IN THE COURT OF APPEALS OF IOWA

No. 6-1057 / 06-0141
Filed February 14, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY JOHN PAULSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Kossuth County, Don E. Courtney, Judge.

Defendant appeals his conviction and sentence for sexual abuse in the second degree, lascivious acts with a child, and dissemination and exhibition of obscene material to a minor. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and Greta Truman, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Todd Holmes, County Attorney, and Ann M. Gales, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Timothy Paulson appeals his conviction and sentence for sexual abuse in the second degree, three counts of lascivious acts with a child, and dissemination and exhibition of obscene material to a minor, in violation of Iowa Code sections 709.3(2), 709.8(1) and 728.2. He argues the trial court erred in admitting evidence concerning his prior conviction of lascivious acts with a child. He also claims the trial court erred in permitting witnesses to testify in violation of his Sixth Amendment right to confrontation.

I. Background Facts and Proceedings

Between January 1, 2000 and November 8, 2001, C.O., and her friend C.S., spent time with the defendant Timothy Paulson in his apartment. Paulson pleaded guilty in December 2002, and was convicted in March 2003, to lascivious acts with a child – the victim was C.S. While those charges were being investigated, C.O., who was eight years old at the time, denied any abuse by defendant. In response to child protection authorities' request, C.O. was examined for signs of sexual abuse. The examination was inconclusive: it did not reveal whether C.O. had or had not been sexually abused.

In August 2004, C.O. told her mother that the defendant had sexually touched her. When asked why she did not tell her mother about the abuse previously, C.O. revealed that she was afraid to tell because the defendant had threatened to kill her parents if she told. At trial, C.O. testified that the defendant twice made her watch "sexual movies" and that on numerous occasions he had touched her vagina under her clothes and made her take off her clothes while they played board games.

The defendant was charged with three counts of sexual abuse in the second degree, three counts of lascivious acts with a child, dissemination and exhibition of obscene material to a minor, and one count of lascivious conduct with a minor, in violation of Iowa Code sections 709.3(2), 709.8(1), 709.14, and 728.2.

The defendant filed a motion in limine, requesting that evidence of his 2003 conviction for lascivious acts with a child be limited to evidence of the conviction only. The trial court overruled defendant's motion and allowed the State to go into more detail than just the record of the conviction. The trial court permitted the admission of evidence including the nature of the charge, the underlying facts, the investigation, and the defendant's guilty plea.

Prior to trial, the State filed an application for protection of child victim and witness. The defendant resisted the application. The trial court conducted a pretrial hearing to determine whether the use of the closed-circuit television procedure was necessary. At the pretrial hearing, Dr. Natalie Alsop, a clinical child psychologist, testified that C.O. was very fearful of the defendant and that C.O. would be traumatized by testifying in the physical presence of the defendant to the extent it would significantly impair her ability to communicate. The trial court granted the State's application, specifically finding that C.O "would suffer trauma if required to testify in the physical presence of the Defendant and that it would impair C.O.'s ability to communicate."

Additionally, William Pischke, a Department of Human Services child abuse investigator, testified that C.S. would be traumatized by testifying in the presence of the defendant and that it would impair her ability to communicate.

The trial court found that closed-circuit measures were also necessary to protect C.S. from being in the presence of the defendant, because the trauma caused by her testifying would impair her ability to communicate. C.S.'s examination took place in the jury deliberation room, with the defendant in the courtroom.

The jury found the defendant guilty on three counts of sexual abuse in the second degree, three counts of lascivious acts with a child, one count of dissemination and exhibition of obscene material to a minor and not guilty of lascivious conduct with a minor. Defendant was sentenced to three concurrent terms of incarceration not to exceed twenty-five years on the sexual abuse in the second degree convictions; three concurrent five-year terms of incarceration on the lascivious acts convictions, consecutive to the term of incarceration on the sexual abuse convictions; and a concurrent one-year sentence for dissemination and exhibition of obscene material. The defendant appeals.

II. **Standard of Review**

We review the rulings on the admission of evidence of prior bad acts for abuse of discretion. *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). The trial court has leeway to determine the evidence's probative value against the dangers of unfair prejudice. *Id*. We will disturb the trial court's determinations only if the grounds on which they rely are clearly unreasonable or untenable. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). We review constitutional challenges de novo. *State v. Gregg*, 464 N.W.2d 431, 432 (Iowa 1990).

III. **Preservation of Error**

The defendant made a pretrial motion, requesting that the prior bad acts concerning his conviction for lascivious acts with a child be precluded from

evidence, and objected to such testimony at trial. The State asserts that, because the defendant objected based on Iowa Code section 701.11 (2005), not on the basis of Iowa Rule of Evidence 5.404(b), error is not preserved.

