ATTORNEY FOR APPELLANT

Nancy A. McCaslin
McCASLIN & McCASLIN
Elkhart, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana
Indianapolis, Indiana

Jodi Kathryn Stein
Supervising Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

J.B.,

Appellant-Respondent,

v.

State of Indiana,

Appellee-Petitioner

February 20. 2023

Court of Appeals Case No. 22A-JV-612

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge
The Honorable Elizabeth A. Bellin, Magistrate

Trial Court Cause No. 20C01-2107-JD-209

Opinion by Judge May
Judges Crone and Weissmann concur.

May, Judge.

[1] J.B. appeals his adjudication as a delinquent child for committing an act that, if committed by an adult, would be Level 4 felony child molesting.[1] He raises three issues on appeal but we need address only one: Whether fundamental error resulted from the admission of a videotaped interview of the child victim, A.W., that had been recorded at the Child and Family Advocacy Center ("CFAC") when: (1) A.W. asserted her Fifth Amendment privilege not to testify at the delinquency hearing; (2) J.B. had no opportunity to cross-examine A.W. about her recorded statement; and (3) that recorded statement, which provided the only proof at trial of the elements of the alleged delinquent act, was not admissible under the hearsay exceptions cited by the State and the trial court. We reverse and remand.

Facts and Procedural History

[2] J.B. and A.W. are half-siblings who were both living with their maternal grandmother, A.M. ("Grandmother"), in the early months of 2021. At the relevant time, J.B. was fifteen years old and A.W. was thirteen years old. In March 2021, A.W. came to Grandmother and "type[d] something on a tablet" about herself and J.B. (Tr. Vol. II at 52.) A.W. "made clear it was inappropriate sexual contact, but it wasn't forced." (*Id.* at 68.) Soon thereafter, Grandmother took A.W. to a mental health facility, Michiana, because A.W. "wanted to hurt herself." (*Id.* at 53.) Because of a disclosure made by A.W.,

[1] Ind. Code § 35-42-4-3(b).

Michiana contacted the Department of Child Services ("DCS"),[2] which arranged for A.W. to be interviewed at CFAC. During the "forensic" interview at CFAC, which was videorecorded, A.W. disclosed the details of sexual contact between herself and J.B. (hereinafter "CFAC interview"). (*See id*. at 27 (interviewer Faith Abney defines herself as a "forensic interviewer").) The State filed a petition that alleged J.B. was a delinquent child for committing an act that would be Level 4 felony child molesting if committed by an adult.

[3] Soon thereafter, A.W. wrote a letter that said:

> Im writing this letter to clarify on my Previous Statement. I Had claimed that my brother Had sexually assaulted me. that Statement was made while I was in a broken mental State. I made that claim because I was Angry at my bio mom, and everyone around me. I also made that claim while being cheacked into a psych ward. I never expected it to become such a big deal. I am embarrassed, That statement was wrong and uncalled For to make. I'm sorry For making such a big problem.

(App. Vol. 2 at 100) (errors in original). Grandmother contacted the prosecutor's office, J.B.'s defense counsel, and A.W.'s victim advocate because Grandmother wanted to stop the delinquency proceedings against J.B. based on A.W.'s letter. Prior to the delinquency hearing, the juvenile court appointed

[2] At the evidentiary hearing on the delinquency petition, the State did not call a witness from Michiana or from DCS. Accordingly, the transcript does not reflect what A.W. revealed to prompt further investigation.

counsel for A.W., who then invoked her Fifth Amendment right not to testify at J.B.'s delinquency hearing.

[4] At the delinquency hearing, over a "general objection" from J.B., the juvenile court admitted into evidence the recording of A.W.'s CFAC interview. (Tr. Vol. II at 34.) During Grandmother's testimony, J.B. admitted into evidence the letter, quoted above, that A.W. had written after the delinquency petition was filed. J.B. took the stand and testified he had not touched A.W. on her private parts, he had never had A.W. touch him to arouse him sexually, and A.W.'s statements in the CFAC interview were not true.

[5] The juvenile court determined J.B. had committed an act that would be Level 4 felony child molesting if committed by an adult, declared him a delinquent child based thereon, and set a dispositional hearing. After the dispositional hearing, the juvenile court placed J.B. on supervised probation, which was to be transferred to Hernando County, Florida, where J.B. had begun living with his father.

