videotaped testimony is not challenged by Rojas. Clearly, the statements of the victim identifying Rojas as the perpetrator are material to the case.

Rojas challenges the necessity of the videotaped testimony, noting that the victim herself testified at trial. In United States v. Renville, the court found videotaped testimony of the victim absolutely necessary on facts substantially similar to those present here:

> We also believe that there is a strong need for these statements. The victim was the only one who could identify her abuser. Where she later recanted her prior accusations, it was important for the government to show that she had earlier made a consistent series of accusations naming Renville as her abuser.

779 F.2d at 441. We agree with the Renville court and conclude the need for the videotaped testimony was substantial.

Admission of the videotaped testimony also serves the interests of justice. The function of our system of justice is truth-seeking. See Iowa R. Evid. 102. We find the admission of the videotaped testimony of the victim in this case central to serving the interests of justice.

The final question involves the adequacy of notice. Rojas does not challenge the adequacy of the notice he received regarding the intended use of the videotape and we do not consider it further.

In addition, we are are persuaded by the fact the declarant in this case testified at trial and was subject to cross-examination. See Renville, 779 F.2d at 440. "The availability of the declarant at trial vitiates the main concern of the hearsay rule, which is the lack of any opportunity for the adversary to cross-examine the absent declarant." Id.

In summary, we note significant indicia of reliability are present in this case. Traditional tests of reliability have been satisfied. The declarant testified at trial and was subject to cross-examination. We agree with the trial

court's conclusion the videotape comported with the requirements of the residual exception to the hearsay rule and Iowa Code section 910A.14(3) (1991). In addition, we find the facts of this case satisfy the "indicia of reliability" required by the confrontation clause.

II. Ineffective Assistance of Counsel Claim

Rojas next contends he was denied effective assistance of counsel. He claims trial counsel failed to make significant objections based on constitutional grounds. The State agrees that resolution of these claims would likely involve matters outside the current record.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.