IN THE COURT OF APPEALS OF IOWA

No. 9-434 / 08-1344
Filed October 7, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JESS ESPINOZA CUEVAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Hardin County, William J. Pattinson, Judge.

Defendant appeals his first-degree murder conviction. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Randall J. Tilton, County Attorney, and Douglas D. Hammerand, Assistant County Attorney, for appellee.

Heard by Vogel, P.J., and Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, J.

Jess Cuevas appeals his first-degree murder conviction. He contends there is insufficient evidence to sustain the conviction. He also contends the court erred in permitting his children to testify outside his presence, and in failing to grant his motion for mistrial. We affirm.

I. Background Facts and Proceedings.

Brenda Cuevas's body was found after firefighters extinguished a fire at her home at about 3:30 a.m. on October 15, 2005. It appeared the fire had been deliberately set—the room smelled of gasoline, the air conditioner was turned to its lowest setting, and the gas line to the furnace was disconnected.

On August 18, 2006, the State filed a trial information charging Brenda's estranged husband, Jess Cuevas, with murder in the first degree. Minutes of testimony filed that date list Cuevas's two minor daughters, N.C. and J.C., as witnesses. On January 25, 2007, the State filed a motion seeking a protective order allowing Cuevas's daughters to give deposition testimony by means of closed-circuit television. Defendant resisted the motion. Following an evidentiary hearing, the district court granted the motion for a protective order.

On January 18, 2008, defendant filed a notice of defense asserting his intention to rely upon the defense of alibi and listing his two minor daughters as witnesses. On January 24, 2008, the State filed a motion seeking a protective order allowing the prosecution to present testimony from defendant's two minor

daughters at trial by means of closed-circuit equipment. Following an evidentiary hearing, the district court granted the State's motion.

Jury trial began on May 13, 2008. Based on the evidence presented at trial, a reasonable juror could find the following. At about 3:20 a.m. on Saturday, October 15, 2005, emergency personnel were dispatched to the Eldora home of Brenda Cuevas after a 911 caller reported a fire there. Eldora Police Officer Edward Lepley arrived at the scene about two minutes later and saw flames on the east side of the house. Finding the front door locked, he beat on the door, breaking a glass panel in the door.

The Eldora volunteer fire department arrived at 3:27 a.m. Fire Chief Bruce Harvey noted that the front door, two of the three garage doors, and the back door were locked. He was able to raise the third garage door. Although it was a cool October morning, the central air conditioning was running. Chief Harvey unlocked the front door and sent in a team of firefighters to put out the fire. They discovered Brenda's burned body on the bed in her basement bedroom. Chief Harvey smelled a strong odor of a flammable liquid and he saw a burn pattern on the floor leading to the bed.

Further investigation showed that the gas line had been disconnected from the gas input line of the furnace, which could have lead to an explosion. The thermostat was turned all the way down. The fire originated in the basement bedroom, and the burn pattern extended all around the bed, indicating the flammable liquid had been intentionally poured rather than accidentally spilled.

Analysis of burnt carpet and other items near the bed showed that the flammable liquid was gasoline and oil. The fire probably started ten to thirty minutes before the 3:20 a.m. 911 call. Brenda had installed alarms on the front and back doors, which had been turned off. There was no indication of a forced entry. Brenda's purse, containing cash and credit cards, remained in the house. No fingerprints suitable for identification were found, and blood found on the doors and the hood of the stove matched Brenda's DNA profile.

The medical examiner who performed the autopsy on Brenda's body observed a strong smell of a substance like gasoline on the body and discolorations on her upper body suggesting chemical burns. Brenda's head had been bludgeoned three to five times with a hard object, fracturing her skull. There were also injuries to her neck consistent with strangulation. Bruising in the muscles of her upper arm was consistent with defensive injuries. The medical examiner determined that Brenda's death was the result of head and neck trauma and occurred before the fire started.

Brenda and Cuevas, both nurses, married in October 1992. They had two daughters: N.C., born in 1993, and J.C., born in 1996. Brenda and Cuevas separated in May 2005 after Cuevas began to suspect that Brenda was communicating with an old boyfriend who lived out of state. Brenda initiated divorce proceedings and sought physical custody of the girls. Cuevas was ordered to pay temporary child support to Brenda. N.C. and J.C. spent every other weekend with Cuevas.

