MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jose D. Sanchez Maldonado,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 16, 2022

Court of Appeals Case No. 21A-CR-1479

Appeal from the Hamilton Superior Court

The Honorable William Hughes, Judge

Trial Court Cause No. 29D03-2007-F5-3927

May, Judge.

[1] Jose D. Sanchez Maldonado appeals following his convictions of Level 5 felony domestic battery with a prior battery conviction related to the same person[1] and Level 6 felony domestic battery in the presence of a child less than 16 years old.[2] Maldonado raises two issues on appeal:

(1) Whether the trial court abused its discretion by admitting the deposition testimony of an unavailable witness; and

(2) Whether his two convictions of domestic battery constitute substantive double jeopardy prohibited by the Constitution.

We hold the deposition of the unavailable witness was admissible as an exception to the hearsay rule because the State demonstrated it made a reasonable but futile effort to secure the witness by serving her with a subpoena requiring her appearance at trial. Further, the State concedes, and we agree, Maldonado's Level 6 felony domestic battery conviction must be vacated to avoid a double jeopardy violation, as it is a lesser-included offense of Maldonado's conviction of Level 5 felony domestic battery. Accordingly, we affirm in part, vacate in part, and remand.

Facts and Procedural History

[1] Ind. Code §§ 35-42-2-1.3(a)(1) & 35-42-2-1.3(c).

[2] Ind. Code §§ 35-42-2-1.3(a)(1) & 35-42-2-1.3(b)(2).

[2] Maldonado lived in an apartment with his girlfriend, Y.G., and their one-year-old child. On the evening of July 2, 2020, Maldonado and Y.G. had an argument, during which Maldonado grabbed Y.G. and pushed her into their bedroom. He then pushed her onto the stairway of their apartment and slapped her face, while in the presence of their child. Y.G. called her adult daughter, Keyra Ortiz, for help, and police were also dispatched to the apartment in response to an active domestic disturbance call. After arriving at the scene, Westfield Police Officer Charles Terry noted Y.G. had visible swelling of the left orbital socket and her left eye was still red and puffy.

[3] On July 8, 2020, the State charged Maldonado with Count I Level 6 felony domestic battery in the presence of a child under the age of 16, Count II Class A misdemeanor domestic battery,[3] Count III Level 5 felony domestic battery with a prior conviction, and Count IV Level 6 felony domestic battery with a prior conviction.[4] Maldonado waived his right to a jury trial, and the trial court scheduled a bifurcated bench trial for May 17, 2021. On November 6, 2020, Maldonado's defense counsel conducted a pretrial deposition of Y.G. during which counsel and the State had an opportunity to examine her.

[4] On the day of trial, Y.G. did not attend, and the State asked for a Rule to Show Cause hearing against Y.G. The court refused to issue a Rule to Show Cause

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[3] Ind. Code § 35-42-2-1.3(a)(1).

[4] Ind. Code §§ 35-42-2-1.3(a)(1) & 35-42-2-1.3(b).

because the State did not present a witness or provide proof that Y.G. had actually received a subpoena to appear at trial. The State moved to dismiss, admitting it would be unable to proceed with trial at that time because it did not think there was a way to admit Y.G.'s deposition. The court suggested the trial could and should still proceed with the admission of Y.G.'s pretrial deposition, because it was conducted under oath and the State did not procure her non-appearance. The State affirmed it believed Y.G. was voluntarily not attending trial but represented to the court that it believed a subpoena had been left tacked to her door by Robert Kuba.[5]

[5] The State called Keyra as a witness. Keyra testified, "I told [Y.G.] that I received a paper last week and that we had to be there," (Tr. Vol. II at 14), but Y.G. "told me not to worry about it. That we didn't have to be here" and that "she wasn't going to come." (*Id.* at 15.) Following Keyra's testimony, the State asked the court to declare Y.G. unavailable and moved to admit her pretrial deposition into evidence as a substitute for her in-court testimony. Maldonado objected on the grounds that it was not clear whether there was ever proper service of a subpoena to Y.G. and that admitting only the transcript of the deposition would violate his constitutional right to confrontation. The court overruled the objection and admitted the deposition under Evidence Rules 804(a) and 804(b)(1).

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[5] The State did not call Roger Kuba as a witness to testify at trial. Nor did it specify the identity of Roger Kuba.

