MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Willie Witherspoon, Jr.,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

February 23, 2021

Court of Appeals Case No.
20A-CR-995

Appeal from the
Allen Superior Court

The Honorable
David M. Zent, Judge

Trial Court Cause No.
02D06-1901-F1-1

Vaidik, Judge.

Case Summary

[1] Willie Witherspoon Jr. appeals his convictions for Level 1 felony child molesting and Level 4 felony child molesting. He argues the trial court abused its discretion by allowing the video of the victim's forensic interview to be played for the jury under Indiana Rule of Evidence 803(5)—the "recorded recollection" exception to the rule against hearsay. He also asserts his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] Witherspoon and K.C. are the biological parents of J.C., born in 2007. In 2013, Witherspoon gained full custody of J.C., with K.C. exercising parenting time. Witherspoon and J.C. lived in a house in Fort Wayne. In 2016, Witherspoon's partner moved into the house.

[3] On August 25, 2018, J.C., who had just started sixth grade, told his mother's boyfriend that Witherspoon had been molesting him. The next day, J.C. participated in a forensic interview at the Dr. Bill Lewis Center for Children. J.C. stated on the last day of school in his fifth-grade year, Witherspoon entered his bedroom in the middle of the night, pulled J.C. over to the side of the bed, removed J.C.'s gym shorts and underwear, and "licked [J.C.'s] butt" and put

his penis "in [J.C's] butt with liquid" for five to ten minutes.[1] Ex. 2, VOB 1, 15:30-44. After Witherspoon stopped, he told J.C. he was being punished. J.C. then stated later that summer Witherspoon put his penis "in [J.C.'s] mouth" which tasted "nasty." *Id.* at 28:26-28; Ex. 2, VOB 2, 0:09. J.C. reported Witherspoon sometimes "pees" in J.C.'s butt. Ex. 2, VOB 2, 0:33. J.C. also stated Witherspoon would put his "finger on his hand" in J.C.'s butt and lick J.C.'s penis. *Id.* at 4:00-05, 5:45-50. Witherspoon once did not use a "liquid" when penetrating J.C. and this made it "harder." *Id.* at 6:58-7:29. Another time, Witherspoon held J.C.'s arm behind his back because J.C. was "squirming," which "hurt," and afterward J.C. noticed his butt was bleeding. *Id.* at 7:42-8:26. J.C. reported the "last time" this happened was within a week of the interview. Ex. 2, VOB 1, 20:51.

[4] In January 2019, the State charged Witherspoon with committing Level 1 felony child molesting and Level 4 child molesting against J.C. The case proceeded to a jury trial in March 2020. The State put J.C., then twelve, on the stand and asked him to tell the court about the "first thing" Witherspoon did to him. Tr. Vol. III p. 211. J.C. stated that while he was sleeping Witherspoon entered his room and "put his finger in my butt." *Id.* He also stated Witherspoon would put "his private parts" inside J.C.'s anus and would lick

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[1] J.C. used the term "finger"—rather than penis—initially in the forensic interview. Later in the interview, it was clarified that he understood the term "finger" to refer to a penis. He confirmed to the interviewer that the "finger" he was referring to when he stated Witherspoon put his "finger" in J.C.'s butt and mouth was the penis. Ex. 2, VOB 2, 2:50-3:10.

J.C.'s anus. *Id*. at 212. J.C. then testified Witherspoon would use a "liquid" when he inserted "his private" inside J.C.'s anus and this hurt J.C., once causing him to bleed. *Id*. at 216.

[5] However, J.C. repeatedly answered other questions by stating he could not remember. He could not remember what he or Witherspoon would typically wear during these events. He could not remember if Witherspoon ever licked other parts of J.C.'s body besides his anus, nor could he remember when these incidents occurred or even what else was going on in his life at the time. He also could not remember if Witherspoon ever did not use "the liquid" before penetrating him, if anything came out of Witherspoon's body, or if Witherspoon ever touched J.C.'s "private part." *Id*. at 217.