After the separation, Brenda and the girls lived with her mother and stepfather for a time, and then moved into a split-level house in Eldora. Brenda installed alarms on both the front and back doors and kept the doors locked. Friends and family observed that Brenda seemed upset when she talked with Cuevas on the telephone.

In May 2005, Cuevas moved into the rural Norwalk house of an older woman, Dixie Ribar, with whom he worked at a hospital in Knoxville. Ribar's house was about one hour forty minutes from Brenda's house in Eldora. Ribar lived on the main level of the house, Cuevas had two bedrooms and a bathroom upstairs, and Ribar's son, Michael, lived on the lower level. Because "money was tight," Cuevas mowed the grass and did odd jobs for Ribar to reduce his $200 per month rent. He also used (and was buying) a black Ford Ranger pickup that had belonged to Ribar's late husband. Cuevas usually kept the pickup in Ribar's garage, which was accessed by use of an automatic garage door opener or a key code panel. Ribar testified the only time she knew Cuevas to be angry was when she overheard Cuevas and Brenda discuss money or the girls in telephone calls.

Cuevas began dating Deb College in August 2005. In September 2005, they talked about marriage and Cuevas wanting custody of the girls. Cuevas was confident that the lawyer he hired would be successful in getting him custody. However, about a week before October 14, 2005, Cuevas told Deb that

the attorney had sent him a letter “to drop him” because he was unable to pay his legal fees.

On Friday, October 14, 2005, Brenda took the girls to the local Hy-Vee to meet Cuevas at 6:30 p.m. Cuevas was driving the black Ford Ranger pickup. The girls were spending the weekend with Cuevas at Ribar’s house. Ribar and her son were both out of town for the weekend. Cuevas asked Brenda whether she would be home later that night because he wanted to call and talk to her about the custody issue after the girls went to sleep.

Brenda went to dinner with her parents and then to a gathering at the American Legion with Ivan Miller. She left the American Legion before midnight, telling a friend she needed to get home because she was expecting a telephone call from Cuevas. Miller drove her home.

Cuevas and the girls stopped at a convenience store for a snack before continuing on to Ribar’s house. Cuevas called Deb College at 8:09 p.m. and told her that they were just pulling into the driveway. Although Cuevas usually parked the pickup inside the garage, he left it outside that evening.

Cuevas and the girls had something to eat and watched a movie, and then the girls went upstairs to bed, N.C. at about 10:00 p.m. and J.C. a short time later. Cuevas told J.C. that if she woke up and he was not there, she should not be scared; he was going to the grocery store and she could call him on his cell phone. Cuevas called Deb at 10:30 p.m. and said the girls were in bed and he was getting ready for bed. Deb thought it was strange that he was going to bed

that early: he generally worked night shifts and would not go to sleep until early morning, often talking to her on the phone at 1:00, 2:00, or 3:00 a.m. When Cuevas went upstairs that night, he tucked the girls in, straightened up their room, and then lay down on the floor next to J.C.'s side of the bed and went to sleep. Cuevas had never slept on the floor at Ribar's house when the girls were there on other occasions. He was lying on the floor when N.C. woke up briefly at a later point, and J.C. thought he was there when she woke up briefly. Cuevas later told Ribar that he left the house at about midnight to get gas for the pickup.

At about 1:40 or 1:45 a.m., on Saturday, October 15, 2005, Richard Jeske and Tiffany Balvanz saw a black or dark-colored pickup driving very slowly and then turn onto the street on which Brenda lived in Eldora. The pickup had a topper, a ball hitch, and a bar or rack on top. Both said that the pictures of Cuevas's pickup were consistent with the pickup they saw in Eldora in the early morning hours of October 15, 2005. However, Balvanz believed the license plate on the truck she saw was a Hardin County plate.

Cell phone records show that at 5:07 and 5:08 a.m. on Saturday, October 15, 2005, Cuevas checked his voice mail. The calls went through a different cell tower in the Norwalk area than the call he made to Deb College at 10:30 the previous evening.

