Illinois Criminal Procedure Rule 115-10

By Peter G. Baroni and Harry C. Smith

Over the last ten years the Illinois state legislature created and amended Section 115-10 of the Code of Criminal Procedure. Section 115-10 creates a statutory hearsay exception for statements made by children who are alleged abuse victims. The abuse may be sexual or physical. The statute provides in pertinent part as follows: "(a) In a prosecution for a physical or sexual act perpetrated upon or against a child under the age of 13,…the following evidence shall be admitted as an exception to the hearsay rule: (2) testimony of an out of court statement made by such a child describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual or physical act perpetrated upon or against a child

(b) Such testimony shall only be admitted if: (1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) The child…either: (a) testifies at the proceeding; or (b) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement."

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Section 115-10 raises issues that concern everything from the United States Constitution to complex statutory interpretation. The first section of this article addresses the age requirement of the statute. The second section looks at the "time, content and circumstances" requirement as it relates to the Confrontation Clause of the U.S. Constitution. The final section reviews the unavailability and corroborative evidence requirements of the statute.

I. The Age Requirement: Judicial Interpetration of 115-10

The issue of a child's age under Section 115-10 is relevant as to when the criminal offense occurred, as well as when the hearsay statements were made.

The First District Appellate Court addressed this issue in People v. Holloway, 656 N.E.2d 200 (Ill. App. 1st Dist. 1995). In Holloway, the defendant appealed a conviction for aggravated criminal sexual assault of his eleven-year-old daughter. The trial court ruled that the hearsay testimony of a cousin concerning statements made by the victim were admissible under Section 115-10. The victim's cousin testified that approximately one month before the victim's fourteenth birthday, the victim informed the cousin of the attack. The defendant argued that under subsection (a)(2) of Section 115-10, such testimony is admissible only if the statement was made when the victim was younger than 13. The court found for the defendant and reasoned by allowing corroboration of in-

court statements, that the legislative history of Section 115-10 shows it was intended to assist children under the age of 13, and should be narrowly construed in favor of the defendant.

Thus, under Section 115-10 (a)(2), testimony about an out-of-court statement made by a child is admissible only if the child is younger than 13 when the statement is made.

II. The Time, Content and Circumstances Requirement:

115-10 And The Confrontation Clause Of The U.S. Constitution

The Confrontation Clause of the Sixth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with witnesses against him." U.S. Const. amend. VI.

The "time, content and circumstances" section of 115-10 is the legislature's attempt to guarantee a defendant's Sixth Amendment rights, in light of the new hearsay exception.

The United States Supreme Court addressed the concerns of the Conformation Clause as they relate to child abuse victim's hearsay statements in Idaho v. Wright, 497 U.S. 805 (1990). The Wright case involved the hearsay testimony of a 2-1/2-year-old victim who had been found incompetent to testify. The State trial court found the testimony admissible pursuant to an Idaho child abuse victim residual hearsay exception, analogous to the Illinois 115-10 exception. The Idaho Supreme Court found the testimony inadmissible as a violation of the Confrontation Clause, and the U.S. Supreme Court affirmed that decision.

In its analysis the Supreme Court set forth a test for determining when incriminating statements, found admissible under an exception to the hearsay rule, meet the requirements of the Confrontation Clause. First, in the "usual" hearsay case, the prosecution must either produce or demonstrate the unavailability of the witness; and second, once the witness is shown to be unavailable, her statement is admissible only if it bears adequate "indicia of reliability." The Court next found that the "indicia of reliability" standard may be established in two ways. First, "where the hearsay statement falls within a firmly rooted hearsay exception." Second, where it is supported by a showing of "particularized guarantees of trustworthiness."

Because this hearsay statement did not fall within a firmly rooted common law exception, the court looked for particularized guarantees of trustworthiness. The Court held that the "particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief." The Court specifically required that such a

determination shall be made without the use of any other evidence which might corroborate the statement.

