ATTORNEY FOR APPELLANT

Lisa M. Johnson
Brownsburg, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Sean Douglas Neal,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 16, 2021

Court of Appeals Case No. 21A-CR-730

Appeal from the Greene Circuit Court

The Honorable Erik C. Allen, Judge

Trial Court Cause No. 28C01-2003-F4-4

Pyle, Judge.

Statement of the Case

[1] Sean Neal ("Neal") appeals his conviction, following a jury trial, of Level 4 felony child molesting[1] and his adjudication as an habitual offender.[2] He argues that the trial court committed fundamental error when it admitted evidence in violation of Indiana Evidence Rule 704(b). Concluding that the admission of this evidence was erroneous but did not constitute fundamental error, we affirm Neal's conviction and habitual offender adjudication.

[2] We affirm.

Issue

Whether the trial court committed fundamental error when it admitted evidence.

Facts

[3] In February 2020, ten-year-old Z.N. spent the night with her paternal grandparents, Susan ("Grandmother") and Doug Neal (collectively "Grandparents"). Grandparents' son, thirty-two-year-old Neal, lived with Grandparents at that time.

[4] At some point during the evening, Z.N. took a bath and put on an oversized t-shirt and underwear. Z.N. then went into Neal's bedroom to tell him

---

[1] IND. CODE § 35-42-4-3.

[2] I.C. § 35-50-2-8.

goodnight. Neal, who was lying on his bed, appeared to be intoxicated. Z.N. sat on Neal's bed, and the two talked about Neal's job and how much money Neal made.

[5] While they were talking, Neal touched Z.N.'s vagina on the outside of her underwear. Z.N. told Neal to stop; however, Neal continued to touch Z.N.'s vagina "a few more times[.]" (Tr. Vol. 2 at 190). Neal touched Z.N.'s vagina "softly." (Tr. Vol. 2 at 195). Z.N. left the room and told Grandmother that Neal had inappropriately touched her. Grandmother told Z.N. not to tell anyone what had happened.

[6] The following day, Z.N. went to her father's ("Father") house for a weekend visit. Father noticed that Z.N. was unusually quiet and spent most of the weekend alone in her bedroom. Z.N. did not tell Father what had happened because Grandmother had specifically told her not to tell.

[7] When Z.N. returned to her mother ("Mother") two days later, Mother noticed that Z.N. was unusually quiet and would not look at her. Mother was concerned about Z.N.'s behavior and asked her daughter what had happened. Z.N. told Mother that Neal had touched her. When Mother told Z.N. to be specific, Z.N. "pointed down" and used a word "referring to her vagina." (Tr. Vol. 2 at 238, 239).

[8] Mother immediately took Z.N. to the local police station and filed a police report. Z.N. spoke with a Department of Child Services caseworker, who scheduled an appointment for Z.N. with a child forensic interviewer. While

Z.N. and Mother were at the police station, Neal telephoned the station and spoke with Greene County Sheriff's Department Deputy Camron Frye ("Deputy Frye"). Neal initially told Deputy Frye that he had not touched Z.N. However, during the course of the conversation, Neal told the deputy that he had "touch[ed] [Z.N.'s] butt, but in a non-sexual way and asked if groping in a non-sexual way was inappropriate." (Tr. Vol. 2 at 149).

[9] A few days later, the child forensic interviewer met with Z.N. The interviewer noticed that Z.N. was "able to articulate very descriptively . . . through . . . verbal communication[.]" (Tr. Vol. 3 at 12). Z.N. also "share[d] her experience [with the forensic interviewer] . . . [by] drawing what [had] happened." (Tr. Vol. 3 at 13).

[10] Two weeks later, Greene County Sheriff's Department Detective Shawn Cullison ("Detective Cullison") interviewed Neal. During the interview, Neal told Detective Cullison that he had "grabb[ed] [Z.N.'s] butt." (Tr. Vol. 3 at 19). Neal further admitted that he had "grabb[ed] [Z.N.'s] thighs and that she had told him to stop." (Tr. Vol. 3 at 19). When Detective Cullison asked Neal if he had touched Z.N.'s vagina, Neal responded that "if it [had] happen[ed,] [he had not] mean[t] for it." (Tr. Vol. 2 at 19).

[11] The State charged Neal with Level 4 felony child molesting and alleged that he was an habitual offender. At Neal's March 2021 two-day jury trial, the jury heard the facts as set forth above through the testimony of Z.N., Mother, Father, Deputy Frye, Detective Cullison, the DCS caseworker, and the child

forensic interviewer. Also at trial, Z.N. testified that Neal had touched her vagina on the outside of her underpants four or five times. During the testimony of the child forensic interviewer, the trial court admitted into evidence the drawing that Z.N. had made during the forensic interview. The drawing depicts a figure lying on a bed and a smaller figure sitting on the same bed. The word "stop" and the numbers 1, 2, 3, 4, and 5 are written at the top of the drawing. (Ex. Vol. at 10).

