## MEMORANDUM DECISION





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# IN THE COURT OF APPEALS OF INDIANA

Kyle McArthur Taylor,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff*

March 20, 2023

Court of Appeals Case No. 22A-CR-1754

Appeal from the Huntington Circuit Court

The Honorable Davin G. Smith, Judge

Trial Court Cause No. 35C01-2103-F4-94

**Memorandum Decision by Judge Crone**
Judges Robb and Kenworthy concur.

**Crone, Judge.**

## Case Summary

[1] Kyle McArthur Taylor appeals his conviction for level 4 felony child molesting. He argues that the trial court abused its discretion in admitting certain evidence and in excluding other evidence. He further argues that the trial court violated his Sixth Amendment rights. Finding no reversible error and that he has waived his constitutional claim, we affirm.

## Facts and Procedural History

[2] In the fall of 2020, eight-year-old H.T. lived with her father and her brothers: twelve-year-old E.T. and nine-year-old C.T. Taylor was one of the children's three paternal uncles. The three uncles lived together and routinely took care of H.T. and her brothers on the weekends while the children's father worked. The children often spent the night at their uncles' house.

[3] Sometime in September 2020, H.T. and C.T. went to their uncles' house to spend the night. E.T. was at a friend's house, so he was not with his siblings. At one point, two of the uncles left the house, and Taylor was alone with the children. Taylor picked H.T. up by placing his hands under her armpits and put her on his lap on the couch. He placed a blanket over himself and H.T. and began tickling her upper thighs, which made her feel "uncomfortable." Tr. Vol. 2 at 137. Taylor then put his hands down the front of H.T.'s pants and inside her underwear. He touched her vagina with his index finger and middle fingers and was "moving" his fingers around. *Id.* at 139.

[4] H.T. thought her other uncles had returned home, so she jumped off Taylor's lap and went to the window to look. Taylor followed H.T. and picked her up again and brought her back to his lap. He again attempted to put his hand down the front of her pants, but at that point the other uncles returned. H.T. got up and went outside to see the other uncles, and Taylor followed. H.T. did not tell her other uncles what had happened because she was scared. H.T.'s father came to the house and took C.T. to pick up the children's grandmother. H.T. had tears in her eyes when she saw her father, but she did not tell him what had happened. Approximately an hour later, H.T. told her uncles that she did not feel well so that she would not have to spend the night. Taylor and one of her uncles drove her home.

[5] The following day, H.T. told her father and E.T. that Taylor had touched her "private part." *Id*. at 147. A few weeks later, the counselor at H.T.'s elementary school presented a body safety program explaining "good touches" and "bad touches" to the children. *Id*. at 148. This prompted H.T. to tell one of her third-grade female classmates what Taylor had done. The two girls then spoke to their teacher, Ashley Myers. H.T. disclosed the molestation to Myers. Myers went to the school counselor, and the women called the Department of Child Services (DCS) to make a report. On November 24, 2020, H.T., E.T., and C.T. each spoke with a DCS case manager. All three children were subsequently separately forensically interviewed at McKenzie's Hope, a child advocacy center in Huntington. H.T. disclosed that she had been sexually abused by Taylor.

[6] On March 4, 2021, Huntington Police Department officers interviewed Taylor. Although Taylor initially swore "on his mor[t]al soul" that he never touched H.T. inappropriately, he later admitted to tickling her upper thighs, putting his hand into her pants, and touching her vagina. Tr. Vol. 3 at 6. He explained that he had been fantasizing about his ex-girlfriend sexually when he touched H.T.'s vagina and that touching H.T. made him feel sexually aroused. Taylor then stated that he had an "oh shit" moment and realized he should not be touching H.T. *Id*. at 16.

[7] The State charged Taylor with one count of level 4 felony child molesting. Prior to trial, the State filed a motion in limine pursuant to Indiana Evidence Rule 608(b) seeking to prohibit the defense from introducing certain extrinsic character evidence regarding H.T. Following a hearing, the trial court granted the State's motion. A jury trial began in May 2022. During trial, defense counsel made an offer to prove on the extrinsic evidence. The trial court confirmed its prior ruling excluding the evidence. Additionally, DCS case manager Christina Smith testified that she met with H.T. at school and that H.T. disclosed that she had been touched inappropriately. She then explained that H.T. and her siblings were referred for forensic interviews at a child advocacy center. Smith testified that she observed H.T.'s forensic interview in a separate room by closed-circuit television.

[8] The following exchange then occurred between the State and Smith:

> Q: And did you watch the entirety of H.T.'s interview at McKenzie's Hope?

A: Yes, I did.

Q: [Were] her statements during that forensic interview consistent with what she told you at school?

A: Yes, they were.

Q: Were any other forensic – were any other people forensically interviewed that same day?

A: Yes, C.T. and E.T.

