IN THE COURT OF APPEALS OF IOWA

No. 1-270 / 00-0933
Filed July 18, 2001

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS ACE BUTRICK,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke (discovery ruling), Timothy J. Finn (suppression ruling), and Allan L. Goode (trial and sentencing), Judges.

Defendant appeals from the judgment and sentence entered upon his conviction for second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney General, Ron Robertsen, County Attorney, and Timothy N. Schott, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Mahan and Miller, JJ.

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STREIT, P.J.

Dennis Butrick appeals his conviction for second-degree sexual abuse claiming improper discovery occurred and his confession was the result of promised leniency by the police. We affirm.

I. Background Facts & Proceedings.

Dennis Butrick is accused of sexually abusing his nine-year-old daughter, D.B., on December 25, 1999. A few days later, D.B.'s mother learned of the abuse and contacted the police. During an interview by a police officer, Butrick admitted he had rubbed D.B.'s vagina while he masturbated. He was charged with second-degree sexual abuse.

Butrick and the State filed various pretrial motions. Butrick filed a motion to suppress his statements to the police officer alleging he had been illegally interrogated and had made the statements involuntarily. The district court denied the motion. The State filed two motions concerning D.B. as a child victim. The first motion requested that any deposition taken of D.B. be taken with Butrick confined to an adjacent room or behind a screen or mirror. The district court sustained the motion. The second motion requested that D.B.'s trial testimony be taken by videotape or by closed-circuit television. Butrick agreed to the latter procedure before trial.

Butrick was convicted of second-degree sexual abuse. On appeal, he claims the district court erroneously failed to make a specific finding that it was necessary for D.B.'s deposition to be taken outside of his presence. He also claims he received ineffective assistance of counsel because his trial counsel did

not adequately pursue the issue of promissory-leniency in his motion to suppress.

II. Deposition.

Butrick claims Iowa Rule of Criminal Procedure 12(2) and Iowa Code section 915.38 both require that, if D.B.'s deposition was to be taken outside of his presence, the district court had to make a specific finding that such a procedure was necessary. We review for an abuse of discretion. *Otteson v. Iowa Dist. Ct.*, 443 N.W.2d 726, 728 (Iowa 1989).

Butrick bases his claim on language found in rule 12(2)(a) and section 915.38(1). Rule 12(2)(a) states:

> Whenever the interests of justice and the special circumstances of a case make necessary the taking of the testimony of *a prospective witness not included in subsection 1 or 3 of this rule*, for use at trial, the court may upon motion of a party and notice to the other parties order that the testimony of the witness be taken by deposition and that any designated book, paper, document, record, recording, or other material, not privileged, be produced at the same time and place. For purposes of this subsection, special circumstances shall be deemed to exist and the court shall order that depositions be taken only upon a showing of necessity arising from either of the following:
>
> (1) The information sought by way of deposition cannot adequately be obtained by a bill of particulars or voluntary statements.
>
> (2) Other just cause necessitating the taking of the deposition.

Iowa R. Crim. P. 12(2)(a) (emphasis added). Witnesses included in subsection 1 are those "listed by the state on the indictment or information or notice of additional witnesses." Iowa R. Crim. P. 12(1); *see also State v. Weaver*, 608 N.W.2d 797, 801 (Iowa 2000). Because D.B. was listed on the trial information as one of the State's witnesses, rule 12(2)(a) is inapplicable to this case.

Section 915.38(1) states, in pertinent part:

> Upon its own motion or upon motion of any party, a court may protect a minor, as defined in section 599.1, from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate, by ordering that the testimony of the minor be taken in *a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom.* However, such an order shall be entered only upon a specific finding by the court that such measures are necessary to protect the minor from trauma. Only the judge, prosecuting attorney, defendant's attorney, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the minor may be present in the room with the minor during the minor's testimony. The judge shall inform the minor that the defendant will not be present in the room in which the minor will be testifying but that the defendant will be viewing the minor's testimony through closed-circuit television.
>
> During the minor's testimony *the defendant shall remain in the courtroom* and shall be allowed to communicate with the defendant's counsel in the room where the minor is testifying by an appropriate electronic method.

Iowa Code § 915.38(1) (emphases added). The above-quoted portion of section 915.38(1) clearly establishes procedures to protect minor witnesses when they are testifying in trials or other court hearings—not when they are giving depositions. Section 915.38(1) thus also does not support Butrick's claim.