[12] In addition, Detective Cullison specifically testified as follows regarding Neal's statements to Deputy Frye and Detective Cullison:

> [During the telephone call,] [Neal] stated he had not touched [Z.N.] I believe he said maybe [he had] grabbed [Z.N.'s] butt in a playful manner and then he continue[d] on in this [in-person] interview with a little bit more that now he ha[d] touched her thigh and her butt. That is pretty indicative of somebody's process of[,] I don't know how to explain it really. They are giving a little bit [of] details[,] a little bit more truth with each statement they give and he went as far as touching her thighs while she is wearing the panties but stops short of saying he touched her vagina on purpose.

(Tr. Vol. 3 at 19). Neal did not object to Detective Cullison's testimony.

[13] The State rested following Detective Cullison's testimony, and Neal called Grandmother to testify. According to Grandmother, she had seen Z.N. and Neal together in Neal's bedroom the night of the molestation. Grandmother further testified that, although she had not thought that Neal had appeared to be intoxicated that night, she believed that he had probably been drinking alcohol

because he drank himself to sleep most nights. Grandmother also testified that Z.N. had told her that Neal had "had his hand down there[,]" but Grandmother stated that she had not asked Z.N. what she meant. (Tr. Vol. 3 at 52). According to Grandmother, Z.N. had specifically told her that Neal had "pinched [Z.N.'s] butt." (Tr. Vol. 3 at 37). In addition, Grandmother denied that she had told Z.N. "to keep it a secret." (Tr. Vol. 3 at 45).

[14] The jury convicted Neal of Level 4 felony child molesting and adjudicated him to be an habitual offender. Neal now appeals.

Decision

[15] Neal argues that the trial court improperly admitted Detective Cullison's testimony regarding Neal's statements to Deputy Frye and Detective Cullison. However, Neal did not object at trial to the admission of Detective Cullison's testimony. He has therefore waived appellate review of this issue. *See Palilonis v. State*, 970 N.E.2d 713, 730 (Ind. Ct. App. 2012) (explaining that in order to preserve an issue for appeal, a contemporaneous objection must be made when the evidence is introduced at trial), *trans. denied*.

[16] In an attempt to avoid waiver, Neal argues that the trial court committed fundamental error when it admitted into evidence Detective Cullison's testimony. "Fundamental error is an extremely narrow exception to the waiver rule where the defendant faces the heavy burden of showing that the alleged errors are so prejudicial to the defendant's rights as to make a fair trial impossible." *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014)(cleaned up). To

establish fundamental error, the defendant must show that, under the circumstances, the trial court erred in not sua sponte raising the issue because the alleged error constituted a clearly blatant violation of basic and elementary principles of due process and presented an undeniable and substantial potential for harm. *Id.* "Fundamental error is meant to permit appellate courts a means to correct the most egregious and blatant trial errors that otherwise would have been procedurally barred, not to provide a second bite at the apple for defense counsel who ignorantly, carelessly, or strategically fail to preserve an error." *Id.* An erroneous evidentiary ruling does not constitute fundamental error when the jury could overlook the improper evidence and reach the same conclusion based solely upon properly admitted evidence. *See Southward v. State*, 957 N.E.2d 975, 977 (Ind. Ct. App. 2011).

[17] Here, Neal argues that the trial court committed fundamental error when it admitted Detective Cullison's testimony in violation of Indiana Evidence Rule 704(b). According to Neal, "[b]y testifying that guilty defendants typically give 'a little bit more truth with each statement,' [Detective] Cullison essentially stated that in his opinion, Neal's denial of the allegations was evidence of Neal's guilt. This testimony invaded the jury's province." (Neal's Br. 26).

[18] "Indiana Evidence Rule 704(a) generally allows witness opinion testimony to 'embrace' an ultimate issue – but as a matter of constitutional right, only a jury may *resolve* an ultimate issue." *Williams v. State*, 43 N.E.3d 578, 580 (Ind. 2015) (emphasis in original). However, "Evidence Rule 704(b) explicitly prohibits, in criminal cases, witness opinions concerning the ultimate issue of guilt." *Id.*

"Such testimony is an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony." *Rose v. State*, 846 N.E.2d 363, 367 (Ind. Ct. App. 2006).

