

IN THE COURT OF APPEALS OF IOWA

No. 3-827 / 12-1676
Filed October 23, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDUARDO ARTEMIO RODRIGUEZ LOPEZ,
Defendant-Appellant.

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

Eduardo Artemio Rodriguez Lopez appeals his conviction of sexual abuse in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin Parrott, Assistant Attorney General, Jason Carlstom, County Attorney, and Douglas Hammerand, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Eduardo Artemio Rodriguez Lopez appeals his conviction of sexual abuse in the second degree. He contends his trial counsel was ineffective for failing to contest the admissibility of various hearsay statements entered into evidence at trial. He also asserts the trial court abused its discretion in failing to grant his motion to continue. We affirm.

I. Background Facts and Proceedings.

From the evidence presented at trial, the jury could have found the following facts. On May 3, 2012, the Centers Against Abuse and Sexual Assault (CAASA) presented a program to a fourth grade class on “good and bad touches,” providing a “kid-friendly description of what a good touch and a bad touch is” and explaining to the children “what to do if [they’re] in a situation where [they’re] receiving some of those bad touches and how to identify the risk factors there.” As part of the presentation, the class watched a video on the subject, and then the CAASA presenter asked the class questions and also answered students’ questions. Although many students participated, one girl stood out to the presenter because her questions “raised flags.” Ten-year-old K.C. asked questions that “were more directed towards her house, her family dynamics,” such as K.C.’s questions asking “what would happen to [her] and [her] family if [her] step-dad went away; if he wasn’t there to take care of [them]?” The presenter had to leave early that day, and the school guidance counselor finished the presentation to the class. Before she left, the presenter passed on her concerns regarding K.C. to a teacher in the class, telling the teacher “someone might want to open a door for [K.C.] to be able to talk.”

After the guidance counselor completed the presentation and the class was dismissed, K.C. and a classmate friend approached the counselor and asked her if they could speak to her privately. K.C.'s friend told the counselor that what the class had just talked about in the lesson was happening to K.C. The counselor dismissed K.C.'s friend for confidentiality reasons, and she then asked K.C. if she could explain what her friend was talking about. K.C. told the counselor that "this is happening to her, that [her step-father Eduardo Rodriguez Lopez] would—when everybody was gone or sleeping, he would take her to a bedroom and then he would ask her to take her pants off and he would touch her . . . in her naughty spot." The counselor asked where that was, and K.C. showed her "with her hands, sort of down here . . . [w]here her swimsuit covers up." K.C. continued talking to the counselor, telling the counselor that Rodriguez Lopez also had "her touch his naughty spot," and after the counselor asked where that was, K.C. pointed "down there again" and described it as "his 'winky.'" K.C. told the counselor this had been going on since she was three years old.

After the guidance counselor returned K.C. to her classroom, the counselor, a mandatory reporter, contacted the Iowa Department of Human Services (DHS) and relayed K.C.'s statements. Later that day, a DHS worker came to the school with a uniformed police officer, and after talking to the counselor, requested to speak with K.C. When K.C. returned to the counselor's classroom and saw the officer and the DHS worker, she "absolutely froze, started crying, and grabbed [the counselor]." At one point, K.C. yelled to them, "You're here to take my dad." The officer and the DHS worker asked K.C. questions, but K.C. did not talk; the counselor stated that K.C. "was so afraid, really frightened."

Another DHS worker and police officer went to K.C.'s home that evening to assess K.C.'s safety. The DHS worker interviewed Rodriguez Lopez, K.C.'s mother, K.C., and K.C.'s sister. Based upon how K.C. "reacted and of what she didn't say," the DHS worker determined, for K.C.'s safety, there was to be no contact between K.C. and Rodriguez Lopez, and the worker explained that either K.C. or Rodriguez Lopez would have to leave the home. K.C.'s mother had K.C. stay with her maternal grandmother, who lived next door.

