

# MEMORANDUM DECISION

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## ATTORNEYS FOR APPELLANT

Daniel A. Dixon  
Chief Deputy Public Defender

Adam M. Larimer  
Deputy Public Defender  
Lawrence County Public Defender  
Agency  
Bedford, Indiana

## ATTORNEYS FOR APPELLEE

Theodore E. Rokita  
Indiana Attorney General

Ellen H. Meilaender  
Supervising Deputy Attorney  
General  
Indianapolis, Indiana

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# IN THE COURT OF APPEALS OF INDIANA

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Joshua J. Stevens,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff*

June 30, 2023

Court of Appeals Case No.  
22A-CR-2377

Appeal from the Lawrence  
Superior Court

The Honorable John M. Plummer  
III, Judge

Trial Court Cause No.  
47D01-2001-F1-154

**Memorandum Decision by Chief Judge Altice**  
Judges Riley and Pyle concur.

**Altice, Chief Judge.**

## **Case Summary**

[1] Following a jury trial, Joshua J. Stevens was convicted of five counts of child molesting and subsequently sentenced to an aggregate term of eighty-five years incarceration. On appeal, Stevens argues that the trial court abused its discretion by admitting into evidence, over his objection, a videotaped forensic interview of the victim.

[2] We affirm.

## **Facts & Procedural History**

[3] Stevens was married to Jasmin, and they have four children together. E.S., the oldest of their children, was born in 2007. Stevens had difficulty holding a job and was frequently unemployed. The family was evicted from several homes, forcing them to move frequently.

[4] On Thanksgiving Day 2019, E.S. went into the kitchen at her grandmother's house, where she was residing at the time, and told her mother and grandmother that Stevens had been inappropriately touching her. E.S. did not provide any more details because Stevens came into the kitchen. Later, in December 2019, E.S.'s grandmother asked E.S. to elaborate on what she had disclosed on Thanksgiving. Over the course of several days, E.S. told her grandmother about the sexual abuse perpetrated on her by Stevens. E.S.'s grandmother contacted Jasmin and the Department of Child Services. Approximately two weeks later, E.S. went to Susie's Place in Bloomington for a

forensic interview. During the recorded interview, E.S. disclosed the longstanding history of sexual abuse she had endured.

[5] On January 28, 2020, the State charged Stevens with three counts of Level 1 felony child molesting (counts I, II, and IV) and two counts as Class A felony child molesting (counts III and V). A four-day jury trial commenced on August 22, 2022.

[6] At trial, E.S. testified about the sexual abuse her father inflicted upon her. Specifically, she testified that beginning when she was three or four years old, Stevens began touching her legs with his hands, putting his hands down her pants, touching her “butt” and “private,” and trying to put his finger in her private. *Transcript Vol. 3* at 225. She explained that Stevens told her not to tell anyone about what had happened because she would never be able to see him again. Throughout her testimony, E.S. identified the multiple locations where the family lived as places where the abuse occurred, including Grandma Bea’s house, an apartment on Ted Jones Drive, a white house, a trailer, another apartment on Ted Jones Drive, Grandma Patty’s house, and a second white house. She associated the types of sexual abuse she was subjected to with the location where she was living at the time.

[7] E.S. detailed how the sexual abuse escalated over the years. She testified that after the family moved into the first white house, Stevens continued touching her private with his hand and fingers but also began licking her private with his tongue. E.S. testified that this caused her pain due to Stevens’s tongue ring.

E.S. also testified that Stevens would show her pornography on his phone and masturbate in front of her while they watched those videos. She explained that sometimes when he touched himself, he would make “grunting” sounds. *Id.* at 243.

[8] E.S. testified that after they moved to one of the apartments on Ted Jones Drive, Stevens continued touching and licking her private and also tried to put his “private” in her private.<sup>1</sup> *Id.* at 233. E.S. described this as “painful” and testified that when she tried to move around, Stevens would “try to keep [her] steady and yell at [her].” *Id.* E.S. testified that she observed a “white” “slimy” substance come out of Stevens’s body and that Stevens cleaned it up with a shirt. *Id.* at 234. When the family moved to the second white house, Stevens continued touching her private with his fingers, his tongue, and his penis. He also put a pen in her private and tried to put his private part in her “behind.” *Id.* at 238. E.S. was not certain whether Stevens’s penis went “all the way in” her private, but she did testify that his penis did go “all the way in” her “behind” and that it hurt and made her cry. *Id.* at 241. In May 2019, the family “lost” the house where they were living, so E.S. and her siblings went to live with their grandmother. *Id.* at 133. E.S. testified that she decided to tell her grandmother about the abuse because she “wanted it to stop.” *Transcript Vol. 4* at 7.