Issues must be raised and passed upon by the district court before they can be decided on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The underlying rationale for error-preservation rules include "that the trial court's ruling on an issue may either dispose of the case or affect its future course" and that it is important to give "opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling." *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983). The purpose of the error-preservation rules were met by the defendant's timely objections to the admission of details concerning his prior conviction. Error was preserved.

IV. Admissibility of Prior Bad Acts

The defendant asserts that the trial court erred in admitting prior bad acts when it admitted evidence of the details concerning his 2003 conviction for lascivious acts with a child. Iowa Rule of Evidence 5.404(b) states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith."

The trial court ruled that evidence of the details of the 2003 conviction was admissible under Iowa Code section 701.11, which states in pertinent part:

> In a criminal prosecution in which a defendant has been charged with sexual abuse, evidence of the defendant's commission of another sexual abuse is admissible and may be considered for its bearing on any matter for which the evidence is relevant. This evidence, though relevant, may be excluded if the probative value

> of the evidence is substantially outweighed by the danger of unfair prejudice.

There is no question that the defendant's prior conviction was admissible under section 701.11. The issue is whether the details of the conviction were relevant and whether, if relevant, the probative value was substantially outweighed by prejudicial effect.

Iowa Code section 701.11 is patterned after Federal Rules of Evidence 413 and 414, which establish exceptions to the general prohibition against character evidence in cases of sexual assault and child molestation. Evidence of prior sexual assaults of children is admissible for any purpose for which it is relevant in the prosecution of other sexual assault cases. Fed. R. Evid. 414(a). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. "The test is 'whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence.'" *State v. Larsen*, 512 N.W.2d 803, 807 (Iowa Ct. App.1993) (citation omitted).

The details of the 2003 conviction were relevant to legitimate issues in dispute. The defendant completely denied touching C.O.'s genitals and physical contact with C.O. The victims reported similar abuse, during the same time frame, from the defendant. Therefore, whether or not the defendant engaged in the acts is made more or less probable by the details of the 2003 conviction.

We conclude the evidence is relevant. We also conclude the trial court did not abuse its discretion in admitting the evidence because its probative value

outweighed its prejudicial effect. *See Larsen*, 512 N.W.2d at 807 (the trial court determines whether the danger of unfair prejudice created by the admission of relevant evidence "substantially outweighs its probative value").

Under Iowa Code section 701.11, "evidence, though relevant, may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." Unfair prejudice is an "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988) (citations omitted).

Defendant was charged with three counts of lascivious acts with a child in connection with his acts with C.O. and pleaded guilty on March 24, 2003 to lascivious acts with a child in connection with his acts with C.S. The similarity of C.S.'s and C.O.'s experiences with the defendant makes the probative value of the details of the 2003 conviction high. *See U.S. v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005) ("Congress enacted Rule 413 because sexual assault cases, especially cases involving victims who are juveniles, often raise unique questions regarding the credibility of the victims which render a defendant's prior conduct especially probative."), *cert. denied*, ___ U.S. __ , 126 S. Ct. 1444, 164 L. Ed.2d 143 (2006); *State v. Mitchell*, 633 N.W.2d 295, 301 (Iowa 2001) (Neuman & Ternus, JJ., dissenting) ("Federal Rule of Evidence 414 . . . recognizes the special nature of crimes of sexual abuse against children, and the fact that evidence of prior, similar actions is highly probative and relevant.").

Additionally, the defendant completely denied any sexual abuse of C.O., which directly contradicted C.O.'s description. Therefore, the need for other evidence was substantial. *See State v. Rodriquez*, 636 N.W.2d 234, 242 (Iowa

2001) ("In light of the 'he said/she said' nature of this disagreement, the need for other evidence . . . was substantial.").

The trial court was also required to consider the degree of prejudice that would result from the admission of evidence concerning the prior acts. *Rodriquez*, 636 N.W.2d at 243. The defendant contends that the probative value of the evidence was outweighed by unfair prejudice, claiming the evidence is the type of prior bad acts that would arouse a jury's horror and provoke its instinct to punish, and the jury would likely base its decision on the prior bad acts rather than on the facts. It may be true that evidence of the prior conviction would prejudice the jury against the defendant. However, in a case such as this, "most of the evidence, by its nature, will be shocking and at least somewhat prejudicial. Exclusion is required only when evidence is *unfairly* prejudicial and substantially outweighs its probative value." *Mitchell*, 633 N.W.2d at 301 (Neuman & Ternus, JJ., dissenting).

