IN THE COURT OF APPEALS OF IOWA

No. 8-064 / 07-0237
Filed March 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EDWIN BELLO PAREDES,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Edwin Paredes appeals his judgment and sentence for child endangerment resulting in serious injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Janet Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Edwin Paredes appeals his judgment and sentence for child endangerment resulting in serious injury. He maintains the district court should have admitted a hearsay statement made by his girlfriend that exculpated him and potentially implicated her in the crime.

I. Background Facts and Proceedings

Paredes and his sixteen-year-old girlfriend, Cassidy, became the parents of J.M. Paredes, Cassidy, and J.M. lived together in the home of Paredes's sister. When J.M. was approximately two months old, the parents noticed the child was "twitching." Paramedics determined he was having seizures and rushed him to a hospital emergency room. A pediatric intensive care physician diagnosed J.M. with "[s]haken baby syndrome, inflicted trauma." He predicted that the baby "would have a very strong chance to be blind, be deaf, have significant motor delay if he was able to walk again as well as having continued problems with seizures later."

The hospital notified the Department of Human Services of the child's injuries. The Department, in turn, informed police. Department employees and a police officer spoke to Paredes and Cassidy. Both parents said they were J.M.'s only caretakers in the days preceding the seizures, except for fifteen minutes the baby spent with Paredes's sister.

Paredes eventually confessed to shaking J.M. He later affirmed his confession, albeit with some equivocation.

Approximately a week after J.M. was hospitalized, Cassidy contacted a Department social worker and discussed J.M.'s diagnosis. She stated Paredes

was not responsible for the child's injuries. She also stated she was afraid she might go to prison when she was eighteen if she said she shook the baby. The social worker memorialized the conversation in an e-mail and transmitted the e-mail to a detective at the local police department.

The State charged Paredes with child endangerment resulting in serious injury. Iowa Code § 726.6(1)(b) (2003). On the day of trial, the State filed a motion in limine seeking to exclude as hearsay any testimony about Cassidy's conversation with the social worker. The district court sustained the motion but offered defense counsel an opportunity to create a record.

Paredes moved to reconsider the court's ruling. He asserted he did not want to introduce "the exact language of the e-mail," but only "the general reason why [the officer who received the e-mail] felt the need to" follow up with the social worker. That reason, according to counsel, was "that Cassidy questioned whether she had done this and not Edwin." The court denied the motion, addressing defense counsel's argument that the evidence was relevant to explain responsive conduct and also addressing the State's argument that the evidence was hearsay and the exclusion from the hearsay rule for statements against interest did not apply. In connection with its ruling on the exclusion, the court determined Cassidy was "not available to testify at the trial."

A jury found Paredes guilty. On appeal, Paredes argues, "[Cassidy's] statements were admissible as a statement against interest."

II. Preservation of Error

As a preliminary matter, the State contends Paredes failed to preserve error. The State points out that Paredes did not argue the statement was

hearsay subject to the exclusion for statements against interest. Instead, he argued the statement was non-hearsay that was admissible to explain the police officer's responsive conduct.

There is no question Paredes changed his theory on appeal. Generally, this would foreclose our review. *See Clark v. Estate of Rice ex rel. Rice*, 653 N.W.2d 166, 172 (Iowa 2002). However, evidentiary rulings are not subject to the usual rules of error preservation. *See DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa 2002). And, even if they were subject to those rules, the State concedes the prosecutor, the defense attorney, and the district court were aware of and discussed the hearsay nature of this statement as well as the hearsay exclusion for statements against interest. Additionally, the court ruled on that exclusion. Because the district court fully considered and decided the issue, we conclude error was preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *State v. Webb*, 493 N.W.2d 868, 870 (Iowa Ct. App. 1992) ("[W]here both counsel and the court were aware of the ground now urged for reversal, the issue was preserved for review."). Accordingly, we proceed to the merits, reviewing Paredes's hearsay claim for errors of law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

III. Hearsay Exclusion for Statements Against Interest

"Hearsay . . . must be excluded as evidence at trial unless admitted as an exception or exclusion under the hearsay rule or some other provision." *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). As proponent of the evidence,

Paredes had the burden of showing the statement fell within an exception or exclusion to the hearsay rule. *See State v. Long*, 628 N.W.2d 440, 443 (Iowa 2001).

Iowa Rule of Evidence 5.804(*b*)(3) contains an exclusion for statements against interest.[1] The exclusion only applies "if the declarant is unavailable as a witness." Iowa R. Evid. 804(b). Rule 5.804(*a*) has several definitions of "unavailability." Among them, a witness will be deemed unavailable where the declarant "[i]s absent from the trial or hearing and a proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means." Iowa R. Evid. 5.804(*a*)(5).

Paredes was the "proponent" of Cassidy's statement to the social worker. As proponent, he was obligated to establish that he was "unable to procure [Cassidy's] attendance by process or other reasonable means." *Id.* He failed to make this preliminary showing.

As noted, Cassidy was a minor. After J.M.'s condition came to light, Cassidy was placed in foster care. Prior to an originally scheduled trial date on Paredes's child endangerment charge, Paredes moved to compel the State to provide him with Cassidy's address. The district court ordered the State to make

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[1] Rule 5.804(*b*)(3) provides that a statement against interest is:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Cassidy "available to be served with any subpoenas that the defense may wish to serve upon her." Paredes subpoenaed Cassidy for his original trial date in March 2006. That trial was postponed to November 2006. Several days before the rescheduled trial date, Paredes filed a witness list that included Cassidy's name. There is no indication that he attempted to serve her with another subpoena. Because he did not take this step, he did not establish that he was "unable to procure [Cassidy's] attendance by process or other reasonable means." *See State v. Holland*, 389 N.W.2d 375, 379 (Iowa 1986) (concluding State failed to establish unavailability of witness under confrontation clause and rule 804(*a*) where prosecutor failed to subpoena witness for trial); *see also State v. Kite II*, 513 N.W.2d 720, 721 (Iowa 1994) (holding State did not make good-faith effort to obtain witness's presence for trial where State did not subpoena out-of-state witness); *State v. Wells*, 437 N.W.2d 575, 579-80 (Iowa 1989) (finding State made good-faith effort to procure witness where witness was served one subpoena for original trial date and another for continued trial date, but second subpoena was procedurally infirm). As Paredes could not show Cassidy was unavailable as a witness, his argument that her statements were admissible as statements against interest necessarily fails. *See* Iowa R. Evid. 5.804(*b*).

We affirm Paredes's judgment and sentence for child endangerment.

AFFIRMED.

Vogel, J. and Vaitheswaran, J. concur. Sackett, C.J., dissents.

SACKETT, C.J. (dissenting)

I respectfully dissent from the majority's determination that "Paredes could not show Cassidy was unavailable as a witness . . . ." In ruling on the defendant's motion to reconsider motion in limine, the district court determined Cassidy "is not available to testify at the trial." The State did not challenge this conclusion. Because Cassidy was unavailable as a witness, I believe Cassidy's statements were admissible as a statement against interest. *See* Iowa R. Evid. 5.804(*b*)(3). I would reverse and remand for new trial, allowing the excluded evidence.