

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Michael N. Jacobs,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

August 24, 2022

Court of Appeals Case No.
22A-CR-653

Appeal from the Whitley Circuit
Court

The Honorable Matthew J.
Rentschler, Judge

Trial Court Cause No.
92C01-2010-F1-1027

Bradford, Chief Judge.

Case Summary

- [1] Michael Jacobs and his wife Amy engaged in various sexual encounters involving Amy's daughter, L.H. Jacobs was arrested, and he and Amy were charged with various crimes after L.H. reported the abuse to a family member. The trial court subsequently found L.H. to be a protected person under Indiana Code section 35-37-4-6 and allowed the State to play recordings of L.H.'s prior statements at Jacob's trial rather than requiring her to testify in person. Jacobs was ultimately convicted of five counts of Level 1 felony child molesting, two counts of Level 4 felony child molesting, two counts of Level 6 felony performing sexual conduct in the presence of a minor, and one count of Level 6 felony contributing to the delinquency of a minor; found to be a habitual offender; and sentenced to an aggregate fifty-eight-year term of incarceration. On appeal, Jacobs contends that the trial court erred in admitting certain video-recorded statements made by L.H. after finding L.H. to be a protected person under Indiana Code section 35-37-4-6. We affirm.

Facts and Procedural History

- [2] Jacobs started dating Amy, L.H.'s mother, while she was pregnant with L.H. Jacobs is not L.H.'s biological father. Jacobs and Amy married sometime after L.H. was born. Jacobs and Amy also share a four-year-old son.
- [3] At some point during their marriage, Jacobs began "asking [Amy] for a threesome." Tr. Vol. III p. 65. Amy initially refused. Amy eventually agreed,

and the other person “ended up being L.H.” Tr. Vol. III p. 66. L.H. was ten years old when the sexual encounters with Jacobs and Amy started. In the beginning, Amy facilitated the encounters, offering L.H. money to participate by giving Jacobs “oral sex.” Tr. Vol. III p. 66. Amy then watched as L.H. did so. Amy witnessed the sexual encounter, paying L.H. \$50.00 of the promised \$200.00 because “[s]he didn’t do it long enough.” Tr. Vol. III p. 67. On another occasion, Jacobs provided L.H. with alcohol and marijuana “[t]o loosen her up,” and L.H. then performed fellatio on Jacobs as Amy watched. Tr. Vol. III p. 68. During this encounter, Jacobs penetrated L.H.’s vagina with his finger, telling Amy that he “had gotten his finger into L.H. up to his first knuckle.” Tr. Vol. III p. 71. During a third incident, L.H. was on top of Jacobs and Amy “rubbed his penis on [L.H.’s] vagina.” Tr. Vol. III p. 72.

- [4] During a fourth incident, Jacobs penetrated L.H.’s vagina with a finger while L.H. “was standing next to” Amy in the kitchen. Tr. Vol. III p. 76. On a fifth occasion, Amy showered with L.H. while Jacobs watched and masturbated. On another occasion, Amy offered to allow L.H. to skip school if she would agree to perform fellatio on Jacobs, but Amy claimed that school ended up being canceled and L.H. did not end up participating in any sexual acts on that date. Other incidents involving oral sex and masturbation occurred between Jacobs and L.H. when Mother was not present. At some point, Amy performed oral sex on L.H., claiming it occurred “[j]ust once.” Tr. Vol. III p. 87. Amy admitted that L.H. had expressed that she had not wanted to engage

in sexual activity with Amy and Jacobs but that Amy had “persuaded her into doing it.” Tr. Vol. III p. 78.

[5] In June of 2020, L.H. disclosed to her aunt that Jacobs “had done multiple sexual things to her,” including oral sex and masturbating in front of her with a vacuum. Tr. Vol. III p. 25. The sexual abuse was reported to the Churubusco Police Department and the Indiana Department of Child Services. L.H. subsequently participated in two forensic interviews, during which she described the sexual encounters with Jacobs and Amy. The forensic interviewer observed that while the words used by L.H. to describe the sexual encounters were “very age appropriate,” L.H.’s descriptions showed that she “did have advanced sexual knowledge.” Tr. Vol. III p. 144. The interviewer also observed no signs of coaching.

[6] L.H. was further examined by a nurse at a sexual assault treatment center and by a psychologist, Dr. Lisa Wooley. L.H. described to the nurse that she had been subjected to “a lot of sexual touching” including vaginal penetration by Jacobs’s fingers, Amy licking her vagina, and Jacobs licking her breasts. Tr. Vol. III p. 111. L.H. managed to discuss innocuous topics but struggled to speak about the trauma she endured when speaking to Dr. Wooley.

[7] On October 9, 2020, the State charged Jacobs with ten counts of Level 1 felony child molesting, three counts of Level 4 felony child molesting, two counts of Level 6 felony performing sexual conduct in the presence of a minor, and one count of Level 6 felony contributing to the delinquency of a minor. On July 8,

2021, the State further alleged that Jacobs qualified as a habitual offender. On January 3, 2022, the State moved to dismiss without prejudice four of the Level 1 felony child molesting counts and one of the counts of Level 4 felony child molestation. The trial court subsequently granted the State’s motion to dismiss.

[8] Prior to trial, the State sought to have L.H. classified as a protected person. Jacobs’s counsel participated in the statutorily-required hearing, after which the trial court found L.H. to be a protected person. Jacobs’s trial was held on January 25–27, 2022, after which a jury found Jacobs guilty of the remaining charges. Jacobs admitted to being a habitual offender. Following a sentencing hearing, the trial court sentenced Jacobs to an aggregate thirty-eight-year sentence, which was enhanced by twenty years by virtue of Jacobs’s status as a habitual offender, for a total sentence of fifty-eight years.¹

Discussion and Decision

[9] Jacobs contends that the trial court abused its discretion in admitting certain video-recorded statements made by L.H. after finding her to be a protected person. “A trial court has broad discretion to admit or exclude evidence, including purported hearsay.” *Blount v. State*, 22 N.E.3d 559, 564 (Ind. 2014). “We therefore disturb its ruling only if it amounts to an abuse of discretion,

¹ Amy was also charged with a number of criminal acts in connection to her participation in Jacobs’s acts involving L.H. and court records from her criminal case indicate that she pled guilty to one count of Level 1 felony child molesting and was sentenced to a twenty-five-year sentence, with twenty years executed and five years suspended to probation.

meaning the court’s decision is clearly against the logic and effect of the facts and circumstances or it is a misinterpretation of the law.” *Id.*

[10] The Protected Person Statute (“PPS”), codified at Indiana Code section 35-37-4-6, “allows for the admission of otherwise inadmissible hearsay evidence relating to specified crimes whose victims are deemed ‘protected persons.’” *Tyler v. State*, 903 N.E.2d 463, 465 (Ind. 2009). The PPS applies to a victim of sex crimes who “is less than fourteen (14) years of age at the time of the offense” and “less than eighteen (18) years of age at the time of trial.” Ind. Code § 35-37-4-6(c)(1). The PPS provides that

- (d) A statement or videotape that:
 - (1) is made by a person who at the time of trial is a protected person...;
 - (2) concerns an act that is a material element of an offense listed in subsection (a) ... that was allegedly committed against the person; and
 - (3) is not otherwise admissible in evidence;is admissible in evidence in a criminal action ... if the requirements of subsection (e) are met.

Ind. Code § 35-37-4-6(d). Subsection (e) provides that a statement or videotape is admissible if:

- (1) The court finds, in a hearing:
 - (A) conducted outside the presence of the jury; and
 - (B) attended by the protected person in person or by using closed circuit television testimony...;that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability.