[6] The trial court found Maldonado guilty of Counts I and II, but merged Count II into Count I, and guilty of Counts III and IV, but merged Count IV into Count III. On June 17, 2021, the trial court imposed a three-year sentence for Level 5 felony domestic battery with a prior battery conviction against the same victim, to be served concurrent with a 545-day sentence for Level 6 felony domestic battery in the presence of a child under the age of 16.

Discussion and Decision

I. Admission of Y.G's Deposition

[7] Maldonado argues the trial court improperly designated Y.G. as an unavailable witness and abused its discretion in admitting her pretrial deposition into evidence after she failed to appear at trial. Our court will reverse a decision to admit evidence only where the admission was a "manifest abuse of discretion resulting in the denial of a fair trial." *Ennik v. State*, 40 N.E.3d 868, 877 (Ind. Ct. App. 2015), *trans. denied*. Maldonado's claim also implicates principles of constitutional law, which we review *de novo*. *Brittain v. State*, 68 N.E.3d 611, 618 (Ind. Ct. App. 2017).

[8] Prior testimony is hearsay and inadmissible pursuant to Indiana Evidence Rule 802 unless it fits within a few well-delineated exceptions. *Miller v. State*, 575 N.E.2d 272, 274 (Ind. 1991). We generally leave it to the sound discretion of the trial court to determine whether these exceptions apply. *Berkman v. State*, 976 N.E.2d 68, 74 (Ind. Ct. App. 2012), *trans. denied, cert. denied*. Indiana Rule

of Evidence 804(b)(1) provides a hearsay exception for the prior testimony of a declarant who is "unavailable" as a witness:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding [is admissible], if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Thus, prior recorded testimony may be admitted if the trial court finds: (1) the testimony was given under oath at a prior judicial proceeding; (2) the party against whom the testimony is offered had the opportunity to cross-examine the witness at the prior proceeding; and (3) the witness is unavailable at the time of the later proceeding. *Stidham v. State*, 637 N.E.2d 140, 143 (Ind. 1994).

[9] Indiana Evidence Rule 803(a)(5) defines a witness as "unavailable" if she is "absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance." To meet this burden, the State must demonstrate it made a good faith effort to obtain attendance at trial, where "[r]easonableness is the test that limits the extent of alternatives the State must exhaust'" to meet the good faith standard. *Garner v. State*, 777 N.E.2d 721, 725 (Ind. 2002).

[10] Under the circumstances of this case, we cannot conclude the trial court abused its discretion in declaring Y.G. unavailable and admitting her deposition into evidence. During a sidebar at the beginning of trial, the State affirmed Y.G. did

not appear for trial despite a subpoena being tacked to the door of her residence. Furthermore, direct examination of Y.G.'s daughter Keyra revealed that Y.G. was aware of the subpoena, but she disclosed to her daughter that she was deliberately not coming to trial. Keyra's testimony permits a reasonable inference that Yolanda had indeed been served with a subpoena and was aware of the need to attend and testify at trial, but willfully chose to disregard the summons and not attend trial.

[11] Serving a witness with a subpoena is a reasonable, good-faith effort to obtain the attendance of that witness at a trial. *See Berkman*, 797 N.E.2d at 76 (concluding the State made a reasonable, good-faith effort to secure defendant's presence at trial after the State subpoenaed defendant at his last known address and gave its investigator his last known address and telephone number). *See also Tiller v. State,* 896 N.E.2d 537, 546 (Ind. Ct. App. 2008) (finding the State fulfilled its obligation to secure witness via personal service of subpoena despite the witness deliberately absenting himself). A subpoena is a powerful method to procure a witness and is accompanied by serious consequences should it be willfully disregarded, and generally the State is under no further obligation to undertake additional steps to ensure the presence of a witness to satisfy the reasonableness standard. *See Garner,* 777 N.E.2d at 725 (reasonableness does not demand that the State make every possible effort to secure attendance of a witness). As such, under the facts of this case, the State took appropriate measures to secure the attendance of the witness by serving her with a subpoena at her residence.

[12] Maldonado asserts that, by declaring Y.G. as unavailable and admitting her deposition in lieu of her testimony, the trial court deprived him of his constitutional right to confront the witnesses against him. It is true that "[t]he Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court." *Hemphill v. New York*, 142 S. Ct. 681, 694 (2022). Our Indiana Supreme Court has held, however, that a defendant's right to meet witnesses face-to-face "is secured where the testimony of a witness at a former hearing or trial on the same case is reproduced and admitted, where the defendant either cross-examined such witness or was afforded an opportunity to do so, and the witness cannot be brought to testify at trial again[.]" *Brady v. State,* 575 N.E.2d 981, 987 (Ind. 1991). It is only where a defendant "has never had the opportunity to cross-examine a witness and meet him face to face, admission of prior testimony at a subsequent proceeding violates the right of confrontation." *Hill v. State*, 137 N.E.3d 926, 936 (Ind. Ct. App. 2019) (quoting *Brady v. State,* 575 N.E.2d 981, 987 (Ind. 1991)).

