IN THE COURT OF APPEALS OF IOWA

No. 7-936 / 06-1577
Filed March 14, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NEAL CARROL REETZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Floyd County, Bryan H. McKinley, Judge.

Defendant appeals his conviction for sexual abuse in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Jesse Marzen, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Baker, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.

I. Background Facts & Proceedings

Neal Reetz was charged with sexual abuse in the third degree under Iowa Code section 709.4(2)(a) (2003). Section 709.4(2)(a) applies when a person commits a sex act, the persons are not cohabiting as husband and wife, and "[t]he other person is suffering from a mental defect or incapacity which precludes giving consent." Reetz admitted having sexual relations with Glenda, who is mildly mentally retarded, but claimed these encounters were consensual. The State's position is that Glenda was not capable of consenting.

The State designated Dr. Brent Seaton, a clinical neuropsychologist and psychologist, as its expert to testify on the issue of Glenda's ability to consent. Dr. Seaton personally evaluated Glenda. He also relied upon an interview of Glenda by a social worker, Julie Kelly, and reports by psychiatrist Dr. Michael Taylor and psychologist Dr. Dan Rogers. Reetz filed a motion in limine raising hearsay and Confrontation Clause issues. The district court ruled that as long as defendant had the reports relied upon by Dr. Seaton, he could testify to correspondence he received from other experts and underlying data.

The case proceeded to trial. Dr. Seaton testified he had personally examined Glenda and administered a series of tests designed to measure her mental capacity. He concluded she did not have "the capacity to knowingly and willingly enter into sexual activity or to consent to sexual activity." He stated she "basically lacks the ability to recognize the risks and benefits, recognize alternatives, and to even make a choice" due to her mental incapacity. On

intellectual testing Glenda's age-equivalent scores were between five to ten years of age.

Glenda testified she did not want to have sex with Reetz, but did not know what to do when he asked her for sex. She stated she took her own clothes off, but did not know why she had done so. She was unable to articulate any reasons why people would or would not want to have sex. Glenda's testimony revealed a very child-like manner.

Reetz presented the testimony of Jim Hughes, and attempted to present evidence of Glenda's reputation in the community regarding sexual activity. The State objected based on Iowa Rule of Evidence 5.412(*c*)(1) and on the grounds of hearsay and relevance. Further testimony by Hughes as to Glenda's reputation for sexual activity was offered outside the presence of the jury. The court determined the proffered testimony was inadmissible on the grounds raised by the State. At the trial, Hughes and other witnesses testified to Glenda's level of independence.

The jury returned a verdict finding Reetz guilty of third-degree sexual abuse. The district court denied Reetz's motion in arrest of judgment and motion for new trial. Reetz was sentenced to a term of imprisonment not to exceed ten years. He now appeals.

II. Testimony of Dr. Seaton

Reetz raises concerns about the testimony of Dr. Seaton based on the Sixth Amendment Confrontation Clause and the hearsay rules of evidence. Our standard of review on constitutional issues, such as those presented by the

confrontation clause, is de novo. *State v. Newell*, 710 N.W.2d 6, 23 (Iowa 2006). On issues of hearsay we review for the correction of errors at law. *State v. Brown*, 656 N.W.2d 355, 361 (Iowa 2003).

A. In a motion in limine, Reetz asked that Dr. Seaton not be permitted to testify to the statements of Kelly and Dr. Taylor, who were not present to be cross-examined. In ruling on the motion in limine, the district court stated that as long as defendant had the underlying materials, it would "allow Dr. Seaton in his testimony to rely upon correspondence received from other experts and underlying data." The court stated it would accept additional record outside the presence of the jury and revisit the issue at that time.

During the trial, Dr. Seaton was questioned about the basis for Kelly's meeting with Glenda. Reetz objected on hearsay and confrontation grounds, and the court sustained the objection. Dr. Seaton was also asked whether Kelly was reporting about Glenda's sexual activity with defendant. Reetz again objected on hearsay and confrontation grounds, and the objection was sustained. Dr. Seaton testified it was his practice to review other reports in reaching an opinion. Dr. Seaton was then questioned as to Kelly's findings. Reetz's hearsay and confrontation objections were overruled. Dr. Seaton testified Kelly's report concluded there was reason for concern about sexual activity between Glenda and defendant.