[19] Here, Detective Cullison testified that, during the initial telephone call with Deputy Frye, Neal had first stated that he had not touched Z.N. Detective Cullison further pointed out that, during the course of the telephone conversation, Neal had further stated that he had maybe "grabbed [Z.N.'s] butt in a playful manner." (Tr. Vol. 3 at 19). Detective Cullison also testified that, during the in-person interview, Neal first told the detective that he had "grabb[ed] [Z.N.'s] butt." (Tr. Vol. 3 at 190. The detective also testified that, during the course of the interview, Neal had revealed that he had "touched [Z.N.'s] thigh." (Tr. Vol. 3 at 19). In addition, Detective Cullison pointed out that Neal had "stop[ped] short of saying he [had] touched [Z.N.'s] vagina on purpose." (Tr. Vol. 3 at 19). Had Detective Cullison stopped his testimony at this point, the jurors would have been free to draw their own inferences and to decide what weight, if any, to give to this testimony and Neal's statements to Deputy Frye and Detective Cullison.

[20] However, Detective Cullison further testified that child molesters, as part of their process, will progressively admit more and more facts without confessing to the actual crime. This is precisely the type of opinion testimony that Evidence Rule 704(b) prohibits because it "'invades the province of the jury in determining what weight to place on a witness' testimony.'" *See Williams*, 43 N.E.3d at 581 (quoting *Blanchard v. State*, 802 N.E.2d 14, 34 (Ind. Ct. App.

2004)) (concluding that a detective's testimony that he had observed a controlled drug buy had violated Indiana Evidence Rule 704(b) because it had "crossed the line into declaring Williams's guilt"). "In other words, such testimony usurps the jury's 'right to determine the law and the facts,' Ind. Const. art. I, § 19, and is therefore inadmissible." *Williams*, 43 N.E.3d at 581. Accordingly, the trial court erred in admitting Detective Cullison's testimony.

[21] Although we find that the trial court erred in admitting this testimony, we do not find that this rises to the level of fundamental error. Specifically, our review of the evidence reveals that Neal's evidentiary appeal centered on one isolated instance of Detective Cullison's testimony, which in light of the other unchallenged evidence in the two-day trial, was not so prejudicial to Neal's rights as to make a fair trial impossible. *See Ryan*, 9 N.E.3d at 668. We reach this conclusion because there is a plethora of unchallenged evidence that independently supports Neal's convictions, and the jury could have reached the same conclusion based solely upon this properly admitted evidence. *See Southward*, 957 N.E.2d at 977.

[22] For example, Z.N. unequivocally testified that Neal had touched her vagina on the outside of her underwear four or five times. The trial testimony further revealed that when Z.N. went to Father's house the day after the molestation, she had been unusually quiet and had spent most of the weekend in her room. Z.N. had also been uncharacteristically quiet when she returned to Mother and had refused to look at Mother. Z.N. had eventually told Mother that Neal had touched her vagina. The forensic interviewer described Z.N.'s verbal

communication as articulate, and the drawing that Z.N. completed during the forensic interview was consistent with Z.N.'s account of the molestation. In addition, Grandmother had seen Z.N. and Neal together in Neal's bedroom on the night of the molestation. Z.N. had told Grandmother that Neal had "had his hand down there[,]" but Grandmother had not asked her what she had meant. (Tr. Vol. 3 at 52). This properly admitted evidence more than support's Neal's child molesting conviction. Accordingly, the trial court did not commit fundamental error in admitting Detective Cullison's testimony into evidence.[3]

[23] Affirmed.

Bailey, J., and Crone, J., concur.

---

[3] In a separate issue, Neal acknowledges that "[u]nder current Indiana law, the uncorroborated testimony of a child is sufficient to support a conviction." (Neal's Br. 13). *See Hogland v. State*, 962 N.E.2d 1230, 1238 (Ind. 2012) (explaining that the testimony of a child victim is sufficient to sustain a child molesting conviction); *see also Stewart v. State*, 768 N.E.2d 433, 436 (Ind. 2002) (stating that "the uncorroborated testimony of a child victim is sufficient to support a conviction for child molesting"). However, under the guise of a sufficiency of the evidence argument, Neal asks this Court to "recommend that the [Indiana] Supreme Court adopt a corroboration requirement in cases where the complaining witness is a child." (Neal's Br. 14). In support of his request, Neal directs us to Judge Baker's dissenting opinion in *Leyva v. State*, 971 N.E.2d 699, 705-06 (Ind. Ct. App. 2012), *trans. denied*. First, to the extent that Neal argues that Z.N.'s testimony was uncorroborated, he is mistaken. As discussed above, there is more than ample evidence corroborating Z.N.'s testimony. Second, we decline Neal's request.