

IN THE COURT OF APPEALS OF IOWA

No. 2-181 / 11-1307
Filed May 9, 2012

**IN THE INTEREST OF J.M.S.,
Minor Child,**

**J.M.S., Minor Child,
Appellant.**

Appeal from the Iowa District Court for Iowa County, Russell G. Keast,
District Associate Judge.

A minor appeals an order adjudicating him delinquent for committing three counts of second-degree sexual abuse, contending (1) the evidence was insufficient to support the district court's finding that he sexually abused the children, (2) the district court abused its discretion in denying his request to depose the children, and (3) the district court abused its discretion in placing him on the sex offender registry. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Nicholas A. Sarcone and Dean A. Stowers of Stowers Law Firm, West Des Moines, for appellant minor child.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, and Tim McMeen, County Attorney, for appellee State.

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

VAITHESWARAN, P.J.

J.M.S. appeals an order adjudicating him delinquent for committing three counts of second-degree sexual abuse involving two children. J.M.S. contends (1) the evidence was insufficient to support the district court's finding that he sexually abused the children, (2) the district court abused its discretion in denying his request to depose the children, and (3) the district court abused its discretion in placing him on the sex offender registry.

I. Background Facts and Proceedings

Two children, ages ten and eleven years old and identified as Child A and Child B, came forward with allegations that fourteen-year-old J.M.S. engaged in sex acts with them. The State charged J.M.S. with three counts of the delinquent act of second-degree sexual abuse.

J.M.S. responded with a notice of depositions seeking to question the children under oath. One of the children filed an application for an order denying the request. The other child joined the application. Following a hearing, the court determined that J.M.S. failed to establish good cause for the depositions.

The case proceeded to trial. The district court adjudicated J.M.S. delinquent on all three counts, sentenced him to probation, and ordered him placed on the sex offender registry. The court summarily denied J.M.S.'s motion to reconsider the disposition or, alternately, suspend the registration requirement. This appeal followed.

II. Analysis

A. Sufficiency of the Evidence

J.M.S. maintains that the children's testimony was so absurd and self-contradictory as to amount to a nullity. Alternately, he asserts that even if their testimony is not deemed a nullity, the evidence as a whole is insufficient to establish the elements of second-degree sexual abuse.

The State preliminarily responds by asking us to change the scope of our review from a de novo examination of the record to an examination for errors of law. This court addressed an identical request in a prior opinion and refused to adopt the more deferential "errors of law" standard in delinquency proceedings. See *In re C.L.C. Jr.*, 798 N.W.2d 329, 335 n.1 (Iowa Ct. App. 2011). We see no reason to deviate from the views expressed in that opinion. Accordingly, we will review the record de novo. See *In re J.D.F.*, 553 N.W.2d 585, 587 (Iowa 1996).

We begin with the children's testimony and J.M.S.'s assertion that their statements should have been deemed a nullity. See *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993) ("The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." (quoting *Graham v. Chi. & Nw. Ry. Co.*, 119 N.W. 708, 711 (1909))). In *Smith*, three children, ages eleven, eleven, and eight, testified that Smith sexually abused them. *Id.* A jury found Smith guilty of sexually abusing two of the children and assaulting the third child. *Id.* at 102. On appeal, the Iowa Supreme Court reversed, finding the children's testimony "inconsistent, self-contradictory, lacking in experiential detail, and, at times, border[ing] on the

absurd.” *Id.* at 103. According to J.M.S., the same can be said of the children’s testimony in this case.

J.M.S. faces a significant hurdle that was not present in *Smith*: the district court’s explicit credibility finding in favor of the children. See *In re D.L.C.*, 464 N.W.2d 881, 882 (Iowa 1991) (“We give weight to the fact-findings of the trial court, especially when considering credibility of witnesses, but are not bound by them.”). While the court acknowledged contradictions in the complaining children’s testimony, the court stated, “[T]hose contradictions do not alone render the evidence insufficient or a witness’s testimony unbelievable.” Citing “the age of the witnesses, the subject matter of their testimony, and the circumstances surrounding each incident of testimony,” the court stated that “contradictions as to specifics can be expected.” We are not in a position to second-guess this credibility finding, based as it is on the court’s observation of the children on the witness stand. See *State v. Tesch*, 704 N.W.2d 440, 449 (Iowa 2005) (noting that the juvenile court has the opportunity to observe witnesses and assess their credibility). However, even if we were to set aside the credibility finding, we cannot say the children’s testimony was absurd.