[6] The State then asked J.C. about his forensic interview, and J.C. confirmed he remembered the interview, he had the opportunity to watch the interview, his memory would have been fresher the day of the interview than it was at trial, and he told the truth in that interview. The State then asked the court to play the video of the forensic interview "based on [J.C.'s] lack of memory" and argued it was a recorded recollection under Indiana Evidence Rule 803(5). *Id*. at 225. Defense objected on several grounds: (1) the recorded-recollection exception should not apply because J.C. was able to sufficiently testify; (2) it violates Witherspoon's right to "confrontation under both the Indiana and the United States Constitutions"; and (3) it violates Witherspoon's "right to fair

trial[.]" *Id.* at 232.[2] The trial court stated it would allow the recording to be played the following day during the testimony of the forensic interviewer.

[7] The next day, before the jury was brought in, both sides met with the judge. The State mentioned it may need to recall J.C. as a witness to confirm J.C. had watched his forensic interview two hours before giving his testimony the day before. The State wanted to lay the foundation that watching the interview "didn't refresh his recollection given his testimony." Tr. Vol. IV p. 14. Defense counsel stated he believed that information had already come in, and even if it had not he did "not consider that an issue." *Id.* at 15.[3] J.C. was not recalled, and later that day the forensic interview was played for the jury.

[8] The jury found Witherspoon guilty as charged. At the sentencing hearing, the trial court found three aggravators: (1) Witherspoon had a prior criminal conviction—a 2012 conviction for operating a motor vehicle while intoxicated; (2) he violated a position of trust, which was of "great weight" to the court; and (3) J.C.'s injuries were above and beyond the statutory elements. Tr. Vol. V p. 19. For mitigators, the trial court found Witherspoon's sentence would cause financial hardship on his family. The court also acknowledged Witherspoon had a large support network and "there's a lot of people that think very highly

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[2] Witherspoon does not raise the latter two issues on appeal, addressing only Evidence Rule 803(5).

[3] It appears from the record that information had not come in. During his direct testimony, J.C. did state he had the opportunity to watch his forensic interview, but specifically when he watched the interview was not asked. *See* Tr. Vol. III p. 219.

of [him]." *Id*. Ultimately, the court imposed an above-advisory sentence of forty years for the Level 1 felony, with ten years suspended, and eight years for the Level 4 felony, with two years suspended, to be served consecutively, for an aggregate sentence of forty-eight years, with thirty-six years to serve and twelve years suspended, with five years of probation.

[9] Witherspoon now appeals.

Discussion and Decision

I. Admission of Evidence

[10] Witherspoon asserts the trial court abused its discretion in admitting J.C.'s forensic interview. Generally, the decision to admit or exclude evidence is committed to the sound discretion of the trial court and will be reviewed only for an abuse of that discretion. *Ballard v. State*, 877 N.E.2d 860, 861-62 (Ind. Ct. App. 2007).

[11] There is no dispute J.C.'s statements during the forensic interview were hearsay, which 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." Ind. Evidence Rule 801(c). Hearsay is generally inadmissible. Ind. Evidence Rule 802. However, Indiana Evidence Rules 803 and 804 set forth numerous exceptions. Here, the trial court admitted J.C.'s interview under the "recorded recollection" exception—Evidence Rule 803(5). That rule allows the admission of "[a] record that: (A) is on a matter the witness

once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge." Ind. Evidence Rule 803(5). Witherspoon challenges all three elements.

[12] Regarding the first element, Witherspoon argues J.C.'s inability to answer certain questions does not "show that he was not able to [recollect] nor that he testified inaccurately." Appellant's Br. p. 13. Whether a witness lacks sufficient recollection to testify fully and accurately rests within the trial court's discretion. *Smith v. State*, 719 N.E.2d 1289, 1291 (Ind. Ct. App. 1999). Complete exhaustion of the witness's memory is not required. *Id.*