At 6:00 a.m., October 15, J.C. woke up to find Cuevas was not there. N.C. woke up at 7:30 a.m. when she heard the garage door opening. Cuevas came into the house with some groceries and said he had gone to get waffles.

N.C. observed that there were some fresh scratches on Cueva's left hand. She had not seen the scratches on Friday. J.C. noticed a scratch on Cuevas's back, but he did not respond when she asked him about it. Cuevas and the girls went to Jordan Creek Mall and McDonald's and then stopped at Deb College's house. Deb also observed the fresh scratches on Cuevas's left hand.

On the way home that Saturday afternoon, Cuevas and the girls stopped at a Dollar General Store, where Cuevas bought some cleaning supplies, including hydrogen peroxide, Clorox Oxi Magic, and a package of six terry cloth towels. When Cuevas and his daughters returned to the Ribar house, N.C. and J.C. went upstairs to play video games in their bedroom. Cuevas stayed outside and cleaned his pickup.

Shortly after 5:00 p.m., Warren County deputy sheriff Bob Gebhart and Special Agents Chris Callaway and Jon Turbett of the Iowa Division of Criminal Investigation (DCI) arrived at Ribar's house. Cuevas was pulling out of the driveway in the pickup and told the officers he was going to get gas. The officers informed Cuevas of Brenda's death. Cuevas then told the girls of their mother's death.

The officers interviewed Cuevas and conducted a consent search of the house, garage, and vehicles. They found wet clothing and towels in the washing machine, and Cuevas volunteered the information that if they found Brenda's DNA, it was because he often washed the girls' clothes. In Cuevas's pickup was a garbage bag in which was another bag containing towels (similar to ones found

in the washing machine) and the scrub brush Cuevas used to clean the pickup. The officers did not see a pair of white tennis shoes.

A videotape from the Indianola Wal-Mart on Friday afternoon, October 14, shows Cuevas wearing white tennis shoes. N.C. observed that Cuevas's white tennis shoes were clean on Friday night. On Saturday, after N.C., J.C., and Cuevas arrived home from the Dollar General Store, N.C. saw the shoes in the garage and observed that they were dirty. On Sunday, October 16, Cuevas bought new white tennis shoes at Wal-Mart.

During the interview on October 15, Cuevas told the officers that he and Brenda had been getting along well. Cuevas then criticized Brenda at length, saying that she drank to excess, spent her time with men, and paid little attention to the girls. Before hearing that the death was considered suspicious, he said that Brenda had been depressed and then suggested that her brother, Chad Roy, would benefit financially from her death. When informed that Brenda's death was suspicious and not accidental, Cuevas said that she had been with numerous men and the killer could be anyone. He insisted that he had never before left the girls alone. He claimed that when he got home from getting gas, he realized he had forgotten to get waffles and went out again. Both N.C. and J.C. said he came home only once.

Four days later, on October 19, 2005, law enforcement officers executed a search warrant at Cuevas's residence. During the search, the officers took photographs of the scratches on Cuevas's hand and back. Cuevas said that he

had received the scratches while working on wiring under the dashboard of the pickup. As he talked to the officers, Cuevas claimed he had cleaned the pickup on October 15 because a dog had urinated in the back a month or two earlier. Yet he described himself as "anal" about keeping the pickup clean. Cuevas also told the officers "that his fingerprints would be everywhere or on everything in Brenda's house" because he had visited numerous times and helped Brenda with some repairs.

In the course of the search, officers seized a diamond stud earring Cuevas was wearing. Special Agent Jack Seward of the DCI poked the earring through a small manila envelope and labeled the envelope with the date, time, and a description. As they were readying items to place in bags, Seward and Special Agent Turbett stepped away from the table a few times. When they were finished collecting items, they gave Cuevas an inventory receipt to review and sign. The next day, they realized that the earring was not with the other items seized, nor was it listed on the inventory receipt.

On October 31, 2005, investigators again executed a search warrant at Cuevas's house. In response to questions, Cuevas insisted that the officers had taken the earring with them. The officers found the envelope with Special Agent Seward's handwriting ripped up and in a garbage can in the garage. They did not find the earring.

