**IN THE COURT OF APPEALS OF IOWA**

No. 9-182 / 08-0798
Filed May 29, 2009

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**KEVIN JOHN McDONNELL,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Muscatine County, James E. Kelley, Judge.

Kevin McDonnell appeals his conviction and sentence for sexual abuse in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, Theresa R. Wilson, Assistant Appellate Defender, and Joseph Glazebrooke, Student Legal Intern, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Gary Allison, County Attorney, and Dana Christiansen, Assistant County Attorney, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

**DOYLE, J.**

Kevin McDonnell appeals his conviction and sentence for sexual abuse in the second degree. He contends the district court violated his right to confrontation of his accuser in allowing the alleged victim to testify by closed-circuit television and by improperly restricting his counsel's cross-examination of the alleged victim. In the event we find that error was not preserved on these issues, McDonnell asserts that his trial counsel was ineffective in those respects. Additionally, McDonnell asserts his trial counsel was ineffective in failing to challenge inadmissible hearsay and the warrantless entry into his home. Upon our review, we affirm McDonnell's conviction and sentence and preserve his ineffective assistance claims for possible postconviction relief proceedings.

***I. Background Facts and Proceedings*.**

From the evidence presented at trial of the underlying criminal charge against McDonnell, the jury could have found the following facts: M.G. is the mother and R.M. is the father of H.M., born in 2001, and H.M.'s younger brother. The parents split up in 2001. The children lived with M.G., and R.M. generally had visitation with the children on weekends.

Sometime after M.G. and R.M. split up, M.G. began dating McDonnell. M.G. and McDonnell began living together in 2003, and they became engaged thereafter. McDonnell often watched the children while M.G. was at work. The children referred to McDonnell as "Daddy Kevin," which R.M. did not like.

On August 1, 2007, M.G. went out of town for approximately a week. The children stayed with M.G.'s sister for the first part of the week. Thereafter,

McDonnell picked the children up from M.G.'s sister's home and dropped the children off at R.M.'s home on August 3, as planned by M.G.

On the evening of August 5, H.M. told R.M. she had a secret with "Daddy Kevin" that she wanted to share with him. According to R.M., H.M. described acts of sexual abuse committed against her by McDonnell and stated that no one was to know, especially her younger brother because he knew the police number. R.M. called M.G. in California and asked if the children could stay an additional night with him. R.M. did not tell M.G. about what H.M. told him. M.G. agreed to let the children stay with R.M. for an additional night, and M.G. let McDonnell know.

The next day, R.M. decided to document what H.M. told him by making a video recording of him questioning H.M. about her secret. On the video, H.M. was very descriptive of the acts of sexual abuse by McDonnell. R.M. then contacted the Iowa Department of Human Services (Department).

The Department began investigating the sex abuse allegation immediately, and the Department's caseworker, Vicki Leau, contacted Detective Mark Lawrence of the Muscatine Police Department. Detective Lawrence then arranged for the Child Protective Center to conduct a forensic interview with H.M. The interview was recorded, and Detective Lawrence was able to observe the interview on a television in the observation room. On this video, H.M. again described the acts of sexual abuse by McDonnell. She stated that McDonnell told her not to tell anyone or soldiers would come and take him to jail.

Following H.M.'s interview, Detective Lawrence and caseworker Leau went to McDonnell's home to talk with him about H.M.'s sexual abuse allegation.

They had no warrant. McDonnell became very upset after he answered the door and learned Detective Lawrence's and Leau's identities. Detective Lawrence made it very clear immediately that the children were fine and not in any danger. Detective Lawrence and Leau tried to calm McDonnell so they could explain why they were there. McDonnell demanded to know what was going on with the kids, and Detective Lawrence explained to him that he did not think it was a good idea to talk about it on the front porch. McDonnell said no a few times, that he did not want them to come into the house, but eventually let them in after deciding he was not going to learn anything until he allowed them inside.

