2018 IL App (3d) 170402-U

Order filed October 15, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellant,	)	
	)	Appeal No. 3-17-0402
v.	)	Circuit No. 16-CF-529
	)	
MARY E. TOUNE,	)	Honorable
	)	Clark E. Erickson,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not abuse its discretion in denying State's motion to introduce hearsay statements.

¶ 2 In a prosecution for, *inter alia*, predatory criminal sexual assault of a child, the State moved to admit certain hearsay statements made by the victim pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2016)). The circuit court denied that motion and the State appeals. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant, Mary E. Toune, with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2016)), aggravated criminal sexual abuse (*id.* § 11-1.60), and harmful material (*id.* § 11-21(b)(1)(A)). Each of the counts alleged that defendant committed the offenses against E.T., who was under 13 years of age when the offenses were committed. The State subsequently filed notice of its intent to use hearsay statements made by E.T. to three individuals, pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2016)).

¶ 5 At the ensuing section 115-10 hearing, Emily Toune testified that she was E.T.'s mother. E.T. was six years old at the time of the hearing. Emily explained that she was formerly married to Andrew Toune, and defendant was Andrew's sister and E.T.'s aunt. Emily testified that on November 20, 2016, E.T. was at Andrew's house pursuant to visitation arrangements. That day, Emily received a phone call from Megan, Andrew's girlfriend. Megan informed Emily that E.T. had been caught viewing pornography on a tablet.

¶ 6 Emily was angry, but did not speak to E.T. about the pornography when he returned to her home that night. The next day, Emily's neighbor, Beth Olszewski, came to Emily's house. She and Emily discussed Megan's account that E.T. had been caught viewing pornography. Emily then talked to E.T. She described that conversation as follows:

> "I told him to tell me about the tablet that he has and he got really like upset. He was really agitated and started to cry. And he said mommy I'm so sorry. I said what are you sorry for, Buddy? You didn't do anything wrong. And he said [defendant] makes me watch naked pictures. And I said what—what do you mean? And then he was crying and saying I'm so sorry. I'm so sorry."

Emily then removed herself from the conversation because she was angry and distraught. She called the police the next day.

¶ 7 Emily testified that the police arranged for E.T. to be interviewed by the children's advocacy center (CAC). Emily took E.T. to the CAC that same day, two days after Megan had told her E.T. had been caught viewing pornography. Emily did tell E.T. what the interview would be about and she did not watch the interview.

¶ 8 In the vehicle on the way home from the CAC interview, E.T. was nervous and apologetic. He told Emily he did not want defendant to go to jail. Emily testified: "I believe it was in the car when he said that he got poked with a stick and that [defendant] would make his private stand up and she would smack it." Emily clarified that E.T. said he got "poked in his bottom" with the stick. When Emily asked E.T. if anyone else was present when these things happened, he told her that defendant's boyfriend, Ryan, was there or that he was at work.

¶ 9 Olszewski testified that she spoke with Emily at her house on November 21, 2016. Emily informed her that E.T. had been caught viewing pornography. Olszewski later asked E.T. about the tablet, and E.T. told her "he watches naked people on the tablet." When Olszewski asked E.T. with whom he watched the naked people, he said "Aunt Mary." Olszewski testified that at that point Emily was in shock and left the room.

¶ 10 Olszewski continued talking to E.T. She asked E.T. if he and defendant ever played any games together. E.T. told her they would play the game "tickle my pickle." When she asked E.T. what that game consisted of, he told her they played the game in his underwear and defendant "touched his privates." E.T. stood up and put his hand in his underwear to demonstrate the game.

¶ 11 Andrea Longtin testified that she conducted the CAC interview with E.T. She testified that E.T. was five years old at the time of the interview. She found his behavior during the interview to be that of a typical five year old.