Cuevas was arrested on August 16, 2006. While in the Hardin County jail, he was in the same cell block as Michael Sajulga. Sajulga and Cuevas got into

an argument one day about which television channel to watch. The exchange became heated. Sajulga said that he knew Cuevas was in jail for a killing. According to Sajulga, Cuevas responded, "You want to be number two?"

The jury found Cuevas guilty of first-degree murder. He now appeals. Cuevas contends: (1) there is insufficient evidence to sustain the conviction; (2) the trial court erred in allowing his children to testify via closed-circuit television pursuant to Iowa Code section 915.38(1) (2007); and (3) the court erred in denying his motion for mistrial. We affirm.

II. Discussion.

A. Sufficiency of the Evidence.

> The standard of review for insufficient-evidence claims is for correction of errors of law. The jury's findings of guilt are binding on appeal if the findings are supported by substantial evidence. Substantial evidence is evidence that could convince a rational trier of fact that a defendant is guilty beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record.

State v. Enderle, 745 N.W.2d 438, 443 (Iowa 2007) (citation omitted). If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence. *State v. Ame*, 579 N.W.2d 326, 328 (Iowa 1998). The very function of

the jury is to sort out the evidence and place credibility where it belongs. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(6)(*p*); *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993). We find the circumstantial evidence in this case is substantial and supports the jury's determination that Cuevas is guilty of first-degree murder.

1. Motive. The jury could rationally have determined that Cuevas had a motive for killing Brenda. He and Brenda were in the process of getting a divorce, and both sought custody of the girls. Cuevas could no longer pay the attorney he believed would help him gain custody of the girls. Cuevas was $1000 behind in temporary child support payments and could not afford his $200 per month rent at the Ribar residence.

2. Opportunity. Cuevas had the opportunity to kill Brenda. Cuevas knew at least two weeks in advance that Ribar and her son would be gone the weekend of October 15. Even Ribar's dogs were gone for the weekend. Cuevas ensured that Brenda would be home by telling her he planned to call her that night to discuss the custody issue. Brenda told a friend she needed to be home that night because she was expecting a phone call from the defendant. Cuevas told investigators he had arranged with Brenda to discuss the custody issue over the phone that night, but did not make the phone call. He stated he intended to call, but fell asleep.

There is evidence from which the jury could infer Cuevas was in Eldora at the time of the murder. It takes about an hour and forty minutes to drive to Eldora from Ribar's house. In his first account to Ribar of his activities that night, Cuevas said he left the house at midnight to get gas.[1]

The fire at Brenda's house was set at or shortly before 3:00 a.m. Cuevas was back in the Norwalk area shortly after 5:00 a.m. and checking his voice messages. This timing is consistent with the timing of the killing and fire and the driving time from Eldora to Norwalk.

The garage door at Ribar's house made noise when it opened. Contrary to his usual practice of parking in the garage, Cuevas parked his pickup outside on Friday evening when he and the girls arrived from Eldora. For the first time, he slept on the floor near the girls' beds and told them not to worry if he was not there when they awoke. Cuevas told investigators he was aware of triangulation capabilities based on cell phone location. He told J.C. to call his cell phone if she woke up in the night and was afraid. He checked his voice mail at 5:07 and 5:08 a.m. The jury could infer that he turned his phone on and checked for messages as he neared Norwalk to see whether the girls had tried to call him.

3. Access to Brenda's house. The evidence shows that Brenda's killer used a key, making the fire appear accidental. Emergency personnel who responded to the report of the fire found the house locked and no sign of a forced entry. Smears of Brenda's blood were later found on the front door, the vent above the kitchen range, and the back door near the dead bolt lock. A photo of

[1] He later gave her other, contradicting accounts.

the dead bolt lock on the back door shows blood smears. A key was needed to lock the doors from the outside.

Sometime after the separation, possibly in late summer or early fall, Cuevas had a house key made. Although he no longer lived in Eldora, he had the key made at a hardware store there. Cuevas had been in Brenda's house in Eldora to do some repairs and could have had an opportunity to take one of Brenda's keys to copy. Cuevas had no need for a key to the Ribar residence. He knew the key code to get into the house through the garage, and Ribar had given him a key to get into the lower entrance.