Discussion and Decision

[6] J.B. asserts the juvenile court erred by admitting into evidence the recording of the CFAC interview. We afford trial courts broad discretion in ruling on the admission of evidence. *Townsend v. State*, 33 N.E.3d 367, 370 (Ind. Ct. App. 2015), *trans. denied*. "Generally, we review the trial court's ruling on the admission of evidence for an abuse of discretion. We reverse only where the

decision is clearly against the logic and effect of the facts and circumstances." *Jones v. State*, 982 N.E.2d 417, 421 (Ind. Ct. App. 2013) (internal citation omitted), *trans. denied*.

[7] The parties agree the CFAC interview contains hearsay.[3] Hearsay is defined as "a statement that: (1) is not made by the declarant while testifying at the trial or hearing; and (2) is offered in evidence to prove the truth of the matter asserted." Evid. R. 801(c). Herein, the statements A.W. made during the CFAC interview were being offered to prove the delinquency allegation against J.B. and, as such, was hearsay. Hearsay presumptively is excluded from evidence unless its admission is permitted by some other rule or law, Evid. R. 802, such as the exceptions provided within our Evidence Rules. *See*, *e.g.*, Evid. R. 803 (providing exceptions that apply regardless of whether declarant is available to testify) and Evid. R. 804 (providing exceptions that apply only when the declarant is unavailable to testify).

[8] At trial, the State moved to admit the recording of the CFAC interview under the hearsay exception for statements against interest, Evid. R. 804(b)(3), because A.W.'s assertion of her Fifth Amendment privilege against testifying made her unavailable to testify and because an admission of incest "would expose this child to ridicule." (Tr. Vol. II at 34.) In response, J.B.'s counsel

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[3] The parties also implicitly concede that Indiana's Rules of Evidence apply to the delinquency fact-finding hearing. We agree. *See N.L. v. State*, 989 N.E.2d 773, 779 (Ind. 2013) (explaining the difference between informal juvenile hearings, where the rules of evidence do not apply, and "formal evidentiary hearings . . . analogous to a criminal trial" at which the rule of evidence do apply).

asserted "just a general objection of admissibility, if you find that it doesn't fit the exception that the Prosecutor is requesting today." (*Id*.) The State offered to rebut J.B.'s objection if he spoke to a "particular prong" of the exception it offered, but J.B. chose not to clarify. The juvenile court then stated:

> I'll show, um, that the Defendant provides a general objection to State's Exhibit 1. Court will note that under 804(a), the witness is unavailable to testify, and under 804 – oh, that would be, 804(a)(5) and 804(b)(1)(A) and (B), we will show State's Exhibit 1 is entered into evidence at this point.

(*Id*. at 35.)

[9] J.B.'s "general objection" to the admission of this evidence was wholly inadequate to lodge an effective objection to the video. Indiana Rule of Evidence 103 requires not just a "timely" objection, but it also demands an objection that "states the specific ground, unless it was apparent from the context." Evid. R. 103(a)(1). "Failure to state the specific basis for objection waives the issue on appeal." *See K.C. v. State*, 84 N.E.3d 646, 649 (Ind. Ct. App. 2017) (quoting *Mullins v. State*, 646 N.E.2d 40, 44 (Ind. 1995)), *trans. denied*. Here, when offered an opportunity to make a more specific objection, J.B. declined and thereby waived any error in the admission of this evidence. *See*, *e.g.*, *Reed v. Bethel*, 2 N.E.3d 98, 110 (Ind. Ct. App. 2014) ("Because the Defendants did not object at trial to the photographs as being gruesome or prejudicial, they cannot raise an appellate argument challenging the admission of the photographs on these grounds.").

[10] J.B. argues we should look past his waiver and consider the merits of his argument because the error that occurred was fundamental. Fundamental errors are those that "'either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process.'" *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013) (quoting *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010)). The fundamental error exception to waiver is available "only in egregious circumstances[,]" *Brown*, 929 N.E.2d at 207, and thus we apply it "only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Halliburton*, 1 N.E.3d at 678. Accordingly, waiver notwithstanding, we address J.B.'s argument to determine whether the admission of the recording of the CFAC interview denied J.B. fundamental due process. *See*, *e.g.*, *In re Commitment of A.W.D.*, 861 N.E.2d 1260, 1263 n.2 (Ind. Ct. App. 2007) (reviewing alleged error despite failure to object at hearing because "A.W.D.'s liberty was at stake and the issue he raises could, if supported, implicate his fundamental right to a fair trial"), *trans. denied*.