¶ 12 A video recording of the CAC interview was submitted into evidence and reviewed by the circuit court. In the video, Longtin begins by asking E.T. what the best part of being five years old is, to which E.T. replies: "making good choices." Longtin then asks E.T. why he is there, to which he replies: "I told the truth." When Longtin asks what he told the truth about, E.T. states: "[Defendant] touched me in the privates" Later, E.T. says defendant touched him on the privates when they play a game. E.T. explains that the game is called "pop pig" E.T. describes the game as a pig's head getting bigger and eventually popping.[1]

¶ 13 E.T. tells Longtin in the interview that defendant touched him on the privates with her finger, "a pointer" and "a gun." He also tells Longtin: "She goes in my underwear" When Longtin asks E.T. again where defendant touched him, he merely replies: "She shoots the feet off of reindeer." E.T. also states that defendant touched his buttocks with a pointer, that the pointer goes "in [his] butt" and he "just poop[s] it out." Longtin asks if defendant ever used anything other than a pointer to touch E.T.'s buttocks, he responds: "A square."

¶ 14 E.T. tells Longtin the incidents he is describing occurred at his grandmother's house. He also states that his grandmother witnessed the touching, but did not say anything. With respect to defendant's boyfriend, Ryan, E.T. states that Ryan touched him on the arm, nipple, and buttocks with a shoe. When Longtin asks E.T. to tell her more about Ryan, E.T. replies: "He shot a leg off of a foot stump."

[1]E.T. later calls the game "pop the pig."

¶ 15 Throughout the interview, E.T. appears restless and agitated, moving around in his chair and, as the interview progresses, moving around the room. He is often distracted and unresponsive. At one point, he points to the anatomical drawing provided by Longtin with his foot rather than his finger. Longtin briefly leaves the room about 20 minutes into the interview. The circuit court would later describe that break as follows: "[I]t appeared that Ms. Longtin had grown exasperated with attempting to maintain [E.T.'s] attention. She left the room at that time, presumably to confer with someone else, but when she returned she did not re-initiate the interview."

¶ 16 Following the hearing, the court issued a 10-page written opinion denying the State's motion to admit E.T.'s statements. In the opinion, the court emphasized that it was impossible to determine the length of time that had passed between the alleged acts and E.T.'s statements, observing: "This is because [E.T.] was never asked *when* he was touched by defendant." (Emphasis in original.)

¶ 17 The court also found, with respect to the content of E.T.'s statements, that there was a "general inconsistency from statement to statement." The court noted specifically that, referring to games he and defendant had played together, E.T. told Olszewski they played tickle my pickle and told Longtin they played pop the pig, with no reference to tickle my pickle. As to the instances of abuse themselves, the court found that E.T.'s descriptions varied depending on the person to whom he was speaking. To Emily, E.T. described defendant poking him with a stick and smacking his penis. To Olszewski, E.T. described a game of tickle my pickle in which defendant placed her hand in his underwear. The court continued: "To Andrea Longtin, he presents a patchwork of abuse," including touching his privates while playing pop the pig; touching his privates with a finger, a pointer, and a gun; and inserting a pointer in his butt.

Further, the court found E.T.'s statements inconsistent regarding the actions or presence of people other than defendant. He told Emily both that Ryan was present for the abuse and that he was not. He told Longtin Ryan actually touched him as well, with a shoe. He further told Longtin his grandmother had witnessed the touching but said nothing.

¶ 18 The court listed a number of what it described as "odd statements" made by E.T. throughout the interview. The court wrote:

> "For example, when asked by *** Longtin what part of [defendant's] body touches [E.T.'s] body, he responds 'she shoots the feet off of reindeer.' When reminded by Ms. Longtin of the importance of telling the truth, [E.T.] replies 'I think you can make a truck.' And he describes that [his brother] is touched on the butt with a pointer and a square."

The court found that such responses "give rise to a concern as to his ability to understand the nature of the questions he is being asked, which gives rise to a concern for the reliability of the statements."

¶ 19 Finally, the court expressed concern that no information had been adduced at the hearing regarding the pornography E.T. had been found watching. Noting that it was that incident that precipitated all of E.T.'s statements, the court found that "[i]t would have been helpful to learn specifically what [E.T.] was observed to be viewing, for what length of time he had an opportunity to view material, and *** how he may have gained access to the 'pornography.' " Such information, the court concluded, could have clarified "whether or not [E.T.] is describing perhaps what he saw on a computer as compared to describing what may have actually happened to him."

