IN THE COURT OF APPEALS OF IOWA

No. 8-158 / 07-0916
Filed May 14, 2008

STATE OF IOWA,
Plaintiff-Appellant,

vs.

DOROTHY LYNN RICHARDS,
Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

The State was granted discretionary review of a district court ruling denying its request for a protective order to allow a then six-year-old alleged victim of child endangerment to testify via closed circuit television. **AFFIRMED.**

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Shelly Sedlak, Assistant County Attorney, for appellant.

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

Thomas Gaul, Public Defender's Office, Council Bluffs, for appellee.

Heard by Miller, P.J., and Vaitheswaran and Baker, JJ.

MILLER, J.

The State was granted discretionary review of a district court ruling denying its request for a protective order to allow a then six-year-old alleged victim of child endangerment to testify via closed circuit television. We affirm.

The State charged Dorothy L. Richards, by trial information, with child endangerment in violation of Iowa Code section 726.6 (2005). The charges stem from allegations that Richards physically abused her boyfriend's then six-year-old son, D.L. The State filed a motion for a protective order seeking to allow D.L. to testify via closed circuit television pursuant to Iowa Code section 915.38(1). Section 915.38(1) provides that a court may 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" by ordering the minor's testimony be taken in a room other than the courtroom. 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." Iowa Code § 915.38(1).

A hearing was held on the State's motion. The State called two witnesses in support of its motion. The district court denied the motion. In doing so the court concluded, in part, that the term "trauma" in section 915.38(1) meant "an emotional injury with lasting or substantial damage to a person." It based this interpretation on several dictionary definitions of the term, because the term is not defined in relation to section 915.38. The court concluded the State did not prove D.L. would suffer substantial and lasting damage and thus did not show he would suffer the required "trauma" if required to testify in Richards's presence. In

addition, the court noted the State's witnesses did not testify that D.L.'s ability to communicate would be impaired if he had to testify in front of Richards. Thus, the court concluded the State had not satisfied the requirements of section 915.38(1) as it had not "establish[ed] the victim will suffer trauma and will have difficulty communicating if required to testify in court in front of [Richards]."

The State filed an application for discretionary review of the district court's ruling and our supreme court granted the application.

When determining whether the trial court erred in granting or denying protection under 915.38(1), we review for errors at law. *State v. Rupe*, 534 N.W.2d 442, 444 (Iowa 1995). To the extent Richards's appeal raises constitutional issues, we review de novo the totality of the circumstances. *Id.*

On appeal the State claims the district court incorrectly interpreted the term "trauma" found in section 915.38(1) by requiring it to prove D.L. would suffer "lasting and substantial" emotional injury by testifying in front of Richards. The State argues the court set an incorrectly high standard to obtain a protective order under section 915.38(1). The State alternatively contends that even if the court applied the correct standard the State satisfied that standard through the expert testimony it provided at the hearing.

In *Maryland v. Craig*, 497 U.S. 836, 853, 110 S. Ct. 3157, 3167, 111 L. Ed. 2d 666, 683 (1990), the United States Supreme Court concluded that the protection of a child witness from trauma was one public policy that may be sufficiently important, at least in some cases, to outweigh a defendant's right to face his or her accusers in court. It stated,

> [I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

Id. at 855, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. The critical inquiry is whether the use of 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.

> [W]here necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, *at least where such trauma would impair the child's ability to communicate*, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.

Id. at 857, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686 (emphasis added).

Craig sets forth a three-part test to determine necessity, a determination that must be case specific on each element of the test. First, the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. *Id.* at 855, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. Second, the trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. *Id*. at 856, 110 S. Ct. at 3169, 111 L. Ed. 2d at 685. Finally, 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*, more than mere nervousness or excitement or some reluctance to testify. *Id*.

> [T]he Confrontation Clause requires the trial court to make a *specific finding* that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child *could not reasonably communicate.*

Id. at 858, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686-87 (first and third emphases added).

Like that statute at issue in *Craig*, Iowa Code section 915.38(1) "preserves the defendant's basic right to confrontation while protecting minor victims from the trauma which often results from testifying in a defendant's physical presence. *If this trauma impairs or handicaps a child's ability to communicate*, protective measures must be adopted." *Rupe*, 534 N.W.2d at 444 (emphasis added).

The State called two witnesses at the hearing on its motion for the protective order. Dr. Ravipati, a child psychiatrist who works with D.L., testified that if D.L. had to testify in front of Richards it would be "extremely anxiety provoking" and "very distressful" to him, he would be "extremely hypervigilant", and it would not be in his best interest to be in the same room with the person who may have abused him. Dr. Ravipati further stated that if D.L. had to testify in front of Richards it would cause him to have setbacks in his treatment. Brigette Maas, a program therapist who works with D.L., also testified at the hearing. She testified D.L. was "very hypervigilant" and when redirected to do new tasks or when he perceives he may be in trouble he "hides underneath tables and chairs."

Maas also opined that if D.L. had to testify in front of someone who had abused him he would regress in his behaviors.

We agree with the district court that the State did not provide sufficient case-specific evidence that testimony by D.L. in the courtroom in the presence of the defendant would result in him suffering such serious emotional distress that he would not be able to reasonably communicate. *See Craig,* 497 U.S. at 858, 110 S. Ct. at 3170, 111 L. Ed. 2d at 686-87. For example, the State's witnesses provided no testimony that D.L. had stated he was afraid of Richards, or that he would have difficulty answering questions in front of Richards. *See Rupe*, 534 N.W.2d at 444. Dr. Ravipati testified *generally* about what *children* who are abused go through, including displaying avoidance behaviors and hypervigilance, and how when such children are exposed to their abuser they "tend" to become more withdrawn and emotionally uptight. However, Dr. Ravipati did not express any opinion that if D.L. were to testify at trial in front of Richards he would exhibit these behaviors in the courtroom, or that he would not be able to reasonably communicate. Nor did Brigette Maas express such an opinion.

Contrary to the State's argument in its brief, we do not believe the "only fair inference" from Dr. Ravipati's testimony is that D.L.'s ability to communicate would be impaired by testifying in front of Richards. When viewed in light of the absence of any testimony opining that D.L.'s ability to communicate would be impaired, we believe that is only one possible inference that could be drawn from the testimony.

We conclude the district court did not err in denying the State's motion for a protective order, because the State did not to establish that D.L. would have difficulty communicating if he were to testify in court in front of Richards, a requirement of *Craig* and section 915.38(1). Because we have determined the district court was correct in concluding the State did not present sufficient specific evidence that D.L.'s ability to communicate would be impaired by testifying in front of Richards, and for that reason did not err in denying the State's motion for a protective order, we need not decide whether the district court erred by utilizing an overly strict definition of "trauma."

AFFIRMED.