MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Justin Wilson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 13, 2023

Court of Appeals Case No.
23A-CR-5

Appeal from the
Marion Superior Court

The Honorable
Jeffrey L. Marchal, Judge

Trial Court Cause No.
49D31-1708-F4-28883

Memorandum Decision by Judge Foley
Chief Judge Altice and Judge May concur.

Foley, Judge.

[1] Following a bench trial, Justin Wilson ("Wilson") was convicted of Level 4 felony attempted child molesting[1] and Level 5 felony child solicitation.[2] Wilson now appeals his convictions, presenting two issues for our review: whether the trial court abused its discretion when it admitted E.P.'s forensic interview and E.P.'s statement to her mother into evidence under the hearsay exceptions outlined in Indiana Evidence Rule 803. We affirm.

Facts and Procedural History

[2] In July of 2017, Wilson and Jesse Pennington were friends. Jesse Pennington lived with his wife, Danielle Cooper, and their three children, four-year-old E.P., two-year-old P.P., and newborn L.P., in a garage apartment. Wilson frequently came over to hang out with the family, and he babysat the children a few times while Jesse Pennington ("E.P.'s father") and Danielle Cooper ("E.P.'s mother") were away (together, "E.P.'s parents").

[3] On July 8, 2017, Wilson came over to hang out with the family. E.P.'s parents decided to go get food with L.P. and asked Wilson to watch E.P. and P.P. while they were away. E.P.'s parents and L.P. were gone for "no more than 30 to 45 minutes." Tr. Vol. II p. 210. Upon their return, E.P.'s father walked into the garage and immediately noticed that E.P. was in the process of putting her pants back on while Wilson stood "in the middle of the garage[,] smoking a

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[1] Ind. Code §§ 35-42-4-3(b); 35-41-5-1(a).

[2] I.C. § 35-42-4-6(b).

cigarette." *Id.* at 210–11. After E.P. finished putting her pants back on, she walked into the house and told her mother that Wilson "had taken her pants down." *Id.* at 232. E.P.'s parents and L.P. had been back home "for about five minutes." *Id.* at 231. As days passed, E.P. told her parents more about what happened when they left E.P. and P.P. under Wilson's care. E.P.'s parents contacted the police and reported the incident.

[4] On July 12, 2017, E.P. had a forensic interview regarding what happened when her parents left her and P.P. under Wilson's care. E.P. told the forensic interviewer that Wilson asked her to touch his penis. *See* State's Ex. 3 at 5:04–5:08. E.P. further said that Wilson liked when people touched his penis and that she saw Wilson's penis when Wilson unbuttoned his pants, pulled the zipper down, and pulled his penis out. *See id.* at 6:29–6:35, 7:15–7:22, 7:38–7:58. E.P. told the interviewer that Wilson's penis looked "like a roll up." *Id.* at 7:19–7:23. E.P. also told the forensic interviewer that her "pants got pulled down" when Wilson's nail got stuck on her pants while he was tickling her. *Id.* at 10:02 to 10:27.

[5] On August 3, 2017, the police interviewed Wilson. During the interview, Wilson initially denied ever touching E.P. and exposing his penis. However, Wilson later stated that he started tickling E.P., and while he was doing so, his finger got stuck on E.P.'s pants so he pulled E.P.'s pants down. *See* State's Ex. 9 at 15:30 to 16:31. Wilson later claimed that he may have accidently exposed his penis while he was sitting down or maybe if his pants were unzipped because he "doesn't really wear underwear" under his pants or shorts. *Id.* at

36:20 to 36:40, 44:22 to 44:55. Wilson then claimed that E.P. may have seen his penis when he noticed that his penis was "sticking out a little bit [and he] pushed it back in [his shorts] really quickly." *Id.* at 51:13 to 51:30.

[6] On August 7, 2017, Wilson was charged with: Count 1, child molesting as a Level 4 felony; Count 2, attempted child molesting as a Level 4 felony; Count 3, child solicitation as a Level 5 felony; Count 4, child molesting as a Level 4 felony; Count 5, attempted child molesting as a Level 4 felony; and Count 6, battery as a Level 6 felony. On January 26, 2018, the State filed notice of its intent to introduce E.P.'s forensic interview into evidence. On April 11, 2018, a competency hearing was held, and during the hearing, then five-year-old E.P. testified that she knew the difference between a truth and a lie, and demonstrated which one was good and which one was bad. *See* Tr. Vol. II pp. 37–38. E.P then testified that she told the forensic interviewer the truth. Subsequently, the trial court issued an order finding E.P. competent to testify at trial.