On May 9, 2012, K.C. was examined and interviewed at the Child Advocacy Center (CAC) by a pediatric sexual assault nurse examiner. K.C. initially only answered general questions the nurse asked her, such as her age and school grade. After the nurse asked K.C. if she was afraid to tell the nurse something, K.C. nodded yes. The nurse asked K.C. "if she was afraid of getting someone in trouble," and K.C. again nodded her head yes. The nurse asked K.C. "who she was afraid of getting in trouble," and K.C. told the nurse, "her dad." The nurse clarified K.C.'s answer, asking if she was talking about Rodriguez Lopez, and K.C. said, "yes," but that she calls him "Papi."

[The nurse] asked [K.C.] if Papi was doing something to her. And she nodded her head, "Yes." [The nurse] asked her if it was . . . doing something to her body. And she nodded her head, "Yes." And [the nurse] asked if she could tell [her] what part of her body she was talking about. And [K.C.] shook her head, "No." [The nurse] asked her if she would write down what part of her body she was talking about. And . . . she just said, "I don't want to."

. . . .
[The nurse asked K.C.] if what Papi was doing was something that she wanted to have happen. And she said, "No." [The nurse] asked her if that was something that she wanted to stop. And she said, "Yes."

The nurse again asked K.C. what part of her body she was talking about, and K.C. told her she did not want to talk about it, and she began crying. K.C. did not want to go any further with the exam, and the nurse returned K.C. to her mother in the waiting room. Shortly thereafter, K.C.'s mother found the nurse and informed her that K.C. would continue the exam if her mother could stay in the room with her. The nurse then performed the physical exam, and K.C.'s exam results were determined to be normal.

K.C. was then interviewed by Amy Scarmon, a CAC interviewer, and the interview was video-recorded. In the interview, K.C. told Scarmon that Rodriguez Lopez had been touching her in places she did not want to be touched. She told Scarmon that she loved Rodriguez Lopez, but she wanted "him to stop." K.C. told Scarmon that Rodriguez Lopez touched her where she goes potty and her crotch with his hands and fingers. K.C. told Scarmon that Rodriguez Lopez put his hands down her front pants and touched her crotch inside and out. She also told Scarmon that he put his hands under her shirt and touched her "boobies," and he kissed her on her mouth with his tongue. She told Scarmon it happened on weekends when she stayed up late and her mom had gone to bed, or it happened when her mom or brother was outside. She explained sometimes Rodriguez Lopez would pick her up and touch her in the hallway while he watched out the hallway window to make sure no one was entering the home.

At one point, K.C. told Scarmon that she thought she always grew up with Rodriguez Lopez touching her, but she later stated she remembered it starting at age eight. She also told Scarmon she did not realize it was wrong until she was eight. K.C. told Scarmon that before the officer and DHS worker came to her

home on May 3, 2012, Rodriguez Lopez denied touching her, and it made her cry because she knew he was lying. K.C. stated that Rodriguez Lopez and her mother told her he would go to jail if she told, and K.C. told Scarmon that she did not want Rodriguez Lopez to get deported. K.C. denied that Rodriguez Lopez had made her touch him.

On May 21, 2012, the State filed its trial information charging Rodriguez Lopez with one count of second-degree sexual abuse, in violation of Iowa Code sections 709.1 and .3 (2011).¹ Rodriguez Lopez was arraigned on June 18, and he pled not guilty and demanded a speedy trial. His trial was set that day for August 7, 2012, and the court noted it was the only date available before the speedy trial deadline would expire. Shortly thereafter, Rodriguez Lopez filed an application for an expense voucher for him to obtain an investigator.

On July 17, less than a month before the set trial date, Rodriguez Lopez filed a motion for enlargement of time. The motion stated Rodriguez Lopez's trial counsel had been unexpectedly called to trial on July 17, and trial counsel requested the court extend its prior pretrial-ruling deadlines to permit discovery to be completed up to and including July 23, and to extend the time for filing motions. Trial counsel did not request the trial be continued.