Once Detective Lawrence and Leau were inside, McDonnell became very excited, as if in a panic mode. McDonnell called M.G. on the telephone and told her Detective Lawrence and Leau were there about the children. Detective Lawrence and Leau had not yet told McDonnell of H.M.'s allegation, and kept trying to calm McDonnell down. Detective Lawrence then explained H.M.'s sexual abuse allegation. McDonnell again became frantic and called M.G. and advised her of the allegations, and blamed R.M. Detective Lawrence spoke with M.G. briefly and explained they were investigating H.M.'s allegation. McDonnell denied the allegations to M.G. and to Detective Lawrence and Leau. Detective Lawrence asked to look at H.M.'s room. McDonnell became upset again and stated "no way you guys are going to look into [H.M.'s] bedroom." McDonnell telephoned M.G. again. While on the phone with M.G., McDonnell told Detective Lawrence that M.G. said they could look in H.M.'s bedroom and then showed Detective Lawrence and Leau to H.M.'s bedroom. Detective Lawrence explained to McDonnell that they might be able to clear his name if they were able to test

H.M.'s bedclothes for DNA. McDonnell became very animated and excited and stated he had washed the sheets since two weeks ago; however, he agreed to give Detective Lawrence and Leau the bedclothes, and gave them an unused garbage bag in which to place the bedclothes.

The bedclothes were sent for testing. H.M.'s fitted bedsheet was examined and the screening test indicated the presence of seminal fluid. The seminal fluid stain in the bedsheets matched the known DNA profile of McDonnell.

On October 26, 2007, the State charged McDonnell, by trial information, with sexual abuse in the second degree, in violation of Iowa Code section 709.4(2)(b) (2007). Prior to trial, the State filed a motion to allow H.M. to testify at trial via closed-circuit television, pursuant to section 915.38(1). The State asserted that it believed H.M. would suffer from trauma caused by testifying in the physical presence of McDonnell, and that such trauma would impair H.M.'s ability to communicate. McDonnell resisted, and a hearing was held.

At the hearing, H.M.'s therapist, a licensed mental health counselor and a certified rehabilitation counselor with twelve years of work experience, testified on behalf of the State. The therapist, who had counseled H.M. for over six months at the time of the hearing, opined that testifying as normally contemplated under the rules—on the witness stand, in the courtroom, with the jury, judge, and especially McDonnell present—would cause more trauma to H.M. than was necessary. When asked what it was about H.M.'s situation that rose to the level of traumatic, the therapist explained "I am concerned that [H.M.] won't be able to talk or communicate. That she just may hide." The therapist's

major concern was that H.M. would not talk with McDonnell present. The therapist testified:

> [H.M.] has expressed a lot of anger, she has expressed that [McDonnell] is in jail and he's never getting out so he can't hurt her again. We have not discussed a lot of that but at this point she is more angry than anything else.

Additionally, the therapist opined that although H.M. might potentially shut down and not communicate no matter who was around in court, she believed the likelihood of that was higher if McDonnell was in the room than if he was not in the room, explaining that H.M. has said "[t]hat [McDonnell] cannot hurt her any more and that he's in jail and he can't come by her any more and he can't be around her and she feels good and safe at this point that that cannot happen."

On February 28, 2008, the district court granted the State's motion for use of closed-circuit television testimony. The court found from the testimony presented that H.M. would be traumatized if required to testify in McDonnell's presence, and that such a procedure would unnecessarily impede H.M.'s ability to testify. The court determined the procedure under section 915.38(1) was necessary to protect the welfare of H.M., the prosecuting witness, and H.M. would be traumatized, not by the courtroom generally, but by the presence of McDonnell in the courtroom where she would testify. Additionally, the court found the emotional distress likely to be suffered by H.M. in the presence of McDonnell was more than de minimus.

The matter proceeded to trial. H.M. was called as the first witness and testified in chambers, beginning at approximately 3:05 p.m.[1] Her testimony was

[1] The times reported here are taken from the trial transcript.

observed by McDonnell and the jury in the courtroom via closed-circuit television. The judge first conducted a colloquy with H.M. discussing the importance of truth and establishing that H.M. understood about telling the truth. H.M. then promised to tell the truth. The State then began its direct examination. A recess was taken at 3:50 p.m. McDonnell's trial counsel began his cross-examination of H.M. at 4:00. After McDonnell's trial counsel asked H.M. questions for several minutes (fourteen pages of transcript), the following exchange occurred.

> [MCDONNELL'S COUNSEL]: May I take a very, very brief recess to talk to my client? Two minutes?
>
> THE COURT: We've been at this for over an hour. That's enough time for a six-year-old, so if you want to finish up now, finish up now.
>
> [MCDONNELL'S COUNSEL]: Okay. No further questions.

The court's admonition was then given to jury, and the trial was adjourned at 4:30 p.m. for the day.

