IN THE COURT OF APPEALS OF IOWA

No. 1-695 / 10-0511
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DONALD LYLE CLARK,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Nancy A. Baumgartner (pretrial motion) and Douglas S. Russell (trial), Judges.

Defendant appeals his conviction and sentence for second-degree sexual abuse, challenging the district court's refusal to continue the trial and allow additional depositions to be taken. **AFFIRMED.**

Clemens A. Erdahl of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

DOYLE, J.

In this appeal from a sexual abuse conviction, we are asked to decide whether Donald Clark was denied a fair trial due to the district court's refusal to continue trial and allow additional depositions to be taken regarding an email written by the victim that was not disclosed to Clark until a few days before trial.

I. Background Facts and Proceedings.

Donald Clark was a guidance counselor at an elementary school during the 2003-04 school year. A fifth grade student met with Clark weekly throughout that year. He had been diagnosed with attention-deficit disorder and was having some motivation problems at school. Although the child had always been quiet, he became angry and withdrawn after his fifth-grade year. He began drinking and using drugs in seventh grade. In the ensuing years, he engaged in self-harming behavior and attempted suicide.

Shortly after his sixteenth birthday, the child's parents sent him to a school for troubled youth. Within a month of arriving there, he revealed during a group session that he had been sexually abused. A few days later, on June 8, 2009, he wrote his family an email telling them about the abuse for the first time, though he did not name the perpetrator. The email stated:

> id rather just tell you guys in my letter the true honest to god reason i really started everything like my drug use and what not. well before as you guys know i said it was because i see things . . . but that was only a little little part of why. . . . [B]ack in fifth grade i was sexually abused and as you know i started doing bad things around seventh grade my whole life ive been seeing things and hearing things and i just used that as my reason. . . .
>
> My whole life ive been living a lie from you guys. i remember you guys always suspected something happening like me being sexually abused especially when me and [my brother] were going through the lessons at the church downtown for our communion

> and what not and you guys asked me if the priest ever did anything . . . well that was true he didnt do it to me it was someone else.
>
> . . . .
>
> . . . like this is why i really dont need to be here . . . i want to see a counselor about this and talk to someone . . . but they wont let me here. . . .
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> . . . .
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> . . . i told my family rep . . . about me seeing and hearing things. . . . its hard when im constantly lieing to people about shit that happens and just playing it off that i dont have something that i do have and its hard when you guys just say its spirits . . . and not schitzophernia. . . .
>
> I really dont need to be here im open i want to change. . . .

The child later revealed the abuse had occurred during his fifth-grade counseling sessions with Clark. He recalled two distinct incidents in Clark's office, which involved Clark touching his genitals over and underneath his clothing.

These allegations of abuse were reported to the police. The child provided a written statement for the police which, after describing the abuse, related that his

> parents always suspected that something like this ha[d] happened to me. I remember a few years after going through my first communion at my church my parents asked me and my brother if the priest that was there ever had done anything to me or my brother. We both always said no because that was the truth, but I never told them about Mr. Clark.

The statement continued,

> I would always tell [my brother] my life sucked because of me hearing and seeing things . . . and he would mock me over it all but I would always tell him that there is one more thing, one more reason why it sucks and I never told anyone that reason until I got to [the school].

Clark was arrested and charged by trial information with second-degree sexual abuse. He waived his right to a speedy trial, and a jury trial was scheduled for February 8, 2010. Depositions were held on January 20.

During the depositions, Clark's attorney asked the child's parents whether they still had a copy of the email in which the abuse was first revealed to them. The father said he did and provided it to the State, who had not seen it before, after the depositions were over. The State then gave a redacted version of the email to Clark's defense counsel on February 3.

Clark filed a "Request for Production, Request for Additional Depositions & Motion to Continue" on February 5. The motion requested an unredacted version of the email and alleged it raised "information not previously made available to Defendant. Proper exploration of said information is proper and necessary in connection with the Defendant's fair trial and due process rights."

The State resisted the request for continuance and additional depositions, though it agreed to and did provide the full version of the email to Clark. Following a hearing on the motion, the district court reviewed the depositions that had been taken and issued a ruling denying Clark's requests. The court found there was "nothing in the email that warrants further investigation, depositions or a continuance of the trial."

The jury trial commenced as scheduled. The email was admitted as an exhibit by Clark. The child, his parents, and other witnesses were questioned by defense counsel about the email, including the child's claimed hallucinations and fear that he suffered from schizophrenia, his parents' suspicions that he had

been sexually abused by a priest, and his desire to leave the school his parents had placed him in.

The jury returned a verdict finding Clark guilty of second-degree sexual abuse. Clark appeals, claiming the district court violated his federal and state constitutional "rights to due process, a fair trial and effective representation of counsel"[1] in denying his "requests to reopen depositions and for a brief continuance in order to further investigate significant matters raised by the eleventh hour production of an exculpatory document."

