IN THE COURT OF APPEALS OF IOWA

No. 2-191 / 91-1486

FILED
JUN 25 1992
CLERK SUPREME COURT

IN THE INTEREST OF S.A.S.W., A Minor Child,

P.S.W., Father,

Appellant.

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Appeal from the Iowa District Court for Woodbury County William E. Adams, District Associate Judge.

Father appeals an adjudicatory order and a subsequent disposition finding his minor child to be a child in need of assistance. **AFFIRMED.**

Mayer Kanter of Forker & Kanter, Sioux City, for appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter, Special Assistant Attorney General, and Judy Sheirbon, Assistant Attorney General, for appellee State.

Elizabeth A. Rosenbaum of Munger, Reinschmidt & Carter, Sioux City, guardian ad litem for the child.

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

SACKETT, J.

A father appeals from an adjudicatory order and disposition finding his minor child to be a child in need of assistance pursuant to Iowa Code section 232.2(6)(d). The father contends the juvenile court referee and the juvenile court erred in finding by clear and convincing evidence he sexually abused the child. We affirm.

The question in this case is whether there is clear and convincing evidence Sheila[1] was sexually abused by her father. Our review is de novo. In re W.G., 349 N.W.2d 487, 491 (Iowa 1984) cert. denied 105 S. Ct. 1212 (1985).

Sheila was born on January 1, 1986. Her parents' marriage was dissolved in August 1987, and her father was established as the primary physical custodian. Her mother has not contacted the child for several years, and the mother's current whereabouts is unknown.

In September 1989 the father, on active duty with the United States Army in Germany and unable to care for Sheila, brought her to the United States to live with his maternal aunt, Susan, and her family, which included her husband Lyle and four minor children.

The father came to Iowa in April 1990 after he was discharged from active duty. He lived in the basement of Susan's home and then moved to a mobile home located on her property.

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1. The child's first initial is S. Sheila is not her given name.

Susan testified after Sheila's father returned Sheila sometimes complained of what she described as vaginal soreness and the father would send Sheila to her for care. Susan said Sheila appeared to be red, but there was no bleeding. Susan also testified Sheila's father would take Sheila to Sheila's bedroom to clean the bedroom. The door to the bedroom would be closed, and the room would be cleaned. Susan testified Sheila complained of being sore once after she had helped her dad clean her room.

The father subsequently had some disagreement with his aunt Susan and on July 29, 1990, his mother took Sheila to the home of Delores, a family friend. The first day Sheila was in Delores's home, Delores noted Sheila's vaginal area was inflamed and red, and Sheila complained about it hurting when she urinated. Delores said she washed the vaginal area and applied Vaseline. She was not certain if the father was in the room at the time. The father testified he was present and he spread Sheila's legs apart to see the area while Delores applied the Vaseline. The paternal grandmother supported the father's version of the events.

Delores was not able to care for Sheila so arrangements were made for Delores's daughter Amy to take care of her. Amy said when Sheila came to her house Sheila's crotch area was really red and she complained of soreness. Amy soaked

Sheila in the bathtub and put Vaseline on her. Amy could not control Sheila, so she asked her sister Patty to take Sheila. Patty cared for Sheila from August 1990 until January 1991. Patty testified Sheila's father visited his daughter two or three times a week at first, and then once every two or three weeks. Sometimes he took Sheila for the weekend. Patty testified she was told to soak the child in the bathtub because she was sore down there. Patty testified Sheila called it her cee-cee and Patty identified Sheila's cee-cee as her vagina. Patty said after three days the redness was gone.

