IN THE SUPREME COURT OF THE STATE OF NEVADA

ARNOLD PRESTON BERTNICK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45355

FILED

JUL 05 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of first-degree murder. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant Arnold Preston Bertnick was convicted of murdering his girlfriend's two-and-one-half-year-old daughter Asiamae Rasa. Several employees of the Blue Kangaroo Learning Center testified at trial that Asiamae suffered bruises and other injuries in the months before her death and, when they asked Asiamae what happened, she responded, "Preston did it." In addition, Asiamae's mother–also a Blue Kangaroo employee–and her grandmother testified that Asiamae would often say "No Preston" when they were preparing to go to his home.

Bertnick argues the admission of these out-of-court statements violated his Sixth Amendment right to confrontation under Crawford v. Washington[1] and was improper because Asiamae would not have been competent to testify had she been available. We conclude Bertnick's claims lack merit and thus affirm.

[1]541 U.S. 36 (2004).

06-13818

Sixth Amendment right to confrontation

In Crawford, the United States Supreme Court held that testimonial hearsay statements made by an unavailable witness must be subject to a prior opportunity for cross-examination in order to be admissible.[2] The definition of a testimonial statement includes those that an objective witness would reasonably believe would be available for use at a later trial.[3]

In Flores v. State, we applied Crawford to determine whether a child witness's statements to her foster mother, a child abuse investigator, and a Child Protective Services investigator were testimonial.[4] We concluded the child's statements to her foster mother were not testimonial because they were made spontaneously and thus not "such that a reasonable person would anticipate their use for prosecutorial purposes."[5] In contrast, the statements to the investigators were testimonial because they were made to "police operatives or [individuals] tasked with reporting instances of child abuse for prosecution."[6]

Relying on this passage from Flores, Bertnick argues Asiamae's statements were improperly admitted because they were made

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[2]Id. at 68-69.

[3]Id. at 52.

[4]121 Nev. ____, ____, 120 P.3d 1170, 1178-79 (2005).

[5]Id. at ____, 120 P.3d at 1179.

[6]Id.

to Blue Kangaroo employees who are statutorily mandated to report any instances of child abuse.[7] We conclude this claim lacks merit.

Neither Crawford nor Flores mandates such a mechanical analysis where a statement made to a person tasked with reporting abuse must be considered testimonial. Instead, we will continue to employ the type of ad hoc, case by case inquiry adopted in Flores to determine whether a reasonable person would anticipate the statement being used for prosecutorial purposes.

When the circumstances surrounding Asiamae's "Preston did it" statements are considered, it is clear they are not the type a reasonable person would expect to be available at a future trial. Unlike the statements in Flores that were made to investigators after a formal investigation into child abuse allegations had already begun, Asiamae's statements were made in response to initial inquiries from Blue Kangaroo employees. There was no structured questioning, and the employees were not attempting to gather information for a criminal investigation. Notably, several other jurisdictions have refused to consider a child victim's statements testimonial even when the statements were made further along in the investigatory process than presented here.[8]

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[7]See NRS 432B.220.

[8]See State v. Bobadilla, 709 N.W.2d 243, 254-56 (Minn. 2006) (statements made during structured interview between child victim and child-abuse investigator not testimonial); see also People v. Sharp, No. 04CA0619, 2005 WL 2877807, at *6 (Colo. Ct. App. Nov. 3, 2005) (statements made during taped interview between child victim and private forensic interviewer not testimonial).

Likewise, Asiamae's "No Preston" utterances to her mother and grandmother are not transformed into testimonial statements merely because her mother was a Blue Kangaroo employee. The statements were made spontaneously to family members and thus are analogous to the non-testimonial statements in Flores made by the witness to her foster mother.[9] Neither statement is the type a reasonable person would anticipate being used at a later trial.

Because none of Asiamae's statements were testimonial, their admission did not violate Bertnick's Sixth Amendment right to confrontation.

Competence

Bertnick alternatively argues that Asiamae's statements were improperly admitted because, had she been available to testify, she would not have been competent to do so. "A child witness is competent to testify if the child has the capacity to receive just impressions and possesses the ability to relate to them truthfully."[10] A district court's finding of competency will not be disturbed "absent a clear abuse of discretion."[11]

The district court appropriately considered whether Asiamae was competent at the time she made her statements and its decision was not an abuse of discretion. Asiamae's statements were made spontaneously without any coaching and repeated to various individuals on numerous occasions. Thus, Bertnick's claim lacks merit.

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[9]121 Nev. at ____, 120 P.3d at 1179.

[10]Koerschner v. State, 116 Nev. 1111, 1118, 13 P.3d 451, 456 (2000).

[11]Lanoue v. State, 99 Nev. 305, 307, 661 P.2d 874, 874 (1983).

Conclusion

Because Asiamae's out-of-court statements were properly admitted, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk