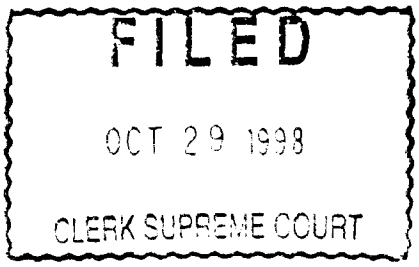
IN THE COURT OF APPEALS OF IOWA

No. 8-340 / 97-1191
Filed October 29, 1998



STATE OF IOWA,

Appellee,

vs.

MONTE LEE HORTON,

Appellant.

Appeal from the Iowa District Court for Cherokee County, John P. Duffy, Joseph J. Straub, and Charles H. Barlow, Judges.

Monte Lee Horton appeals from judgment and sentence entered for second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, and Chris Kragnes, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and John A. Wibe, County Attorney, for appellee.

Heard by Cady, C.J., and Streit, and Vogel, JJ., but decided by Streit, P.J., and Vogel and Mahan, JJ.

PER CURIAM.

Monte Lee Horton appeals the judgment and sentence following his conviction for second-degree sexual abuse. He claims his Sixth Amendment right to confront his accuser was violated, insufficient evidence existed to support the conviction, and the district court erred by allowing inadmissible hearsay testimony into evidence. We affirm the district court.

The facts giving rise to this case involve the sexual abuse of a seven-year-old girl by her father. Brittney, Horton's seven-year-old daughter, initially told her grandmother, Cecilia Stevens, about the abuse. Brittney told Stevens the abuse happened on three occasions in four different locations: the bathroom, dining room, bedroom, and basement.

Dr. Lorraine Hazard examined Brittney following the revelation. Although Dr. Hazard could not pinpoint a time over which the abuse occurred, she determined Brittney's vaginal and anal openings had been penetrated "multiple times over a prolonged period of time."

Brittney was also videotaped during an interview by social worker Jan Kircher at the Child Protection Center. During the interview, Brittney stated the abuse happened in the bathroom, basement, and garage. Brittney also described how her father's body came into contact with her body and how there was a stain in her underwear following the abuse.

Brittney did not testify at trial. The trial court ruled Brittney's videotaped interview was sufficiently trustworthy and admissible due to her unavailability.

The jury found Horton guilty of second-degree sexual abuse. The district court sentenced him to an indeterminate twenty-five year imprisonment term.

On appeal Horton claims: (1) his Sixth Amendment right to confrontation was violated by the admission of Brittney's videotaped interview; (2) insufficient evidence existed to support the conviction; and (3) the district court erred by admitting impermissible hearsay evidence.

I. Confrontation Clause.

On appellate review of an evidentiary ruling we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis,* 574 N.W.2d 15, 16 (Iowa 1998). Our review of constitutional issues, however, is de novo. *In re E.H. III,* 578 N.W.2d 243, 245 (Iowa 1998).

Iowa Code section 910A.14(3) (1997) provides:

> The court may upon motion of a party admit into evidence the recorded statements of a child, as defined in section 702.5, 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(b)(5).

A hearsay statement may be admissible under the residual exception provided in rule 803(24)[1] as long as the statement is trustworthy, material, necessary, of service to the interests of justice, and proper notice has been provided. *State v. Rojas,* 524 N.W.2d 659, 662-63 (Iowa 1994).

In determining whether statements admissible as hearsay exceptions also meet the confrontation clause requirements, two restrictions must be considered. *State v. Campbell,* 539 N.W.2d 491, 493 (Iowa App. 1995). First, the range of permissible evidence is restricted by requiring the prosecution to demonstrate the unavailability of the declarant. *Id.* Second, once unavailability is proven, the statements must be trustworthy enough so as to bear "adequate indicia of reliability." *Id.* In *Rojas* the court observed:

> There is no fixed test for admission of a child's statement regarding sexual abuse under the confrontation clause. Instead, whether the statement contains "particularized guarantees of trustworthiness" must

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[1] Iowa Rule of Evidence 803 (24) provides:
Other Exceptions. 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 produce through reasonable efforts; and 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.

> be drawn from the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. Corroborative evidence may not be considered in making this determination.

Rojas, 524 N.W.2d at 664 (citations omitted).

Horton claims the district court erred by admitting Brittney's videotaped interview into evidence because it contained hearsay testimony and violated his right to confront his accuser. He first asserts the videotaped interview was inadmissible hearsay and should not have been admitted pursuant to the residual exception provided in Iowa Rule of Evidence 803(24). In support of this argument, Horton maintains the district court only considered the notice and trustworthiness factors in finding the exception applied to the videotaped interview. Horton next contends even if the admissibility criteria were met, the videotaped interview should not have been admitted because it violated the confrontation clause. He claims the district court erred by finding Brittney was unavailable, and assuming she was unavailable, the videotape did not "bear an adequate indicia of reliability to be admissible."

We first address Horton's claim the videotaped interview did not meet the five requirements necessary for the admission of evidence under the residual hearsay exception. While the trial court's written rulings focused on the issues of trustworthiness and notice, the court verbally addressed each of the factors prior to the admission of the videotape. The trial court stated:

> So far as the tape is concerned, the Court finds that it is a statement that is offered as evidence of material fact, and it is more probative on the

> point which it is offered more than any other evidence which the proponent can procure through reasonable efforts, and that the general purpose of these--of the rules in the interest of justice will best be served by admission by the State into evidence.