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<sup>1</sup> E.S. described Stevens’s “private part” as what he used to “[p]ee.” *Id.* at 233.

[9] After E.S. was dismissed as a witness, the State requested to play for the jury the recording of E.S.’s forensic interview, asserting that Stevens “opened the door” to its admission by alleging during opening statements that E.S. “fabricated her story” about the sexual abuse.<sup>2</sup> *Transcript Vol. 4* at 13. Stevens objected to admission of the forensic interview as inadmissible hearsay and asserted that admission of such amounted to improper bolstering of E.S.’s trial testimony. Over Stevens’s objection, the trial court admitted E.S.’s forensic interview pursuant to Ind. Evid. Rule 801(d)(1)(B). The interview was then played for the jury.

[10] At the conclusion of the evidence, the jury found Stevens guilty as charged. On September 22, 2022, the trial court sentenced Stevens to forty years on count I, thirty-five years on counts II and IV, and forty-five years on counts III and V. The court ordered the sentences on counts I, II, and IV to run concurrently and the sentences on Counts III and V to run concurrently, with the two sets of sentences to be served consecutively for an aggregate sentence of eighty-five years. Stevens now appeals. Additional facts will be provided as necessary.

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<sup>2</sup> During opening statements, defense counsel framed the case to the jury as: “This all comes down to whether you’re going to believe [E.S.]. She’s a 14-year-old girl, and you’ll be asking yourselves a reasonable question, why would a 14-year-old make up this kind of story?” *Transcript Vol. 3* at 49. Defense counsel then explained that the jury would hear evidence that E.S. had an unstable upbringing, having moved frequently throughout her childhood, and that prior to making the allegations against Stevens, E.S. had found a stable living environment with her grandmother. Defense counsel suggested that E.S.’s motive for making the allegations against Stevens was that she “did not want to go back with her parents.” *Id.* at 50.

## Discussion & Decision

- [11] Stevens argues that the trial court abused its discretion in admitting E.S.'s forensic interview as substantive evidence under Evid. R. 801. He maintains that the erroneous admission adversely affected his substantial rights thereby entitling him to remand and a new trial.
- [12] The decision to admit or exclude evidence lies within the trial court's sound discretion. *Filice v. State*, 886 N.E.2d 24, 34 (Ind. Ct. App. 2008), *trans. denied*. An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Dixon v. State*, 967 N.E.2d 1090, 1092 (Ind. Ct. App. 2012).
- [13] Under Evid. R. 801(d)(1)(B), a witness's prior statement is not hearsay, and is admissible as substantive evidence, if the statement is consistent with the witness's trial testimony and is offered "to rebut an express or implied charge that the [witness] recently fabricated it or acted from a recent improper influence or motive in so testifying." *See Bassett v. State*, 895 N.E.2d 1201, 1214 (Ind. 2008). The timing of the prior statement in relation to the alleged motive to fabricate is an essential component of this rule. *See Stephenson v. State*, 742 N.E.2d 463, 474 (Ind. 2001) (agreeing with *Tome v. U.S.*, 513 U.S. 150, 167 (1995)). The prior consistent statement must have been made before the motive to fabricate asserted or implied at trial arose. *Bassett*, 895 N.E.2d at 1214; *Stephenson*, 742 N.E.2d at 474 (agreeing with *Tome v. U.S.*, 513 U.S. 150, 167

(1995), which held the same thing with respect to the equivalent federal rule of evidence).

[14] At trial, Stevens’s entire theory of defense was that E.S. made up the allegations against him because she did not want to go back to living with Stevens, who had failed to provide a stable home. The trial court recognized that the alleged motive to fabricate arose before the forensic interview, but nevertheless concluded that the forensic interview was admissible under Evid. R. 801(d)(1)(B). *Transcript Vol. 4* at 19. On appeal, the State essentially concedes that because E.S.’s prior consistent statement was made after the alleged motive to fabricate arose, the forensic interview was not admissible under Evid. R. 801(d)(1)(B). Indeed, given the timing of the motive relative to the prior consistent statements, the recording of the forensic interview was not admissible under Evid. R. 801(d)(1)(B). The trial court abused its discretion in this regard.