- (2) The protected person:
- (A) testifies at the trial; or
 - (B) is found by the court to be unavailable as a witness for one (1) of the following reasons:
 - (i) From the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the physical presence of the defendant will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate.
 - (ii) The protected person cannot participate in the trial for medical reasons.
 - (iii) The court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

Ind. Code § 35-37-4-6(e).

[11] “Because the PPS represents a departure from ordinary trial procedure, it should be used only when necessary to further its basic purpose of avoiding further injury to the protected person.” *Tyler*, 903 N.E.2d at 466.

Considerations in making the reliability determination under Ind. Code § 35-37-4-6 include: (1) the time and circumstances of the statement, (2) whether there was significant opportunity for coaching, (3) the nature of the questioning, (4) whether there was a motive to fabricate, (5) use of age appropriate terminology, and (6) spontaneity and repetition.

Surber v. State, 884 N.E.2d 856, 862 (Ind. Ct. App. 2008), *trans. denied*.

[12] In this case, following a hearing, the trial court found that “L.H. is unavailable as a witness because she cannot reasonably communicate due to serious emotional distress such that she cannot reasonably communicate with [Jacobs] present.” Appellant’s App. Vol. II p. 155. In reaching this decision, the trial court considered the testimony of L.H.’s psychologist, Dr. Lisa Marie Wooley, who opined that testifying in the physical presence of Jacobs would cause L.H. to suffer serious emotional distress such that she would not be able to reasonably communicate. In explaining her conclusion, Dr. Wooley testified that

I have significant concerns that she would have difficulty communicating. Um, and also significant concerns about how it would impact her psychologically. Um, and the underlying reasons were that, um, one was the personal relationship of both the individuals that she would testify in front of were parental figures. Um, that was concerning. The level of chronicity and how long the abuse had been happening. Um, also the fact that they, the PTSD diagnosis she demonstrated more of a severe form of that. Whenever we see dissociative symptoms along with the PTSD, um, that is a more severe variety as with all psychological disorders, there is a spectrum, and you could be on the more milder side or the more severe side. Um, and uh, so those factors played into my concern. And also the fact that when I talked with her about, um, testifying, and I said, “What do you think is going to happen?” And she said, “I think I’m going, I think I’m going to freeze. I’m not going to be able to talk.” So even she was [able] to verbalize [her likely inability to communicate]. Um, another piece that related to the decision is having the, the individuals where the allegations were made against were primary parent figures, is that she was always told

that if she reported it or talked about it that she would go into foster care. She had been in foster care previously, so there was a lot of anxiety that what's going to happen because of what I say or what I report.

Tr. Vol. II p. 74. Dr. Wooley also indicated that there was the potential that forcing L.H. to testify in front of Jacobs would cause her to regress from the progress she had made in her mental-health treatment, stating

One of the things that her therapist had concern for, two things actually, one is re-traumatization, um, one of the comments is that even in session they were trying to work through some of the events is that she would become escalated and very briefly after starting to process stuff, so they would have to back down because she was starting to be re-traumatized. So the concerns for re-traumatization as well as when triggers are brought back up, issues are brought into play, uh, kids often regress in treatment. Um, and at that time, you know, they just had initiated treatment, she was starting to develop that relationship, she was starting to disclose, and starting to work through things and her therapist was concerned about how that would impact the therapeutic process.

Tr. Vol. II p. 75.

[13] Dr. Wooley concluded that while L.H. “might be able to provide some verbal information with regards to some of the questions ... she’s highly likely to shut down” and “may disassociate” when asked more detailed questions. Tr. Vol. II p. 81. Dr. Wooley reiterated these conclusions in her written report, concluding

[L.H.] is a child who struggles with significant anxiety and depression that often immobilizes her ability to communicate. She struggles in being able to feel secure and safe in her world. She also meets the criteria for Post-Traumatic Stress Disorder and has been experiencing symptoms that are consistent with a more severe form of this disorder. The primary question asked regarding this evaluation is whether it would be psychologically damaging for [L.H.] to testify in front of her alleged perpetrator. It is my opinion, that if [L.H.] were to testify in front of her perpetrators it would very likely result in significant psychological damage and in a limited ability to communicate effectively. This opinion is based on the fact that [L.H.] has a personal relationship with the alleged perpetrators, the intensity and chronicity of the trauma, and the high level of her traumatization. It would be difficult for any child to testify; however, given these factors, it is highly likely to be detrimental psychologically for [L.H.]. It would also significantly impact her ability to communicate effectively.