On July 24, the district court entered its order granting Rodriguez Lopez's requests for the extension of deadlines and for an expense voucher for an investigator. The court enlarged Rodriguez Lopez's time for the filing of any pretrial motions or notices of defenses to July 27, 2012. The court's order

¹ Rodriguez Lopez was also charged with child endangerment, but the charge was later dismissed by the State.

explicitly stated that it had “discussed with counsel whether they believed this matter would be ready to proceed to trial on August 7, 2012, at the hour of 9:30 a.m. as presently scheduled. Both counsel agreed that the case would proceed as scheduled on that date.”

Six days after that order was filed, Rodriguez Lopez filed a motion to continue and for enlargement of time to complete discovery and file notice of defenses, along with a waiver of a speedy trial. The motion to continue explained Rodriguez Lopez’s trial counsel “was called unexpectedly to trial on one certain pending matter . . . which delayed the depositions in this case and additional discovery and execution of certain orders.” The motion further stated that “the record in this pending matter reveals that there is no physical or medical evidence and that the primary issue to be presented before this court will rest upon the credibility of witnesses including . . . ‘K.C.’” The motion noted “[a]t the time of her deposition, ‘K.C.’ made certain statements wherein she acknowledged that she had denied the allegations made which form the basis for the charge against [Rodriguez Lopez],” and it argued that her statements provided Rodriguez Lopez’s trial counsel and his investigator need “for further investigation.” “[S]ince the revelation of this information,” Rodriguez Lopez asserted he now had “reason to believe that additional conflicting testimony may exist.” Rodriguez Lopez maintained that “without a continuance and the opportunity to explore certain investigative leads, [he would] be prejudiced.” The same day, the district court entered its order granting Rodriguez Lopez’s motion to continue, moving the trial to October 2012.

The next day, the State filed its motion to resist Rodriguez Lopez's motion to continue trial, arguing Rodriguez Lopez failed to show good cause for a continuance. The State noted at the prior hearing the court confirmed with both sides that the trial would proceed as scheduled on August 7. Additionally, the State pointed out that K.C. admitted in her deposition that she had made a prior inconsistent statement to a witness, and, because of her admonition, Rodriguez Lopez was prohibited from calling the witness to testify as to the inconsistent statement, citing Iowa Rule of Evidence 5.613.

On August 1, 2012, the court entered its order rescinding its prior order granting Rodriguez Lopez's continuance. The court explained it mistakenly believed the State did not resist Rodriguez Lopez's motion to continue, and it set the matter for hearing. At the hearing, trial counsel again explained that after taking depositions, he and his investigator had "developed certain information that must be further refined and developed before proceeding with trial and without which the defendant may be prejudiced." Trial counsel stated the motion was not limited to K.C.'s deposition testimony, "but also includes investigative work that is larger than—but—I believe falls under work product between the investigator and . . . the attorney but is not limited strictly to the comments made by . . . K.C. during her deposition."

The State reiterated its resistance, arguing it was in K.C.'s best interests to resolve the matter, and, due to more ongoing family issues that arose following her report, K.C. might ultimately "become unavailable as a witness." The State noted Rodriguez Lopez still had time to continue his investigation and depose

witnesses if necessary before trial, and it would work with trial counsel to get those finished.

Thereafter, the district court entered its order denying Rodriguez Lopez's motion to continue. The court observed that it had been assured by trial counsel that the case would be ready for trial on August 7, and if Rodriguez Lopez's other trial would have conflicted with this case, he should have been aware of it when he stated he would be ready for trial on August 7. Additionally, the court found that the evidence Rodriguez Lopez sought had not been shown "as evidence that would be admissible in this trial or lead to the discovery of admissible evidence."

Finally, the court found:

Here, the court has not been provided with any information about what trial strategy or defense the defendant intends to further develop or what evidence or theories defendant proposes to realize with additional discovery if a continuance is granted. The parties have expended considerable time and resources to prepare this case for trial on August 7, 2012, and absent a showing by [Rodriguez Lopez] of a good and compelling cause to continue trial beyond August 7, 2012, or a showing that substantial justice would be more nearly obtained by granting a continuance, the motion should be overruled. No such showing has been made.