[7] Wilson waived his right to trial by jury. A bench trial was held on October 24, 2022. E.P. testified that she did not remember what happened with Wilson when she was four years old, and even after she watched her forensic interview to refresh her memory, E.P. did not remember the incident. E.P. testified that she remembered the forensic interview taking place, that her memory of the event was better during the forensic interview, and that she told the forensic interviewer the truth. The State moved to introduce a copy of E.P.'s forensic interview into evidence under the hearsay exception for a recorded recollection,

and Wilson objected. The trial court overruled Wilson's objection and admitted E.P.'s forensic interview.

[8] E.P.'s mother was also called to testify regarding what E.P. told her. Wilson objected, arguing that the statement was hearsay. The State responded that the statement fell under the hearsay exception for a present sense impression. The trial court overruled Wilson's objection, and E.P.'s mother testified that E.P. told her that Wilson "had taken her pants down." Tr. Vol. II at 232. E.P.'s mother also testified that Wilson explained that he took E.P.'s pants off because "his finger got stuck in [E.P.'s] pants" while he was tickling her. *Id.* E.P.'s mother also testified that the pants that E.P. was wearing did not have any belt loops, pockets nor anything that could cause a finger to get stuck. *See id.* at 236. E.P.'s father was also called to testify. He testified that he was surprised when he walked into the garage and saw that E.P. did not have her pants on. E.P.'s father also testified regarding Wilson's explanation as to why he took E.P.'s pants off. *See id.* at 211.

[9] The trial court found Wilson guilty of Counts 2 and 3. As to the remaining counts, the trial court dismissed Counts 4 and 5, and found Wilson not guilty of Counts 1 and 6. The trial court sentenced Wilson to three years on Count 2 and two years on Count 3 to be served concurrently, resulting in an aggregate sentence of three years executed in the Indiana Department of Correction. Wilson now appeals.

Discussion and Decision

[10] The admission or exclusion of evidence is a matter that is generally entrusted to the discretion of the trial court. *Pribie v. State*, 46 N.E.3d 1241, 1246 (Ind. Ct. App. 2015). We review challenges to the admission of evidence for an abuse of the trial court's discretion. *Fansler v. State*, 100 N.E.3d 250, 253 (Ind. 2018). In those instances, we will reverse only where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* Moreover, the trial court's ruling will be upheld "if it is sustainable on any legal theory supported by the record, even if the trial court did not use that theory." *Tibbs v. State*, 59 N.E.3d 1005, 1011 (Ind. Ct. App. 2016).

[11] There is no dispute that E.P.'s forensic interview and E.P.'s statement to her mother 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. Evid. R. 802. However, Indiana Evidence Rule 803 sets forth several exceptions to this general rule, among them, exceptions for the declarant's recorded recollection and present sense impression.

A. Recorded Recollection

[12] Here, the trial court admitted E.P.'s forensic interview under the recorded recollection exception outlined in Indiana Evidence Rule 803(5). Rule 803(5) 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." Evid. R. 803(5). When a witness cannot vouch for the accuracy of the statement nor remember having made the statement, the trial court should not admit the witness's statement into the evidence. *Hurt v. State*, 151 N.E.3d 809, 813 (Ind. Ct. App. 2020).

[13] Wilson challenges only whether the evidence satisfied the last element, *i.e.*, whether the forensic interview accurately reflected E.P.'s knowledge. According to Wilson, "common sense informs that no four-year-old always tells the truth and no one could accurately testify that they told the truth about an incident they do not remember occurring when they were four years old." Appellant's Br. p. 20. Wilson argues that E.P. cannot "claim to have told the truth to the [forensic] interviewer . . . given that [E.P.] did not remember any illegal or inappropriate event with [ ] Wilson or the questions [E.P.] was asked by the [forensic] interviewer." *Id.* at 13. Wilson further contends that the forensic interview was unreliable because E.P "was under no compulsion to tell the truth" and that she lied about who was present when Wilson asked her to touch his penis. *Id.* at 21.

[14] The evidence presented established that the exhibit accurately reflected E.P.'s knowledge. E.P.'s stance on the accuracy of her forensic interview has not wavered. E.P. first vouched for her forensic interview during the competency hearing in 2018. E.P. first testified that she knew the difference between a truth

and a lie, and demonstrated which one was good and which one was bad. When asked if she told the forensic interviewer the truth about what happened when her parents left her under Wilson's care, E.P. answered in the affirmative. *See* Tr. Vol. II p. 40. E.P. again vouched for her forensic interview during the bench trial in 2022. When asked if she would have told the forensic interviewer the truth and answered the questions truthfully, E.P. answered in the affirmative. *See id*. at 190. Furthermore, E.P. testified that her memory of the events was better during the forensic interview and that she remembered the forensic interview taking place. The foundational requirements necessary to admit the forensic interview were met, and thus, Wilson's argument fails. *See Hurt*, 151 N.E.3d at 814 (noting "some acknowledgment that the statement was accurate when it was made" as one of the foundational requirements that must be met "[b]efore a statement can be admitted under the recorded recollection [ ] exception"). The trial court did not abuse its discretion when it admitted E.P.'s forensic interview.