[11] The juvenile court's announced basis for admission of the recording of the CFAC interview was that it constituted former testimony under Evidence Rule 804(b)(1), which makes former testimony admissible when a witness is unavailable for trial. The text of the hearsay exception defines former testimony as testimony that:

> (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
>
> (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Evid. Rule 804(b)(1). For former testimony to be admissible under that rule, it "must have been given under oath at a prior judicial proceeding [and] the party against whom the testimony is offered had to have had the opportunity to cross-examine the witness at the prior proceeding[.]" *Rhea v. State*, 814 N.E.2d 1031, 1033 (Ind. Ct. App. 2004), *trans. denied*.

[12] Here, however, the CFAC interview of A.W. occurred prior to the filing of the delinquency allegation against J.B., such that J.B. had no opportunity to cross-examination her during that interview. Nor did he have an opportunity to cross-examine her at trial because she asserted her Fifth Amendment right not to testify. Moreover, while A.W. agreed at the beginning of the CFAC interview that she would tell the truth, she was not placed under oath, as she would have been at a deposition or an in-court hearing. *See*, *e.g.*, Trial Rule 28(A) (requiring deposition be taken by person "authorized to administer oaths"). Accordingly, the juvenile court abused its discretion when it determined the video was admissible as former testimony under Evidence Rule 804(b)(1). *See Rhea*, 814 N.E.2d at 1033 (holding trial court abused its discretion when it admitted evidence under exception for former testimony because appellate court had ruled defendant's right to cross-examination had

been improperly limited during that former testimony). *Cf. Matter of Powell*, 76 N.E.3d 130, 134-35 (Ind. 2017) (videotaped deposition from one proceeding was admissible in another proceeding, where party in subsequent proceeding had notice of deposition but declined opportunity to participate).

[13] The State argues on appeal, as it did at trial, that the videotaped interview was admissible under the hearsay exception for a "statement against interest." That exception provides:

> A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.
>
> A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.

Evid. Rule 804(b)(3). "Statements against interest are admissible because they tend to expose the declarant to criminal liability, and thus a reasonable person in the declarant's position would not have made the statements if she did not believe them to be true." *Webb v. State*, 149 N.E.3d 1234, 1240 (Ind. Ct. App. 2020). To be admissible under this hearsay rule, the statement "must be incriminating on its face." *Id*.

[14] Assuming arguendo A.W.'s admission of sexual activity with her half-brother sufficiently exposed her to civil or criminal liability,[4] the fact remains that her statement implicates both herself and J.B. Evidence Rule 804(b)(3) explicitly provides: "A statement or confession . . . implicating both the declarant and the accused is not within this exception." As such, A.W.'s statement in the CFAC interview is not admissible under 804(b)(3)'s exception for statements against interest. *See State v. Chavez*, 956 N.E.2d 709, 713 (Ind. Ct. App. 2011) (accomplice's hearsay statement, which implicates both himself and Chavez in the disposal of dead bodies, cannot be admitted under exception for statement against interest because Rule 804(b)(3) explicitly excludes statements "implicating both the declarant and the accused"). *See also Payne v. State*, 854 N.E.2d 7, 22 (Ind. Ct. App. 2006) (videotaped statement implicating both declarant and Payne in crime is excluded from admissible statements against interest by text of Rule 804(b)(3)).