On August 2, 2012, Rodriguez Lopez filed a renewal of his motion to continue, setting forth the same reasons previously asserted for continuing the trial. He also filed a "notice of defendant's first constitutional challenge," arguing Rodriguez Lopez would be deprived of his constitutional rights of due process and a fair trial if his trial was not continued, but he provided no further explanation or analysis. "Defendant's notice of first assignment of error" was also filed by Rodriguez Lopez, asserting the district court abused its discretion in failing to grant his motion to continue and erred in concluding trial counsel should

have known at the hearing where he stated he would be ready for trial on August 7, that he would not actually be ready for trial.

On August 6, the district court heard arguments on the pending trial motions. The court ultimately denied Rodriguez Lopez's pending motions.

Trial commenced on August 7, as scheduled, and K.C. testified. K.C. again stated that Rodriguez Lopez had been touching her around her bathing suit area bottom, underneath her clothes. She testified that she thought it started happening when she was three, but she did not know it was something that was not good until she was eight. She testified it would happen maybe a couple times a week. K.C. testified that she told her classmate friend before she talked to her guidance counselor, and she testified that in April 2012, she had told her best friend, who lived near her, that Rodriguez Lopez had been touching her. She explained that she decided to tell her best friend because the friend showed her a card she got at school from her teacher that had phone numbers on it for troubled teens, including a number for a "sexual abuse/assault place." K.C. said she told her friend that she needed that number because Rodriguez Lopez did that to her, and she asked her friend to "keep it quiet and not say anything." She testified she did not talk to the DHS worker and police officer because she was afraid they were going to take her step-dad away, and she did not want that to happen. K.C. admitted that, after she and her classmate friend talked to their guidance counselor, she denied to her classmate friend that Rodriguez Lopez had touched her, "[b]ecause [her classmate friend] didn't really need to know." However, K.C. testified that what she had said initially and what she was stating to the jury at that time—that Rodriguez Lopez had touched her—was true.

On cross-examination, K.C. testified she “just remembered” that the touching had been going on since age three, but she later testified she was not sure. She did not recall telling her guidance counselor that Rodriguez Lopez had made her touch his “winky,” and she testified that Rodriguez Lopez had never made her touch him. She testified she could not remember any specific times or dates in which good-touches or bad-touches happened between her and Rodriguez Lopez.

The CAC interviewer testified about the statements K.C. made to her and her interview with K.C. Before the video recording of K.C.’s interview was offered into evidence, the State and Rodriguez Lopez’s trial counsel made the following record concerning the admissibility of the video:

[THE STATE]: . . . The State wants to offer [the video recording] in as some hearsay exceptions. We believe it would come under [Iowa Rule of Evidence] 5.803(4), also under [rule] 5.807, which would relate to Iowa Code section 915.38(3). The State’s understanding is, [Rodriguez Lopez] is not going to object to the video coming into evidence. They have strategic reasons for that, and I will let them discuss that in a minute.

There’s also one portion of this video that talks about [Rodriguez Lopez] being deported and being arrested for a driving offense. We talked about redacting that. But [Rodriguez Lopez] would like that in, and I believe that’s for strategic reasons as well, which I’ll let them address at this time.

. . . .
[TRIAL COUNSEL]: . . . [Rodriguez Lopez] and [his trial] counsel have had an opportunity to develop a strategy in this case. And part of that strategy, we believe, includes—although we believe it would be inadmissible, includes, generally, under the rules of evidence, that this tape would be inadmissible. [Rodriguez Lopez] has further waived his objections to what he believes to be other hearsay testimony in this case, including the testimony of [the guidance counselor] and possibly the testimony of [the CAASA presenter], waiving certain hearsay testimony as a part of that trial strategy.

And [Rodriguez Lopez] is prepared and has—I have discussed with [Rodriguez Lopez] the playing of this tape in its

entirety. And we agree that, as part of a trial strategy, we consent—although we disagree with the State that it's admissible, we are going to consent to its admission at this time as a part of our trial strategy at this time.

. . . .
. . . [Rodriguez Lopez], has that been translated to you in its entirety?

[RODRIGUEZ LOPEZ]: (Through interpreter) Yes.

