IN THE COURT OF APPEALS OF IOWA

No. 8-224 / 97-1477

STATE OF IOWA,

Plaintiff-Appellee,

vs.

JESUS R. CARDOZA,

Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Defendant appeals from his conviction for domestic assault. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Richard R. Phillips, County Attorney, and Chris Dalton, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Vogel and Mahan, JJ.

MAHAN, J.

Jesus Cardoza appeals his conviction for domestic assault and requests a new trial. He contends the trial court erred when it allowed the State to read the deposition of the victim, Alice Cardoza, into the record under 804(b)(1) of the Iowa Rules of Evidence. We affirm.

Prior to the trial, Jesus made several attempts to depose Alice. She was personally or constructively served four times. Three times she failed to appear for her scheduled deposition. At one point prior to Alice's appearance for the deposition, Jesus moved to have Alice excluded as a witness because of her failure to respond to the subpoenas. When Alice finally appeared for her deposition, the State personally served her with a subpoena to appear at trial on June 2, 1997.

At the trial, the State presented witnesses Margaret McGourty and Charles Madden. McGourty worked at an H & R Block office across the street from Jesus' parents' house, where a portion of the alleged assault occurred. Madden was in his car outside the H & R Block office.

McGourty testified she was outside on a cigarette break and heard a child screaming. She looked up and saw a man kick a child in the back and then hit a woman who was standing on the steps screaming. According to McGourty, it looked like the man hit the woman in the face.

Madden testified he heard a woman screaming and, in his rearview mirror, saw a man pick the woman up and push her onto the porch. She fell down and he kicked

her in the butt, grabbed her again, and forced her through the door.

The State also presented pictures of Alice Cardoza showing a bruise on the left side of her chin and on her left shoulder. Jesus' written statement contends when he went to pick Alice up, he smelled beer on her breath. When they got into the car, they started arguing and Alice got mad because he would not take her back to her mom's house to finish her beer. According to Jesus, Alice got out of control, started to hit him, and he tried to push her away. When they arrived at his mother's home they were still arguing when Alice slipped on the steps. He tried to go over her, but accidentally stepped on her.

Police officer Tim Hull testified Jesus told him the fight had been over Alice wanting to return to her mother's to drink beer. Hull also testified he specifically looked at Alice for bloodshot eyes and any signs of intoxication, but did not find any. Hull claimed there was no odor of alcohol and Alice denied drinking.

Alice did not appear at the trial. Chris Dalton, assistant Muscatine County attorney, gave a professional statement to the trial court:

> DALTON: This morning when she didn't show up at 8:35, we contacted the Muscatine County Sheriff's Department, Officer Jim Fulcher went to her residence of 707 East Seventh Street. Someone at that residence, a young lady, told him well, she might be at 1321 -- well, Defendant's residence, I can't remember the numbers' order.
>
> THE COURT: At the Defendant's residence?
>
> DALTON: His parents' residence, I don't know where Defendant lives for sure. Anyway, Mr. Fulcher said he's going to go look. He then called back, "Well someone's in the house, they won't answer the door." I have no way of knowing who's in the house or whether Officer Fulcher is correct in his belief that someone is in the

> house and refuses to answer the door. I have no other leads to give Officer Fulcher to have him go look for her any further. Again, she's had notice, apparently she's making herself unavailable today.

The trial court then ruled Alice's deposition was admissible.

> THE COURT: All right. ***I note that in the file there is a subpoena*** for Alice Cardoza, *which was served on her on May the 22nd by Matthew Fowler. So she is aware of this proceeding today and has not appeared.* I do believe that under Rule 804, Rule of Evidence 804(2). because of her continuing failure to cooperate to give her deposition, and more specifically 804(5), that the state is entitled to read into the record portions of her deposition . . . .

(Emphasis added.)

I. STANDARD OF REVIEW. The use of prior testimony in a criminal trial raises constitutional claims regarding the right of the defendant to cross-examine witnesses. *See State v. Murray*, 512 N.W.2d 547, 551 (Iowa 1994). Our review of constitutional rights is de novo. *State v. Haviland*, 532 N.W.2d 767, 768 (Iowa 1995). We must look at the totality of the circumstances as shown by the entire record. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995).

II. ADMISSION OF DEPOSITION. If a witness is unavailable, the rules of evidence declare former testimony is not hearsay. Iowa R. Evid. 804(b)(1). Former testimony is:

> Testimony given as a witness at . . . a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Iowa R. Evid. 804(b)(1); *see also State v. Ray*, 516 N.W.2d 863, 866 (Iowa 1994)

(deposition testimony may be used at trial if the witness is unavailable and if the party against whom the testimony is offered has had the opportunity and motive to develop the testimony). A witness is unavailable when the witness:

> (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
>
> (5) is absent from the trial or hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

Iowa R. Evid. 804(a).

We find the State proved Alice was unavailable. The record reflects the State personally served Alice when she attended the deposition and also told her to be at the courthouse one-half hour early. The county attorney gave a professional statement informing the court that when Alice did not arrive as requested, a police officer was sent to her residence and then to Jesus' parents' home. No other options were known to the State. We find this case is distinguishable from those cited by Jesus. *See State v. Dean*, 332 N.W.2d 336, 339 (Iowa 1983) (the only evidence of the State's effort was the return of an unserved subpoena issued six days before trial and a printed "Diligent Search" form recited Allard could not be found in the county, he was "Out of State Fishing"); *see also State v. Zaehringer*, 325 N.W.2d 754, 759 (Iowa 1982) (the State introduced no evidence regarding its efforts in attempting to produce the witness for trial).

We also find Jesus had a sufficient opportunity to cross-examine Alice. *See State v. Castillo*, 315 N.W.2d 63, 66 (Iowa 1982) (it was the defendant and his

co-defendants who, pursuant to rule 12(1), initiated the taking of Hagens' deposition and defendant's counsel examined Hagens at some length in the deposition).

Last, the jury was present and the case was ready to proceed.

Even if the trial court erred by allowing the deposition to be read into the record, we find it was harmless error beyond a reasonable doubt. *See State v. Hensley*, 534 N.W.2d 379, 381 (Iowa 1995) (defendant's Sixth Amendment right to counsel was violated, but the court's erroneous admission into evidence of statements obtained in violation of that right was harmless beyond a reasonable doubt). The State presented overwhelming evidence in the form of the testimony by McGourty, Madden, and Hull, as well as the pictures showing Alice's bruises. Even if Alice's deposition had been excluded, the outcome of the trial would not have been different.

Even though we have affirmed the use of the professional statement in this situation, we find trial courts ought to require parties to call the person who served or attempted to serve the unavailable witness. A first-hand account would be of more value to the court and the attorneys than a professional statement.

For these reasons, we affirm the trial court's decision to allow the use of the deposition testimony and Jesus' conviction.

AFFIRMED.