B. Present Sense Impression

[15] The trial court also admitted E.P.'s statement to her mother that Wilson "had taken her pants down" under the present sense impression exception outlined in Indiana Evidence Rule 803(1). Tr. Vol. II p. 232. Rule 803(1) defines present sense impression as a "statement describing or explaining an event, condition or transaction, made while or immediately after the declarant perceived it." To be admissible under this exception, the statement must "describe or explain the event or condition during or immediately after its occurrence and it must be

based on the declarant's perception." *Jones v. State*, 780 N.E.2d 373, 376–77 (Ind. 2002). Present sense impression is based on an "assumption that the lack of time for deliberation provides reliability." *Hurt*, 151 N.E.3d at 814. For a statement to fall under present sense impression, "three requirements must be met: (1) [the statement] must describe or explain an event or condition; (2) during or immediately after its occurrence; and (3) [the statement] must be based upon the declarant's perception of the event or condition." *Id.*

[16] In challenging the admission of the evidence, Wilson focuses on the second requirement, asserting the statement was not made "during or immediately after" E.P.'s interaction with Wilson. Wilson argues that because E.P.'s father testified that "he and [E.P.'s mother] may have been gone as much as forty-five minutes" and E.P. did not say anything to her mother for another five minutes after they returned, "the event could have occurred as much as thirty to forty-five minutes before E.P.'s statement . . . giving her adequate time to fabricate a statement." Appellant's Br. pp. 27–28. We need not decide whether E.P.'s statement qualifies as a present sense impression because even assuming error, any error was harmless.

[17] "An error is harmless when it results in no prejudice to the substantial rights of a party." *Hall v. State*, 177 N.E.3d 1183, 1197 (Ind. 2021) (quotation omitted). In viewing the effect of an evidentiary ruling on a defendant's substantial rights, we look to the probable impact on the fact finder. *Turner v. State*, 953 N.E.2d 1039, 1059 (Ind. 2011). If the evidence was cumulative of other properly

admitted evidence, any error caused by the admission of evidence is harmless. *Robey v. State*, 168 N.E.3d 288, 290 (Ind. Ct. App. 2021).

[18] Here, E.P.'s statement to her mother that Wilson "had taken her pants down" is cumulative of other properly admitted evidence. In the forensic interview that we concluded was admissible, E.P. stated that Wilson pulled her pants down in addition to more specific details regarding what else occurred while her parents left her in Wilson's care. The trial court implicitly found E.P. credible based on the forensic interview. E.P.'s parents both testified that Wilson admitted that he removed E.P.'s pants. Wilson admitted to the police that he pulled E.P.'s pants down. Therefore, E.P.'s statement to her mother that Wilson "had taken her pants down" was cumulative of other properly admitted evidence.

[19] There was also corroborating evidence of Wilson's guilt. Wilson initially denied ever touching E.P. and exposing his penis during his interview with the police. As the interview went on, Wilson claimed that he was tickling E.P. on her waist and his finger got stuck on her pants so he took her pants off. However, E.P.'s pants did not have any belt loops, pockets nor anything that could cause Wilson's finger to get stuck. Wilson's story further changed when he claimed that he may have accidently exposed his penis to E.P. while he was sitting down because he was not wearing any underwear underneath his shorts. Wilson also claimed that at one point he noticed that his penis was exposed, so E.P. may have seen his penis right before he covered it up. Wilson's statement to the police demonstrated a guilty conscience given that his version of events

drastically changed throughout his interview. *See Sisson v. State*, 985 N.E.2d 1, 15 (Ind. Ct. App. 2012) (concluding that there was no substantial likelihood that the admitted evidence contributed to the defendant's guilt because of the overwhelming nature of the evidence against him). In light of this substantial, independent evidence of Wilson's guilt beyond E.P.'s statement to her mother, we conclude that any error in the admission of the statement was harmless.

Conclusion

[20] Based on the foregoing, we conclude that the trial court did not abuse its discretion when it admitted E.P.'s forensic interview under the recorded recollection exception outlined in Rule 803(5). Any error in the admission of E.P.'s statement to her mother was harmless.

[21] Affirmed.

Altice, C.J., and May, J., concur.