[15] Nevertheless, “the erroneous introduction of a witness’s prior consistent out-of-court statements is subject to harmless error analysis.” *Corbally v. State*, 5 N.E.3d 463, 470 (Ind. Ct. App. 2014). When reviewing whether the erroneous introduction of evidence was harmless, we must consider whether the evidence was likely to have substantially swayed the jury’s verdict. *Id.* (citing *Baker v. State*, 997 N.E.2d 67, 72 (Ind. Ct. App. 2013)). In other words, we will reverse “only if the record as a whole discloses that the erroneously admitted evidence was likely to have had a prejudicial impact upon the mind of the average juror, thereby contributing to the verdict.” *Granger v. State*, 946 N.E.2d 1209, 1213

(Ind. Ct. App. 2011) (quoting *Wales v. State*, 768 N.E.2d 513, 521 (Ind. Ct. App. 2002), *trans. denied*).

[16] The State argues that any error was harmless because the recording of the forensic interview was merely cumulative of E.S.'s trial testimony. Stevens, however, characterizes the admission as a “devastating blow” to his substantial rights because it “impermissibly bolstered E.S.'s in court testimony.” *Appellant's Brief* at 24; *Appellant's Reply Brief* at 4. He asserts that there is a danger that the jury relied on statements made in the improperly admitted forensic interview in reaching its verdict and that there is “not substantial independent evidence of guilt sufficient to alleviate that danger.” *Appellant's Brief* at 24.

[17] Here, E.S. provided detailed testimony about the sexual abuse she suffered at the hands of Stevens. She explained to the jury how Stevens touched her “private part” with his hands and fingers, put his finger inside her private, licked her private with his tongue, tried to put his penis in her private, put a pen or marker in her private, put his penis in her anus, showed her pornography, and masturbated in front of her. *Transcript Vol. 3* at 225. She also testified that the abuse started when she was three to four years old and continued until she was eleven, and she was able to associate certain acts of molestation with the places where the family had lived. E.S. also described the appearance of Stevens's penis and how she saw a “white” “slimy” substance come out of his body and how Stevens made grunting sounds when he was touching himself.



*Id.* at 234. E.S.'s testimony was consistent and unequivocal even when faced with cross-examination.

[18] We have reviewed the forensic interview and conclude that it added nothing of significance to the case before the jury. During the interview, E.S. provided much of the same information to which she testified before the jury regarding the various acts of molestation; she did not provide different or more persuasive details about the sexual abuse. To the extent E.S. made statements during the interview that she did not make during her testimony, such statements primarily concerned extraneous circumstances leading up to or surrounding the sexual abuse, not the acts themselves.

[19] Stevens argues that admission of the forensic interview was prejudicial because it contained allegations of uncharged conduct as E.S. stated that Stevens had inappropriately touched her “about ninety” times even though he was charged with only five counts. The State charged Stevens with only one count for each primary type of sexual abuse he perpetrated on E.S., but E.S. did not describe only five instances of sexual abuse at trial. To the contrary, her testimony described repeated, ongoing instances of various types of sex acts Stevens perpetrated on her continuously from the ages of three or four to eleven and at every location in which they resided. We agree with the State that “[n]o juror hearing her trial testimony would have been left with the impression the molestation was limited to five instances or would have needed to rely on [the forensic interview] to find evidence supporting one or more of the five counts charged by the State.” *Appellee’s Brief* at 14.

[20] We further note that E.S.'s trial testimony was the product of open-ended questioning just as it was during the forensic interview, and that E.S. was subjected to thorough cross-examination. Further, the forensic interviewer testified before the jury and did not suggest that E.S.'s statements during the forensic interview, which were not under oath, were more reliable than her trial testimony. The jury was tasked with determining E.S.'s credibility. In light of the fact that the substance of E.S.'s forensic interview was no different than the substance of her trial testimony, we cannot say that admission of the forensic interview affected Stevens's substantial rights. The erroneous admission of the forensic interview was harmless.

[21] Judgment affirmed.

Riley, J. and Pyle, J., concur.