The Wright court set forth a number of factors a court may consider when making a trustworthiness determination as to a statement made by a child abuse victim witness. These factors include: (1) spontaneity and consistent repetition, (2) mental state of the declarant; (3) use of terminology unexpected of a child of similar age; and (4) presence of, or lack of, motive to fabricate. Illinois case law has expanded this list to include: (5) the child's physical condition; (6) the nature and duration of the sexual act; (7) the relationship of the child and the accused; (8) reaffirmation or recantation; (9) whether the child is likely, apart from the incident, to have sufficient knowledge of sexual matters to realize the act is possible and sexually gratifying to some; (10) whether the language is embarrassing and, therefore, only spoken if true; and (11) whether it was a cry for help. People v. Jahn, 615 N.E. 2d 1270, 1278 (Ill.App.2d Dist. 1993).

Following the Supreme Court's direction in Wright, Illinois case law has uniformly held that the admissibility determination of the reliability of hearsay statements under Section 115-10 must satisfy the test for "particularized guarantees of trustworthiness." See People v. Zwart, 600 N.E. 2d 1169 (Ill. 1992); People v. Panier, 630 N.E. 2d 479 (Ill. App.3d Dist. 1994); People v. C.H., 626 N.E. 2d 359 (Ill. App.2d Dist. 1993)); People v. Moss, 630 N.E. 2d 850 (Ill. App.1st Dist. 1993); People v. Coleman, 563 N.E. 2d 1010 (Ill. App. 4th Dist. 1990). This is a requirement whether the child declarant testifies at trial or is unavailable to testify. People v. C.H., 626 N.E. 2d 16 365 (Ill. App. 2d Dist. 1993) (citing People v. West, 598 N.E. 2d 1356, 1362 (Ill. App. 2d Dist. 1992) (finding that 115-10 "requires a hearing before the out-of-court statement can be introduced whether the victim testifies or is unavailable."))

In Coleman, an often relied on Fourth District case, the Court synthesizes Wright and 115-10 determinations of reliability as follows: "it is necessary to construe the general language of Section 115 - 10(b)(1) to be in line with the more particular language of Wright. Thus, the required finding that the statement provides 'sufficient safeguards of reliability' must be understood to be of a comparable nature with a finding that the circumstances of the statement render the declarant 'particularly worthy of belief' and, in reaching this decision, the Court must consider only [the time, content and circumstances surrounding] the making of the statement." Coleman, 563 N.E. 2d at 1020-21

Ruling on admissibility of evidence, including 115-10 hearsay statements, is within the discretion of the trial court. Zwart, 151 Ill.2d at 44. A reviewing court may reverse a trial court's determination only when the record clearly demonstrates that the court abused its discretion. Id. The State, as proponent of the evidence; bears the burden of proving that the "time, content and circumstances" of the victim's statements provide "sufficient safeguards of reliability." Panier, 630 N.E. 2d at 482.

A. Cases Where Factors of Reliability Were Sufficient

The Illinois Supreme Court found sufficient factors of reliability to admit the statements of a child abuse victim in People v. West, 632 N.E.2d 1004 (1994). In West, the seven-year-old victim, S.W., implicated the defendant immediately to family members after the abuse, and was interviewed by a police officer within hours of the incident. Hearsay statements from those conversations were used against the defendant, and he was convicted of two counts of aggravated sexual abuse. The conviction was reversed on appeal, and the supreme court granted the State's appeal request. On final review our supreme court reversed the appellate decision and affirmed the trial court's decision as they found no abuse of the trial court's discretion in its determination of the admissibility of the hearsay statements.

In reviewing the reliability factors present in West, the Supreme Court held that the immediacy of the victim's out-cry, the consistency of the victim's statements concerning the abuse, and the appropriateness of her language, gave sufficient indicia of reliability to the hearsay statements admitted at trial. The court also considered the lack of any suggested prompting during the investigative interview and the fact that the victim had no motive to fabricate these facts in deciding the hearsay statements were admissible under 115-10.

In People v. Jahn, 615 N.E.2d 1770 (Ill. App. 2d Dist. 1993), the victim, R.R. was 6 years old at trial and found competent to testify. Hearsay statements R.R. made to police investigators, her mother, and her therapist over eight months after the date of the offense, were used against the defendant at trial which resulted in a conviction for aggravated criminal sexual abuse. The trial court ruled the statements admissible, even though it excluded statements made by R.R. closer in time to the date of the offense. The conviction was affirmed on appeal.

