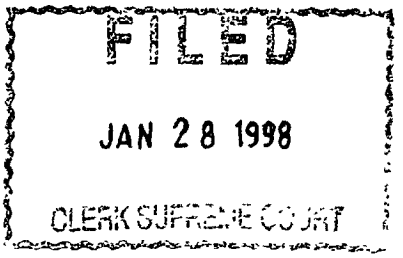
IN THE COURT OF APPEALS OF IOWA

000453

No. 7-588 / 96-1965



STATE OF IOWA,
Appellee,

vs.

MARK EDWARD LOMHOLT, SR.,
Appellant.

Appeal from the Iowa District Court for Mitchell County, Jon Stuart Scoles, John S. Mackey, and Gilbert K. Bovard, Judges.

Mark Lomholt, Sr., appeals his conviction, following a jury trial, of second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3 (1995).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Jerry H. Folkers, County Attorney, and Mark Walk, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

VOGEL, J.

Following a jury trial, Mark Lomholt, Sr. appeals his conviction of two counts of second-degree sexual abuse in violation of Iowa Code sections 709.1 and 709.3 (1995). The abuse was perpetrated upon Lomholt's four-year-old niece, B.G., and her five-year-old friend, N.P. The district court granted the State's motion to permit the children to testify by closed-circuit television under Iowa Code section 910.14 (1997). Lomholt argues that form of testimony violated his right to confrontation under the Sixth Amendment to the United States Constitution.

Scope of review. We review this constitutional question de novo; we make an independent evaluation of the totality of the circumstances. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989); *Origer v. State*, 495 N.W.2d 132, 135 (Iowa App. 1992).

Right to confrontation. Iowa Code section 910.14(1) (1997) provides in relevant part:

> Upon its own motion or upon the 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 [case by case] finding by the court that such measures are necessary to protect the minor from trauma.* (Emphasis added.)
>
> . . . .
>
> 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.

Id. Where the State makes an adequate showing, its interest in protecting a child witness from trauma may justify testimony outside the defendant's presence. *See State v. Rupe*, 534 N.W.2d 443, 444 (Iowa 1995) (citing *Maryland v. Craig*, 497 U.S. 836, 851, 110 S. Ct. 3157, 3166, 111 L.Ed.2d 666, 682 (1990)). The trial court must find the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, more than "mere nervousness or excitement or some reluctance to testify." *Craig*, 497 U.S. at 856, 110 S. Ct. at 3169, 111 L.Ed.2d at 685.

Moreover, the *Craig* court also held the right to confront a witness does not necessarily require face-to-face confrontation at trial. *Id.*, 497 U.S. at 851, 110 S. Ct. at 3166, 111 L.Ed.2d at 682. The presence of other elements of confrontation such as oath, cross-examination, and observation of the witness's demeanor, safeguard the constitutional interests of the defendant while ensuring reliable testimony and allowing an adversarial dialogue functionally equivalent to in-person testimony. *Id.* Additionally, the State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. *Craig*, 497 U.S. at 852-53, 110 S. Ct. at 3167, 111 L.Ed.2d at 683.

Any exceptions to the confrontation right must be based upon case-specific findings. *See Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed.2d 857 (1988). Patricia Tomson, the executive director of Parents United of North Central Iowa, had engaged in group and individual counseling with both children. Tomson testified B.G. was brought in for treatment by her mother during the last week of April 1996. Tomson visited with B.G. several times during the following three or four weeks, both individually, and in group sessions. Tomson last saw B.G. in May, 1996, as B.G. and her mother moved away thereafter. Tomson testified B.G. became anxious when describing the abuse and wet her pants on one occasion. She stated B.G. indicated she felt "sad and tired" when she thought of Lomholt. Her drawing of herself did not include arms which Tomson stated was an indication of powerlessness.

Tomson initially met with N.P. in May 1996 and continues to see her regularly. Tomson maintained N.P. was afraid of Lomholt and played like a baby when the subject was broached. Tomson testified N.P. said she was frightened of Lomholt and that "she doesn't want to see him. Her words are, I want him to stand in a corner for a long, long time."

Tomson further testified it would be "very traumatic" for either child to testify in Lomholt's presence. She stated, "I'm not sure either child would talk." Tomson also thought testifying before Lomholt would impair both girls' ability to testify and make it less likely they would tell the truth.

Lomholt maintains Tomson's testimony that she knew of no situation in which a four or five-year-old child should give direct testimony in the courtroom revealed a predisposed bias specifically applied to N.P. and B.G. While we recognize Tomson did make some generalized statements, she also gave particularized assessments as to each girl based upon numerous counseling sessions with the girls. We find there was specific information presented to the satisfaction of the court to indicate the girls' ability to testify would be impaired if not shielded from Lomholt.

Independent of the girls' testimony, Lomholt admitted he had been abusing his niece, B.G., "[f]or the last couple of months." Two officers testified about Lomholt's admissions of the abuse during interviews with him. Lomholt's written statement indicating he "asked [B.G.] and [N.P.] to pull their pants down and I touched them with my hand and penis and they put it in their mouth[s]" was introduced against him at trial. Lomholt had the opportunity to commit the abuse as he was alone with the girls. In addition, N.P.'s mother testified that N.P.'s personality had changed after spending the evening with Lomholt. These facts collectively corroborate Lomholt's criminal acts.

We therefore affirm the trial court's ruling to allow the girls to testify via closed circuit television and we accordingly affirm Lomholt's convictions.

AFFIRMED.