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IN THE
COURT OF APPEALS OF INDIANA

Jose L. Izaguirre,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 14, 2022

Court of Appeals Case No.
21A-CR-2258

Appeal from the Kosciusko Circuit
Court

The Honorable Michael W. Reed

Trial Court Cause No.
43C01-1904-F1-258

May, Judge.

[1] Jose L. Izaguirre appeals his convictions of two counts of Level 1 felony child molesting¹ committed against his stepdaughter (“Child”). He claims the trial

¹ Ind. Code § 35-42-4-3(a).

court erred by allowing Child, who was fourteen years old at the time of trial, to testify with a comfort animal pursuant to Indiana Code section 35-40-5-13, which provides:

When a child less than sixteen (16) years of age is summoned as a witness to any hearing in any criminal matter, including a preliminary hearing, a comfort item or comfort animal shall be allowed to remain in the courtroom with the child during the child's testimony unless the court finds that the defendant's constitutional right to a fair trial will be unduly prejudiced.

We affirm.

Facts and Procedural History

[2] Around age twenty-two, Izaguirre began a relationship with W.I., who had young children. Izaguirre and W.I. lived together and then married, and W.I.'s children lived with them. On March 29, 2019, twelve-year-old Child reported Izaguirre had been molesting her at least monthly for four years. Child and W.I. were interviewed that day, and police began to investigate. Warsaw Police Department Detective Paul Heaton went to Izaguirre's residence to talk to Izaguirre and to ask him to come to the police station for an interview. Izaguirre consented and waived his *Miranda*² rights in the interview room. During the interview, Izaguirre admitted he put his penis near Child's vagina but insisted he never put it inside her. (Exhibit at 25.) Then he indicated he put

² *Miranda v. Arizona*, 384 U.S. 436 (1966), *reh'g denied*.

it inside Child’s anus “just a little bit.” (*Id.* at 26 & 32) (capitalization removed). He also admitted placing his penis in Child’s mouth. (*Id.* at 27.) In all, he admitted engaging in some form of sexual activity with Child on at least twenty occasions, but he claimed Child initiated all the activity.

[3] On April 1, 2019, the State charged Izaguirre with three counts of Level 1 felony child molesting. All three counts alleged Izaguirre engaged in sexual intercourse or other sexual conduct as defined in IC 35-31.5-2-221.5³ with Child, and the three charges differed only in the date ranges of the alleged molestation.⁴ Izaguirre moved to suppress his confession, and the trial court denied his motion. We affirmed the trial court’s denial of that motion to suppress in a memorandum opinion deciding his interlocutory appeal. *Izaguirre v. State*, 2020 WL 26009934 (Ind. Ct. App. May 22, 2020), *trans. denied*.

[4] Before Izaguirre’s jury trial, the State moved to permit a comfort animal to sit with Child as she testified. The trial court granted the State’s motion over Izaguirre’s objection, and Child testified with a canine sitting near her. After all evidence was presented, the jury found Izaguirre not guilty of the molestation alleged to have occurred in 2016 and 2017, but guilty of the other two counts, which alleged intercourse or other sexual conduct in 2018 and 2019. The trial

³ “‘Other sexual conduct’ means an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.” Ind. Code § 35-31.5-2-221.5.

⁴ The first count alleged behavior in 2016 and 2017; the second alleged behavior in 2018; and the third alleged behavior “on or about the 22nd day of February 2019[.]” (App. Vol. 2 at 3.)

court entered judgments of conviction on the second and third counts and scheduled a sentencing hearing. After the presentation of evidence and argument, the trial court imposed a forty-year sentence for count two and a thirty-year sentence for count three; ordered the two sentences served concurrently; and suspended five years of the forty-year sentence to probation. Thus, Izaguirre’s aggregate sentence amounts to a forty-year term, with five years suspended to probation. Izaguirre filed a motion to correct error,⁵ which the trial court denied.

Discussion and Decision

[5] Izaguirre questions whether the trial court erred by permitting Child to testify with a comfort animal pursuant to Indiana Code section 35-40-5-13. (*See* Appellant’s Br. at 4) (Statement of Issues). In his Summary of Argument, Izaguirre asserts two broad reasons the court erred by following the statute: (1) the statute “permits a Court to prejudice a Defendant’s Constitutional rights with no findings at all that the action to be taken, i.e. use of a comfort animal, is necessary” (*id.* at 9); and (2) the statute’s use of “shall” means “that the legislature controls how Trial Courts conduct trials[,]” which contravenes Evidence Rule 611 and constitutional separation of powers. (*Id.*)

⁵ Izaguirre’s motion to correct error alleged newly discovered evidence called the convictions into question, but Izaguirre was unable to produce an affidavit to support his assertion that Child had admitted to a friend that her allegations of molestation were false.

