

IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

THE STATE OF IOWA,

Plaintiff,

vs.

DANNY LEE BARNES,

Defendant.

CRIMINAL NO. FECR015027

**RULING ON STATE'S MOTION FOR
TESTIMONY BY TWO-WAY
TELEVISION AND REQUEST FOR
PRESENCE OF ADVOCATE**

A hearing on the State's Motion was held on August 10, 2015 before the undersigned. Evidence was received from State's witness Lynne McMahon and argument was received from Counsel. The State was represented by Sioux County Attorney Thomas Kunstle. The Defendant was present and was represented by Billy Oyadare. The hearing was reported by Cheryl Smith, CSR-RMR.

In this case, the Defendant is charged with the crime of Sexual Abuse in the Third Degree, a Class C Felony. The alleged victim of this offense is C.V. and it is alleged that at the time of the offense, she was fourteen or fifteen years of age. The Defendant has entered a plea of not guilty and the parties are currently undertaking the process of discovery. The Defendant has expressed his intentions to take the discovery deposition of C.V. She is currently involved in counseling and seeing Lynne McMahon. At the hearing, the Court expressed its intentions of only addressing the Motion as it relates to the discovery deposition and that it will leave for the trial judge the issue of how C.V. may be allowed to testify i.e. form and manner consistent with the Confrontation Clause of the U.S. Constitution. Accordingly the Court's ruling here is limited to form and manner as it relates to the discovery deposition proposed by the Defendant. It is the State that seeks the protective order or limitations by this motion.

Lynn McMahon testified that she has been counseling C.V. since November 2014. C.V. is somewhat immature for her chronological age. McMahon has seen the impact on C.V. after she has seen the Defendant in the community as there have been occasions when C.V. has seen him from a distance or in passing. C.V. shuts down and disassociates. Contact between C.V. and the Defendant is emotionally traumatic to C.V. In McMahon's opinion, C.V. will have a therapeutic shutdown if she has to provide a deposition while in the same room as the Defendant. When C.V. disassociates, she becomes minimally communicative and will likely not be able to complete the deposition or provide answers to questions posed if she must do so in the presence of the Defendant. McMahon opined that C.V. will experience high anxiety at her deposition if she is required to be in the presence of the Defendant. McMahon also testified that while the criminal matter is present she believes that C.V. will relive the events that lead to the allegations of a crime and that she will likely act out as she has in the past. McMahon identified C.V.'s behaviors as symptomatic of post-traumatic stress disorder of which disassociation is a feature.

A discovery deposition of an alleged victim of sexual abuse was precisely the subject of **Otteson v. Iowa D. Court for Linn County, 443 N.W.2d 726, 728 (Iowa 1989)** and the application to that deposition of the right of confrontation. Our Iowa Supreme Court concluded in **Otteson** "that a discovery deposition not taken for use at trial is not a "stage of trial," andthe right of confrontation was not abridged by the use of the mirror at the deposition. The **Otteson** decision came after **Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988)**. Further, the U.S. Supreme Court modified **Coy** in **Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666**

(1990) permitting denials of confrontation where the government is able to make a particularized showing that the witness would be traumatized by testifying in the presence of the Defendant. **Iowa Code Section 915.38** permits the Court to protect a minor from trauma caused by testifying in the physical presence of the Defendant where it would impair the minor's ability to communicate, by ordering the testimony to be taken in a room other than the courtroom and be televised by closed-circuit equipment for viewing in the courtroom. This order may only be entered upon a specific finding by the Court that such measures are necessary to protect the minor from trauma. While this specific provision appears to be directly addressing testimony at trial it is also relevant to the inquiry here as to the discovery deposition.

Under the facts presented here, this Court in addressing only the issue as to whether a discovery deposition can be completed without the alleged victim being in the same room as the Defendant and not be a violation of the Defendant's right of confrontation concludes based upon the foregoing that the answer to that question is yes. Based primarily upon the ruling in **Otteson**, the discovery deposition setting is not a "stage of trial" such that the right to confrontation is implicated. Further, the Court also finds under the record here that requiring C.V. to testify in the presence of the Defendant at a discovery deposition would clearly impair C.V.'s ability to communicate and to do so would be traumatizing to C.V. While the Court does not necessarily feel that these particularized findings are necessary for a discovery deposition, it nevertheless has considered this additional layer of consideration normally left for consideration with regard to trial testimony and shares herein its findings based on the evidence presented.

Accordingly, C.V. need not be in the same room as the Defendant when her discovery deposition is taken by the Defendant. The Sioux County Attorney, the stenographer, and the Defendant's attorney may be present in the room with C.V. when her deposition is taken but the Defendant may not be. The Defendant shall be situated so that he can see and hear C.V.'s deposition and communicate with his attorney at any time while the deposition is being taken but he will not be in the room with C.V. The issue of the presence of an advocate for C.V. at the deposition is addressed next.

The Sioux County Attorney seeks the Court's permission to have an advocate present for C.V. at her discovery deposition and to remain present until the deposition is completed. The Defendant objects. Victim counselors' roles and the presence of one in a criminal proceeding are addressed in **Iowa Code Section 915.20**. As a starting point, **Section 915.20(1)(b)(2)** states: *A victim counselor who is present as a result of a request by a victim shall not be denied access to any proceedings related to the offense.* Proceedings related to the offense are described in **Section 915.20(1)(a)** and includes *.....activities engaged in or proceedings commenced by a law enforcement agency, judicial district department of correctional services, or a court pertaining to the commission of a public offense against the victim, in which the victim is present.....* The Court concludes that this language is broad enough to cover the discovery deposition of C.V. who is the identified alleged witness to the Defendant's offense.

Accordingly, C.V. is permitted to be accompanied by a victim rights advocate who meets the requirements of Section 915.20A when she has her discovery deposition taken by the Defendant.