Ex. Vol. IV pp. 11–12.

[14] Dr. Wooley’s testimony and written conclusions established that it would be traumatic for L.H. to testify in front of Jacobs and that she would be unable to communicate effectively if forced to do so. As such, Dr. Wooley’s testimony and written conclusions were sufficient to support the trial court’s determination that L.H. qualified as a protected person. Further, to the extent that Jacobs argues that Dr. Wooley’s testimony and conclusions was insufficient to support the trial court’s determination because she did not testify with absolute certainty that L.H. would be traumatized or unable to communicate, we have previously recognized that testimony from a clinical psychologist that being forced to testify in front of the accused “may render” the

child unable to communicate was sufficient to support the trial court's determination that the child qualified as a protected person. *See Norris v. State*, 53 N.E.3d 512, 520 (Ind. Ct. App. 2016).

[15] Furthermore, to the extent that Jacobs argues that L.H. should have been re-evaluated prior to trial to determine whether she still qualified as a protective person, we are unconvinced that such re-evaluation was necessary. The trial court acknowledged Jacob's request to re-evaluate whether L.H. continued to qualify as a protected person in the weeks leading up to trial, finding that re-evaluation was "unnecessary, especially in light of the fact that this case has been twice delayed at the request [of Jacobs]. [Jacobs] should not stand to benefit from the delays he requested." Appellant's App. Vol. II p. 154. The trial court noted that Jacobs's counsel "had full opportunity to examine L.H. at the protected person hearing. This courtroom confrontation followed a full deposition conducted by defense counsel just a few days earlier[.]" Appellant's App. Vol. II p. 153. The trial court further stated that

The Court is convinced that re-evaluation is not only imprudent, it is also unnecessary. The most convincing evidence of the lack of need for re-evaluation is the child's emotional state leading up to and during the protected person hearing. Amber Bender testified that L.H. was distraught on the trip to testify in front of the Defendant. She crawled into a ball in the back seat of Amber's car and cried on the way to the Courthouse. She ultimately was able to answer questions posed by the Prosecutor and Defense Counsel at the hearing, but was visibly experiencing anxiety while doing so. The Court further notes that the questioning she was subjected to at the hearing was very general. She was not asked to relate a detailed accounting of her

allegations, but instead was asked general questions and whether she affirmed allegations she had previously made in settings where the Defendant was not present. She acknowledged she was using techniques and advice from her counselor on breathing and calming herself. It was apparent to the Court that L.H. was in emotional distress during her testimony.

Appellant's App. Vol. II pp. 154–55. The trial court also noted that

“[w]hen asked to describe how she felt about potentially having to see the Defendant in court, L.H. said she would be “uncomfortable ... it gives me anxiety and it feels like I can't move ... like I am running off a cliff. It makes me feel like—just everything around me is like—well, like stopping and stuff. It makes like my skin tight[.]”

Appellant's App. Vol. II p. 155 (ellipses in original).

[16] The trial court properly considered the relevant factors in determining that L.H. qualified as a protected person and the record is devoid of any evidence that there had been a change in circumstances such that a re-evaluation of her status was warranted. Jacobs does not challenge the authenticity of the recordings or argue that the recordings are unreliable. We therefore conclude that the trial court did not abuse its discretion in finding L.H. to be a protected person or in admitting the video recordings of her statements.

[17] The judgment of the trial court is affirmed.

Riley, J., and Bailey, J., concur.