Dr. Seaton was questioned about Dr. Taylor's findings. Reetz objected on hearsay and confrontation grounds, and the court sustained the objection. Outside the presence of the jury, the court revisited the issue raised in the motion

in limine. The prosecutor stated Reetz had access to the materials relied upon by Dr. Seaton, and defense counsel agreed he had those materials. On the basis of relevancy, the court ruled Dr. Seaton should be questioned only on the issue of capacity to consent. The trial resumed, and Dr. Seaton testified Dr. Taylor concluded "it's inconceivable to believe that Glenda would be able to willingly and knowingly consent to sexual activity." Reetz did not object to this testimony.

The State claims Reetz failed to preserve error on his claims regarding Dr. Seaton's testimony about Dr. Taylor because he did not object to the questions about the contents of Dr. Taylor's report. The ruling on the motion in limine did not preserve error because the district court stated it would revisit the issue during the trial. *See State v. Albert*s, 722 N.W.2d 402, 406 (Iowa 2006) (noting a ruling on a motion in limine preserves error only when it is unequivocal).

Furthermore, the court did not add anything to its previous ruling during the conference outside the presence of the jury. Reetz had previously raised several objections on hearsay and Confrontation Clause grounds, and some were sustained and some were overruled. Thus, it was not clear that further objections would be of no avail. *See State v. Taylor*, 310 N.W.2d 174, 177 (Iowa 1981) (finding repeated objections did not need to be made to the same class of evidence, once the court had ruled on the subject). Because Reetz did not object to the questions about the contents of Dr. Taylor's report, in this portion of the opinion we will address only Dr. Seaton's testimony about Kelly's report.

B. We turn to Reetz's hearsay argument as it pertains to Iowa Rule of Evidence 5.703, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Under rule 5.703, experts may base their opinion upon hearsay, and the expert may testify concerning the hearsay evidence, if it is "of a type reasonably relied upon by experts." *See Brunner v. Brown*, 480 N.W.2d 33, 37 (Iowa 1992). Evidence under this rule is "admitted for the limited purpose of showing the basis for the expert witnesses' opinions; it is not admissible as substantive evidence of the matters asserted therein." *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 183 (Iowa 2004). "Admitting the substance of a non-testifying expert's opinion is not a hearsay use at all." *State v. Rogovich*, 932 P.2d 794, 798 (Ariz. 1997). An expert may refer to the findings of another expert's report, as long as this is not the sole basis for the expert's opinion. *See Sauerwin v. State*, 214 S.W.3d 266, 270 (Ark. 2005).

Dr. Seaton testified he reviewed documents provided to him by other professionals in the health care field. He stated these reports were of the type that other professionals in his field would reasonably rely upon in conducting evaluations and reaching opinions. Dr. Seaton testified briefly to the conclusion in the report by Kelly. Kelly's report did not comment upon whether Glenda had the capacity to consent, and stated only there were concerns about Glenda's sexual relationship with defendant.

The evidence was admitted to show the basis for Dr. Seaton's opinions. *See Gacke*, 684 N.W.2d at 183. It was not admitted as substantive evidence of the matters in the report. *See id.* Furthermore, Dr. Seaton interviewed Glenda and performed extensive testing himself. It is clear his testimony did not serve merely "as a conduit for another non-testifying expert's opinion." *See Rogovich*, 932 P.2d at 798 n.1.

We conclude Dr. Seaton's testimony regarding Kelly's report did not violate the rules against hearsay.

C. Under the Sixth Amendment, a defendant has the right to confront witnesses against him. *State v. Wells*, 738 N.W.2d 214, 218 (Iowa 2007). Reetz asserts Dr. Seaton's testimony about Kelly's report should have been deemed inadmissible because he was unable to cross-examine Kelly.

In *Crawford v. Washington*, 541 U.S. 36, 51, 124 S. Ct. 1354, 1364, 158 L. Ed. 2d 177, 192 (2004), the United States Supreme Court determined the Confrontation Clause prohibited the admission of testimonial statements made by an unavailable witness who has not been subject to cross-examination. Statements that are nontestimonial are not subject to scrutiny under the Confrontation Clause. *State v. Musser*, 721 N.W.2d 734, 753 (Iowa 2006) (citing *Davis v. Washington*, 547 U.S. 813, ___, 126 S. Ct. 2266, 2276, 165 L. Ed. 2d 224, 236 (2006)).

