2015 IL App (5th) 130141-U

NO. 5-13-0141

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Randolph County.
	)	
v.	)	No. 12-CF-130
	)	
GREGORY I. FAJARDO,	)	Honorable
	)	Richard A. Brown,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Cates and Justice Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err when it granted the State's motion to allow the minor witness, A.N., to testify via closed-circuit television rather than in open court in this prosecution for predatory criminal sexual assault of a child.

¶ 2 In this direct appeal, the defendant, Gregory I. Fajardo, asks us to reverse his conviction and sentence, following a trial by jury, for the offense of predatory criminal sexual assault of a child. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal are derived from this court's review of the record on appeal, and are as follows. On September 17, 2012, the

defendant was charged, by information, with two counts of predatory criminal sexual assault of a child. On January 11, 2013, the State filed a motion asking that the alleged minor victim in the case, A.N., be allowed to testify by means of closed-circuit television, rather than in open court. On January 17, 2013, a hearing was held on the State's motion. At the outset of the hearing, counsel for the State noted that pursuant to section 106B-5(a)(2) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/106B-5(a)(2) (West 2012)), the trial judge could allow A.N. to testify via closed-circuit television if the judge found A.N. "would suffer serious emotional distress that would make it difficult for the child to reasonably communicate her testimony and would also cause her to suffer from severe adverse effects." Counsel stated that she could call a witness or could rest on the motion as filed, along with its accompanying memorandum of law, to which the trial judge responded that it was the State's motion, but that "it's only fair to tell you that my decision on whether or not to make these special provisions for the child would in large part be based on the testimony that I heard regarding the need for deviation from the confrontation between the accused" and A.N., and that "if you've got a good reason, you better–you better present it with some testimony."

¶ 5 The State thereafter called A.N.'s mother, Melodie Nesbitt, as a witness. Nesbitt testified that at the time of the hearing, A.N. was five years old, but that she was four years old at the time of the alleged abuse. Nesbitt testified that the defendant−who we note the record indicates was 18 years old at the time of the hearing−was her stepson and that the defendant and A.N. were "half-brother and–sister." She testified that after the allegations against the defendant came to light, another sister of the defendant sent

Nesbitt threatening messages via a social media site. The messages only threatened Nesbitt, not A.N., and A.N. was not aware of the messages. When asked if she was concerned about A.N. "being in court providing testimony while members of her family are in the courtroom" or while members of the defendant's family were in the courtroom, Nesbitt answered: "Yes. Because she still in her mind cares and loves all of her family, and I don't think she should have to feel awkward in front of them." Nesbitt denied that there was animosity from the defendant's family toward A.N., but testified that she was concerned about A.N. testifying in front of the defendant's family members. When asked if she thought that in such a situation A.N. "would have difficulty talking about what happened," Nesbitt testified that A.N. "would be extremely nervous," and that Nesbitt did not believe A.N. "would know how to act." She testified that she believed it would be easier on A.N. to testify in "a smaller room with just the judge and the attorneys present." When asked if she believed it would be in A.N.'s best interest to testify via closed-circuit television rather than in open court, Nesbitt answered, "I believe so." When asked if she felt having A.N. testify in open court "would cause serious or significant emotional harm or trauma to" A.N., Nesbitt answered, "Yes, I do."

¶ 6 On cross-examination by defense counsel, Nesbitt testified that A.N. had only recently begun counseling−having to date only completed "initiation with the counselor"−despite Nesbitt having requested counseling over a month before. Nesbitt conceded that she was not a psychiatrist, nor trained in psychiatry, but testified that when she had told A.N. that A.N. might have to testify against the defendant, A.N. did not seem to understand. When asked if A.N. acted "emotionally upset" at the prospect of

testifying, Nesbitt answered, "She didn't act any way," and confirmed that A.N. had "no response" to the conversation. Although Nesbitt tried to explain to A.N. what a trial was, A.N. did not "seem interested in" what Nesbitt was saying. In response to questions from defense counsel, Nesbitt testified that A.N. had never spoken in front of large groups of people or acted "in a play or pageant or anything like that."

¶ 7 The trial judge then conducted his own brief cross-examination of Nesbitt, to ascertain A.N.'s date of birth, her grade in school, and the school she attended. On redirect examination, counsel for the State asked Nesbitt if she had tried to shield A.N. "from the family issues surrounding this case." Nesbitt testified that she had. Counsel asked if A.N. had been informed that "there are individuals from [the] defendant's family that are upset that this case is proceeding," to which Nesbitt replied that she had not. When asked why, Nesbitt testified that she didn't want A.N. "to know those things because she's only five. She doesn't need [to be] involved in grown-up stuff."

¶ 8 Following argument, the trial judge stated that he found "that having 14 people sitting in the jury box within a few feet of her, as well as spectators who are most likely to be in the courtroom, and again as well as her brother, is likely to cause [A.N.] to suffer serious emotional distress." Accordingly, he granted the State's motion to allow A.N. to testify via closed-circuit television.

