

2011 IL App (2d) 100283-U  
No. 2—10—0283  
Order filed July 19, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Ogle County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08—CF—219
	)	
ALBERTO L. FUENTES,	)	Honorable
	)	Michael T. Mallon,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE BOWMAN delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

**ORDER**

*Held:* The trial court did not abuse its discretion in excluding a child's statements to an interviewer under section 115—10, as the interviewer's suggestive questioning and the ambiguity as to the incidents being discussed militated against the reliability of the statements.

¶ 1 The State charged defendant, Alberto L. Fuentes, with predatory criminal sexual assault of a child (720 ILCS 5/12—14.1(a)(1) (West 2008)) and aggravated criminal sexual assault (720 ILCS 5/12—16(c)(1)(i) (West 2008)). The State moved to admit, pursuant to section 115—10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115—10 (West 2008)), statements that the victim made

to her mother and to a forensic interviewer. The trial court denied the motion and the State appeals. The State contends that the trial court erred in finding that the interviewer coaxed the victim into making accusatory statements. We affirm and remand.

¶ 2 The indictment alleged that defendant knowingly placed his penis in the mouth of B.F., his five-year-old daughter. The State sought to admit B.F.'s statement to her mother in which she initially revealed the alleged abuse, as well as a DVD of a later interview with Sky Nieson Smith at the Shining Star Children's Advocacy Center.

¶ 3 At the hearing on the motion, Megan Fuentes testified that she was B.F.'s mother. She had two other children, A.F. and G.F. On September 21, 2008, she was playing "I spy" with her daughters and her mother, Linda Lynch. The girls had just returned from a weekly visit with defendant, from whom Megan was separated. At one point, A.F. touched Lynch's breast. When told that "people don't touch people on their privates," A.F. said that "her daddy stuck his PP in her mouth." B.F. became extremely scared and upset. She was "freaking out" and saying "don't tell her it, don't say anything."

¶ 4 Megan took B.F. into another room and asked if there was anything she needed to tell her. B.F. was still crying, scared, and shaken. Megan told B.F. that she was not in trouble and that she "needed to tell the truth and what was going on." B.F. said that "one time her daddy caught her rubbing herself on the bed, and he called her over to him, and he pulled her pants down and touched her." B.F. said that this happened when they lived at their former apartment on South Second Street, which would have been between October 2007 and May 2008. Megan called defendant and "went off on him," then called the police.

¶ 5 The police spoke briefly to Megan, telling her not to talk about the matter with B.F. or A.F. unless one of the girls brought it up. The following day, Megan heard A.F. telling a friend what had happened and told her that she should not be talking about this with other children. Otherwise, she had no further conversations with A.F. or B.F. about the matter.

¶ 6 Sky Nieson Smith testified that she had been a forensic interviewer at Shining Star. She interviewed B.F. on September 23, 2008. The trial court viewed the video of the interview. On the video, Smith initially talked with B.F. about her family, parts of the body, touches that she does and does not like, and private places that should not be touched. Smith took a break at about 10:20 a.m., leaving the room for about a minute.

¶ 7 When Smith resumed the conversation, she asked B.F. if someone in her family had said anything about touches or private parts. She responded that her mother asked them if Dad wanted them to touch him in private. She also mentioned “sucking on somewhere bad.” B.F. then described an incident in which defendant broke her arm by flipping her over in bed when she was a baby.

When asked what she meant by “sucking somewhere bad,” B.F. said that she did not remember all of it, but remembered only “half of it.” She did not want to tell what happened because she was “too scared.” She did not remember what happened because she was “too little.” (She stated that she was three at the time of the incident.)

¶ 8 B.F. said that she was sleeping in her mother’s room at her grandmother’s house when defendant woke her up and wanted her to “suck on his private.” B.F. was wearing her pajamas. Defendant was wearing boxers or “all clothes.” B.F. pointed to the genital area of a picture of a boy when asked where the sucking was. Defendant made her suck on his privates over his boxers.

¶ 9 When asked what she meant by “suck,” B.F. initially replied, “I don’t know, I’m too little for that.” However, she eventually said that she touched defendant on his privates with her hand. Defendant made her do this. She touched him only with her hand, not with her mouth. She used the hand of a doll to touch the groin area of a drawing of a boy to show what defendant made her “suck.” She also made a drawing of her hand touching defendant’s groin area.

¶ 10 B.F. said that defendant did not touch her during this incident. Defendant touched her “there” (pointing to the groin area of a drawing of a girl) “long, long ago.” Defendant touched her only with his hand. Defendant rubbed her there, then went into the bathroom to wash his hands. Defendant touched her “on [her] skin.” This happened once when she was three. Defendant did not touch her anywhere else on her body or use anything other than his hand. Defendant told her not to tell, but she told her mom.

¶ 11 After B.F. drew a picture of how she touched defendant’s “privates” with her hand, Smith took a second break. She returned to the room and talked with B.F. about safe people to tell if someone touches her in a way she does not like or if she feels unsafe. After the second break, B.F. did not directly discuss any alleged sexual abuse.

¶ 12 The trial court denied the motion to admit the DVD and the statements to B.F.’s mother. The trial court initially stated no reasons for its decision. In denying the State’s motion to reconsider, the court stated:

“[T]he tape of the interview, I believe, did show that the interviewer led the witness, not coached, but she certainly—when the minor was not giving the responses the interviewer appeared to want. I don’t recall if she recessed two times or three times before she went back in and asked additional questions, but I know there were—at least twice, I believe, where the

interviewer stopped the interview, went outside the room and came back in, and then began asking much more leading questions in order to illicit [*sic*] what I assume the interviewer wanted to hear, so that was the major reason why I granted [*sic*] the motion.”

The State timely appeals, specifically attacking the exclusion of only the DVD.