II. Scope and Standards of Review.

Ordinarily, we review a district court's discovery and continuance orders for an abuse of discretion. *State v. Cashen*, 789 N.W.2d 400, 405 (Iowa 2010); *State v. Grimme*, 338 N.W.2d 142, 144 (Iowa 1983). However, because Clark's claim alleges his constitutional rights were violated, we review the issue de novo to determine whether the court abused its discretion. *Cashen*, 789 N.W.2d at 405.

III. Discussion.

Clark argues the district court's denial of his motion to continue and request for additional depositions deprived him of the effective assistance of

[1] The State argues error was not preserved on Clark's state constitutional claims. We elect to bypass this error-preservation concern and proceed to the merits. *See State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999). In any event, we note Clark has not argued the provisions in the Iowa Constitution should be interpreted or applied any differently than the parallel provisions in the United States Constitution. *See DeSimone v. State*, ___ N.W.2d ___, ___ n.3 (Iowa 2011) (considering the federal and state Due Process Clauses "as congruent" where applicant provided no argument the provisions should be applied differently).

counsel and the "meaningful opportunity to present a complete defense."[2] We do not agree.

"The right to effective assistance of counsel requires more than a mere formal appointment. It requires appointment of effective counsel and counsel that are afforded 'an opportunity' and 'time' to prepare and present their indigent client's case." *State v. Williams*, 207 N.W.2d 98, 104 (Iowa 1973). The related right to present a defense encompasses a defendant's "'right to offer the testimony of witnesses, and to compel their attendance, if necessary,'" at trial. *State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998) (citation omitted). These rights do not, however, mean that a criminal defendant has an absolute constitutional right to pretrial discovery in criminal cases. *See Jones v. Iowa Dist. Ct.*, 620 N.W.2d 242, 243 (Iowa 2000) ("[A] criminal defendant has no due process right to pretrial discovery."); *accord State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000); *State v. Eads*, 166 N.W.2d 766, 768-69 (Iowa 1969).

Instead, a defendant's ability to engage in discovery in criminal cases is governed by our state's rules of criminal procedure. Under Iowa Rule of Criminal Procedure 2.13(1), a defendant "may depose all witnesses listed by the state on the indictment or information or notice of additional witnesses." Clark used that rule to depose the child and his parents before the trial. The decision whether to

[2] Although these claims have their genesis in the Sixth Amendment, the United States Supreme Court, along with our supreme court, "has simply relied on the Due Process Clause alone when deciding issues in this area." *State v. Simpson*, 587 N.W.2d 770, 771 (Iowa 1998) (utilizing a due process analysis in considering defendant's Sixth Amendment right to present a defense claim); *State v. Williams*, 207 N.W.2d 98, 104 (Iowa 1973) (noting the right to counsel is the right to the effective assistance of counsel, which an accused is assured of under the federal and state Due Process Clauses). This is because the right to present a defense and the right to effective assistance of counsel are essential to a fair trial. *Simpson*, 587 N.W.2d at 771; *Williams*, 207 N.W.2d at 104.

grant Clark's request for a continuance so that he could redepose those witnesses about matters contained in the email was within the district court's "sound discretion." *State v. Froning*, 328 N.W.2d 333, 335-36 (Iowa 1982) (observing that "'discovery matters are committed to the sound discretion of the trial court, and are reviewable only upon an abuse of that discretion'" (citation omitted)).

"This discretion vested in trial courts necessarily includes supervision of the exercise of discovery. Thus, although criminal defendants possess the right to depose witnesses to be called on behalf of the State, this right is subject to reasonable regulation." *State v. Gates*, 306 N.W.2d 720, 725-26 (Iowa 1981) (cautioning that "in exercising their supervisory authority, trial courts must strike a careful balance between the interest in economizing discovery and the rights afforded criminal defendants"). "'Error in the administration of discovery rules is not reversible absent a demonstration that the substantial rights of the defendant were prejudiced.'" *Froning*, 328 N.W.2d at 335-36 (citation omitted).

Clark argues his defense was hampered because the email contained information that had not previously been disclosed to him, including the child's claimed hallucinations and fear that he suffered from schizophrenia, his parents' suspicions that he had been sexually abused by a priest, his desire to leave the school his parents had placed him in, and his dishonest behavior. None of this, with the exception of the reference to schizophrenia, was new information.

As mentioned earlier, in a written statement for the police, the child asserted his "life sucked because of . . . hearing and seeing things." Defense counsel accordingly asked the child at his deposition about whether he suffered

from hallucinations or paranoia. He responded that he had hallucinated when he was on drugs and often thought people were out to get him. Counsel also asked the child about his mental health, criminal, and sexual history. The structured program at the school where he was residing was explored as well. Clark's attorney did not ask the child about his parents' suspicions that he had been sexually abused by a priest when he was younger, though that concern had been revealed in his written statement for the police.