R.M. testified the next day. His testimony included statements H.M. made to him concerning the sexual abuse, without objection by McDonnell's trial counsel. Additionally, the video recording R.M. made of him questioning H.M. about the abuse was admitted into evidence by stipulation of McDonnell's counsel and was played for the jury. Later, Detective Lawrence testified as to his investigation in the matter, and H.M.'s forensic interview with the Child Protection Center was admitted into evidence by stipulation of McDonnell's counsel and was played for the jury. The jury found McDonnell guilty as charged.

McDonnell appeals.

***II. Scope and Standards of Review*.**

When determining whether the trial court erred in granting or denying protection under section 915.38(1), we review for errors at law. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995). We review claims involving the Confrontation Clause de novo. *State v. Bentley (Bentley I)*, 739 N.W.2d 296, 297 (Iowa 2007). Additionally, we review claims of ineffective assistance of counsel de novo. *State v. Bentley (Bentley II)*, 757 N.W.2d 257, 262 (Iowa 2008).

***III. Discussion*.**

On appeal, McDonnell contends the district court violated his right to confrontation of his accuser in allowing H.M. to testify by closed-circuit television and by improperly restricting his counsel's cross-examination of H.M. In the event we find that error was not preserved on these issues, McDonnell asserts that his trial counsel was ineffective in those respects. Additionally, McDonnell asserts his trial counsel was ineffective in failing to challenge inadmissible hearsay and the warrantless entry into his home.

***A. Testimony by Closed-Circuit Television*.**

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). 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). "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*. 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). 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. *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.[2] *Id*.

McDonnell asserts there was insufficient evidence to make an adequate showing of necessity that would justify depriving him of his right to face-to-face confrontation of H.M. Upon our review, we conclude there was sufficient evidence in the record to make an adequate showing of necessity.

The district court conducted a pretrial hearing to determine whether the use of the closed-circuit television procedure was necessary to protect H.M. H.M.'s therapist testified to her opinion based upon her experience with H.M. and her counseling: that having H.M. testify in front of McDonnell would cause H.M. trauma. Moreover, the testimony of the therapist, who at the time of her pretrial testimony had counseled H.M. for six months, was sufficient to show that the emotional distress H.M. might suffer would be more than mere nervousness or excitement or reluctance. The therapist's major concern was that H.M. would not talk with McDonnell present, and explained H.M.'s anger with McDonnell. Although the therapist did not expressly state that H.M. was afraid of McDonnell, the therapist testified that H.M. had stated that McDonnell was in jail and was never getting out so he could not hurt her again and that she was safe, clearly illustrating the child's fear of McDonnell. Furthermore, we do not believe the

[2] 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.

therapist's testimony that H.M. might shut down no matter who was present in the courtroom sufficient to preclude finding that McDonnell's presence, rather than the courtroom, would traumatize H.M. We find there was at least a minimal showing that H.M. would be traumatized by the presence of McDonnell, and we therefore affirm on this issue.

***B. Compliance with Iowa Code section 915.38.***

McDonnell next argues the district court failed to comply with Iowa Code section 915.38. Specifically, McDonnell asserts the court prohibited his trial counsel from conferring with him prior to the end of his cross-examination of H.M., violating section 915.38(1). Additionally, McDonnell contends the court cut off all further questioning of H.M. "when it ended all questioning of [H.M.] after an hour." McDonnell asserts the court's alleged failure to comply with these statutory provisions implicates his constitutionally protected right to confront his accuser. *See* U.S. Const. amend. VI; Iowa Const. art. I, § 10. However, these arguments were not made by McDonnell's counsel at trial and were therefore not preserved. Nevertheless, McDonnell also raises the arguments on appeal in the context of ineffective assistance of counsel, an exception to the general rule of error preservation. *See Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

***C. Ineffective Assistance of Counsel.***

In addition to his section 915.38 claim, McDonnell asserts his trial counsel was ineffective in failing to challenge inadmissible hearsay and the warrantless entry into his home. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002) (citing *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave

ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle*, 652 N.W.2d at 203.

We conclude the record before us is inadequate to address McDonnell's claims of ineffective assistance of counsel on direct appeal. Under these circumstances, we pass on the issue of ineffective assistance in this direct appeal and preserve it for a possible postconviction proceeding. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

***IV. Conclusion*.**

Because we conclude the district court did not violate McDonnell's right to confrontation of his accuser in allowing H.M. to testify by closed-circuit television, we affirm his conviction and sentence for sexual abuse in the second degree. We preserve his claims of ineffective assistance of counsel for a possible postconviction proceeding.

**AFFIRMED.**