4. Black pick-up truck. Richard Jeske and Tiffany Balvanz saw a black pickup matching Cuevas's pickup at about 1:30 or 1:45 a.m. in Eldora, not far from Brenda's house and driving in that direction. The truck was a small compact truck that looked like a Ford Ranger. Jeske was "99 percent sure" the pickup was black, and it had a rack on top. Balvanz thought the pickup she saw had Hardin County license plates. Cuevas's pickup had Warren County license plates, but the ball hitch on the back bumper obscured part of the plate. Using information provided by the Iowa Department of Transportation, investigators compiled a list of all pickups registered in Hardin County as of October 2005. They narrowed down the list to those that were ten years old or newer, small to mid-sized, and dark-colored. They took photographs of any pickup with a topper. Jeske and Balvanz eliminated all of the pickups in those photographs as not matching the pickup they saw on October 15. Jeske and Balvanz stated the pictures of Cuevas's pickup were consistent with the pickup they saw in Eldora in the early morning hours of October 15, 2005.

5. Injuries. Brenda had injuries that could be considered defensive injuries. Cuevas's children noticed recent injuries to his hand and back on October 15.

6. Missing Evidence. The jury could also reasonably infer that Cuevas took steps to dispose of evidence. Cuevas cleaned his truck with a cleaner that contained hydrogen peroxide. Cuevas was a nurse and regularly used hydrogen peroxide to get blood out of his uniforms. Cuevas was about to leave (without the girls) when officers showed up at the Ribar residence. The towels and scrub brush used to clean the pickup were in the pickup in a garbage bag for disposal. Cuevas had placed the cleaning supplies in a garbage bag for disposal, despite having washed similar items in the past. He claimed he was concerned about spontaneous combustion after cleaning his truck with bleach despite the fact there was a garbage can outside where he could have placed the materials.

A videotape from the Indianola Wal-Mart on Friday afternoon shows Cuevas wearing white tennis shoes. N.C. observed his white tennis shoes were clean on Friday night. On Saturday, N.C. saw the shoes and observed that they were dirty. When agents conducted the consent search on October 15, they looked specifically for shoes but did not see tennis shoes. On Sunday, Cuevas bought new white tennis shoes at Wal-Mart.

Cuevas's seized earring disappeared. The envelope to which it was attached was later found torn up in the garbage can at Cuevas's residence.

7. Cuevas's statements. When the conduct of a defendant subsequent to the crime indicates a consciousness of guilt, such conduct can constitute an implied admission. *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). "A false story

told by a defendant to explain or deny a material fact against him is by itself an indication of guilt" and "relevant to show that the defendant fabricated evidence to aid his defense." *Id*. (citing *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982)). Thus, "inconsistent statements are probative circumstantial evidence from which the jury may infer guilt." *State v. Blair*, 347 N.W.2d 416, 422 (Iowa 1984).

Cuevas seemed anxious to explain any evidence that might materialize during searches at his residence. As officers swabbed some red material in the lint trap of the washing machine, he told them that Brenda's DNA might be present in his laundry because he washed the girls' clothes. He also told them that his fingerprints were all over Brenda's house because he had done repairs there.

The jury here could infer Cuevas's guilt from his inconsistent conduct and statements. Cuevas told officers he had never before left the girls alone and did so for the first time while he went to get gas in the early morning of October 15. Yet, he was leaving his residence without the girls to get gas when officers arrived the afternoon of October 15. Cuevas told officers he used the Oxi Magic, towels, and scrub brush purchased at the Dollar General Store to clean dog urine out of his truck because he was "anal" about the cleanliness of his truck. Yet, Cuevas had gotten rid of his dogs in May 2005. Cuevas was pulling out of the driveway alone in his pickup with the garbage bag full of used cleaning supplies when officers arrived. He told the officers he was on his way to get gas that afternoon and that he had gone to get gas early that morning. He told Ribar he had left at midnight to get gas. Cuevas's statements made during the October 15 interview with law enforcement officers show inconsistencies and contradictions.