[13] Maldonado admits his defense counsel called for Y.G.'s deposition and actively participated in questioning her. This satisfies the protections afforded to Maldonado under the Confrontation Clause. *See State v. Owings*, 622 N.E.2d 948, 953 (Ind. 1993) (where defense counsel takes the deposition and actively participates in it, defendant is deemed to have waived his right of confrontation at trial). As Maldonado was not deprived of his constitutional guarantee to face and question his accuser, the trial court did not abuse its discretion in

permitting the admission of Y.G.'s deposition testimony after it declared her unavailable at trial. *See Hammers v. State*, 502 N.E.2d 1339, 1344 (Ind. 1987) (the admission of testimony given at a bail hearing prior to trial did not violate the defendant's right to confrontation, where witness was unavailable for trial and the sworn testimony taken under oath and recorded had sufficient indicia of reliability to be properly admitted).

II. Double Jeopardy

[14] Maldonado asserts his simultaneous convictions of Level 5 felony and Level 6 felony domestic battery violate double jeopardy principles because both convictions were based on a single rude, insolent, or angry touching, and thus the conduct used to support both convictions stems from a single transaction. Substantive double-jeopardy claims principally arise in one of two situations: (1) when a single criminal act or transaction violates multiple statutes with common elements, or (2) when a single criminal act or transaction violates a single statute and results in multiple injuries. *Wadle v. State*, 151 N.E.3d 227, 247 (Ind. 2020).

[15] The Indiana Supreme Court addressed the latter situation in *Powell v. State*, 151 N.E.3d 256 (Ind. 2020), and developed a two-step process to determine whether "'the same act may be twice punished' as 'two counts of the **same** offense.'" *Id.* at 263 (quoting *Kelly v. State*, 527 N.E.2d 1148, 1154 (Ind. Ct. App. 1988), *aff'd*, 539 N.E.2d 25, 26 (Ind. 1989)) (emphasis in the original). First, a reviewing court must examine the text of the statute itself to determine if it expressly or by judicial construction indicates a unit of prosecution. *Id.* at 264. If the statute is

ambiguous, the second step of the analysis asks the court to analyze whether the facts of the case indicate a single offense or distinguishable offenses, which requires determining whether the defendant's actions are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Walker v. State*, 932 N.E.2d 733, 735 (Ind. Ct. App. 2010), *reh'g, denied*. Thus, "if the defendant's criminal acts are sufficiently distinct, then multiple convictions may stand; but if those acts are continuous and indistinguishable, a court may impose only a single conviction." *Powell,* 151 N.E.3d at 264-65.

[16] The State concedes, and we agree, that under the new analytical framework presented by our Indiana Supreme Court in *Powell*, Maldonado's two convictions of domestic battery, which were based on the same angry act of pushing Y.G. in the bedroom, constitute a substantive double jeopardy violation. Because Maldonado's conviction of Level 6 felony domestic battery committed in the presence of a child less than sixteen years old is a lesser-included offense of Level 5 felony domestic battery where the defendant has been previously convicted of a battery, the conviction of Level 6 felony battery should be vacated. *See*, *e.g.*, *Kerner v. State*, 178 N.E.3d 1215, 1232 (Ind. Ct. App. 2021) (under the *Powell* analysis defendant's two convictions of attempted robbery violated double jeopardy, as there was only one act of attempted robbery), *trans. denied*.

Conclusion

[17] The trial court did not abuse its discretion in finding Y.G. unavailable to testify and admitting her pretrial deposition in lieu of in-court testimony. As Maldonado admits his defense counsel had the opportunity to cross-examine Y.G. during the deposition, no constitutional violation of his right to confront and question a witness against him has taken place. Lastly, the State concedes Maldonado's two convictions of domestic battery arising out of the same angry touching result in a substantive double jeopardy violation that cannot be upheld. Accordingly, we affirm Maldonado's Level 5 felony conviction, vacate his Level 6 felony conviction, and remand for resentencing.

[18] Affirmed in part, vacated in part, and remanded.

Brown, J., and Pyle, J., concur.