¶ 20 Following the court's denial of its motion, the State filed a certificate of impairment and a notice of appeal.

¶ 21 ANALYSIS

¶ 22 The State's sole contention on appeal is the circuit court abused its discretion by denying its motion to admit E.T.'s hearsay statements. It maintains that E.T.'s spontaneity, consistency, use of terminology unexpected for a child of similar age, and lack of motive to fabricate render his statements sufficiently reliable to be admitted under section 115-10 of the Code.

¶ 23 Section 115-10 of the Code allows for the introduction of hearsay statements made by child victims in the prosecution of certain sex offenses. 725 ILCS 5/115-10 (West 2016). Such statements will be deemed admissible where the court finds that the "time, content, and circumstances of the statement provide sufficient safeguards of reliability." *Id.* § 10(b)(1).

¶ 24 As part of a section 115-10 hearing, it is the State, as the proponent of the evidence, that bears the burden of demonstrating that the time, content, and circumstances of the child's statements provided sufficient safeguards of reliability. *People v. Zwart*, 151 Ill. 2d 37, 43 (1992). Like any other evidentiary ruling, the circuit court's ruling on a section 115-10 motion is reviewed for an abuse of discretion. *People v. Bowen*, 183 Ill. 2d 103, 120 (1998). Thus, we will not disturb the lower court's ruling unless we find that its ruling was "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 25 The time component of reliability contemplated in section 115-10 is concerned with the intervening time between the alleged abuse and the victim's outcry. See *Zwart*, 151 Ill. 2d at 45-46. That is, a statement made closer in time to the alleged abuse will tend to be considered more reliable, on the grounds that the events are fresher in the child's mind. See *Bowen*, 183 Ill. 2d at

115-16. However, even significant delays between abuse and reporting do not render a victim's statement *per se* unreliable. *Zwart*, 151 Ill. 2d at 46 ("[A]s a general rule, delay in reporting abuse or initial denials of abuse will not automatically render a victim's statements inadmissible under section 115-10.").

¶ 26 Our supreme court has broken down the general precepts of content and circumstances—as found in section 115-10—into numerous subfactors in determining the reliability of statements. Under the heading of content, a court will look to whether the child has shown consistency in his or her repetition of statements. *Bowen*, 183 Ill. 2d at 120. Also as a subfactor of content, a court will look at the language employed by the child in his or her statements. In *Zwart*, for example, the supreme court found that statements made by a three-year-old child "reflect[ing] a knowledge of sexual activity which is unexpected and unusual" for a child of that age militated in favor of reliability. *Zwart*, 151 Ill. 2d at 44. On the other hand, the use of terminology or phrasing *expected* from a young child may be an indicator of reliability insofar as it demonstrates the absence of adult coaching or suggestion. See *People v. West*, 158 Ill. 2d 155, 165 (1994).

¶ 27 Our supreme court has also enumerated a series of circumstances that have a bearing on the reliability of a child's hearsay statements. Primary among these subfactors is the concept of "adult intervention." *Zwart*, 151 Ill. 2d at 46. Premised on the notion that young children are "particularly susceptible to suggestion from outsiders," (*id*. at 45) this subfactor considers whether the questions giving rise to a child's statements were leading or suggestive. *West*, 158 Ill. 2d at 166; *Bowen*, 183 Ill. 2d at 121. It also looks to more pernicious possibilities, such as whether the interview of the child was "coercive or threatening" (*West*, 158 Ill. 2d at 166) or even whether the child was explicitly "encouraged to accuse the defendant of sexual abuse."

Zwart, 151 Ill. 2d at 44-45. Other circumstances that may impact the reliability of a child's statement include the spontaneity of the statement, the mental state of the child giving the statement, and the lack of a motive for the child to fabricate his or her statement. *Bowen*, 183 Ill. 2d at 120.