He initially seemed to suggest, even before he knew police considered the death suspicious, that Brenda was suicidal. Then he tried to attribute the murder to her brother, and finally to other men she may have dated. He complained about her drinking, her conduct as a parent, and her relationships with other men.

Additionally, Cuevas angrily asked another inmate in the jail, "Want to be number two?" when that person said he knew Cuevas was in jail for killing someone.

Cuevas argues that there is evidence pointing to other suspects. However, the jury had the duty of assessing the credibility of the differing accounts of the incident and weighing the testimony of the witnesses. *State v. Laffey*, 600 N.W.2d 57, 59 (Iowa 1999). The jury heard and considered the evidence about the other suspects and concluded that Cuevas was guilty of Brenda's murder.

Viewing the evidence in the light most favorable to the State, there was substantial evidence supporting the jury's determination of guilt.

B. Child Witnesses' Testimony by Closed Circuit Television.

Cuevas contends the trial court erred in permitting the children to testify outside his presence. When determining whether the trial court erred in granting or denying protection under Iowa Code section 915.38(1), we review for errors at law. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995). To the extent Cuevas's claims involve the Confrontation Clause, our review is de novo. *State v. Bentley*, 739 N.W.2d 296, 297 (Iowa 2007).

The Sixth Amendment of the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

the witnesses against him." U.S. Const. amend. VI. "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845,110 S. Ct. 3157, 3163, 111 L. Ed. 2d 666, 678 (1990).[2] While face-to-face confrontation is preferred, it is not required in every instance where testimony is admitted against a defendant. *Id.* at 847-48, 110 S. Ct. at 3164, 111 L. Ed. 2d at 680. In *Craig*, the Court recognized that a state's interest in "protecting child witnesses from the trauma of testifying" in the presence of a defendant, is sufficient to abrogate the defendant's right to confront witnesses face-to-face. *Id.* at 855, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685; *see also U.S. v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994) (concluding defendant's confrontation rights were not violated by non-victim child witness's testimony via closed-circuit television where trial court specifically found that testifying in court would be traumatic for witness); *Marx v. State*, 987 S.W.2d 577, 580-81 (Tex. Crim. App. 1999) (upholding testimony via closed-circuit television by non-victim child witness where trial court made finding that procedure was necessary to protect witness from significant emotional trauma).

[2] Three main rights may be claimed by Cuevas under the Confrontation Clause: (1) testimony under oath, (2) cross-examination by his counsel, and (3) the right to have the jury observe the witness's demeanor. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995); *accord Craig*, 497 U.S. at 845-46, 110 S. Ct. at 3163, 111 L. Ed. 2d at 678. None of these rights was infringed here. The judge's colloquy with the girls established that they each understood the importance of telling the truth and promised to do so. Cuevas, through his counsel, vigorously cross-examined each child. The jury had a full opportunity to observe the girls' demeanor because the jury viewed their testimony, live, over closed-circuit television. *See State v. Shearon*, 660 N.W.2d 52, 55 (Iowa 2003).

In order to protect a minor "from trauma caused by testifying in the physical presence of the defendant where it would impair the minor's ability to communicate," a minor's testimony may be taken outside the courtroom and televised by closed-circuit in the courtroom. Iowa Code § 915.38(1). "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." *Id.* Thus, the use of closed-circuit television testimony does not violate the Confrontation Clause if it is necessary to protect a child witness from significant emotional trauma. *Craig*, 497 U.S. at 855,110 S. Ct. at 3169, 111 L. Ed. 2d at 685.

The critical inquiry is whether the "procedure is necessary" to further the important State interest of protecting the child witness. *Id.* at 852, 110 S. Ct. at 3167, 111 L. Ed. 2d at 682. The trauma must be more than "mere nervousness or excitement or some reluctance to testify." *Id.* at 856, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685 (citations omitted). The trial court must find that the child witness would be traumatized by the presence of the defendant, not by the courtroom generally.[3] *Id.*

> [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.

[3] The U.S. Supreme Court has articulated a three-part case-specific test to determine necessity: (1) The trial court must hear evidence and determine whether use of the closed-circuit television procedure is "necessary to protect the welfare of the particular child witness," (2) the trial court must find that "the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant," and (3) "the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., 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 (citation omitted).