Q: Did C.T. or E.T. provide any details about what H.T. had told you?

A: E.T. did.

Q: [Were] his statements also consistent with H.T.'s disclosure?

A: Yes –

Tr. Vol. 2 at 191-92. Defense counsel objected first on hearsay grounds, arguing, "This witness cannot testify about what E.T. said. It's hearsay." *Id.* Defense counsel continued, "And for them to indicate that it's consistent [with H.T.'s disclosure] is vouching so I object on that basis." *Id.* The trial court overruled the objection and allowed the State to ask, "[Were] E.T.'s statements consistent with what H.T. disclosed?" *Id.* at 193. Smith responded, "Yes." *Id.*

[9] Further, Huntington Sheriff's Department Detective Dylan Lagonegro testified in detail regarding Taylor's police interview and his confession to molesting H.T. Taylor also took the stand, and, although he denied molesting H.T., he

admitted that he confessed to the molestation during his police interview. At the conclusion of trial, the jury found Taylor guilty as charged. The trial court sentenced Taylor to eleven years, with two years suspended to probation. This appeal ensued.

## Discussion and Decision

## Section 1 – The trial court's erroneous admission of certain testimony was harmless.

[10] Taylor first argues that the trial court abused its discretion in admitting testimony from DCS case manager Smith that E.T.'s statements during his forensic interview were "consistent" with H.T.'s statements during her forensic interview when she disclosed the molestation. A trial court has broad discretion in ruling on the admissibility of evidence, and we will disturb its rulings only where it is shown that the court abused that discretion. *Hoglund v. State*, 962 N.E.2d 1230, 1237 (Ind. 2012). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. *Id*.

[11] Taylor objected to Smith's testimony regarding E.T.'s forensic interview statements on hearsay grounds and further argued that the testimony constituted impermissible vouching. E.T. did not testify at trial and was not subject to cross-examination regarding his forensic interview statements. Taylor claims that, in permitting Smith to reference, even generally, the content of E.T.'s out-of-court statements, the trial court improperly allowed Smith to

provide indirect vouching testimony for the veracity of H.T.'s molestation allegations. We agree.

[12] First, Smith's testimony that E.T.'s forensic interview statements were "consistent" with H.T.'s forensic interview statements was inadmissible hearsay.[1] As noted above, E.T. did not testify at trial. Hearsay is an out-of-court statement that "is offered to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). "Hearsay is not admissible unless [the Indiana Rules of Evidence] or other law provides otherwise." Indiana Evidence Rule 802. The State did not argue to the trial court that an exception to the hearsay rule applied to Smith's reference to the content of E.T.'s out-of-court statements, and we do not believe that one does. Smith's testimony summarizing that E.T.'s statements were "consistent" with H.T.'s is akin to instructing the jury to simply substitute H.T.'s words for E.T.'s to prove the truth of the matter (molestation allegations) asserted. *Cf. Thornton v. State*, 25 N.E.3d 800, 804 (Ind. Ct. App. 2015) (detective's testimony that non-testifying witness's out-of-court statements were inconsistent with those reported by defendant constituted hearsay as such testimony was "akin to a witness summarizing the content of an out-of-court statement"; a summary is "worse than specific facts" and "pure innuendo" necessitating jury to speculate regarding "nature and extent of alleged inconsistencies."). The trial court's decision to overrule Taylor's hearsay

[1] The State notes that Taylor has not reasserted his hearsay objection on appeal. We nevertheless choose to exercise our discretion to address the merits of the objection made below.

objection to this testimony was against the logic and effect of the facts before the court.

[13] More significantly, Indiana Evidence Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." When a witness's testimony even indirectly suggests that a child witness was telling the truth, the testimony violates the prohibition against vouching set forth in Evidence Rule 704(b). *Hoglund*, 962 N.E.2d at 1236. Such vouching testimony is considered an invasion of the province of the jurors in determining what weight they should place upon a witness's testimony. *Carter v. State*, 31 N.E.3d 17, 29 (Ind. Ct. App. 2015), *trans. denied*.

[14] We have no difficulty concluding that the trial court also should have sustained Taylor's vouching objection. Smith's testimony that E.T.'s forensic interview statements were "consistent" with his sister's statements indirectly suggested that H.T. was telling the truth when she made molestation allegations and thus constituted impermissible indirect vouching. *See, e.g.*, *Wilkes v. State*, 7 N.E.3d 402, 405-06 (Ind. Ct. App. 2014) (detective's testimony, including statement that sexual misconduct victim's various reports were "consistent," amounted to "the type of indirect vouching that our Supreme Court held inadmissible in *Hoglund*."). Indeed, Smith's testimony is more egregious because the actual vouching was introduced through hearsay from a third party (E.T.) who, as already noted, did not testify. The jury was left to assume, without the benefit of cross-examination, that E.T.'s forensic interview statements were the same

as, or at the very least corroborated, his sister's statements, thereby significantly bolstering H.T.'s credibility. This was impermissible vouching, and, as we concluded above, this evidence should not have been admitted over Taylor's objection.