¶ 28 Thus, supreme court case law establishes a list of no fewer than seven factors that may be considered by a trial court when determining the reliability of a child's hearsay statements under section 115-10. These factors include, but may not be limited to the following considerations: (1) the timing of the statement in relation to the alleged abuse; (2) the consistency of the child's statements; (3) the language used by the child; (4) any adult intervention or suggestion; (5) the spontaneity of the child's statement; (6) the child's mental state; and (7) any motivation the child might have to fabricate his or her statement. Indeed, in its most recent discussion of reliability under section 115-10, the supreme court stated bluntly: "Reliability is judged based on the totality of the circumstances ***." *People v. Stechly*, 225 Ill. 2d 246, 313 (2007) (citing *Idaho v. Wright*, 497 U.S. 805, 819-20 (1990)). Nevertheless, it is these seven enumerated factors that we use to guide our analysis.

¶ 29 At the outset, we note that Longtin's CAC interview with E.T. was completely free of any leading or suggestive questioning, and there was certainly no coercion or manipulation on Longtin's part during that interview. Longtin conducted the interview professionally at all times, even when, as the circuit court pointed out, the circumstances became difficult. While Longtin's method of questioning weighs in favor of the reliability of E.T.'s statements, we must also consider the remaining factors. See *Bowen*, 183 Ill. 2d at 120.

¶ 30 In this case, the trial court concluded that the time factor weighed against a finding of reliability. Specifically, the court found that any calculation of undue delay between the alleged

abuse and E.T.'s outcry was rendered impossible because the State did not establish when the alleged abuse took place. As it was the State's burden to establish that the timing of E.T.'s statements was indicative of reliability, the circuit court correctly construed this failure to establish a timeframe against the State. However, given that even delays of multiple years between abuse and outcry do not necessarily undermine a reliability finding, this factor is also not dispositive. See *id*.

¶ 31 The language used by E.T. in his statements to his mother, Olszewski, and Longtin favors a finding of reliability. A typical five-year-old child would not ordinarily be expected to know of a game called "tickle my pickle" [2] or speak of things going "in [his] butt." Such comments "reflect a knowledge of sexual activity which is unexpected and unusual" for a child of that age militated in favor of reliability. *Zwart*, 151 Ill. 2d at 44. Likewise, there is no evidence on the record that E.T. had any motivation to fabricate his statements; indeed, his comment that he did not want defendant to go to jail demonstrates the opposite. This favors a finding of reliability.

¶ 32 Other circumstantial factors are less clear. For example, E.T.'s statements could be considered spontaneous insofar as they were not the result of leading questions. See *id*. On the other hand, as defendant argues on appeal, E.T.'s statements were not completely spontaneous, as they were only made after he had been caught viewing pornography and his mother confronted him. See *Bowen*, 183 Ill. 2d at 106 (child's outcry described as a sudden revelation made while child watched cartoons).

¶ 33 Similarly, the factor of consistency runs in both directions. The circuit court observed that E.T.'s version of events varied in his accounts to Emily, Olszewski, and Longtin. In

[2]The State posits that the "pickle" in "tickle my pickle" refers to a penis. Defendant asserts that E.T. may have heard the phrase in a cartoon. For the purposes of appeal, we will assume that the State's interpretation—which was clearly the same interpretation taken by Olszewski—is correct.

particular, the court noted that E.T. recounted a completely different game to Longtin (pop the pig) as he did to Olszewski (tickle my pickle). E.T.'s details varied in other respects as well, such as his description of Ryan's participation in the abuse. These variations are, at least in a sense, inconsistent with one another. However, as the State points out on appeal, while the details of E.T.'s accounts varied at times, there were no actual contradictions. That is, it is perfectly possible that defendant and E.T. played both tickle my pickle *and* pop the pig. Moreover, there was a general thread of consistency regarding defendant touching E.T. across each of E.T.'s statements.

¶ 34 The mental state factor is also inconclusive in this case. Emily testified that E.T. was agitated and crying when he made his first statement regarding the abuse, perhaps the mental state that would be expected of a young abuse victim. The circuit court, on the other hand, construed E.T.'s nonsensical answers to indicate that E.T. had less than a full understanding of what he was being asked. Further muddying the waters is the fact that while numerous supreme court opinions have cited mental state as a relevant factor in a section 115-10 reliability analysis, none have clarified how that factor operates. That is, what about a child's mental state impacts the reliability of the statement? As a result, we do not construe E.T.'s mental state either in favor of or against the reliability of his statements.