In Jahn, the defendant's main contention on appeal was that the passage of time from the date of the offense until the victim reported the acts to the corroborating witnesses, under section 115-10, made the hearsay statements unreliable. The appellate court pointed out that although spontaneity may be a factor when considering reliability of the victim's statements, Section 115-10 does not require that the sexual conduct be reported promptly in order for the statements to be admissible. The appellate court specifically distinguished this case from the supreme court's findings in Zwart. The court held that the child's age was such that she was less susceptible to adult influence, and that when she testified at trial, her statements were clear and unequivocal regarding the essential elements of the crime.

In People v. Moss, 630 N.E. 2d 850 (Ill. App. 1st Dist. 1993), the victim, J.Z., an eight- year-old, told her best friend about her "secret" and then detailed her secret to a doctor and a police officer. The trial court found that the statements contained sufficient safeguards of reliability as to time, content and

circumstances. The defendant was convicted of two counts of aggravated criminal sexual assault and three counts of criminal sexual abuse. He appealed, and based his appeal in part on the trial court's admission of those statements. On appeal, the appellate court held that the spontaneity and consistency of repetition of the victim's statements were indicative of their reliability. Further, the court pointed to the victim's description of the events using language and sexual terminology that a child of eight would otherwise be unfamiliar with as another indication of reliability. Accordingly, the appellate court affirmed the trial court's decision.

B. Cases Where the Factors of Reliability Were Insufficient

In the Illinois Supreme Court case People v. Zwart, supra, the victim, Nicole, was four years old at trial and found not competent to testify. Hearsay statements concerning alleged acts of sexual abuse between April and June of 1988 were elicited from Nicole by her mother based on observations she made prior to a therapy visitation on July 14, 1988. The statements conflicted with Nicole's denials of any abuse at a medical exam on June 30. The trial court ruled the statements admissible, and the defendant was found guilty of aggravated criminal sexual abuse. The conviction was reversed on appeal, and the Illinois Supreme Court granted the State's appeal request.

Evaluating the reliability factors, the supreme court found that the child-victim's delay alone would not render the statements unreliable. However, because the child initially denied the abuse, and because the statements followed substantial adult intervention, the child's delayed statement was unreliable. The court held that, the time and circumstances of the child-victim's statements, viewed together, did not provide sufficient safeguards of reliability as required by Section 115-10. Thus, the court found the trial court had abused its discretion in admitting statements pursuant to the statutory hearsay exception set forth in 115-10.

In People v. Panier, 630 N.E. 2d 479 (Ill. App. 3d Dist. 1994), the four-year-old victim L.H.'s initial statements were not spontaneous, but the product of her mother's inquiry and suggestion, and come approximately 12 days after the alleged act of abuse. In a subsequent DCFS interview, L.H.'s statements were significantly amplified, including allegations of abuse by a 1-1/2-year-old baby and the defendant's sister. Upon further inquiry by family members L.H. recanted the new allegations and then intimated that she told "stories."

The reviewing court found that the delay in L.H.'s reporting "took a greater significance as a detractor in the reliability analysis since both the content of the statements to [DCFS] and the circumstances of the mother's initial interview raised troublesome questions about their reliability." Panier, 630 N.E. 2d at 483. Accordingly, the appellate court affirmed the trial court's decision to exclude L.H.'s statements based on the State's failure to prove that the basis or reliability factor.

III. Establishing Corroborative Evidence and Unavailability If the Child Abuse Victim Declarant Does Not Testify At Trial

One factor that plays a large role in what sort of evidence the State will offer in a 115-10 hearing is the "availability" of the victim. The statute provides that the unavailable victim's hearsay statements may still be admitted if there is sufficient corroborative evidence. In other words, the legislature has offered another avenue to admit these statements because of the obvious difficulties that can arise with the testimony of a victim under the age of 13. This corroborative evidence typically comes in the form of a confession by the accused, medical testimony of the victim's physical condition, or any other physical evidence that substantiates that truthfulness of the child's hearsay statements. The court's main consideration remains whether or not this corroborative evidence offers sufficient indicia of reliability to allow the hearsay statements into evidence. To not offer this other corroborative evidence and then have your victim become "unavailable" at some later date would require a second 115-10 hearing and ruling from the court. The decision to present all evidence corroborative of the victim's hearsay statements at an initial 115-10 hearing is made on a case by case basis.