[13] Here, J.C. repeatedly could not remember answers while testifying. For example, J.C. stated he could not remember (1) what clothing he was wearing, (2) whether Witherspoon ever licked a part of J.C.'s body other than his anus, (3) whether Witherspoon ever did not use "liquid" when inserting his penis into J.C., (4) if Witherspoon ever touched J.C.'s "private part," or (5) the timing of these events—all of which J.C. was able to answer in the forensic interview. This was sufficient for the trial court to find J.C. was unable to testify fully and accurately. *See Horton v. State*, 936 N.E.2d 1277, 1282-83 (Ind. Ct. App. 2010) (finding witness could not testify fully and accurately because throughout her testimony "she frequently responded to questions by saying she did not remember"), *aff'd in relevant part by Horton v. State*, 949 N.E.2d 346 (Ind. 2011); *Smith*, 719 N.E.2d at 1291 (finding an inability to remember some events is enough for the court to find the witness is unable to testify fully and accurately).

[14] Witherspoon argues the above is insufficient to show J.C. could not recall well enough to testify fully and accurately because J.C. answered other questions by the State, including questions similar to the unanswered questions above. For example, although J.C. could not answer questions as to when the events occurred, or even what season they occurred in or what life events they coincided with, J.C. remembered Witherspoon's partner was living in the house at the time. But even if J.C. gave conflicting or partial answers, the trial court determined he could not sufficiently remember the events. We will not second guess the determination of the trial court. *See Gorby v. State*, 152 N.E.3d 649, 653 (Ind. Ct. App. 2020) ("To the extent B.B. gave conflicting answers, it was up to the trial court to decide whether B.B. couldn't remember the events[.]").

[15] Regarding the second element—whether the record was made or adopted by the witness when the matter was fresh in their memory—Witherspoon argues "it was never established that the record was adopted when the matter was fresh in J.C.'s memory." Appellant's Br. p. 14. We disagree. J.C. stated in the forensic interview that one of the incidents of molestation occurred within a week of the interview. And at trial, J.C. stated these events would have been fresher in his mind at the time of the forensic interview and he "remember[ed] these things better" at the time of the interview than he did during trial. Tr. Vol. III pp. 219-20. This is sufficient to show the record was made or adopted when the matter was fresh in J.C.'s mind.

[16] For the third element, Witherspoon argues the State failed to establish the forensic interview correctly reflects J.C.'s knowledge because J.C. was unable to

give a date of the events at trial, even though timing was a "substantial issue." Appellant's Br. p. 14. But J.C. was clearly knowledgeable about the timeline of the events during the interview—he stated it began on his last day of fifth grade, went on throughout the summer, and that the last incident had occurred within a week of the interview. And these statements were never contradicted at trial. Although J.C. stated he could no longer remember the timing of the events, this is not a contradiction of the timeline he gave in the interview; it is simply an inability to remember. Furthermore, J.C. noted he told the truth in his forensic interview and that his memory was better during that time. *See* Tr. Vol. III pp. 219-220, 224. Therefore, Witherspoon's argument fails.

[17] Finally, Witherspoon argues "the State failed to properly provide J.C. an opportunity to recollect[] his memory" because the State did not show J.C. the recorded interview during his live testimony to try to refresh his memory. Appellant's Br. p. 13. Witherspoon points to *Horton*, in which a video of the victim's forensic interview was played to the jury as a recorded recollection because the victim could not remember enough to testify fully and accurately, even after the State attempted to refresh her memory by showing her the video during a break in her testimony. 936 N.E.2d at 1281. However, Witherspoon did not object on this ground at trial. Not only did Witherspoon not object at trial, but when the topic of J.C. watching the video was addressed by the State, defense counsel stated, "I do not consider that an issue." *Id*. at 15. Therefore, this argument is waived. *See Shoda v. State*, 132 N.E.3d 454, 465 (Ind. Ct. App. 2019) ("A party may not object to the admission of evidence on one ground at

trial and seek reversal on appeal based on a different ground.") (quotation omitted). Waiver notwithstanding, Witherspoon has failed to assert any harm from this alleged error. J.C. was shown the video two hours before testifying and still could not sufficiently remember the events. It is unclear how being shown the tape again would produce a different result. We will not grant relief based upon a harmless error. *Hines v. State*, 856 N.E.2d 1275, 1285 (Ind. Ct. App. 2006), *trans. denied*; *see also* Ind. Appellate Rule 66(A).

