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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-434 / 88-1268

STATE OF IOWA,

Appellee,

399

vs.

CHARLES EUGENE COOK,

Appellant.

Appeal from the Iowa District Court for Polk County, Harry Perkins and Richard Strickler, Judges.

The defendant appeals from his conviction, following a jury trial, for second-degree sexual abuse. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and B. John Burns, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Julie Ann Halligan, Assistant Attorney General; and Melodee Hanes, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

PER CURIAM

Defendant Charles Cook appeals from his conviction, following a jury trial, for sexual abuse in the second degree. Defendant contends the district court violated his right to confrontation of witnesses against him. We affirm.

Defendant was accused of repeatedly sexually abusing his son, W.C. The original minutes of testimony which accompanied the trial information notified defendant W.C. would testify to defendant's repeated acts of sodomy upon him. Prior to trial, the State informed defendant that W.C. would not be available for discovery or to testify at trial. Defendant thereupon filed a combined motion in limine and motion to strike witness in order to exclude the testimony of three mental health professionals. The district court overruled defendant's motion, and the three mental health professionals testified at trial as to statements W.C. made to them concerning defendant's sexual abuse of him. W.C. did not testify at trial.

At the hearing on the motion in limine, Dr. Dewdney testified that he first examined W.C. in September of 1986 while W.C. was a resident at the Elizabeth J. Ruan facility. Dewdney diagnosed W.C. as suffering from post-traumatic stress syndrome. As a result of his diagnosis, W.C. was hospitalized. Dewdney further testified that W.C. became and continues to be marginally

psychotic, resulting in W.C. losing contact with reality at times and actively hallucinates. At defendant's trial, both David Cowan and Rosemary Sears gave graphic testimony concerning W.C.'s profound mental infirmity. Cowan testified that due to W.C.'s fear of male molestation when he entered W.C.'s room, "[W.C.] fell to the floor and you know, forced his head sideways on the -- on the floor and raised his rear end -- in such manner as -- as to suggest that he expected to be sodomized." Similarly, Sears testified "[w]henever W.C. would become frightened he would go down on all fours and crawl and make animal sounds and some -- just kind of deep kinds of throat, gutteral sounds."

Dewdney continued to treat W.C. after W.C. had been transferred to Iowa Lutheran Hospital. W.C. was hospitalized there for approximately four or five months. Subsequently, W.C. was transferred in March of 1987 to the Mental Health Institute in Cherokee. At the time of trial in June of 1988, W.C. was still a patient at Cherokee.

Since a constitutional right is involved here, our review on this issue is de novo. See State v. Holland, 389 N.W.2d 375, 378 (Iowa 1986).

In Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597, 608 (1980), the United States Supreme Court held, "when a hearsay declarant is not present for cross-examination at trial, the Confrontation

Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" As the Iowa Supreme Court recently stated: "For Confrontation Clause purposes, a witness is not unavailable 'unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial.'" State v. Wells, 437 N.W.2d 575, 579 (Iowa 1989) (quoting Barber v. Page, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 1322, 20 L. Ed. 2d 255, 260 (1968)). The burden of proving unavailability falls upon the State. See id. The State has met its burden here concerning W.C.'s unavailability.

It is undisputed that W.C. was a patient at the Cherokee Mental Health Institute at the time of trial. David Cowan testified, based on his personal observations of W.C. one month before and on collateral reports, he was of the opinion that W.C. was "not doing very well at all." Defendant's own expert, Dr. Dawdy, testified that he had not seen W.C. but had reviewed his medical records through April of 1988. He opined that W.C. suffered from childhood autism.

The burden is on the State to demonstrate that W.C. was unavailable to testify due to a lack of testimonial qualification. W.C.'s medical history of profound mental infirmity, when combined with his continued residence at the Cherokee Mental Health Institute, provides sufficient

grounds to conclude W.C. was unavailable to testify due to a lack of testimonial qualification.

The second prong of the Roberts analysis, that the declarant's statements bear adequate indicia of reliability, is uncontested by defendant. As such, we consider it waived on appeal.

AFFIRMED.

Sackett and Habhab, JJ., concur; Schlegel, P.J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

Certainly, the evidence given by the health professionals is most damaging to the defendant, and if given before the jury by the victim, would assuredly lead to a conviction.

The Iowa Supreme Court, as pointed out by the majority in State v. Wells, 437 N.W.2d 575, 579 (Iowa 1989), stated: "For Confrontation Clause purposes, a witness is not unavailable 'unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial.'" Also, the burden of proving unavailability falls upon the State. Id.

The State produced no evidence as to W.C.'s current mental condition. The three mental health professionals who testified for the State at trial had their last professional contact with W.C. some fifteen months prior to trial. The clinical social worker, David Cowan, who had seen W.C. most recently, when asked whether W.C. would be able to testify in court about his experiences, answered: "In my opinion [W.C.] could talk about what has happened to him, especially if there were supportive people and if he felt safe."

The burden is on the State to demonstrate that W.C. was unavailable to testify due to a lack of testimonial qualification. His residence at the Cherokee Mental Health

Institute, standing alone, is insufficient to meet this burden. Cf. State v. Brown, 400 N.W.2d 74, 75-76 (Iowa App. 1986) (thirty-two-year-old stepdaughter who suffered from Down's Syndrome ruled to be competent to testify).

The lack of evidence concerning W.C.'s mental condition at the time of trial precludes us from determining W.C.'s competency to testify. The State has failed to demonstrate W.C.'s unavailability for trial due to a lack of testimonial qualification. Without such evidence, defendant's sixth amendment right to confront witnesses against him was violated.

I would reverse and remand for new trial so that either the victim may testify in person, or that an adequate record be made that he was unavailable to testify. In the present state of the record, defendant has been denied his right of confrontation.