Sheila's father took Sheila for visitation around Thanksgiving. Sheila refused to say goodby to her father when he left her at Patty's house. Sheila told Patty she was sore and Patty soaked Sheila in the bathtub. The soreness went away. After the child was with her father at Christmas, Patty testified the following exchange occurred:

> I was standing there doing dishes and she (Sheila) came out of the blue. I dropped a glass and almost cut my hand, and she said my daddy hurt me. I said, Sheila, it's not nice to say things, because I try to teach her not to lie or anything, and I said, it's not nice to lie, and I asked her, and she goes, he really did. And I said, what are you talking about, and she said, he hurt my cee-cee, and I said, no, he couldn't have hurt your cee-cee, and she said, yes, he did. That's when she went into the bedroom and layed on the bed, pulled her panties down, and showed me what he did, and I think I just almost lost it when she told me that, because I broke down and cried.
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> Q. Patty based on anything that Sheila told you, did you feel the necessity to inform law enforcement authorities? A. Well, I called a

lawyer to find out what to do after Sheila had told me, and he told me to call the Child Protective Services.

Q. And did you, in fact, do that? A. Yes, I did.

Marian Health Center records indicated:

History is obtained from Sheila. She was brought in by her foster mother, Brenda, for an examination. Sheila stated that "daddy Butch touched me hard in my cc." She stated that he did that with his index finger into the genital and rectal area. She stated that it was hard and it hurt. She volunteered this information with very clear indication of this being index finger. She referred to her genital and rectal area as her cc.

She stated that there was others in addition that have touched her down there, but when questioned about this, she was less direct and somewhat hesitant to disclose who had done that. She did state that Sue and Lyle did hurt her on her hand and her cc.

Genital examination revealed:

Genital exam - showed appeared to be in tanner state one. Examination was in the supine position. There appeared to be no inguinal adenopathy or discharge present. No condyloma present. The patient was examined with minimal traction to the perineum and the hymen did appear to be obliterated in the inferior portion from 8 o'clock to 4 o'clock position. This was examined in the knee/chest position and confirmed the abnormality. The anus was examined in the supine position. Slides were obtained. There appeared to be normal skin folds, tone and no evidence of fissuring. Please see colposcopic slides for further exam.

Assessment:
Abnormal examination consistent with hymenal penetration.

Review of colposcopic slide shows the posterior fourchette to be intact. The hymen is very jagged. The area from 7 o'clock to 4 o'clock shows the hymen to be obliterated with scar tissue present. The entire hymenal edge is obliterated, thickened with scar formation. The rest of the

fossa navicularis and urethral area appeared to be normal. The dimensions of the hymen were 6.6 mm horizontally and vertically were 5.4 mm. The anus colposcopic slides appeared to be normal.

Katie Boley found:

Conclusions and Recommendations: Sheila, a five-year-old bi-racial female, stated that her "Daddy Butch" hurt her with his finger. Sheila showed on the doll that Daddy Butch had touched her with his finger in her vagina and rectal area. She said that it happened at her house one time.

Sheila talked about a black man hitting her on her back.

Sheila was difficult to interview, because after we started to talk about what had happened, she moved around a lot, and she talked in a very soft tone of voice, so she was hard to understand, and it was hard to get her to answer in a concise way.

I would recommend that Sheila be involved in some type of play therapy.

Greg Roberts, M.D. found:

Although it is impossible to determine whether or not the father committed sexual abuse from any type of interview, polygraph or other means that we currently have at our disposal, reasonable conclusions can be drawn. The father does not fit the type of individual who is associated with criminal activity. That leaves us to address the issue of sexual molestation in general. Nonagressive pedifiles as a group are not necessarily sociopathic hence clues are looked at determine whether the father would fall into this particular pattern. The results of his Cognition Scale are really inconclusive but as we went over the test together, it is my belief that he does not fit an individual who has committed a sex crime either. He denies being associated in any activities where he would expose himself to younger children. (emphasis added).

This leaves the final consideration, that is whether or not the father committed an isolated sexual act upon his daughter. This is very difficult to ascertain and reliance must be placed upon the investigation in its entirety.

These issues lead me based on the interview with the father to believe that the likelihood of his having perpetrated a sexual act on his daughter is low. Of course, my conclusions are assumed that the father has told the truth and all of the information contained in this report should be corroborated independently by appropriate investigators.