The record indicates the district court, at several points during the proceedings, considered all five factors before admitting the videotaped interview. Based upon our review of the record, we also find the district court did not abuse its discretion in determining the elements of the residual exception had been satisfied.

We next turn to Horton's confrontation clause claim. He first asserts the district court erred by finding Brittney unavailable. He maintains the interests of justice require more than the testimony of a social worker to determine Brittney's unavailability.

The district court found Brittney unavailable based upon the testimony of social worker Lynette Obmann, who worked with Brittney weekly for a period of four months. Obmann testified Brittney has a mild intellectual deficiency, regressed to "almost a toddler's level" during therapy, has limited social development, and displays behavior indicating a predisposition to psychotic episodes. Obmann further testified she believed Brittney would not be capable of testifying truthfully at trial.

On our de novo review of the record, we find the district court properly determined Brittney was unavailable to testify. Obmann's explanation of Brittney's psychological and intellectual limitations indicate that requiring Brittney to testify would cause her great psychological trauma, which in turn could prevent her from

testifying truthfully. We therefore find the district court properly determined Brittney was unavailable.

Horton also claims the trial court erred by finding the videotaped interview had an adequate indicia of reliability. Specifically, he points out some of the questions Kircher asked were leading or expressed her opinion. He maintains that while some of the leading or opinion statements were not viewed by the jury, they cannot be ignored in examining the entire statement. Horton further emphasizes the inconsistency in Brittney's statements concerning where the abuse occurred indicate unreliability.

The videotaped interview contained adequate indicia of reliability based upon the types of questions asked by Kircher and the detailed description of abuse provided by Brittney. Generally, Kircher refrained from asking Brittney leading questions[2] and Brittney supplied the details and description of the abuse. She explained and demonstrated with dolls that during one instance her father told her to hold still, he laid on her, and was shaking. She also stated there was a stain on her underwear following the abuse. Brittney's specific description of the abuse indicates veracity and reliability because the experiences she described were beyond the experience of the average child. *See Rojas,* 524 N.W.2d at 663. Furthermore, when considering the videotaped interview as a whole, we note her inconsistency regarding the location of the abuse was not so substantial as to render the entire interview unreliable.

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[2] Kircher did ask Brittney, "[D]id this happen to you when you were five?"

II. Sufficiency of Evidence.

Our standard of review for claims of insufficient evidence is well established. We review such claims for errors at law. Iowa R. App. P. 4.; *State v. Nichols,* 572 N.W.2d 163, 163 (Iowa App. 1997). A verdict of guilty is binding on appeal unless no substantial evidence in the record exists to support it, or it is clearly against the weight of the evidence. *State v. Forsyth*, 547 N.W.2d 833, 834 (Iowa App. 1996). Substantial evidence means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *State v. Maghee,* 573 N.W.2d 1, 10 (Iowa 1997).

In determining the sufficiency of the evidence, we view the record in a light most favorable to the State. *State v. Milner,* 571 N.W.2d 7, 10 (Iowa 1997). All evidence is considered, not merely the evidence supporting the verdict. *State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16). Although a jury verdict can rest on circumstantial evidence, the evidence must raise a fair inference of guilt as to each element of the crimes. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). Additionally, discrepancies in testimony do not, in and of themselves, preclude proof beyond a reasonable doubt. *See generally State v. Phanhsouvanh*, 494 N.W.2d 219, 223 (Iowa 1992) (jury could adopt evidence it found credible); *Forsyth*, 547 N.W.2d at 836 (jury's function to determine credibility and resolve conflicts in evidence).

Horton claims insufficient evidence exists in the record to support his conviction. He maintains Brittney's testimony was unreliable because she could not fully explain or describe the abuse, she was asked leading questions by Kircher during the videotaped interview, and her testimony concerning the location of the abuse was inconsistent. He also emphasizes Brittney's doctor could not pinpoint when the abuse occurred and what type of object penetrated her.

Brittney described the abuse to her grandmother, a police officer, and Kircher in a consistent manner. During the videotaped interview she provided details of sexual activity beyond the experience of a child her age. Further, the medical evidence corroborated her description of the abuse. Although Brittney's interview contained an inconsistency concerning the location of the abuse, her ability to describe the abuse in detail coupled with the corroborating evidence in the case, supports the jury's conclusions. Consequently, we find substantial evidence existed from which a rational trier of fact could find Horton guilty of second-degree sexual abuse.

III. Hearsay.

On appellate review of an evidentiary ruling we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis,* 574 N.W.2d 15, 16 (Iowa 1998).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 801(c).

Horton contends the trial court erred by admitting hearsay statements Brittney made to grandmother Stevens indicating she had sexual contact with him. He maintains these statements were offered to prove the truth of the matter asserted and were therefore inadmissible hearsay. He claims these statements should not be admissible based upon the hearsay exceptions provided in rules 803(24) and 804(b)(5) because the State failed to prove Brittney's hearsay statements bore any indicia of trustworthiness.

The trial court ruled the hearsay statements were admissible pursuant to the residual hearsay exceptions provisions in rules 803(24) and 804(b) (5). We find Brittney's hearsay statements in this instance to be credible and trustworthy for the same reasons we find her videotaped interview to be trustworthy. As in the interview, she told her grandmother specific information beyond the knowledge of a typical seven-year-old child. We therefore find the district court did not abuse its discretion in finding Brittney's statements were sufficiently reliable.

AFFIRMED.