

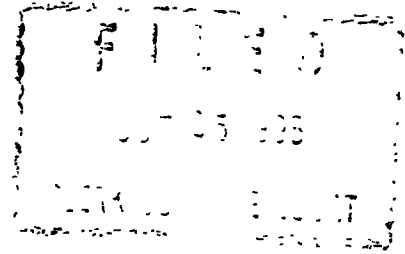
IN THE COURT OF APPEALS OF IOWA

No. 6-516 / 95-1340

STATE OF IOWA,
Appellee,

vs.

JASON LEROY NELSON,
Appellant.



Appeal from the Iowa District Court for Van Buren County, John G. Linn,
Judge.

The defendant appeals his conviction and sentence for second-degree sexual
abuse in violation of Iowa Code section 709.1 and 709.3 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown and Virginia Barchman,
Assistant Attorneys General, for appellee.

Considered by Habhab, P.J., and Cady and Vogel, JJ.

VOGEL, J.

On February 10, 1995, the defendant, Jason Nelson, was charged by trial information with second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3 (1993). According to the trial information, the victim, Nelson's four-year-old daughter S.N., had been living with Nelson at his mother's home following his divorce from his wife, Michelle. In January 1995, Special Agents Wade Kisner and Michael Morris were requested by the Department of Human Services to conduct an investigation of alleged child abuse perpetrated by Nelson against S.N. The agents were present when S.N. was interviewed by Shannon Cooper at the hospital in Cedar Rapids. During the interview, S.N. pointed out her genitals to Cooper and stated "Daddy" had placed his "pee-pee" in her anal region. She told Cooper she sometimes slept with Nelson and that she wore a green nightgown. She stated this touching only occurred when everyone else was in bed. S.N.'s interview with Cooper was videotaped.

The next day, Kisner and Morris interviewed Nelson. At first, Nelson denied the allegations. Ultimately, however, Nelson confessed. He stated that in late December 1994, he had become upset and depressed due to his recent divorce from Michelle. He stated that around 2:00 a.m., S.N. came into his room, climbed into his bed, and began rubbing his chest, stomach, and penis. He told the agents S.N. stopped on his request. He admitted he later placed his hand on her crotch under her nightgown and rubbed her vagina. He maintained S.N. then placed his penis in her

mouth. Nelson stated he told her to stop and carried her back to her own bed. Nelson then stated he went back to his room, thought about his ex-wife, and masturbated. When he awakened the next morning, he felt terrible about the previous evening's transgressions and apologized to S.N.

At trial, Nelson denied intentionally touching S.N. He admitted his hand was on her crotch, but maintained it landed there while he was drifting in and out of sleep. He claimed any discrepancies between his earlier statement and his testimony at trial was due to lack of sleep and confusion during the initial interview.

S.N. was called to testify. After answering a set of initial questions concerning her family and where she lived on direct examination, S.N. answered most of the rest of the questions posed with the answer "I don't know." In its ruling, the district court noted that, despite efforts to make her as comfortable as possible, S.N. appeared nervous and upset by her surroundings in the courtroom. The State requested permission to introduce the videotape of S.N.'s prior interview. The district court overruled defense counsel's objection based on Iowa Rule of Evidence 803(24) and admitted the videotape.

Following Nelson's conviction, the district court sentenced him to an indeterminate term of imprisonment not to exceed twenty-five years.

Nelson appeals.

I. Scope of Review. We generally review the admissibility of evidence under rule 803(24) for abuse of discretion. *State v. Brown*, 341 N.W.2d 10, 21 (Iowa 1983).

We find an abuse of discretion only when the district court “exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Peters*, 525 N.W.2d 854, 859 (Iowa 1994) (citation omitted). Our review of Nelson’s sixth amendment right to confrontation claim, however, is de novo. *State v. Gregg*, 464 N.W.2d 431, 432 (Iowa 1990).

II. *Residual Exception to the Hearsay Rule.* Nelson contends the district court erred in admitting a videotaped interview of S.N. under the residual exception to the hearsay rule in Iowa Rule of Evidence 803(24).

Iowa Code section 910A.14(3) (1993) makes special provision for admission of recorded statements of children describing sexual abuse. Our supreme court has interpreted section 910A.14(3) as making it clear the residual exception to the hearsay rule may be used to admit statements referred to in section 910A.14(3) when the requirements of the exception are met. *State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1981, 131 L. Ed. 2d 869 (1995). Section 910A.14(3) does not change the analysis under rule 803(24). *Id.* The residual exception to the hearsay rule states:

A statement not specifically covered by any of the foregoing exceptions but having 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. However, a statement may not be admitted under this exception unless the proponent of it makes known

to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Iowa R. Evid. 803(24).

Before the hearsay evidence can be admitted under the residual exception to the hearsay rule, the district court must make the following findings concerning the nature of the evidence: (1) trustworthiness; (2) materiality; (3) necessity; (4) notice; and (5) service of the interests of justice. *State v. Weaver*, ___ N.W.2d ___ (Iowa 1996); *Rojas*, 524 N.W.2d at 662-63. The failure to satisfy one of the requirements precludes admission of the evidence. *Weaver*, ___ N.W.2d at ___. The district court has broad discretion in deciding evidentiary issues involving the residual exception to the hearsay rule. *Id.* As Nelson only challenges the trustworthiness and necessity prongs of admissibility under rule 803(24), we consider the merits of those factors only and deem the other factors waived in Nelson's appeal. Iowa R. App. P. 14(a)(3); *Weaver*, ___ N.W.2d at ___.

We first examine Nelson's argument regarding necessity. We find that while S.N. was physically present at trial, she was not available to testify. She was nervous, upset, and unable to answer most of the questions concerning the sexual abuse allegations. We conclude the necessity prong was met.

Next, Nelson argues the videotape lacked the guarantees of trustworthiness and reliability. The district court found:

[T]he statement of [S.N.] presented via the audio visual tape is substantial and reliable evidence and is trustworthy because of the methodology of employing open-ended questions, the detailed and consistent nature of the statement given by [S.N.], and the level of memory exhibited by [S.N.].

These findings are not disputed by Nelson. In addition, Nelson argues the State was required to show the interviewer, Shannon Cooper, was unavailable in order to avoid a violation of the Confrontation Clause. This claim is without merit, however, since S.N. is the declarant at issue, not Cooper. We conclude the district court did not err in finding the videotape was trustworthy and reliable.

Finally, Nelson asserts he was prejudiced by the admission of the videotape because the State would not have been able to corroborate his out-of-court confession without the videotape. We disagree. Out-of-court confessions by a defendant cannot warrant a conviction without corroboration. Iowa R. Crim. P. 20(4). In this case, some of S.N.'s testimony at trial was sufficient to corroborate Nelson's out-of-court confession.

AFFIRMED.