**IN THE COURT OF APPEALS OF IOWA**

No. 2-213 / 91-677

**STATE OF IOWA,**

Appellee,

vs.

**TERRY WAYNE HADLEY,**

Appellant.

FILED
JUL 30 1992
CLERK SUPREME COURT

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Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Hadley appeals his conviction, following a jury trial, of second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Amy M. Anderson, Assistant Attorney General, J. Patrick White, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Sackett, JJ.

**OXBERGER, C.J.**

On October 20, 1990, T.H. disclosed to Brevick Cherryholmes that her father, Terry Wayne Hadley, "had hurt her pee-pee" while they were in bed together.

Terry Wayne Hadley was charged with two counts of second-degree sexual abuse. Trial began on February 4, 1991. Hadley's theory of defense centered upon animosity between Cherryholmes and Hadley due to Cherryholmes' relationship with Hadley's sister.

Prior to the beginning of the defense's case, the prosecutor informed Hadley and the district court that Cherryholmes had been admitted to the hospital due to pancreatitis. The court found that Cherryholmes was unavailable to testify and allowed defense counsel to read Cherryholmes' discovery deposition into the record.

At the close of trial, the district court sustained Hadley's motion for directed verdict as to one count of second-degree sexual abuse. On February 6, 1991, the jury found Hadley guilty on the other count.

On March 22, 1991, Hadley filed a motion for new trial, claiming that he did not receive a fair trial because he was "denied his right to confrontation and to due process as guaranteed by the 5th and 6th Amendments to the United States Constitution" because the discovery deposition was an inadequate substitute for live testimony.

At the new trial hearing, Cherryholmes testified that he could avoid pancreatitis by adhering to a strict diet and avoiding alcohol. Hadley argued in the brief in support of his motion that Cherryholmes was not truly unavailable because he could have controlled the attacks. The district court denied Hadley's motion.

On March 29, 1991, the district court entered judgment and sentenced Hadley to an indeterminate prison term of up to twenty-five years.

Hadley appeals, contending the district court erred in denying his motion for new trial. Hadley argues that he was denied his sixth amendment right to compulsory process because the State unintentionally led defense counsel to believe the illness was not self-induced. Hadley maintains that the substance of the challenge made by trial counsel was sufficient to alert the district court to his compulsory process claim. He further argues that if counsel failed to preserve error on his claim, then he was denied effective assistance due to counsel's omission.

The State responds that the compulsory process claim has not been preserved for appeal because (1) it was not adequately raised before the trial court, (2) Hadley did not attempt to secure Cherryholmes' presence at trial, (3) Hadley failed to request a continuance, and (4) Hadley offered the deposition into the record in lieu of the live testimony. Finally, the State maintains that the State did

not cause or withhold information regarding Cherryholmes' absence from trial.

The parties dispute the scope of review to be applied to Hadley's claim. Hadley maintains that a de novo review is appropriate because the defendant alleges a violation of a constitutional right. The State argues that an abuse of discretion standard applies because the court is reviewing a denial of a motion for new trial and because the district court specifically found that Hadley did not intentionally cause his own illness.

Scope of Review

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

I. Preservation

As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). However, in State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982), the supreme court recognized that review of an appellate issue is not precluded when failure to preserve error results from a due process denial of effective representation. We assume, arguendo, Hadley's compulsory process issue has been preserved.

II. Merits

In order to prove Hadley's right to compulsory process has been violated, he must prove the State was responsible for an act or omission that caused the loss or erosion of testimony which is both material to the case and favorable to Hadley. U.S. v. Hoffman, 832 F.2d 1299, 1303 (1st Cir. 1987).

Hadley fails to prove Cherryholmes' physical presence at trial was material to the case. There was sufficient evidence, even without Cherryholmes' testimony, to establish Hadley's guilt. T.H. testified her father had "touched her pee-pee." In T.H.'s videotaped interview at St. Luke's Hospital (submitted as State's Exhibit 1), she described how her father had touched her underneath her pajamas. In addition, there was medical testimony that T.H.'s genital area was scarred in a manner consistent with sexual abuse.

Hadley argues, had Cherryholmes testified in the presence of the jury, the jury could have witnessed the interaction between the two men, possibly changing the outcome of the trial. This is speculative at best. The animosity between the two men was disclosed at trial. A new trial, with direct testimony from Cherryholmes, would not yield information material to the case that has not already been disclosed.

Hadley has failed to show Cherryholmes' physical presence at trial was material to his case. We affirm the district court's denial of a new trial.

**AFFIRMED.**