[18] The trial court did not abuse its discretion by admitting J.C.'s forensic interview into evidence under Evidence Rule 803(5).

II. Inappropriate Sentence

[19] Witherspoon next argues his sentence of forty-eight years with thirty-six years to serve executed in the Department of Correction is inappropriate and asks us to revise it. Under Indiana Appellate Rule 7(B), an appellate court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The appellate court's role under Rule 7(B) is to "leaven the outliers," and "we reserve our 7(B) authority for exceptional cases." *Faith v. State*, 131 N.E.3d 158, 159-60 (Ind. 2019) (quotation omitted). "Ultimately, our constitutional authority to review and revise sentences boils down to our collective sense of what is appropriate." *Id.* at 160 (quotation omitted).

[20] A person who commits Level 1 felony child molesting shall be imprisoned for a fixed term of between twenty and fifty years, with an advisory sentence of thirty years. Ind. Code § 35-50-2-4(c). A person who commits a Level 4 felony shall be imprisoned for a fixed term of between two and twelve years, with an advisory sentence of six years. Ind. Code § 35-50-2-5.5. The trial court sentenced Witherspoon to an above-advisory sentence of forty years for the Level 1 felony, with ten years suspended, and an above-advisory sentence of eight years for the Level 4 felony, with two years suspended. The court ordered the sentences to be served consecutively for an aggregate sentence of forty-eight years, with thirty-six years to serve and twelve years suspended, with five years of probation. Witherspoon asks us to "order an advisory sentence on Count I and Count II, with a portion of each Count suspended on probation." Appellant's Br. p. 20.

[21] Witherspoon asserts his sentence is inappropriate in light of his limited criminal history. He cites *Hamilton v. State*, 955 N.E.2d 723 (Ind. 2011), and *Prickett v. State*, 856 N.E.2d 1203 (Ind. 2006), for the proposition that his sentence should be reduced. But these cases are distinguishable.

[22] In *Hamilton*, the trial court sentenced the defendant to the maximum term of fifty years for one count of Class A felony child molesting for forcing his nine-year-old step-granddaughter to perform oral sex on him. The Indiana Supreme Court revised the sentence to thirty-five years, noting the defendant (1) had only two prior criminal convictions far removed in time from the offense and not involving sexual misconduct, (2) engaged "in a single act of sexual misconduct

as opposed to a long-term pattern of abuse," and (3) although he violated a position of trust as the victim's step-grandfather, this is not the same violation of a position of trust "that arises from a particularly close relationship between the defendant and the victim, such as a parent-child or stepparent-child relationship." *Hamilton*, 955 N.E.2d at 727, 728.

[23] In *Prickett*, the trial court sentenced the defendant to forty years for one count of Class A felony child molesting for having sexual intercourse with a thirteen-year-old girl when he was twenty-one. The Indiana Supreme Court revised his sentence to the advisory thirty years, noting his prior criminal history was unrelated in gravity or nature to the charged offense and there was little evidence he used force beyond that necessary to perform sexual intercourse.

[24] Here, the trial court sentenced Witherspoon to forty-eight years with twelve years suspended, not the maximum sentence as in *Hamilton*. And while Witherspoon had only a minor criminal history unrelated to sexual misconduct, the nature of his offense alone easily supports the trial court's sentence. Unlike in *Hamilton* and *Prickett*, Witherspoon's offense was not a single incident, but rather a long-term pattern of abuse wherein he molested the victim, told the victim he was being molested as a punishment, and the victim reported that Witherspoon's actions physically hurt him and at least once caused bleeding. And unlike those cases, the victim was Witherspoon's own son, of whom he was the primary caregiver. As Witherspoon concedes, his offenses are "repugnant." Appellant's Br. p. 17.

[25] Witherspoon has failed to persuade us his sentence is inappropriate.

[26] Affirmed.

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