[15] Nevertheless, we conclude that the trial court's errors in this regard were harmless. Errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of the party. *Mendoza-Vargas v. State*, 974 N.E.2d 590, 597 (Ind. Ct. App. 2012). To determine whether an error in the introduction of evidence affected the appellant's substantial rights, we assess the probable impact of that evidence upon the jury. *Id*.

[16] Here, substantial evidence was submitted to the jury to support Taylor's conviction and to corroborate H.T.'s testimony: namely, evidence of Taylor's own confession. Detective Lagonegro testified in detail regarding Taylor's confession to molesting H.T., and Taylor himself testified and admitted that he confessed to the molestation during the police interview.[2] Accordingly, the brief and isolated vouching testimony likely did not impact the jury. *See Wilkes*, 7 N.E.3d at 406 (finding that, "[i]n light of the other evidence in the record, the admission of [the] vouching testimony was harmless"); *see also Norris v. State*, 53 N.E.3d 512, 524 (Ind. Ct. App. 2017) (concluding "that the trial court's erroneous admission of the vouching testimony amounted to harmless error" in

[2] During his testimony, Taylor claimed that he lied to Detective Lagonegro when he confessed to the molestation. Obviously, the jury did not find this testimony credible.

light of "substantial evidence" in the record). The admission of Smith's testimony was harmless error.

## Section 2 – The trial court did not abuse its discretion in excluding character evidence pertaining to the victim.

[17] We next address Taylor's contention that the trial court abused its discretion in excluding certain evidence. As with the admission of evidence, we review the trial court's exclusion of evidence for an abuse of discretion and will disturb the ruling only if the court's decision is clearly against the logic and effect of the facts and circumstances or it is a misinterpretation of the law. *Minor v. State*, 36 N.E.3d 1065, 1070 (Ind. Ct. App. 2015)*, trans. denied*.

[18] Indiana Evidence Rule 608 provides that "the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation for truthfulness but that specific instances may not be inquired into or proven by extrinsic evidence." *Jacobs v. State*, 22 N.E.3d 1286, 1289 (Ind. 2015). Regarding the admissibility of extrinsic character evidence, Evidence Rule 608(b) provides:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of another witness whose character the witness being cross-examined has testified about.

As already noted, the State sought and obtained a pretrial motion in limine pursuant to this rule prohibiting the defense from presenting extrinsic evidence, specifically a note written by H.T., in order to attack her character for truthfulness. Taylor made an offer to prove at trial during which H.T. testified that, subsequent to the molestation, she wrote a note about drawing bruises on herself, letting people at school see the bruises, and then blaming her father so that he would get sent to jail. She testified that she did this because she was angry at him for spanking her and locking her in her room. She testified that although she wrote the note, she never drew bruises on herself or did anything to actually get her father in trouble. She further stated that the note had nothing to do with Taylor. The trial court sustained its prior ruling that the note was excluded from evidence.

[19] Taylor concedes that Evidence Rule 608(b) does not provide for any exception to the admissibility of extrinsic evidence and that our supreme court has carved out an exception to this rule only under the "very narrow circumstances" of "prior false accusations of rape." *Jacobs*, 22 N.E.3d at 1290 (citing *State v. Walton*, 715 N.E.2d 824, 828 (Ind. 1999)). There are no rape accusations at issue in this case, and we decline Taylor's invitation to extend our supreme court's precedent "beyond the strict application to just rape cases." Appellant's Br. at 16. The trial court did not abuse its discretion in excluding the evidence.

## Section 3 – Taylor has waived his federal constitutional claim.

[20] Finally, Taylor contends that both the admission of DCS case manager Smith's testimony and the exclusion of H.T.'s note violated his Sixth Amendment

"right of cross-examination, right of confrontation, and right to present a full defense[.]" Appellant's Br. at 18. However, while Taylor objected and raised the specific evidentiary issues addressed above, he did not develop any argument to place the trial court on notice that there was a constitutional dimension to the admission or exclusion of the challenged evidence. As our supreme court has observed, an objection on one ground cannot serve as an objection on another, distinct legal issue. *Konopasek v. State*, 946 N.E.2d 23, 27 (Ind. 2011). Because the Sixth Amendment issue that Taylor now seeks to bring on appeal was not raised before the trial court, we conclude that Taylor waived his federal constitutional claim. *See Washington v. State*, 840 N.E.2d 873, 880 (Ind. Ct. App. 2006) (finding federal constitutional claim waived because defendant did not present alleged Sixth Amendment violation argument before trial court), *trans. denied*. We affirm his conviction.

[21] Affirmed.

Robb, J., and Kenworthy, J., concur.