[TRIAL COUNSEL]: And we have discussed this as a trial strategy?

[RODRIGUEZ LOPEZ]: (Through interpreter) Yes.

[TRIAL COUNSEL]: And you are in agreement with me to proceed with the tape at this time?

[RODRIGUEZ LOPEZ]: (Through interpreter) Yes, that's fine.

The video was then played for the jury.

Thereafter, the CAASA presenter, K.C.'s guidance counselor, and the CAC nurse examiner testified, and they testified as to K.C.'s statements to them as described above.

Additionally, K.C.'s best friend was called to testify, and Rodriguez Lopez objected. The State argued K.C.'s best friend's potential testimony about K.C. telling her about the abuse in April 2012, before talking to the guidance counselor, was admissible as a prior consistent statement to rebut an express or implied charge against K.C. of recent fabrication or improper influence or motive. In response, Rodriguez Lopez argued he had not made claims K.C. had fabricated her accusations, nor had he contested K.C.'s testimony that she had told her best friend about the abuse in April 2012. Rodriguez Lopez asserted the testimony of K.C.'s best friend concerning K.C.'s April statements would prejudice him "to the extent that the jury will then conclude and be unable to differentiate and will convict [him] based, not on the other evidence in this case, but by the hearsay testimony of [K.C.'s best friend]." The court overruled

Rodriguez Lopez's objection, finding the criteria for the admission of prior consistent statements was met by the State.

K.C.'s best friend then testified, stating that in April 2012, she showed a card she had gotten from her guidance counselor to K.C. She testified that K.C. looked at the card, and then she pointed to the words on it saying "'Sexually abused,' slash, 'assault.'" Over Rodriguez Lopez's objection, she testified that K.C. told her she needed the "sexual abuse/assault" number on the card "because [Rodriguez Lopez] or Papi had been sexually abusing her." She further testified that K.C. told her Rodriguez Lopez had touched "[h]er privates," and that K.C. told her not to tell anybody." She also testified that Rodriguez Lopez paid more attention to K.C. than the other children.

Rodriguez Lopez testified in his defense, stating K.C. was like his daughter, and he denied ever touching K.C.'s body anywhere sexually. Additionally, K.C.'s maternal grandmother testified for Rodriguez Lopez that Rodriguez Lopez appeared to be a loving father and never treated K.C. differently than his own children. She also testified that after K.C.'s deposition in the case, K.C. came home and said to her half-siblings, Rodriguez Lopez's two children, "You got your dad now—or I ain't got my dad, so you ain't got your dad now." K.C.'s maternal step-grandfather also testified that he would describe the relationship between Rodriguez Lopez and the children as "fantastic."

After Rodriguez Lopez's motion for judgment of acquittal was denied by the court, the matter was submitted to the jury. The jury found Rodriguez Lopez guilty as charged. Thereafter, Rodriguez Lopez filed a motion for a new trial,

which was overruled by the district court. Rodriguez Lopez was sentenced to an indeterminate term not to exceed twenty-five years.

Rodriguez Lopez now appeals.

II. Discussion.

On appeal, Rodriguez Lopez argues his trial counsel was ineffective for failing to contest the admissibility of various hearsay statements entered into evidence at trial. He also asserts the trial court abused its discretion in failing to grant his motions to continue. We address his arguments in turn.

A. Ineffective Assistance of Counsel.

We review ineffective-assistance-of-counsel claims de novo. *State v. Clay*, 824 N.W.2d 488, 494 (Iowa 2012). To prevail on his claim, Rodriguez Lopez must show his counsel (1) failed to perform an essential duty and (2) prejudice resulted. *See Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). His claim fails if either element is lacking. *See Lamasters v. State*, 821 N.W.2d 856, 866 (Iowa 2012).

In determining whether counsel failed to perform an essential duty, “we measure counsel’s performance against the standard of a reasonably competent practitioner,” *Everett*, 789 N.W.2d at 158, starting “with the presumption that the attorney performed competently and proceed[ing] to an individualized fact-based analysis.” *Lamasters*, 821 N.W.2d at 866.