Although Child A was confused about when the abuse occurred, he did not waver in his assertion that he was sexually abused. Additionally, his descriptions of the abuse were detailed and graphic. Child A also was confused about where J.M.S.’s bedroom was located, stating that it was in the “basement” of J.M.S.’s ranch-style home rather than on the main level, but he alternately described the abuse as occurring “[d]ownstairs in [J.M.S.’s] bedroom.” More troubling is Child A’s sudden testimony that he engaged in a type of sex act he

had not previously mentioned. While even the prosecutor expressed surprise at this testimony, the child later admitted the sex act could have occurred very quickly. Finally, Child A's testimony did not neatly align with Child B's testimony, but we agree with the district court that contradictions were to be expected, given the children's ages.

We turn to Child B's testimony. His trial testimony, like Child A's, was detailed and graphic. While Child B admitted he did not initially tell his parents that physical contact occurred, he also stated this was a difficult subject to discuss with them. Child B also expressed some confusion about the dates of the occurrences, but his responses to questions about the sex acts, both on direct and cross-examination, were exceptionally articulate for a child of his age. There were additional discrepancies between Child B's prior out-of-court statements and his trial testimony and between his testimony and Child A's testimony. However, Child B's testimony was far from absurd.

On our de novo review of the record, we are convinced the testimony of Child A and Child B was more reliable than the testimony of the children in *Smith*. The district court appropriately declined to discount it.

We turn to the question of whether there was sufficient evidence to support the elements of second-degree sexual abuse. As the district court stated, Iowa Code section 709.1(3) (2009) defines sexual abuse in part as any sex act between persons, where the other person is a child. To constitute second-degree sexual abuse the other person must be under the age of twelve. Iowa Code § 709.3(2).

As noted, the State's petition charged three counts of second-degree sexual abuse. The first count asserted that J.M.S. committed a sex act against Child A between June 1, 2010, and June 15, 2010. The second asserted that J.M.S. committed a sex act against Child A between June 21, 2010, and June 28, 2010. The third asserted that J.M.S. committed a sex act against Child B between May 1, 2010, and July 12, 2010. J.M.S. challenges the State's proof of these time frames. He contends his school and extra-curricular activity schedule limited his opportunities to commit the acts within these time frames, as did his time away from home during the summer. He acknowledged, however, that there were periods when he was at home. For that reason, we are convinced the State established that J.M.S. had the opportunity to commit the sex acts. Therefore, on our de novo review, we conclude that sufficient evidence exists to support the elements of second-degree sexual abuse.

B. Denial of Depositions

J.M.S. next argues that the court should have ordered Child A and Child B to submit to depositions. Our review of this issue is for an abuse of discretion. *C.L.C. Jr.*, 798 N.W.2d at 335.

Iowa Court Rule 8.2(2) provides, "Although informal discovery methods are preferred, upon good cause shown, depositions and interrogatories by any party may be permitted by the court in delinquency proceedings except where they conflict with these rules or with statutes." As noted at the outset, the district court found no good cause for depositions. The court began by explaining that good cause had to connote more than situations "present in all litigations." The court explained that the purpose of discovery was "to allow the Defendant to

prepare a defense in the case” and that purpose was served by the detailed allegations in the State’s delinquency petitions and J.M.S.’s access to the police reports and Child Protection Center interview tapes of the children as well as a therapist’s notes.

We discern no abuse of discretion in this ruling. The two children were the only witnesses proffered by the State at trial, and both children’s prior statements were made available to J.M.S. *Cf. C.L.C. Jr.*, 798 N.W.2d at 340–41 (reversing order denying depositions where juvenile was faced with a plethora of State witnesses, many of whom would not discuss the matter except under compulsion). While depositions might have allowed J.M.S. to develop certain inconsistencies in the children’s testimony, most of those inconsistencies were apparent in the prior statements and were effectively used by J.M.S.’s attorney in his cross-examination of the children. Under these circumstances, we are not convinced depositions were needed to prepare a defense, and we accordingly conclude that the district court did not abuse its discretion in denying the request.