Clark does not identify what additional information could have been learned by redeposing the child and his parents. *See State v. Webb*, 309 N.W.2d 404, 413 (Iowa 1981) (denying defendant's claim he was denied a fair trial because his "bare assertions" about knowledge potentially held by undeposed witnesses did not "demonstrate prejudice to a substantial right"). In fact, as detailed below, the email itself was thoroughly explored by defense counsel at trial during his cross-examination of the child[3] and in closing arguments.

Clark's attorney began his questioning of the child by asking him about the email and his motivation in writing it, asserting, "You didn't like being [at the school], did you?" He said no and agreed with counsel that he wanted to leave when he wrote the email. Counsel continued by asking the child about his belief that he was suffering from schizophrenia, as well as his experiences with

[3] Clark argues his attorney "could not effectively cross-examine the accuser due to the Court's fundamental error that a further deposition to ask about the letter was not warranted." To the extent this argument raises a Confrontation Clause claim, we reject it. *See Froning*, 328 N.W.2d at 336-37 ("'The Confrontation Clause does not provide the defendant with any right to pre-trial or in-trial discovery of the state's evidence.'" (citation omitted) (emphasis removed)).

hallucinations. Finally, he was asked about his parents' suspicion that he had been sexually abused by a priest. The parents were asked similar questions about the email by defense counsel on cross-examination. Clark's attorney then used the email throughout his closing argument to support his theory that the child had fabricated the allegation of sexual abuse in hopes of convincing his parents to allow him to come home.

Upon our de novo review of the record, we agree with the district court there was nothing in the email that "warranted further investigation, depositions or a continuance of the trial." Clark was afforded a full opportunity to prepare and present his defense. He was not denied depositions altogether. Nor was he surprised by the State's evidence at trial. Even in such cases, our supreme court has not found a denial of a defendant's right to a fair trial. *See, e.g.*, *Weaver*, 608 N.W.2d at 801-03; *Grimme*, 338 N.W.2d at 144-45; *Froning*, 328 N.W.2d at 336-37; *Webb*, 309 N.W.2d at 412-13; *State v. Johnson*, 219 N.W.2d 690, 697 (Iowa 1974).

We therefore affirm Clark's conviction and sentence for second-degree sexual abuse.

AFFIRMED.

Eisenhauer, P.J., concurs; Mullins, J., dissents.

MULLINS, J. (dissenting)

I respectfully dissent. Discovery, both formal and informal, provides an attorney an opportunity to identify those matters which truly require more in depth investigation. As the majority notes, there is no constitutional right to discovery, but fundamental due process requires that fair play should govern the discovery practice as allowed by the Iowa Rules.

While it might have been reasonable for defense counsel to interpret the initial disclosure that the alleged victim was "hearing voices" as a serious mental health condition, it might also have been reasonable for counsel to initially discount such remarks made by an obviously troubled young man. During the January 20, 2010, depositions, the existence of an email sent June 8, 2009, from the alleged victim to his parents was disclosed to defendant. That email was the first disclosure of a possible diagnosis of schizophrenia.

Defense counsel immediately requested a copy of the email. The State failed to provide a copy of that email until February 3, only five days before trial, and then provided only a redacted version. On Friday, February 5, defendant filed a request for the entire email, and requested additional depositions and moved to continue the trial date. At hearing on that date, the State provided a copy of the entire email to counsel. The email is four and a half pages of single-spaced typed text and documented the alleged victim's own fear that he was suffering from untreated and undiagnosed schizophrenia, and stating his desire to be tested and treated. The email also contained other facts or nuances of fact not previously disclosed. Although prior discovery had disclosed hints of some of the history and problems encountered by the writer of the email, the detailed and

rambling contents of the email itself reasonably imposed on defense counsel the duty to follow-up and determine the significance of those details. The late disclosure was not a problem of defendant's making. Trial commenced at 9:00 a.m. on Monday morning, about six business hours after the State finally provided the first written disclosure that the alleged victim believed he was suffering from schizophrenia.

The State now, as then, argues that there was nothing else to be learned by additional depositions. This is, of course, the party which had access to the email for a much longer period than defendant. Regardless of the reasons for the delay in disclosure, it is the State that failed to make timely disclosure. The State "assures" defense and the court that there is nothing else to discover or nothing else to learn.

The State's case against the defendant rested primarily on the credibility of the alleged victim and his circumstances. Trial should not be about gamesmanship, but should be an effort to discover the truth. Both sides are entitled to a fair trial. If defense had had an opportunity to take the additional requested depositions, the taint hanging over the quest for truth in this case would have been greatly reduced or minimized. "[S]urprise and guile should, as far as possible, be removed from the arena in criminal trials just as it has in civil cases." *State v. Eads*, 166 N.W.2d 766, 769 (Iowa 1969).

An opportunity for post-disclosure depositions should have been granted to the defendant. Refusal to do same denied defendant of fundamental due process and fair play. I would reverse.