¶ 9 At trial, counsel for the defendant again objected to A.N. testifying by closed-circuit television. Apparently the trial judge construed counsel's objection as a motion to reconsider his previous ruling, because the trial judge ultimately stated, "Motion is denied." A.N. subsequently testified via closed-circuit television as to the abuse of her by

the defendant. Other testimony was adduced as well, none of which is relevant to the issue raised on appeal by the defendant. At the conclusion of the trial, the jury found the defendant guilty of one count of predatory criminal sexual assault of a child. The defendant filed a posttrial motion in which he again challenged the decision to allow A.N. to testify via closed-circuit television. His motion was denied, and this timely appeal followed.

¶ 10 ANALYSIS

¶ 11 On appeal, the defendant raises only one issue: whether the trial judge erred when he granted the State's motion to allow A.N. to testify via closed-circuit television. The defendant contends both that the trial judge erred and that he was prejudiced by the error. However, because we conclude no error occurred, we need not consider the question of prejudice. The defendant also urges this court to conduct a *de novo* review of the trial judge's decision. We have long reviewed the decision of a trial judge to allow or not allow a witness to testify via closed-circuit television under the abuse of discretion standard. See, *e.g.*, *People v. Ely*, 248 Ill. App. 3d 772, 776 (1993). The defendant has provided no compelling argument that would justify a departure from this long-standing procedure, nor is this court aware of any; accordingly, we decline to engage in *de novo* review, and instead will reverse the ruling of the trial judge only if we find an abuse of discretion. That said, we note that even if we were to review the judge's decision *de novo*, we would find no error in this case.

¶ 12 With regard to the substance of his argument, the defendant contends "there were no clear factual findings which supported allowing A.N. to testify via closed circuit

television." The defendant notes that in *People v. Fletcher*, 328 Ill. App. 3d 1062, 1070 (2002), this court held that the Code "requires that before a victim is allowed to testify via closed-circuit television, the trial court must make a finding that 'testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate or that the child will suffer severe emotional distress that is likely to cause the child to suffer serious adverse effects.' " The defendant posits that the trial judge's finding in the case at bar was based on the judge's "general belief that a child of [A.N.'s] age would be upset testifying in front of a jury and spectators," and that Nesbitt's testimony at the hearing was not sufficient "to support a finding that A.N. would be distressed by testifying in the courtroom." The defendant contends "specific testimony as to [A.N.'s] preparation for trial and an assessment of [her] mental state" was required at the hearing.

¶ 13 There are a number of problems with the defendant's arguments. First, there is no basis in the record for the defendant's statement that the trial judge's finding in the case at bar was based on the judge's "general belief that a child of [A.N.'s] age would be upset testifying in front of a jury and spectators." To the contrary, the record indicates that the trial judge was skeptical of allowing A.N. to testify via closed-circuit television. When, at the outset of the hearing on the State's motion, counsel for the State indicated that she could call a witness or could rest on the motion as filed, along with its accompanying memorandum of law, the trial judge responded that it was the State's motion, but that "it's only fair to tell you that my decision on whether or not to make these special provisions for the child would in large part be based on the testimony that I heard regarding the need

for deviation from the confrontation between the accused" and A.N., and that "if you've got a good reason, you better–you better present it with some testimony." Clearly the trial judge had no intention of basing his decision on any "general belief" about children of A.N.'s age, and any argument to the contrary is both a distortion of the record and without merit.

¶ 14 Second, we cannot agree with the defendant's bald assertion that the trial judge made "no clear factual findings which supported allowing A.N. to testify via closed circuit television." As described above, following the hearing the trial judge stated that he found "that having 14 people sitting in the jury box within a few feet of her, as well as spectators who are most likely to be in the courtroom, and again as well as her brother, is likely to cause [A.N.] to suffer serious emotional distress." This was a clear factual finding, supported by the testimony of A.N.'s mother, Melodie Nesbitt, that, *inter alia*: (1) A.N. was five years old; (2) the defendant was her half-brother; (3) Nesbitt was concerned about A.N. testifying in open court in front of the defendant's family members because even though some of the defendant's family members were upset that the defendant was being prosecuted, A.N. "still in her mind cares and loves all of her family"; (4) Nesbitt agreed that if forced to testify in open court, A.N. "would have difficulty talking about what happened," and that in fact A.N. "would be extremely nervous" and would not "know how to act"; (5) Nesbitt agreed that testifying in open court "would cause serious or significant emotional harm or trauma to" A.N.; and (6) A.N. had never spoken in front of large groups of people or participated in "a play or pageant or anything like that."

¶ 15 Accordingly, we reject the meritless contention of the defendant that Nesbitt's testimony at the hearing was not sufficient "to support a finding that A.N. would be distressed by testifying in the courtroom." With regard to the defendant's contention that "specific testimony as to [A.N.'s] preparation for trial and an assessment of [her] mental state" was required at the hearing, we first note that the Code does not even require a hearing on a motion to allow testimony via closed-circuit television, let alone specific testimony as to the preparation of the witness for trial. See 725 ILCS 5/106B-5(a)(2) (West 2012); see also *People v. Fletcher*, 328 Ill. App. 3d 1062, 1071 (2002) ("our statute does not require a hearing to determine whether the best interests of the child would be served by allowing the child to testify via closed-circuit television"). We decline to read provisions into the Code that do not exist. Moreover, with regard to "an assessment" of A.N.'s mental state, we find that the trial judge conducted one, as evidenced by his factual findings, which as noted above were supported by the testimony adduced at the hearing.

¶ 16 CONCLUSION

¶ 17 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 18 Affirmed.