Testimonial statements include: (1) statements taken by police officers during the course of an interrogation, (2) ex parte in-court testimony or its functional equivalent, (3) extrajudicial statements contained in formalized

testimonial materials, and (4) statements made under circumstances that would lead an objective witness to reasonably believe the statements could be used at a later trial. *State v. Bentley*, 739 N.W.2d 296, 298 (Iowa 2007) (citing *Crawford*, 541 U.S. at 52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193). The statements made in Kelly's report could be considered testimonial because Glenda was referred to Kelly by a member of the Division of Criminal Investigation, and therefore it is objectively reasonable to believe the report would be used in legal proceedings.

We note, however, that *Crawford* did not specifically address the application of the Confrontation Clause to an expert's testimony about the basis for the expert's opinion under rule 5.703.[1] *See United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007). In the past, courts determined an expert's reliance on information provided by others did not violate the Confrontation Clause as long as the expert was available for cross-examination and the defendant had access to the information relied upon by the expert. *United States v. Abbas*, 74 F.3d 506, 512 (4th Cir. 1996); *Reardon v. Manson*, 806 F.2d 39, 42 (2d Cir. 1986); *United States v. Lawson*, 653 F.2d 299, 302 (7th Cir. 1981).

This reasoning may still be applicable in light of *Crawford*. *See State v. Lewis*, 235 S.W.3d 136, 151 (Tenn. 2007) (noting "[m]ost courts have concluded that the Confrontation Clause is satisfied if the defendant has an opportunity to cross-examine the expert because his opinion is in evidence—not the underlying

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[1] Iowa Rule of Evidence 5.703 is based on Federal Rule of Evidence 703. The federal rule, however, also includes the statement:

> Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703.

facts" (quoting Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 after Crawford v. Washington*, 55 Hastings L.J. 1539, 1540 (2004))); *see also United States v. Zavala*, 141 Fed. Appx. 69, 75 (3d Cir. 2005) (rejecting *Crawford* argument by finding evidence was "exactly the type of testimony, based on inadmissible evidence which is permitted by Federal Rule of Evidence 703"); *People v. Thomas*, 30 Cal. Rptr. 3d 582, 587 (Cal. Ct. App. 2005) (holding *Crawford* "does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions"); *State v. Delaney*, 613 S.E.2d 699, 701 (N.C. Ct. App. 2005) (finding no *Crawford* violation where expert testified to results of tests by others, and expert was available for cross-examination); *State v. Barton*, 709 N.W.2d 93, 97 (Wis. Ct. App. 2005) (holding *Crawford* did not undermine a previous rule that "[a] defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another").

On the other hand, some courts have cautioned that the testifying expert should not repeat the opinion of the absent expert to the jury. *United States v. Henry*, 472 F.3d 910, 914 (D.C. Cir. 2007) ("*Crawford,* however, did not involve expert witness testimony and thus did not alter an expert witness's ability to rely on *(without repeating to the jury)* otherwise inadmissible evidence in formulating his opinion under Federal Rule of Evidence 703.") (emphasis added); *United States v. Lombardozzi*, 491 F.3d 61, 73-74 (2d Cir. 2007) ("McCabe's reliance on

out-of-court testimonial statements in forming his opinion that Lombardozzi is affiliated with organized crime may only have been permissible if McCabe applied his expertise to those statements *but did not directly convey the substance of the statements to the jury.*" (emphasis added)).

A commentator has stated, "In a case where an expert forms an opinion from many sources, including his own experience, rather than simply relating testimonial hearsay to the jury, there is less risk of a Confrontation Clause violation." Olson, 55 Hastings L.J. at 1558. The commentator additionally states:

> On the other end of the spectrum exist cases where an expert has relied on a number of sources and types of data and has added significant expertise to interpret and analyze them. In these circumstances, a confrontation violation likely will not exist because the expert's opinion is truly original and a product of his special knowledge or experience, and the defendant can test its reliability by cross-examination of the expert.

Id. at 1560.

Regardless of whether Dr. Seaton's recitation of Kelly's conclusion violated the Confrontation Clause, it is beyond reasonable doubt that any error was harmless. *State v. Peterson,* 663 N.W.2d 417, 431 (Iowa 2003) (stating in the case of constitutional error, error is harmless only if the State proves beyond a reasonable doubt the error did not contribute to the result), Here, Kelly's testimony was limited to whether Reetz had sex with Glenda, a fact admitted by Reetz. We are convinced the *Peterson* standard has been met in this case.