The 115-10 hearsay exception expressly requires that an out-of-court statement made by a child-victim declarant may be admitted into evidence only if the child is unavailable to testify.

In People v. Rocha, 547 N.E. 2d 1335 (Ill. App. 2d 1989), the Illinois Appellate Court for the Second District was compelled to interpret the phrase "unavailable" and the legislative intent behind it. The court concluded that the legislature's intent was to include as "unavailable" those children who were too scared, unable to communicate in the courtroom, or incompetent to testify at trial. In Rocha, a three-year-old girl told her mother that she had been sexually assaulted by her baby-sitter's brother. One week later she repeated this story to a DCFS investigator. The defendant was arrested and tried for aggravated criminal sexual assault. In this case the victim-witness refused to testify at trial, but the prosecution sought to have her prior out-of-court statements about the incident admitted into evidence. The prosecution claimed that the victim-witness' refusal to testify qualified her as being "unavailable" to testify, and therefore under 115-10(b)(2)(B) her prior statements concerning the sexual abuse were admissible as exceptions to the hearsay rule. The defendant objected to the inclusion of the prior statements by saying that the victim was available, simply scared and/or incompetent to testify, and therefore her statements were not protected by 115-10. The trial court granted a hearing and ruled that the prior statements were inadmissible.

The prosecution appealed and the appellate court held that the statements were admissible. The court interpreted the legislative intent to include children in the "unavailable" category who are too scared, unable to communicate, and/or

incompetent. The court reasoned that due to the nature of sexual abuse, and the fragile emotional state of children, the legislature meant to create a special hearsay exception category for children who were too scared to testify. The court also looked to the supreme court rulings in a number of other states whose legislatures had enacted laws similar to 115-10. The court used the consistent rulings in favor of the broad interpretation of "unavailable" to bolster its conclusion that "the Illinois statutory hearsay exception for the child-victims of sexual abuse should include as 'unavailable' those children who cannot or will not testify in court."

The aforementioned state supreme court cases generally interpret "unavailable" in 115-10 type hearsay exceptions broadly. See Perez v. State, 536 So.2d 206 (Fla. 1988) (a child is unavailable when to testify would damage child's emotional stability); State v. Robinson, 735 P.2d 801 (Ariz. 1987) (a child is unavailable when the child is uncommunicative); State v. Giles, 772 P.2d 191 (Idaho 1989) (a child is unavailable when unable to communicate to jury); State v. Chandler, 376 S.E.2d 728 (N.C. 1989) (a child is unavailable when child is unresponsive in court); State v. McCafferty, 356 N.W.2d 159 (S.D. 1984) (a child is unavailable when present, but unable to testify); and State v. Jones, 772 P.2d 496 (Wash. 1989) (a child is unavailable when trial judge determines that child is unable to testify).

Illinois case law has further clarified the broad meaning of "unavailable" in several cases decided subsequent to Rocha. See People v. Coleman, 563 N.E.2d 1010 (Ill. App. 4th Dist. 1990) (child unavailable when child testified for some time, then "froze up" and stopped talking); People v. Zwart, 567 N.E.2d 373 (Ill. App. 1st Dist. 1990) (child at bar "unavailable" because she was adjudicated to be incompetent); People v. Hart, 573 N.E.2d 1288 (Ill. App. 1st Dist. 1991) (child "unavailable" to testify because child deemed incompetent to testify); People v. Landis, 593 N.E.2d 893 (Ill. App. 1st Dist. 1992) (child "unavailable" because court found her to be incompetent); People v. M.S., 618 N.E.2d 623 (Ill. App. 1st Dist. 1993) (state must show unavailability of child before out-of-court statements can be put into evidence); and People v. March, 620 N.E.2d 424 (Ill. App. 4th Dist. 1993) (approves of the ruling from Rocha in course of making different ruling).

Conclusion

In an attempt to encourage courts to allow children's statements about sexual or physical abuse to come into evidence, the Illinois legislature created 725 ILCS 5/115-10. This statute authorizes courts to admit out-of-court testimony into evidence if certain criteria are met.

The threshold issue is that the child must have been younger than 13 years old when he or she made the statement.

The statute protects a defendant's rights as described in the Confrontation Clause by demanding an analysis by the court of the statement's reliability.

Further, the statute allows the statement to be admitted even if the witness victim child is unavailable to testify.

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