[4] At trial, the State asserted A.W. statement in the CFAC interview fit the exception for statements against interest because the admission of incest "would expose this child to ridicule." (Tr. Vol. II at 34.) The State did not cite, nor have we uncovered, authority suggesting a statement that would expose a declarant to "ridicule" qualifies as a statement against interest under Evidence Rule 804(b)(3). Nevertheless, on appeal, the State argues A.W.'s admissions in the recorded interview were statements against interest because she "exposed her[self] to an incest delinquency allegation." (Appellee's Br. at 22.) A statement that could expose one to a delinquency proceeding is sufficient to constitute a statement against interest for purposes of Evidence Rule 804(b)(3). *See D.A.L. v. State*, 937 N.E.2d 419, 424 (Ind. Ct. App. 2010) (juvenile's admission to police officer that she had smoked marijuana in a neighbor's home, when juvenile had not been caught in the commission of an unlawful act or been alleged to be a delinquent child, was sufficiently incriminating to constitute a statement against her penal interest). "A child commits a delinquent act if, before becoming eighteen (18) years of age, the child commits and act: (1) that would be an offense if committed by an adult . . . ." Ind. Code § 31-37-1-2. Incest is a Level 5 felony that occurs when a person over age eighteen engages in sexual intercourse or other sexual conduct with a person who is biologically related as a "parent, child, grandparent, grandchild, sibling, aunt, uncle, niece, or nephew." Ind. Code § 35-46-1-3.

[15] J.B. asserts his right to due process was violated because, not only was the recorded CFAC interview entered into evidence as inadmissible hearsay, but he also was not afforded an opportunity to cross-examine A.W. regarding the allegation against him. "The standard for determining what due process requires in a particular juvenile proceeding is 'fundamental fairness.'" *D.A. v. State*, 967 N.E.2d 59, 64 (Ind. Ct. App. 2012) (quoting *S.L.B. v. State*, 434 N.E.2d 155, 156 (Ind. Ct. App. 1982)).

> A juvenile charged with delinquency is entitled to have the court apply those common law jurisprudential principles which experience and reason have shown are necessary to give the accused the essence of a fair trial. Without question, these include the right to adequate notice of the charges, appointment of counsel, the constitutional privilege against self-incrimination, and the right to confront opposing witnesses.

In re K.G., 808 N.E.2d 631, 635 (Ind. 2004). Herein, J.B. was given no opportunity to cross-examine or confront A.W., who was the alleged victim of his delinquent act.

[16] Moreover, the recorded CFAC interview was the only evidence that demonstrated the elements of the delinquent act alleged. The delinquency petition alleged J.B. committed an act that, if committed by an adult, would be Level 4 felony child molesting as defined in Indiana Code section 35-42-4-3(b). (*See* Appellant's App. Vol. 2 at 66.) That statute provides: "A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to

satisfy the sexual desires of either the child or the older person, commits child molesting . . . ." Ind. Code § 35-42-4-3(b).

[17] During the delinquency hearing, Faith Abney, who interviewed A.W. at CFAC, testified as follows regarding the allegations at issue:

> Q In this particular case, did she eventually disclose that there was inappropriate sexual contact between her and the sibling?
>
> A Yes.
>
> Q Did she indicate to you that that was very embarrassing for her to discuss about something like that?
>
> A Yes
>
> Q In your experience, is it, uh, children who disclose acts against family -- sexual relationships between each other, does that sometimes expose them to ridicule and –
>
> A It can, yes.

(Tr. Vol. 2 at 33-34.) Grandmother's testimony included the following references to the alleged incident:

> Q [Grandma], was there a certain situation where [A.W.] came to you and – and disclosed something of inappropriateness between her and [J.B.]?
>
> A Yes, via the tablet, a text.

* * * * *

Q In regards to, though, after you learned of any sort of sexual allegations, had there been, other than the Michiana stay, any other type of therapeutic help for her?

A Well, when she was released from Michiana, we were all still kind of reeling and struggling, so, um, she did go to Bashor for a short while while we were trying to figure out what was the safest for everyone involved, um, because we were advised that the kids could not be in proximity of one another. So, um, she went to Bashor for, I think, it was a week. And, us, we did still have therapy when she got out, so.

* * * * *

Q [Grandmother], other than that initial disclosure of [A.W.] telling about what happened via the tablet, is this some -- is this something that you've talked to her any further about?

A Um, no. We were in therapy and I believe that it was brought up maybe once or twice there, but, um, no, we haven't -- we haven't discussed it. I have tried to, hopefully, get the therapy to bring out, um, who she needs to speak with.

* * * * *

Q [Grandmother], have -- have you been made aware, or have an idea of -- in terms of [A.W.]'s initial allegation of there being a sexual incident between her and [J.B.] about like when it supposedly happened?

A Again, I don't have a timeline from when she told me --

* * * * *

Q And do you recall ever being aware, or seeing anything inappropriate going on between [A.W.] and [J.B.]?

A No.