¶ 35 The most significant factor in this court's judgment—and one cited in the opinion of the court below—is the fact that E.T. had been viewing pornography prior to making the statements in question. Viewing pornography is not one of the seven factors previously enumerated by our supreme court. See *supra* ¶ 27. However, as we stated above, our supreme court has made clear that courts are to consider the totality of the circumstances in making a reliability determination.

Stechly, 225 Ill. 2d at 313. Indeed, given the unique factual circumstances of this case, the trial court properly considered this factor and weighed it heavily.

¶ 36 The undisputed evidence from the section 115-10 hearing established that E.T. had been caught viewing pornography when defendant was not present. His subsequent statement to Emily, that defendant "makes [him] watch naked pictures," indicates that he viewed pornography on multiple occasions. This raises the possibility that the young child's descriptions of "tickle my pickle" or items being put into a butt derived not from his first-hand experiences but from the pornography he had viewed.

¶ 37 Thus, E.T.'s viewing of pornography serves to undermine or neutralize the descriptive language factor. See *supra* ¶ 30. While an ordinary five-year-old child may not be expected to use such terminology that descriptively reports conduct that only consenting adults should be familiar with. The pornography could serve as a source of information about adult sexual conduct and was the proper focus on the trial court's concerns with respect to reliability.

¶ 38 The State takes exception to the circuit court's consideration of E.T.'s pornography viewing as a factor in the section 115-10 determination. The State characterizes the court's comments on that subject as "curious," arguing that any additional evidence regarding that pornography would be "irrelevant" to a reliability determination. We reject this argument. Evidence concerning the content of the pornography E.T. viewed by the child is a very relevant factor for the trial court to evaluate.

¶ 39 In this sense, the circuit court's concerns are analogous to those expressed by our supreme court in *Zwart*. In that case, evidence at the section 115-10 hearing established that the child had been interviewed regarding the alleged abuse on three prior occasions before making

the statements in question. *Zwart*, 151 Ill. 2d at 44. The State presented no evidence regarding the substance of those prior interviews. *Id*. The *Zwart* court concluded:

> "Without such evidence, it was impossible for the trial court to determine whether the victim was questioned in a suggestive manner or was encouraged to accuse the defendant of sexual abuse. It was also impossible for the trial court to determine whether the victim's precocious knowledge of sexual activity was due to sexual abuse, as the State claims, or was the result of suggestive interview techniques." *Id*. at 44-45.

The court further noted that the child was particularly susceptible to suggestion because of her age, and that the circuit court should not presume based on a silent record that the child was *not* influenced by the prior interviews. *Id*. at 45. Ultimately, the *Zwart* court concluded that the circuit court had abused its discretion in finding the statements reliable. *Id*.

¶ 40 To be clear, there were no prior interviews in this case, and there is no implication from any party that the forensic examiner and other adults that spoke with E.T. about these topics did so in a suggestive manner. The evidence of E.T.'s pornography viewing, however, like the prior interviews in *Zwart*, gives rise to the possibility that some or all of E.T.'s narrative came from the pornography. In fact, the record reveals the child's recorded statement was secured professionally and without any improper interviewing techniques. However, pornographic materials were presented to this child long before the criminal investigation began and perhaps doomed the reliability of the child's recorded statement before it began.

¶ 41 Importantly, it is not this court's role to independently determine whether E.T.'s statements should be considered reliable under section 115-10, but only whether the circuit court's decision was arbitrary, fanciful, or unreasonable. *Hall*, 195 Ill. 2d at 20. In a well-

reasoned 10-page written opinion, the court found that it could not rule out the possibility that E.T.'s statements had been influenced by pornography. Moreover, it found that because the State had failed to provide evidence as to when the alleged abuse took place, it was impossible for the court to determine whether the timing of E.T.'s statements was indicative of reliability. While other factors certainly weighed in favor of a reliability finding, we cannot say that the circuit court acted arbitrarily or unreasonably in reaching its conclusion. Accordingly, we affirm the circuit court's denial of the State's motion to introduce E.T.'s hearsay statements.

¶ 42 CONCLUSION

¶ 43 The judgment of the circuit court of Kankakee County is affirmed.

¶ 44 Affirmed.