[6] However, Izaguirre has provided no standard of review for the issue presented; no separate cogent arguments for these two grounds for reversal; and no discussion of the legal standard by which we analyze Due Process, separation of powers, or conflicts between statutes and rules of court. In fact, he cites only one⁶ case to support his arguments on these complex legal issues. Where an appellant fails to support an argument with cogent reasoning and citations to authorities, an argument is waived. *Jones v. State*, 151 N.E.3d 790, 804 (Ind. Ct. App. 2020) (citing Ind. App. R. 46(A)(8)(a)), *trans. denied*. Accordingly, Izaguirre has waived for appellate review the trial court’s decision to allow Child to testify with a support animal pursuant to Indiana Code section 35-40-5-13. *See id.* (waiving argument for appeal).

[7] Waiver notwithstanding, we fail to see how Izaguirre could have been prejudiced by the presence of the support dog in the courtroom. When Child was called to the witness stand, the court explained the dog’s presence to the jury:

. . . I will point out this to the jury, you may see a dog here in the courtroom, but Indiana law permits a child under the age of sixteen to have an animal accompany the child during the child’s testimony here in court. [Child] has chosen to take advantage of

⁶ We do not count his citations of “*Commonwealth v. Purnell*, 233 A.3rd 824 (2020), and *State v. Dye*, 178 Wash. 2nd 541, 309 P.3rd 1192, (2013)[,]” which Izaguirre does not discuss or explain except to acknowledge they support the State’s position. (Appellant’s Br. at 12.)

that provision of the law and will have a comfort animal present during her testimony.

(Tr. Vol. 2 at 61.) In addition, along with all the typical jury instructions in criminal cases regarding a defendant's presumption of innocence and the State's burden of proof, the trial court addressed Izaguirre's concern that the dog would engender sympathy for Child by giving the following final instruction to the jury: "Neither sympathy nor prejudice for or against either the victim or the Defendant in this case should be allowed to influence you in whatever verdict you may find." (*Id.* at 194.)

[8] Child testified in detail about Izaguirre inserting his penis inside her, including the "[w]hite stuff" that Izaguirre would wipe off his penis with a paper towel afterward. (*Id.* at 67.) Child also testified about Izaguirre showing her pornography videos as he penetrated her and about him putting his penis in her mouth, which made her cry. The State presented the jury a picture Child had drawn of Izaguirre's penis, and Child testified to how often and for how many years the abuse had continued. Child's mother, W.I., testified that Izaguirre apologized to her for touching her daughter and admitted what he had done. The jury received a transcript of a recorded conversation between Izaguirre and W.I. in which Izaguirre admitted that he put his penis inside Child's anus "just a little bit" (Exhibits at 26 & 32) (capitalization removed), that he placed his penis in Child's mouth (*id.* at 27), and that he had engaged in sexual activity both at their new house and at the apartment where they lived before the house.

[9] Although Izaguirre took the stand in his own defense and testified that he had not had any form of sexual contact with Child, the State’s evidence was very damning. In light of the weight of the evidence against Izaguirre and the instructions given by the trial court to minimize any impact of the dog’s presence, Izaguirre cannot demonstrate he was prejudiced by the trial court’s decision to allow Child to testify with a support animal. *See, e.g., Hall v. State*, 177 N.E.3d 1183, 1197 (Ind. 2021) (“the State presented cumulative and corroborating evidence implicating Hall in Reynolds’ murder, and thus, any error in evidence admission would not have affected Hall’s substantial rights”). Any error was therefore harmless, and we do not reverse convictions for harmless error. *See* Appellate Rule 66 (No error by the trial court is grounds for “reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as no to affect the substantial right of the parties.”).

Conclusion

[10] Izaguirre waived his arguments regarding Indiana Code section 35-40-5-13 by failing to make cogent arguments or cite relevant authority. Waiver notwithstanding, Izaguirre cannot demonstrate he was prejudiced when he confessed to the two crimes of which the jury found him guilty. Accordingly, we affirm his convictions and sentences.

[11] Affirmed.

Riley, J., and Tavitas, J., concur.