Ineffective assistance is more likely to be established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment. Improvident trial strategy, miscalculated tactics or mistakes in judgment do not necessarily amount to ineffective counsel. When counsel makes a reasonable tactical decision, this court will not engage in second-

guessing. Selection of the primary theory or theories of defense is a tactical matter.

Id. (internal quotation marks, alterations, and citations omitted). However, “[t]he fact that a particular decision was made for tactical reasons does not . . . automatically immunize the decision from a Sixth Amendment challenge. That decision must still satisfy the ultimate test: whether under the entire record and totality of circumstances counsel performed competently.” *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006) (citation and internal quotation marks omitted).

We note that we generally do not resolve claims of ineffective assistance of counsel on direct appeal. *Clay*, 824 N.W.2d at 494. “That is particularly true where the challenged actions of counsel implicate trial tactics or strategy which might be explained in a record fully developed to address those issues.” *Id.* (internal quotation marks and citation omitted); *see also Ondayog*, 722 N.W.2d at 786 (“[P]ostconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance.”). If we determine the claim cannot be addressed on appeal, we must preserve it for a postconviction relief proceeding, regardless of our view of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

The State contends Rodriguez Lopez’s ineffective-assistance-of-counsel claim can be resolved on direct appeal on either prong. On the first prong, it is clear, according to the State, Rodriguez Lopez’s trial counsel “strategically chose to refrain from objecting to putative hearsay statements in order to use those statements to argue to the jury that K.C. made inconsistent statements, showing

she should not be believed.” The State asserts the “record shows this was a reasonable, although ultimately unsuccessful, strategy. Thus, the claim of ineffective assistance of counsel can be rejected on direct appeal.” Upon our de novo review of the record, we agree.

Here, there was no physical evidence to support K.C.’s reports. Consequently, K.C.’s testimony and her credibility were key to the State’s case against Rodriguez Lopez. The record clearly establishes Rodriguez Lopez’s trial strategy was to portray K.C. as a liar, emphasizing the discrepancies in her statements and her inability to provide dates and times. Rodriguez Lopez points out in his brief that his trial counsel “conducted an apparently vigorous cross-examination of K.C. and presented both expert and lay testimony to undermine the credibility of the State’s case.” Additionally, the record plainly evidences that Rodriguez Lopez was both aware of and in agreement with the strategy. Upon our review, we cannot find Rodriguez Lopez’s trial strategy, while unsuccessful, was unreasonable. We therefore conclude Rodriguez Lopez failed to establish his trial counsel was ineffective. Accordingly, we affirm on this issue.

B. Request for Continuance.

Rodriguez Lopez also contends the district court should have granted his motions for a continuance, and he maintains their denial “violated his rights under the state and federal constitutions.” He asserts he “had a legitimate need for the continuance in order to prepare his defense,” because “K.C. admitted denying to one friend that the abuse happened, *which opened the door to the possibility she had denied it to others.*” (Emphasis added.) Rodriguez Lopez also complains

about his trial counsel's time to prepare, citing his decision to demand a speedy trial and an alleged language barrier between himself and his trial counsel.

Generally, a district court's denial of a motion for continuance is reviewed for an abuse of discretion, *State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012), which "occurs when the court's discretion is based on a ground or reason that is clearly untenable or when the court's discretion is exercised to a clearly unreasonable degree." *State v. Becker*, 818 N.W.2d 135, 140 (Iowa 2012). *Clark*, 814 N.W.2d at 560. However, to the extent Rodriguez Lopez asserts constitutional claims, our review is de novo. *Clark*, 814 N.W.2d at 560. "We make an independent evaluation [based on the totality of the circumstances as shown by the entire record," evaluating each case "in light of its unique circumstances." *State v. Brooks*, 760 N.W.2d 197, 204 (Iowa 2009) (internal citations and alteration omitted).

The State directs us to a similar case recently decided by the Iowa Supreme Court, *State v. Clark*, 814 N.W.2d at 551. In that case, Clark appealed from his conviction of second-degree sexual abuse, challenging the trial court's

refusal to grant a continuance and to allow the retaking of depositions based upon the right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Iowa Constitution and the right to a fair trial under the Sixth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Iowa Constitution.