* * * * *

Q . . . You do admit that [A.W.] came to you and disclosed to you that something inappropriate had happened between her and her brother, correct?

A She did.

Q You also, isn't it correct that it overwhelmed you and you didn't ask and [sic] specifics about it, correct?

A That is, basically, correct, yes, ma'am.

* * * * *

Q Now, at the time that she told you there was something inappropriate, your understanding of it was that it wasn't sexual intercourse, correct?

A That -- that is correct.

Q Which was a relief to your mind, correct?

A (No audible response.)

Q Somewhat.

A Okay, I -- I, yes. Um, I don't know what my mind was at that moment, it was overwhelmed, so, you, no, but she did not say that there was sex.

Q But she made clear it was inappropriate sexual contact, but it wasn't forced.

A I believe that is what she said.

(Tr. Vol. 2 at 53, 54, 55, 62, 63, 65-66, 67-68.) Thus, the record did not demonstrate the elements of J.B.'s commission of child molesting without the CFAC interview.

[18] Under the circumstances herein, where a videotaped interview of the child victim was entered into evidence erroneously because it did not meet the cited exceptions to the rule against hearsay, where J.B. had no right to confront the child victim, and where the record contains no other evidence of the elements of the alleged delinquent act, we hold the admission of the videotaped interview constituted fundamental error. *See*, *e.g.*, *Crawford v. Washington*, 541 U.S. 36, 68-69, 124 S. Ct. 1354, 1374 (2004) ("Where testimonial statements[5] are at

[5] *Crawford* held testimonial statements "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to *police interrogations*." 541 U.S. at 68, 124 S. Ct. at 1374 (emphasis added). While Abney's interview of A.W. occurred at CFAC, rather than a police station, Abney told A.W. she had a "team of people" watching who could communicate with Abney via an earpiece, so that

issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.") (footnote added). Accordingly, we reverse J.B.'s adjudication as a delinquent child and remand for further proceedings not inconsistent with this opinion.[6]

Conclusion

[19] Fundamental error occurred when a videotaped interview was entered into evidence to prove the commission of a delinquent act, because the State failed to provide a viable exception for the admission of the hearsay contained therein, because J.B. was not provided an opportunity to confront and cross-examine the only witness against him, and because the videotaped interview

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Abney could be instructed to ask additional questions. At trial, Abney testified she knew law enforcement was present during her interview with A.W., but she could not remember if a caseworker from the Department of Child Services was also present. (Tr. Vol. 2 at 37.) In such a circumstance, Abney's interview was more akin to a police interrogation than to an interview conducted for psychological or medical treatment. *Cf. Palilonis v. State*, 970 N.E.2d 713, 728-29 (Ind. Ct. App. 2012) (no violation to Sixth Amendment right to confrontation when court admitted statements victim made to sexual assault nurse at hospital because the "primary purpose of the examination was to furnish and receive emergency medical and psychological care"), *trans. denied*.

[6] The double jeopardy clause of Indiana's Constitution, Article I, Section 14, applies to juvenile proceedings. *H.M. v. State*, 892 N.E.2d 679, 681 (Ind. Ct. App. 2008) (addressing multiple findings based on the same act in a single proceeding), *trans. denied*. "When a conviction is reversed due to an error in the admission of evidence, double jeopardy concerns usually do not apply." *Walters v. State*, 120 N.E.3d 1145, 1156 (Ind. Ct. App. 2019). This is so because "the improper admission of evidence implies nothing about a defendant's guilt or innocence." *Dumes v. State*, 718 N.E.2d 1171, 1180 (Ind. Ct. App. 1999), *aff'd on reh'g* 723 N.E.2d 460 (Ind. Ct. App. 2000). This same rule applies even if some of the evidence was inadmissible at the first trial. *See Rhone v. State*, 825 N.E.2d 1277, 1285 (Ind. Ct. App. 2005) (holding double jeopardy does not bar retrial following improper admission of hearsay because the evidence at trial, "even that erroneously admitted," was sufficient to convict the defendant) (quoting *Carpenter v. State*, 786 N.E.2d 696, 705 (Ind. 2003), *trans. denied*.

contained the only evidence of the elements of the delinquent act alleged. Accordingly, we reverse and remand.

[20] Reversed and remanded.

Crone, J., and Weissmann, J., concur.