Id. at 858, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686-87.

Cuevas "asserts that the district court erred in interpreting the evidence presented to justify the exceptional procedure of closed circuit examination of the defendant's two children." In our review of this issue, we have considered that the children were not the direct victims of the offense for which Cuevas was on trial and that the children's testimony was relevant to Cuevas's defense of alibi. We conclude the trial court did not err in finding the "exceptional procedure" warranted.

The district court conducted a pretrial hearing to determine whether the use of the closed-circuit television procedure was necessary to protect the girls. Dr. Pottebaum testified she had been providing psychotherapy services to the girls since August 2006. She testified that as of the time of the hearing, N.C. had been experiencing periods of severe post-traumatic stress disorder and was having problems with depression and anxiety. She further testified that N.C. had nightmares, fears that Cuevas would harm her or her loved ones, and problems with concentration to the point that there were periods of time where she was dysfunctional. N.C. was taking two psychotropic medications not commonly given to adolescents to alleviate her symptoms. Dr. Pottebaum felt that N.C. would be "very traumatized" by having to testify in an open courtroom in Cuevas's presence and that such trauma would be more than a general nervousness or reluctance to testify.

Dr. Pottebaum testified J.C. had received less counseling than N.C., but her symptoms of emotional distress were worsening. J.C. had been having realistic nightmares that crossed over between a dream state and a waking state.

Dr. Pottebaum said that J.C. was very fearful of being in the same room with Cuevas and feared he might harm someone else in her family. Dr. Pottebaum believed J.C. would be traumatized by testifying in open court with Cuevas present and that her well-being would be better served by testifying via closed-circuit television. She stated that J.C.'s trauma would be more than just mere nervousness or reluctance to testify.

Both N.C. and J.C. testified at the hearing at Cuevas's request, but outside his presence. Both told the court that they feared their father. N.C. stated she would refuse to testify in her father's presence. The girls' grandmother confirmed that the girls were fearful of their father. Although Cuevas attempted to show through the girls' testimony at the hearing that the grandmother had influenced them to be fearful, the court's finding was limited to the girls' emotional ability to testify, not the source of their fear.

The trial court, after observing the girls' testimony and demeanor, concluded: "The simple fact is that both children are severely traumatized to the extent that neither will be able to communicate in a courtroom if their father is personally present." We conclude that the testimony was sufficient to show that the girls would be traumatized by the presence of the defendant and that the emotional distress they might suffer in the presence of the defendant was more than mere nervousness, excitement or reluctance to testify. *See id.* at 856, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. The requirements of Iowa Code section 915.38 were met.

C. Motion for Mistrial.

A trial court has broad discretion in ruling on motions for mistrial and new trial. *State v. Lindsey*, 302 N.W.2d 98, 101 (Iowa 1981). We review for an abuse of that broad discretion. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). An abuse of discretion occurs when the district court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Id.* An "untenable" reason is one that lacks substantial evidentiary support or rests on an erroneous application of the law. *Id.* A mistrial is appropriate only when an impartial verdict cannot be reached or the verdict would have to be reversed on appeal due to an obvious procedural error in the trial. *State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006).

The following occurred during cross-examination of fourteen-year-old N.C.

> Q. Okay. [N.C.], you talked—we talked about this a bit earlier. You talked to a lot of people during the course of this case, right? A. Yep.
> Q. And, in fact, one of the things that they talked to you about was whether you were scared of your dad, right? A. Yes.
> Q. And, in fact, when you met with Officer Turbett on October 19 and talked to him, he asked you that twice, whether you were scared of your dad, correct? A. Yes.
> Q. And you indicated you were not at that time, correct? A. Yes.
> Q. And then you met with him on—A. Well, because I was afraid he was—
> Q. And then you met with him on October 26th again, correct? A. Uh-huh.
> Q. And he asked you on that date approximately nine times whether you were scared, correct? A. Yes.
> Q. And whether you felt safe staying with your dad, correct? A. Yes.
> Q. And you indicated you felt safe, correct? A. Yes.
> Q. And that you were not scared, correct? A. Yes.
> Q. Then on—A. Wait. Can I finish the sentence I was saying, please?