There are provisions in rule 12(2) and section 915.38 that do apply to depositions. For example, rule 12(2)(b) states:

> The court may upon motion of a party and notice to the other parties order that the testimony of a victim or witness who is a child, as defined in Iowa Code section 702.5, be taken by deposition *for use at trial.* Only the judge, parties, counsel, persons necessary to record the deposition, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child may be present in the room with the child during the child's deposition.
>
> The court may require a party be confined to an adjacent room or behind a screen or mirror that permits the party to see and

> hear the child during the child's deposition, but does not allow the child to see or hear the party. However, if a party is so confined, the court shall take measures to insure that the party and counsel can confer during the deposition and shall inform the child that the party can see and hear the child during deposition.

Iowa R. Crim. P. 12(2)(b) (emphasis added). Similarly, section 915.38(2) states, in pertinent part:

> The court may, upon its own motion or upon motion of a party, order that the testimony of a minor, as defined in section 599.1, be taken by recorded deposition *for use at trial*, pursuant to rule of criminal procedure 12(2)(b). In addition to requiring that such testimony be recorded by stenographic means, the court may on motion and hearing, and upon a finding that the minor is unavailable as provided in Iowa rules of evidence 804(a), order the videotaping of the minor's testimony for viewing in the courtroom by the court. The videotaping shall comply with the provisions of rule of criminal procedure 12(2)(b), and shall be admissible as evidence in the trial.

Iowa Code § 915.38(2) (emphasis added). Neither of these provisions expressly requires a specific finding of necessity before a child victim's deposition can be taken outside of a defendant's presence. Moreover, both of these provisions apply when a child victim's deposition is to be used to perpetuate testimony for use at trial—not when it is to be used merely for discovery purposes. *Cf. State v. Weaver*, 608 N.W.2d 797, 801 (Iowa 2000). Significantly, D.B.'s deposition was never offered into evidence at trial as Butrick only used it to aid in his cross-examination of D.B. Neither rule 12(2)(b) nor section 915.38(2) was implicated in this case.

Accordingly, nothing in rule 12(2) or section 915.38 required the district court to make a specific finding that it was necessary to take D.B.'s deposition outside of Butrick's presence. Rather, the appropriate legal standard in this case

is provided by Iowa Rule of Criminal Procedure 13(6)(a): "Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate." At the hearing on the State's motion requesting that D.B.'s deposition be taken outside of Butrick's presence, D.B.'s mother testified D.B. was upset about what Butrick had done to her and would have trouble talking about what had happened if Butrick was in the room with her. D.B.'s mother also testified D.B. was receiving counseling. The district court's order allowing the disputed deposition procedure was supported by a "sufficient showing." *See Otteson*, 443 N.W.2d at 782. The district court did not abuse its discretion.

We note that, had the Confrontation Clause been implicated below, Butrick would have a stronger claim on appeal. *See Maryland v. Craig,* 497 U.S. 836, 858, 110 S. Ct. 3157, 3170, 111 L. Ed. 2d 666, 686-87 (1990) ("[T]he Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate.") (emphasis original); *Otteson*, 443 N.W.2d at 728 ("The State agrees that, if these depositions had been attempted to be introduced into evidence, *Coy* and the defendant's right of confrontation would come into play."). However, he does not argue—and has no basis for arguing—that this was the case. We affirm the district court.

III. Effectiveness of Counsel.

Butrick also claims his trial counsel was ineffective because he did not attempt to suppress Butrick's confession on the basis of promissory leniency. We review such claims de novo. *State v. Howes,* 525 N.W.2d 874, 876 (Iowa Ct. App.1994). To prevail, Butrick must show his attorney's performance fell outside a normal range of competency and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. McKettrick,* 480 N.W.2d 52, 55 (Iowa 1992).

The officer who interviewed Butrick testified he telephoned Butrick and told him,

> Dennis, you need to come down and talk to me. You want to give your side of the story, fine. Right now there is possible charges going to be filed against you. And I could possibly file them off the information that I have. I would prefer to get your side of the story.

Butrick argues "[t]his alone was an improper inducement rendering the confession involuntary." However, the officer's statements were not threatening in nature. *See State v. Rhiner*, 352 N.W.2d 258, 264 (Iowa 1984). Nor can they be interpreted as promising Butrick better treatment, less severe punishment, or more mercy by confessing guilt. *See State v. Nolan*, 390 N.W.2d 137, 142 (Iowa Ct. App. 1986). Butrick's trial counsel was not obligated to pursue a meritless issue. *See State v. McPhillips,* 580 N.W.2d 748, 754 (Iowa 1998). We affirm the district court.

AFFIRMED.