Id. at 560. Ultimately, the majority in *Clark* rejected these claims, see *id.* at 562-67, and the State argues that holding is instructive here. We agree.

In *Clark*, Clark's trial counsel obtained, a few days before trial, the entirety of a relevant email sent by the victim in that case. *Id.* at 562. Although the

defense's prior deposition of the victim overlapped with the document to some extent, the e-mail exposed the victim's "serious issues" with his school, and it referenced the victim's possible diagnosis of schizophrenia for the first time. *Id.* The dissent in *Clark* believed the e-mail contained "intriguing statements, an intriguing use of language, and lots of context that needed to be integrated into the defense case," and that the "[e]xploration of these features of the e-mail in a reopened deposition *could well have led* to a more effective cross-examination of [the victim] at trial." *Id.* at 569 (Appel, J., dissenting) (emphasis added). Nevertheless, the *Clark* majority rejected that belief, finding that "[w]hile the e-mail was undoubtedly an important document and one that the prosecution had a duty to provide to the defense, it did not dramatically change the direction of the case." *Id.* at 562. The majority explained:

Clark knew from the depositions and otherwise that his accuser had a troubled past including behavioral issues, mental health issues, and problems with substance abuse. Furthermore, Clark knew that, according to [the victim], the parents had suspected [someone else] of having abused [the victim]. Clark also knew that after an incident involving Clark occurred in the Johnson County jail in the spring of 2009, [the victim's] father asked [the victim] about Clark. Clark additionally knew that [the victim] denied any abuse by Clark at that time, and [the victim] did not make any accusation against Clark until after arriving at the highly structured school.

Id. Furthermore, the majority found that

[a]part from the desire to retake depositions, Clark's reasons advanced below for needing a continuance were "vague and uncertain." Clark said only that he wanted to conduct more "investigation. . . ."

Clark also has made no showing that any information he would have obtained from further investigation would be material to his defense. There has thus been no demonstration of prejudice resulting from the trial court's denial of his motion. Therefore, Clark's claim that the district court's denial of his motion for

continuance and additional depositions violated his due process rights and right to present a complete defense must fail.

Id. (internal citations omitted). Finally, the majority rejected Clark's claim the district court had abused its discretion in denying his motion to continue, ultimately concluding Clark had "not made a convincing showing that a substantial right was prejudiced. Rather, he . . . offered a general assertion when a specific showing is required in order to show an abuse of discretion on the part of the trial court." *Id.* at 566-67.

Applying *Clark* here, we determine, based on the totality of the circumstances as shown by our de novo review² of the entire record, the district court did not violate Rodriguez Lopez's due process rights and right to present a complete defense, nor did it abuse its discretion in denying Rodriguez Lopez's motions to continue. As the *Clark* court pointed out, "is possible to conceive of a circumstance when a continuance might be constitutionally required." *Id.* at 561. However, like Clark, Rodriguez Lopez's claims are simply too vague and uncertain to support any constitutional violation. Here, as in *Clark*, there has been no demonstration of prejudice resulting from the trial court's denial of his motion. Rather, there is merely an assertion of a "possibility" that the victim had denied the abuse to another person. However, K.C., in her deposition, told defense she had denied the abuse to her classmate after having previously told her of the abuse, and the defense had the opportunity to question K.C. as to whether she had denied the abuse to other persons, both in the deposition and on the stand. Evaluating the case in light of its own circumstances, we simply

² We assume without deciding Rodriguez Lopez preserved error on his constitutional claims asserted here, bypassing the State's error-preservation concerns.

cannot find that K.C.'s deposition testimony dramatically changed the direction of the case, nor has Rodriguez Lopez shown further time would have materially affected or aided his defense. We therefore affirm the decision of the district court denying his motions to continue. Accordingly, we affirm on this issue.

III. Conclusion.

For the foregoing reasons, we affirm Rodriguez Lopez's judgment and sentence for sexual abuse in the second degree.

AFFIRMED.