"[T]his is not a case where *the prior acts evidence* would rouse the jury to 'overmastering hostility.'" *Rodriquez*, 636 N.W.2d at 243 (citing *Larsen,* 512 N.W.2d at 808 (holding potential prejudicial effect of evidence concerning subsequent acts was "neutralized by equally reprehensible nature of the charged crime")). The details of the 2003 conviction "did not involve conduct any more sensational or disturbing" than the acts for which the defendant was on trial. *Larson*, 512 N.W. 2d at 808 (citation omitted). Therefore, the exclusion of the evidence is not warranted due to unfair prejudice. Because the evidence was not unfairly prejudicial so as to substantially outweigh its probative value, it was admissible.

V. Witness Testimony by Closed Circuit Television

Defendant asserts his Sixth Amendment right to confrontation was violated because the trial court allowed C.S. and C.O. to testify via closed-circuit television. "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). 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 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(a) (2005). "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.*

The Supreme Court has held that, pursuant to the Confrontation Clause of the United States Constitution, testimonial statements of witnesses absent from trial are inadmissible unless the witness is unavailable and the defendant has had a "prior opportunity to cross-examine" the witness. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 1369, 158 L. Ed. 2d 177, 197 (2004). *Crawford* does not prohibit the procedure outlined in the Iowa statute.

Because the State's "interest in 'the protection of minor victims of sex crimes from further trauma and embarrassment' is a 'compelling' one," the

confrontation clause is not violated where the state's interest in the physical and psychological well-being of child abuse victims outweighs the defendant's right to face his accuser in court. *Craig*, 497 U.S. at 852, 110 S. Ct. at 3167, 111 L. Ed. 2d at 682 (citations omitted). 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. *Id.* 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. *Id.*[1]

The first issue here is whether Iowa's statute comports with *Maryland v. Craig*. We find Iowa Code section 915.38 satisfies *Craig's* requirements because the statute requires the trial court make a specific finding that the measures are necessary. Additionally, the statute provides for closed-circuit testimony to protect the minor "from trauma caused by testifying in the physical presence of

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[1] 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.

the defendant where it would impair the minor's ability to communicate." Iowa Code § 915.38. Finally, the trial court must find the minor would be traumatized by the presence of the defendant, not just the courtroom generally. *See Craig*, 497 U.S. at 856, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. Additionally, the use of the word "trauma" in the statute implies emotional distress which is more than *de minimis. See id*.

Defendant asserts there was insufficient evidence to make an adequate showing of necessity that would justify depriving the defendant of his right to face-to-face confrontation of C.O. and C.S. We conclude that there was sufficient evidence to make an adequate showing of necessity.

The trial court conducted a pretrial hearing to determine whether the use of the closed-circuit television procedure was necessary to protect C.O. The context of the questioning did not preclude the trial court from determining that testifying in front of the defendant would impair C.O.'s ability to communicate. When asked, "do you believe [C.O.] would be traumatized by testifying in front of the Defendant to the extent it would be [sic] significantly impair her ability to communicate?" the child psychologist replied, "Yes, I think it's very likely." Moreover, the testimony of the child psychologist, who at the time of her pretrial testimony had conducted nine sessions with C.O., was sufficient to show that C.O. would be traumatized by the presence of the defendant and that the emotional distress she might suffer would be more than mere nervousness or excitement or reluctance. Finally, we do not believe the psychologist's testimony that C.O. might have a difficult time answering questions, and might shut down

even if she were to testify via closed-circuit, sufficient to preclude finding that the defendant's presence, rather than the courtroom, would traumatize C.O.

Defendant further asserts that the testimony of William Pischke, an Iowa Department of Human Services child abuse investigator, was insufficient to support a showing of necessity because of lack of evidence in the record that Pischke has any mental health training or experience. Pischke testified that C.S. would be traumatized by testifying in the presence of the defendant and that it would impair her ability to communicate.

We conclude that Pischke's testimony was sufficient to show that C.S. would be traumatized by the presence of the defendant and that the emotional distress she might suffer in the presence of the defendant is more than mere nervousness, excitement or reluctance to testify. *See Craig*, 497 U.S. at 856, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. Iowa Code section 915.38 does not require that a witness have any specified training, experience, or education in order to testify regarding whether the child witness's ability to communicate would be impaired if required to testify in the presence of a defendant. Moreover, the record indicates Mr. Pischke has been involved in child abuse investigations involving C.S. since 2001, has been involved with child abuse investigations for nineteen years, and has received "hundreds and hundreds of hours of classroom training." The defendant's assertion that Pischke's testimony was insufficient to support a showing of necessity is without merit.

VI. Summary

First, we conclude the evidence of the details of the defendant's 2003 conviction for lascivious acts with a child is relevant. Because its probative value

outweighed its prejudicial effect, the trial court did not abuse its discretion in admitting the evidence. Second, we conclude the defendant's Sixth Amendment right to confrontation was not violated when the trial court allowed C.S. and C.O. to testify at trial via closed-circuit television.

AFFIRMED.