¶ 13 Section 115—10 provides for the limited admission of hearsay statements in a prosecution for a sexual act committed against a victim less than 13 years old. Specifically, the statute provides for the admission of evidence of a victim’s out-of-court statement “describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense” for which the defendant is being prosecuted. 725 ILCS 5/115—10(a)(2) (West 2008). Before admitting such evidence, the trial court must conduct a hearing to decide whether the statement is sufficiently reliable. 725 ILCS 5/115—10(b)(1) (West 2008).

¶ 14 In a section 115—10 hearing, the trial court should evaluate all the circumstances to decide if the statements have sufficient indicia of reliability. Factors to consider include: (1) the child's spontaneity and consistent repetition of the incident; (2) the child's mental state; (3) use of terminology unexpected of a child of similar age; and (4) the lack of motive to fabricate. *People v. Cookson*, 215 Ill. 2d 194, 202 (2005). The State, as the proponent of the statements, has the burden to show that they are reliable and not the result of adult prompting or manipulation. *People v. Sandefur*, 378 Ill. App. 3d 133, 143 (2007). Generally, evidentiary rulings are within the trial court’s discretion, and this court will not overturn such a decision absent an abuse of that discretion. *Id.*

¶ 15 Although the parties discuss all four factors at some length, the decisive factor here is the first one. The second and third factors, the child's mental state and her use of terminology unexpected of a child of similar age, do not strongly favor either party. The victim’s mental state and

terminology were about what one would expect from a five-year-old discussing such a delicate subject. The fourth factor also does not strongly favor either party. Although the victim's mother and defendant were going through a divorce, and each party speculates how this may have affected the victim's statements, there is no evidence that the victim would have had a motive to accuse her father. There is also no evidence that the victim's mother encouraged the victim to accuse her father in the hope of gaining an advantage in the divorce proceedings. Specifically, Smith opined that there was no indication that the victim had been told what to say.

¶ 16 Thus, we consider the first factor, the child's spontaneity and consistent repetition of the incident. We note that this includes two distinct, although related, notions. We consider first the “spontaneity” prong of the first factor. The DVD shows that Smith frequently had to ask the victim multiple questions before getting her to talk about the alleged incident (or incidents) of sexual abuse. Initial questions were often met with answers about other, nonsexual incidents, denials that anything happened, or protestations that the victim could not remember the incidents. Smith often asked increasingly leading questions to get B.F. to talk about the sexual abuse.

¶ 17 Obviously, sexual abuse is a difficult subject for a five-year-old child to talk about, and Smith's questions were in all likelihood necessary to keep B.F. focused on the subject of the interview, but that is the problem. B.F. could very well have perceived that her reason for being there was to talk about inappropriate touching, and wished to please the interviewer by talking about such incidents, or may have felt that she would not be allowed to leave the interview until she repeated her accusations of sexual abuse by her father.

¶ 18 Suggestive questioning by an interviewer has been identified as an important factor militating against the reliability of an out-of-court statement. *People v. Ware*, 259 Ill. App. 3d 466, 471 (1994)

(citing *Idaho v. Wright*, 497 U.S. 805, 826 (1990)); see also *People v. Zwart*, 151 Ill. 2d 37, 44 (1992) (admission of statement reversed where there was no evidence about the content of the questions that precipitated the victim's statements). We recognize that Smith's questions were not leading in the sense that they suggested the answers. See M. Graham, Cleary & Graham's Handbook of Illinois Evidence §611.9, at 505 (7th ed. 1999). The questions were not as suggestive or as opinionated as those in *Ware*. See *Ware*, 259 Ill. App. 3d at 470 (interviewer repeatedly asked victim, " 'What did Todd do to you the other day?' "). Nevertheless, Smith repeatedly focused the interview onto the topic of sexual abuse with questions about touching.

¶ 19 The "consistency" prong is problematic because it is not entirely clear how many incidents were being discussed. Initially, A.F. volunteered that defendant "stuck his PP" in her mouth. Then, upon questioning by her mother, B.F. disclosed an incident when defendant touched her. She later told Smith, apparently for the first time, about an incident in which she touched defendant's penis. Later in the interview, she consistently described the earlier incident. Thus, B.F. twice described an incident in which defendant touched her—which is apparently not one of the incidents alleged in the indictment. Only once did she mention an incident in which she touched defendant's penis with her hand (which apparently corresponds with count II of the indictment). She never stated that defendant placed his penis in her mouth, although she unexpectedly used the term "suck" to refer to touching with her hand.

¶ 20 Further, as defendant notes, B.F. on several occasions denied that anything improper occurred, or stated that she could not remember. Only after additional questioning by Smith did she then discuss the alleged abuse by defendant. In light of these considerations, we cannot say that the trial court abused its discretion in excluding the recorded interview.

¶ 21 *Sandefur*, which the State cites, does not compel a different result. Although there are undoubtedly similarities between the facts of *Sandefur* and those of this case, the court there merely upheld the trial court's ruling that the statement was reliable. Given the fact-sensitive nature of the inquiry, we cannot say that the existence of some similarities compels the conclusion that the trial court here abused its discretion by denying admission of the DVD.

¶ 22 The initial statements to the child's mother seem to be on a somewhat different ground. The parties do not discuss these statements in much detail, and the trial court's rationale for excluding the DVD does not apply to the initial statements, which were the result of only a few general questions. See *Sandefur*, 378 Ill. App. 3d at 144 (victim's statements to her mother resulted from mother's reasonable questions). However, the State develops no argument against the exclusion of these statements, and thus we affirm the entirety of the trial court's order. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 23 We affirm the order of the circuit court of Ogle County, and we remand the cause for further proceedings.

¶ 24 Affirmed and remanded.