> Q. I think [the prosecutor] can go over that with you. On November 8th you met with Teresa Dalton, correct? A. Uh-huh.
>
> Q. Is that yes? A. Yes.
>
> Q. And she asked you about concerns and fears for your dad, correct? A. Yes.
>
> Q. And she asked you that—whether you had any concerns, and you indicated you did not have any concerns living with your dad, correct? A. Yes.
>
> Q. And every time she mentioned were you scared, you talked about how you were scared you would miss out being with your friends, correct? A. Yes. But I'm also scared because he was abusive when I was little.

Counsel immediately moved to strike and asked that the witness be admonished to answer the questions. The court granted the objection and the answer was stricken. The court further noted: "Ma'am, if you'd just kindly listen to what [counsel] asks and then answer that."

At the next break, Cuevas's counsel moved for a mistrial.

> [Defense Counsel]: . . . . Your Honor, at this point in time we would move for a mistrial in this case. The witness who was testifying . . . added information that was not responsive to the question that I had asked.
>
> . . . .
>
> I don't believe that I did ask any further questions, but we believe that that was information that's highly prejudicial. It was not responsive to the question. It's clear that she has been co[a]ched by the state on—her prior answers come quickly after the question.
>
> She's been admonished. We tried to cut her off, but she keeps adding extra information and she hasn't stopped. So we would ask that the court grant a mistrial and that prejudice attach at this point in time. Thank you.
>
> The Court: All right. Correct me if my recollection is faulty, but I believe what happened was [N.C.], after a question was posed, volunteered an answer to the effect that it was because he, referring to Mr. Cuevas, "abused us when we were little." Am I correct?
>
> [Defense Counsel]: Yes, Your Honor. I asked her whether she had been asked if she was scared of her father. And whether she had said she was not. And then she volunteered. She said yes, she had said that, and then she volunteered the additional information.
>
> . . . .

> The Court: . . . . I'm going to deny at this time the motion for mistrial.
>
> This is my thinking. The answer that concerns us here was objected to promptly. I instructed the jury to disregard that comment. I have no reason to disbelieve or to concern myself that the jury will not follow that direction.
>
> But beside that, I think that the witness's efforts—repeated efforts to volunteer that statement and eventually placing it fully on the record can be viewed from one perspective as likely establishing the defendant's proposition here that the witnesses have been indeed conditioned with respect to statements and testimony and attitudes, et cetera.
>
> So I do not believe that there's any prejudice that's accrued at this point. I'm going to ask the state, however, to make sure that their witnesses—they are children I understand, but—it's difficult under the best of circumstances.
>
> But if you'd be sure to make sure that they understand what the protocol is and not to volunteer anything and to answer only the question posed. . . .

In a lengthy cross-examination, N.C. volunteered that Cuevas was "abusive when I was little." The court promptly struck the answer and admonished the witness. The court instructed the jury as to what constitutes evidence, which does not include stricken statements. We do not believe N.C.'s brief statement denied Cuevas a fair trial.

Generally, when improper evidence has been promptly stricken and the jury admonished to disregard the evidence, a motion for mistrial is properly denied. *State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998). "Only in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury is the defendant denied a fair trial and entitled to a [mistrial]." *State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971), *overruled on other grounds by State v. Gorham*, 206 N.W.2d 908, 910 (Iowa 1973). Moreover, whether the incident was isolated or repeated is relevant to the question of whether prejudice is likely to have occurred because

prejudice results more readily from persistent efforts to place prejudicial matter before the jury. *State v. Anderson*, 448 N.W.2d 32, 34 (Iowa 1989). The court quickly struck the statement and later instructed the jury that the evidence in the case did not include any testimony the court told the jury to disregard. The trial court did not abuse its discretion in denying Cuevas's request for a mistrial based on this isolated incident.

III. Conclusion.

We conclude there was sufficient circumstantial evidence to support the defendant's conviction. The trial court did not err in allowing the children to testify via closed-circuit television. Finally, the court did not abuse its discretion in denying the motion for mistrial. We affirm the judgment and sentence for first-degree murder.

AFFIRMED.