Dr. Jung testified to the following:

Q. All right. Was this trauma of recent origin or had it been longstanding, based on your examination? A. That area heals very quickly, and -- and, you know, the -- -- the medical literature will show that you -- after two weeks, you know, maximum healing really has occurred, so I would say it was beyond two weeks. And beyond that, it could have been longer.

* * *

Q. All right. If we assume that this child had been sexually abused back when she was two or three -- A. Mm-hmm.

Q. -- by someone -- -- someone other than the father, isn't that -- isn't it possible that that's the scarring that you're observing now? A. The -- you know, the timing beyond two weeks is -- is difficult. I mean, I -- I couldn't tell you to a, you know, degree whether it was when she was three or two. The hymen -- the hymen opening changes with age. It's a certain size, say, when they're two, and when they're five it -- it enlarges some. But the edge, what we look at with our colposcope, remains intact.

Q. So -- A. After it's been penetrated once or damaged, you know, that's -- that's gone. You -- if it happened at two years we'd still see it when she's eight.

Q. So it is possible that the scarring that you're observing could have happened back when she was two and three? A. Possible.

Q. When you examined her was there anything that indicated a recent traumatic sexual abuse had occurred; that is, within two weeks? A. No. The -- the main scarring that was seen was on the hymen, and there was no bleeding or bruising or sign that there was, say, an acute healing phase that -- that we would normally see if we see them in a fairly short time.

Dr. Jung also testified about a medical report of Sheila's from Germany, dated March 11, 1989, as follows:

> Q. Doctor, when you examined what was handed to you by Mr. Rhinehart -- I believe it was State's Exhibit Number 3 (medial report from Germany) -- is it apparent -- or can you tell from that report whether or not a colposcopic examination was done of -- of Sheila at that time? A. No. Colposcopic exam, at least, was not done based on these records. The only reference really to the -- the genital region included an exam of the vulva, which is really the -- outside. And basically there was said that there was no new trauma. And the anus exam, they said there was no old or new trauma. But the, you know, exam of the inside, you know, the structures beyond the vulva, the hymen, the -- the area of the urethra, the vagina, that appeared to have not been examined, at least by the records.
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> Q. In your initial examination before you did the colposcopic examination of Sheila was the damage to her hymen apparent to the naked eye? A. I looked at it grossly, meaning without the colposcope. And having seen a lot of these, it looked initially normal to me. But looking with -- looking with the naked eye, you don't get the 30 magnification that you get with the colposcope, so we normally then will go right to the colposcope and we do our slides, which -- which we take with the colposcope with the magnification. So if I was looking with the naked eye, I wouldn't be able to see anywhere near what you could see with the colposcope.
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> Q. If you examine a child and view the -- the vulva, by viewing the vulva can you detect hymenal damage? A. No.

The State must prove the allegations of its petition by clear and convincing evidence. See Iowa Code § 232.96(2). There is clear and convincing evidence the child at some time suffered some type of intrusion in the vagina that injured her hymen. There is also clear and convincing evidence the injury was the result of sexual abuse. What

is not nearly so clear is when the injury occurred and who was the perpetrator. The father was in a position where he could have been the perpetrator, as are a number of other identified and unidentified persons. The child was in the care of a number of caretakers and a number of persons who were present in the caretakers' homes, including a person identified by another as having committed sexual abuse.

While there is evidence the child suffered redness in her genital area, there is no evidence medical or otherwise the redness was caused by sexual abuse. We, therefore, give no consideration to the redness.

The evidence identifying the father as perpetrator comes from the child. She describes the alleged abuse as her father hurting her cee-cee. She does not describe how it happened except that he hurt her with his finger and his finger nail. In the child's video taped interview, she does not clearly identify her father or clearly exclude others. The trial court found the child's testimony credible, and the father's testimony not credible. We give consideration to this assessment. See In re S.V., 395 N.W.2d 666, 668 (Iowa App. 1986); Iowa R. App. P. 14(f)(7) (1991). This is an extremely close issue.

Appellant also contends the trial court should not have admitted a copy of a will found in the father's home. We have not considered the will in our de novo review. We affirm.

AFFIRMED.