C. Sex Offender Registry

Finally, J.M.S. asserts that the juvenile court should not have ordered him placed on the sex offender registry. Our review of this issue is *de novo*. *In re B.A.*, 737 N.W.2d 665, 667 (Iowa Ct. App. 2007). “However, where the legislature has built into a statute the element of the juvenile court’s discretion, the appellate court applies a *de novo* review ‘to the extent of examining all the evidence to determine whether the court abused its discretion.’” *Id.* (quoting *In re Matzen*, 305 N.W.2d 479, 482 (Iowa 1981)).

In its dispositional order placing J.M.S. on the registry, the district court cited Iowa Code section 692A.5 (2007).¹ J.M.S. filed a motion to reconsider, pointing out that this provision was repealed. See 2009 Iowa Acts ch. 119, § 31. J.M.S. contended the provision that replaced it, Iowa Code section 692A.103 (Supp. 2009), granted the district court discretion to waive the registration requirement. As noted, the district court summarily denied the motion for reconsideration.

On appeal, J.M.S. reiterates that the current code provision, Iowa Code section 692A.103(3), “specifically empowers the district court with the discretion to waive registration.” That provision states:

A juvenile adjudicated delinquent for an offense that requires registration shall be required to register as required in this chapter unless the juvenile court waives the requirement and finds that the person should not be required to register under this chapter.

Iowa Code § 692A.103(3). This provision is substantively no different from its predecessor. The Iowa Supreme Court construed the old provision as precluding the court from deciding “who initially falls within the requirement of the registration statute.” *In re S.M.M.*, 558 N.W.2d 405, 407 (Iowa 1997). The court stated, “The statute prescribes who is covered by the registration requirements; the only discretion in the court is in deciding who will be excused.” *Id.*

¹ This provision, captioned “Duty to facilitate registration,” related to the district court’s obligations to provide information about the registry. Also relevant is former section 692A.2, “Persons required to register,” which listed the persons who were required to register and stated:

A person who is convicted, as defined in section 692A.1, of a criminal offense against a minor, sexual exploitation, a sexually violent offense, or an other [sic] relevant offense as a result of adjudication of delinquency in juvenile court shall be required to register as required in this chapter unless the juvenile court finds that the person should not be required to register under this chapter.

Iowa Code § 692A.2(6).

J.M.S. was required to register. See Iowa Code § 692A.103 (requiring registration); see *also* 692A.101(7) (including within the definition of “convicted” a delinquency adjudication for an act which is an indictable offense). The question here is whether the district court exercised its limited discretion to excuse his registration. On this question, the court stated: “[I]f I adjudicate, unless I order inpatient treatment, then I have to order the child to register as a sex offender. And I do not have the benefit of the child successfully completing inpatient treatment to determine whether or not a waiver of that registry should occur or not.” The court later stated: “And with that adjudication, then the only way I can forego the sex offender registry at this time is with inpatient treatment.” J.M.S. declined inpatient treatment.

We believe the district court attempted to exercise a different type of discretion than was authorized by section 692A.103(3). That provision allows a court to excuse the initial registration requirement. Another provision, section 692A.103(5)(b), allows modification or suspension of the registration requirement for good cause shown, stating:

If at the time of [a modification or suspension] hearing the juvenile is participating in an appropriate outpatient treatment program for juvenile sex offenders, the juvenile court may enter orders temporarily suspending the requirement that the juvenile register and may defer entry of a final order on the matter until such time that the juvenile has completed or been discharged from the outpatient treatment program.

The court twice stated its belief that it could excuse registration only if J.M.S. agreed to participate in inpatient treatment, statements that implicate section 692A.103(5)(b) rather than section 692A.103(3). As the district court did not exercise its discretion pursuant to section 692A.103(3), we reverse the

dispositional order for reconsideration of whether J.M.S. should be excused from registration under that provision.

III. Disposition

We affirm J.M.S.'s delinquency adjudication. We reverse the disposition and remand to allow the district court to consider whether J.M.S. should be excused from registration pursuant to Iowa Code section 692A.103(3).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.