We conclude the district court properly overruled Reetz's objections to Dr. Seaton's statements about Kelly's report.

III. Testimony of Hughes

Outside the presence of the jury Reetz proffered testimony from Hughes that he heard from other people at his church that Glenda had engaged in a sexual affair with an elderly man in the church. He also stated that he observed Glenda engage in flirtatious behavior at a restaurant or bar, and he believed she was trying to pick up men. Hughes admitted that the basis for his testimony was "mostly a result of gossip."

The district court ruled the evidence was inadmissible under rule 5.412(*c*)(1) because Reetz had not made a written motion to offer the evidence prior to fifteen days before the beginning of the trial. The court also found the evidence was hearsay, and that it had no probative value. Our review of the district court's decision is for an abuse of discretion. *State v. Boggs*, 741 N.W.2d 492, 499 (Iowa 2007).

On appeal, Reetz asserts the district court erred in finding Hughes's testimony was inadmissible. Reetz claims Hughes's testimony "positively dispelled the State's theory that Glenda was not able to consent to having sex and defendant has been prejudiced by the exclusion of said evidence." He contends this testimony was necessary to effectively confront the State's evidence.

We determine the district court did not abuse its discretion by refusing to admit Hughes's proffered testimony. The evidence had no probative value. The issue in this case was whether Glenda had the mental capacity to consent to sexual relations. Whether she had engaged in sexual activities at some other

time was not relevant to the issue of her mental capacity to consent to such activities. "Evidence which is not relevant is not admissible." Iowa R. Evid. 5.402. Because the evidence was not relevant, the exclusion of the evidence was not prejudicial to Reetz. Furthermore, because this evidence was not relevant to the issue of capacity to consent, it did not serve to confront the State's case. The proposed testimony was not admissible on several other grounds as well. The testimony was not based on Hughes's personal knowledge. *See* Iowa R. Evid. 5.602. The testimony was based on the hearsay statements of others. *See* Iowa R. Evid. 5.802. Furthermore, generally under rule 5.412(*a*), "reputation or opinion evidence of the past sexual behavior of an alleged victim of such sexual abuse is not admissible."

For all of these reasons we affirm the district court's decision not to admit the proposed testimony of Hughes.

IV. Ineffective Assistance of Counsel

Reetz raises an issue of ineffective assistance of counsel as an alternative argument, asking that if we find he has failed to preserve error on any issue that we consider whether that failure was due to ineffective assistance of counsel. We will consider Reetz's claims about Dr. Seaton's testimony regarding Dr. Taylor's report as a claim of ineffective assistance of counsel due to counsel's failure to specifically object to the testimony during the trial.

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform

an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

The nature of Dr. Seaton's testimony about Dr. Taylor's report differs from his testimony about Kelly's report, in that Dr. Taylor's report addressed the same subject as Dr. Seaton's analysis, whether Glenda had the capacity to consent. We determine defense counsel had a duty to object to Dr. Seaton's testimony about Dr. Taylor's report on hearsay grounds. *See City of Dubuque v. Fancher*, 590 N.W.2d 493, 496 (Iowa 1999) (noting rule 5.703 "does not permit the use of the opinion of a nontestfying expert to corroborate the opinion of the testifying expert"). Dr. Taylor's opinion could not be admitted as substantive evidence. *See Gacke*, 684 N.W.2d at 183. Furthermore, in repeating Dr. Taylor's testimonial statements, there may be a violation of the Confrontation Clause.

Even if defense counsel failed to perform an essential duty, Reetz would need to show a reasonable probability existed that, but for defense counsel's unprofessional errors, the result of the proceeding would have been different. *See State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). Dr. Seaton testified that based on his own evaluation of Glenda, he found she did not have the capacity to knowingly and willingly consent to sexual activity. We conclude Dr. Seaton's testimony that Dr. Taylor stated it was "inconceivable to believe that Glenda would be able to willingly and knowingly consent to sexual activity," was

merely cumulative to Dr. Seaton's testimony based on his own independent evaluation, and did not change the result of the trial. Allegedly improper evidence should not be considered prejudicial when substantially the same evidence is in the record. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006).

We conclude Reetz has failed to show he received ineffective assistance of counsel based on defense counsel's failure to object to Dr. Seaton's testimony about the report of Dr. Taylor.

We affirm Reetz's conviction.

AFFIRMED.